

AGRICULTURE DECISIONS

Volume 66

January – June 2007



UNITED STATES DEPARTMENT
OF AGRICULTURE

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Part One (General)
Pages 1- 691



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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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

BRIDGEWATER DAIRY, LLC, et al. v. USDA.
No. 3:07 CV 104.
Filed February 22, 2007.

(Cite as: 2007 WL 634059).

AMAA – Preliminary injunctive relief or TRO, four factors – Milk marketing order – Blend price – Make allowance factor inversely proportional to volume – Indirect cost factors.

Bridgewater (milk producer) objected to the minimum fluid milk price set by the Milk Market Administrator following a public hearing. Bridgewater requested a TRO or injunction alleging irreparable financial harm resulting from the Administrator's failure to consider statutory cost factors (7 U.S.C 608c(18)) in setting the milk price whereas the Administrator contended that those factors were considered indirectly in the product price formulas. After Court reviewed the four factors required to grant Preliminary Injunction. (1). Likelihood of success., (2). Showing of irreparable injury, (3) lack of irreparable harm of others, (4) Showing of public interest, it declined to grant the injunction and found Petitioners had not met their burden.

**United States District Court
N.D. Ohio, Western Division.**

MEMORANDUM OPINION AND ORDER

JACK ZOUHARY, U.S. District Judge.

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction (Doc. No. 3), to which Plaintiffs filed a Supplemental Memorandum (Doc. No. 18), Defendant filed a Memorandum in Opposition (Doc. No. 31), Defendant-Intervenors filed a Brief in Opposition (Doc. No. 30), and Plaintiffs filed a Reply (Doc. No. 40). The Court also considered both *amicus curiae* briefs (Doc.

Nos.28, 35), and all supplemental briefing (Doc. Nos. 42 through 46).

The Court has jurisdiction to decide this matter pursuant to 28 U.S.C. §§ 1331 and 1337 and 5 U.S.C. § 705. For the reasons detailed below, Plaintiffs' Motion is denied.

BACKGROUND

The United States Department of Agriculture (USDA) has statutory authority to regulate the dairy industry. *See* 7 U.S.C. § 601-674. Specifically, the Agricultural Marketing Agreement Act of 1937 (AMAA) authorizes the Secretary of Agriculture (Secretary) to issue and amend federal milk marketing orders which set the minimum prices “which those who process dairy products, designated as handlers (as defined in 7 C.F.R. § 1040.9 (1994)), must pay to dairy farmers, designated as producers (as defined in 7 C.F.R. § 1040.12 (1994)).” *Lansing Dairy v. Espy*, 39 F.3d 1339, 1342 (6th Cir.1994). These minimum prices guarantee that producers will receive a uniform minimum price for their milk, regardless of its end-use.

To calculate these minimum prices, the USDA has grouped the end-uses of milk into four classes: Class I (fluid milk); Class II (creams, including ice cream, sour cream, and yogurt); Class III (cheese); and Class IV (evaporated milk, dried milk, and butter). Handlers pay different prices for each Class, but producers receive a uniform “blend price” regardless of the end-use of the milk they produce.

Minimum class prices are calculated on a monthly basis based upon a codified regulatory formula. Each formula takes into account market prices¹ and contains a “make allowance” factor. The make allowance represents the cost that handlers incur in converting raw milk into one

¹ Market prices are determined by a survey of the prices of certain products (butter, cheese, dry whey, etc.) conducted by the National Agricultural Statistics Service (NASS).

pound of product. The parties here have stipulated that the make allowance is inversely proportional to the price that producers receive for their raw milk; that is, if the make allowance is increased, the price that producers receive for raw milk will decrease. At issue in the instant action is a proposed make-allowance increase.

On December 29, 2006, after a year of administrative proceedings,² the USDA promulgated an Interim Order (final rule), effective February 1, 2007. The administrative proceedings were essentially limited to testimony regarding the appropriate level for make allowances, and Defendants concede that no direct testimony was allowed as to the Section 608c(18) factors. The Interim Order “amend[ed] the manufacturing (make) allowances contained in the Class III and Class IV product price formulas applicable to all Federal milk marketing orders.” 71 Fed.Reg. 78333 (Dec. 29, 2006). The economic analysis, commissioned and considered by the USDA, estimates that producer cash receipts will be decreased by an average of \$125 million per year over the next nine years, with the largest reduction (\$195 million) realized in the first year after implementation (USDA Economic Analysis, Doc. No. 4, Ex. C, pp. 13, 15).

Plaintiffs filed the instant action on January 12, 2007, claiming that the Secretary failed to consider certain statutory factors when making the decision to raise make allowances. Specifically, Plaintiffs contend that the AMAA requires the Secretary, when changing minimum milk prices, to consider “the price of feeds, the available supplies of feeds, and other

² The USDA issued a Notice of Hearing on December 30, 2005, and convened a hearing on January 24, 2006. See 71 Fed.Reg. 545 (Jan. 5, 2006). The hearing was reconvened on September 14, 2006, for the introduction of further evidence, namely a survey of plant manufacturing costs commissioned from Cornell University. See 71 Fed.Reg. 52502 (Sept. 6, 2006). Subsequently, a Tentative Final Decision was issued on November 17, 2006, which invited written comments. See 71 Fed.Reg. 67467 (Nov. 30, 2006).

economic conditions which affect market supply and demand for milk or its products.”7 U.S.C. § 608c(18). Defendant and Defendant-Intervenors (hereafter “Defendants”) contend, based on their reading of the statute, that the Secretary is not required to consider these factors. Further, Defendants contend that the Section 608c(18) factors are accounted for indirectly in the product price formulas, and this is sufficient to satisfy the statute.

Plaintiffs filed a Motion for Temporary Restraining Order and/or Preliminary Injunction and for Expedited Hearing (Doc. No. 3) on January 16, 2007. After telephone conferences on January 16 and 17, 2007, and in lieu of granting a temporary restraining order, the USDA agreed to delay the release date of the Interim Final Rule until February 23, 2007. The parties fully briefed the issues, and a Preliminary Injunction Hearing was held on February 15, 2007.

DISCUSSION

Preliminary Injunction Standard

The granting or denial of a preliminary injunction is within the sound discretion of the trial court. *Virginia Railway Co. v. System Federation, R.E.D.*, 300 U.S. 515, 551, 57 S.Ct. 592, 81 L.Ed. 789 (1937). The Sixth Circuit has set forth four factors for the District Court to consider when making this determination: (1) whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits; (2) whether the plaintiffs have shown that irreparable injury will result if the preliminary injunction is not granted; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether issuing a preliminary injunction would serve the public interest. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir.2001); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 564 (6th Cir.1982). These are not elements which must be satisfied; rather, they are factors which the Court must balance.

A “preliminary injunction is an extraordinary and drastic remedy,

one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (per curiam) (citation omitted) (emphasis in original). Indeed, the “proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion, for example” because the preliminary injunction is an “extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it.” *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir.2000) (internal quotation marks and citations omitted).

Likelihood of Success on the Merits

When considering whether to grant a preliminary injunction, the Court must consider “[w]hether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits.” *United States v. Detroit Int’l Bridge Co.*, 7 F.3d 497, 503 (6th Cir.1993) (citing *Mason County Medical Ass’n v. Knebel*, 563 F.2d 256, 261 (6th Cir.1977)). The “likelihood of success on the merits” that Plaintiffs must demonstrate is inversely proportional to the amount of “irreparable harm” that will be suffered absent injunctive relief. *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir.2002). However, “in order to justify [injunctive relief], the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.” *Id.* (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985)).

Although “likelihood of success” is merely one of four factors to be considered, “a finding that there is simply no likelihood of success on the merits is usually fatal.” *Gonzales v. National Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir.2000) (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir.1997)). Indeed, the “likelihood of success” factor is “the weightiest of the four.” *Wilson v. Lexington-Fayette Urban*

County Gov't, No. 05-5923, 2006 U.S.App. LEXIS 25617, at *18 (6th Cir. Oct. 11, 2006) (citing *Gonzales*, 225 F.3d at 625) (affirming the denial of a preliminary injunction despite the fact that the district court's opinion only addressed the "likelihood of success" factor).

Statutory Interpretation

Plaintiffs contend that 7 U.S.C. § 608c(18) requires the Secretary to consider feed prices and supplies as well as other economic conditions which affect market supply and demand. Defendants, on the other hand, argue that a plain reading of the statute reveals that the Secretary did not have to consider these factors.

7 U.S.C. § 608c(18) states:

(18) Milk prices. The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 2 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a

sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.³

Plaintiffs contend that this section mandates that the Secretary must consider feed prices and feed supplies every time that it promulgates a rule which affects the minimum class prices. Defendants advocate a sentence-by-sentence examination of this section, with the following result: (1) sentence one requires the Secretary to first ascertain the parity price; (2) sentence two requires that these parity prices must be adjusted to reflect the price and supply of feeds; (3) sentence three states that if parity prices need to be adjusted, the Secretary must fix prices that reflect feed price, feed supply, and other factors; and (4) after these prices are fixed, the Secretary can adjust the prices as he “finds necessary” upon “changed circumstances.” Defendants contend that under Plaintiffs’ interpretation of this section, the fourth sentence has absolutely no meaning.

Defendants argue that the administrative action here, *i.e.* a modification of the make allowance, falls within the fourth sentence of Section 608c(18), meaning that the Secretary was not required to directly consider feed prices and supply. Further, Defendants contend that under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Secretary’s

³ There is disagreement amongst the parties as to the exact text of this section. Specifically, Plaintiffs contend that the phrase “to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs” should be inserted into the third sentence of Section 608c(18), after “pure and wholesome milk.” This phrase, however, was added in an amendment which eventually expired on December 31, 1996. *See* 97 P.L. 98, at § 101(b) (1981), last amended by 107 Stat. 312, 317, 103 P.L. 66, at § 1005(b) (1993). Accordingly, the Court has considered the above-quoted version of 7 U.S.C. § 608c(18).

interpretation of Section 608c(18) is to be accorded substantial deference. Specifically, the Sixth Circuit has described the intricacies of milk market regulation as being “of labyrinthine complexity.” *Lansing Dairy v. Espy*, 39 F.3d 1339, 1344 (6th Cir.1994). If this statute is indeed ambiguous, then the Court should defer to the Secretary’s interpretation:

If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.

Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 697, 980 (2005) (citing *Chevron*, 467 U.S. at 843-44, and n. 11).

Plaintiffs contend that the Sixth Circuit’s decision in *Lansing Dairy* “held that compliance with the requirements of 608c(18) was required in setting minimum price formulas” (Pls’ Memo., Doc. No. 4, pp. 9-10) (citing *Lansing Dairy*, 39 F.3d at 1352-53). This was not the holding of *Lansing Dairy*; rather, it was merely mentioned in passing. The *Lansing Dairy* court held that the Secretary’s interpretation of the AMAA, namely “that he need not undertake a § 608c(18) economic analysis before modifying location adjustments pursuant to 608c(5),” was reasonable and thus entitled to *Chevron* deference. *Lansing Dairy*, 39 F.3d at 1358. This decision actually favors Defendants here: the Sixth Circuit specifically held that Section 608c(18) was ambiguous and subject to multiple reasonable interpretations:

The AMAA, and §§ 608c(5) and 608c(18) in particular, like much of federal legislation is not a model of clarity or succinctness. The interpretations of both the district court and the Secretary are reasonable and arguably can be supported by the language of the Act. However, we find that neither construction supports a finding that Congress has directly spoken on the “precise question at issue;” therefore, neither the plaintiffs’ nor the Secretary’s interpretation “gives effect to the unambiguously expressed intent of Congress.”

Id. at 1351 (quoting *Chevron*, 467 U.S. at 842-43). The *Lansing Dairy* decision is consistent with Defendants' position here, because under Defendants' interpretation of Section 608c(18), the modification of location adjustments at issue in *Lansing Dairy* falls within the fourth sentence of Section 608c(18) (and is thus exempt from the requirements of the second and third sentences) because it is not part of the initial fixing of prices alluded to in the third sentence of Section 608c(18).

Plaintiffs contend they should prevail because *St. Albans Coop. Creamery, Inc. v. Glickman*, 68 F.Supp.2d 380 (D.Vt.1999) is "on all fours." In that case, the plaintiffs (a group of producers) were granted a temporary restraining order enjoining a Final Rule and Order which realigned and consolidated federal milk marketing orders under the Federal Agricultural Improvement and Reform Act (the FAIR Act). The *St. Albans* court held, under the AMAA, "the establishment of milk prices cannot be made without consideration of - price of feeds, the available supplies of feeds, and other economic conditions which effect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates..*Id.* at 388 (quoting 7 U.S.C. § 608c(18)). Defendants argue *St. Albans* has no persuasive value because (1) it is not a final judgment, (2) it is from the District of Vermont, and (3) most importantly, a few months after the ruling was issued, Congress specifically overruled the decision. *See* 106 P.L. 113, 113 Stat. 1501 (Nov. 29, 1999); *see also* 64 Fed.Reg. 70867, 70868 (Dec. 17, 1999).*St. Albans* certainly supports Plaintiffs' interpretation of Section 608c(18), but it is not binding on this Court and, furthermore, any persuasive value is severely undermined by Congress' direct action a few months after the decision.

Moreover, the legislative history of this Section is instructive. Subsection (18) was added to 7 U.S.C. § 608c in 1937. *See* 50 Stat. 246, 247 (June 3, 1937). When discussing the fourth sentence of subsection (18), Congress expressed a clear intent that adjustments under the fourth sentence are subject to the same requirements as amendments under the third sentence. For instance, the House report on the AMAA contains the

following commentary:

The proposed amendment ... provides that if the Secretary finds that the national parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest. The proposed amendment further provides that as the Secretary finds necessary on account of changed circumstances, he shall make adjustments in such prices. Such adjustments are to be made in accordance with the same standards as are provided for the initial fixing of prices under this subsection.

H.R.Rep. No. 75-468, at 3 (1937) (emphasis added); *see also Lansing Dairy*, 39 F.3d at 1352. The Senate Report reflects a similar sentiment:

The intricate problems of the milk industry as described in the above cited opinion, explain the use of the several pooling and price plans authorized for inclusion in milk orders. Their effectiveness depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions. The Secretary is to use the same standard in adjusting prices as is to be used in the fixing of prices initially in the regulation of any marketing area.

S.Rep. No. 75-565, at 3 (1937); *see also Lansing Dairy*, 39 F.3d at 1352. In *Lansing Dairy*, the Sixth Circuit remarked “that the last two sentences of both reports are troubling,” although it eventually concluded that “this language is as fraught with ambiguity as the text of the Act itself.” *Lansing Dairy*, 39 F.3d at 1352-53. While this language may have been unclear in the context of the *Lansing Dairy* decision, it seems quite clear in the present context: both houses of Congress intended, at the time of the 1937 AMAA, that the Secretary should use the same standard under both the third and fourth sentences of Section 608c(18).

Although both sides expended significant effort briefing and arguing this issue, the Court finds it unnecessary to reach the merits. Regardless of whether Section 608c(18) requires the Secretary to consider feed prices and supplies when amending make allowances, Plaintiffs cannot succeed on the merits because, as detailed below, these factors were given appropriate consideration.

Indirect Consideration of the Section 608c(18) Factors

Defendants contend that even if the Secretary was required to consider the Section 608c(18) factors, these factors are reflected, albeit indirectly, in the current product-price formulas. The Court agrees.

In a final decision issued November 7, 2002, the USDA explained in detail how the Section 608c(18) factors are accounted for under the current product-price-formula system:

The [AMAA] stipulates that the price of feeds, the availability of feeds, and other economic conditions which affect market supply and demand for milk and its products be taken into account in the determination of milk prices. This requirement currently is fulfilled by the Class III and Class IV component price calculations. If conditions increase supply costs, the quantity of milk produced would be reduced due to lower profit margins. As the milk supply declines, plants buying manufacturing milk would pay a higher price to maintain an adequate supply of milk to meet their needs. As the resulting farm profit margins increase, so should the supply of milk. Likewise, the reverse would occur if economic conditions reduce supply costs. The price of feed is not directly included in the determination of the price for milk, but rather is one economic condition which may cause a situation in which the price of milk may increase or decrease. A change in feed prices may not necessarily result in a change in milk prices. For instance, if the price of feed increases but the demand for cheese declines, the milk price may not increase since milk plants would need less milk and therefore would

not bid the price up in response to lower milk supplies. Also, other economic conditions could more than offset a change in feed prices and thus not necessitate a change in milk prices.

The pricing system, according to the recommended decision, accounted for changes in feed costs, feed supplies, and other economic conditions, as explained above. The product price formulas adopted in the recommended decision would reflect accurately the market values of the products made from producer milk used in manufacturing. As supply costs increase with a resulting decline in production, commodity prices would increase as manufacturers secure additional milk to meet their needs. Such increases in commodity prices would mean higher prices for milk. The opposite would be true if supply costs were declining. 67 Fed.Reg. 67906, 67911-12 (Nov. 7, 2002).

Section 608c(18) does not specifically state that the Secretary must receive direct evidence of producer costs. Rather, this section only requires that the Secretary fix minimum prices which are “adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products.”As explained above by the USDA, the pricing system currently in place (*i.e.* the Class III and Class IV product-price formulas) has been designed to account for these factors. *Id.* The USDA’s Interim Order only modifies the amount of the make allowances; it does not modify the portion of the formulas which indirectly incorporates feed costs or supply. Therefore, even with increased make allowances, the fluctuating minimum milk prices are still “adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products.”

Even if Section 608c(18) is read to require consideration of these factors, they have been given appropriate consideration. Accordingly, Plaintiffs are unlikely to succeed on the merits in this matter.

Balance of Hardships and Public Interest

Next, the Court must consider the other three preliminary-injunction factors: (1) irreparable harm to Plaintiffs if the preliminary injunction is not granted; (2) whether the issuance of a preliminary injunction would cause substantial harm to others; and (3) whether issuing a preliminary injunction would serve the public interest. *Mich. Bell Tel. Co.*, 257 F.3d at 592.

First the Court must consider whether Plaintiffs will suffer irreparable injury if a preliminary injunction is not issued. Plaintiffs contend that increasing the make allowances decreases the minimum price that producers receive for their milk. In support, they cite the USDA's own economic analysis, which estimates that producers will lose an average of \$125 million per year over the next nine years (Economic Analysis, *supra*, at pp. 13, 15). If the Court were to rule in Plaintiffs' favor at a later date, however, they would not have any monetary recourse.

Defendants do not contest that Plaintiffs will suffer a reduction in milk prices. Instead, they claim that Plaintiffs do not satisfy the "irreparable injury" prong because Plaintiffs have not shown that their injury was a direct result of the alleged failure to consider the Section 608c(18) factors. Specifically, Defendants claim that Plaintiffs failed to show that the result of the rulemaking (*i.e.* the make-allowance increase) would have been different had those factors been considered. The parties and *amici* filed supplemental post-hearing briefing on this issue (Doc. Nos. 42 through 46), but no one produced a case directly on point. The Court has similarly found a surprising dearth of case law on this issue.

Even if we assume that Plaintiffs have met their burden of demonstrating an irreparable injury, this factor is offset by the substantial harm that Defendant-Intervenors and other handlers would incur if an injunction is granted. Plaintiffs insist there can be no injury to handlers by merely maintaining the *status quo*, but this is not the case. Just as Plaintiffs and other producers will lose unrecoverable revenue if the Interim Order is not enjoined, an injunction would cause

Defendant-Intervenors and other handlers to lose revenue without recourse. The potential harm to Defendant-Intervenors and other handlers is no less real than the potential harm to Plaintiffs and other producers just because it is currently the *status quo*. Indeed, the USDA recognized the harm that the *status quo* was causing handlers when it found that emergency conditions existed. See 71 Fed.Reg. 67467, 67477 (Nov. 30, 2006)

The public interests at issue are similarly offset. Plaintiffs claim that it is not in the public interest to “cripple many dairy farmers” (Pls’ Memo., Doc. No. 4, pp. 14-15). The exact same thing can be said about the emergency conditions facing dairy manufacturers. In their initial brief, Plaintiffs articulated the most important public interest at issue here: “[m]aintaining a viable dairy industry in rural America.” *Id.* at 14 (citing *St. Albans*, 68 F.Supp.2d at 391-92). This interest is not served by favoring one aspect of the industry (producers) over another (handlers).

CONCLUSION

Plaintiffs have failed to show that they are likely to succeed on the merits, and any irreparable harm that Plaintiffs may suffer is offset by the harm to Defendants should an injunction issue. Further, there are no significant public interests that weigh in favor of granting a preliminary injunction. Accordingly, Plaintiffs are not entitled to preliminary injunctive relief, and Plaintiffs’ Motion for a Preliminary Injunction (Doc. No. 3) is denied.

A telephone status conference is scheduled for Wednesday, February 28, 2007, at 8:30 a.m.

IT IS SO ORDERED.

**USDA AND UTAH DAIRYMEN'S ASSOCIATION ET AL. v.
COUNTRY CLASSIC DAIRIES, INC., d/b/a DARIGOLD FARMS
OF MONTANA.
No. 2:05CV00499 DS.
March 1, 2007.**

(Cite as: 2007 WL 677138).

**AMAA – Administrative Remedies, failure to exhaust – Summary Judgment –
SBREFA.**

Country Classic (Handler) was a milk distributing plant which became subject to full regulation and pooling regulations when it met or exceeded a threshold factor of selling 25% of its milk in the area covered by the marketing order. The Handler had withheld significant monies from the Producer Settlement fund. Classic sought summary judgment on several grounds including that the applicable marketing order had expired and that the Market Administrator had not complied with the Small Business Regulatory Enforcement Fairness Act (SBREFA) Pub. L. No. 104-121. The District court did not reach the merits of Country Classic's petition primarily due to its failure to exhaust its administrative remedies under 7 U.S.C. 608c(15)(A).

**United States District Court
D. Utah, Central Division.**

**MEMORANDUM OPINION AND ORDER ADDRESSING CROSS
MOTIONS FOR SUMMARY JUDGEMENT**

DAVID SAM, United States Senior District Judge.

I. INTRODUCTION

Pending before the Court are cross-motions for summary judgment. Both Plaintiff and the Intervenor-Plaintiffs (collectively "Plaintiffs") in separate motions urge that the undisputed material facts entitle them to the Court's judgment. Defendant Country Classic Dairies, Inc. ("Country Classic"), seeks summary judgment on the ground that this action is

barred by the statute of limitations, or in the alternative, that Plaintiffs' claims should be dismissed or reduced due to the failure to comply with the Small Business Regulatory Enforcement Fairness Act of 1996, P.L. 104-121 (March 29, 1996), to fully inform Country Classic about the regulations before the claims accrued.

The full facts surrounding this matter are set forth in the pleadings and need not be repeated here. Suffice it to state that this is an enforcement action brought under the Agricultural Marketing Agreement Act, specifically 7 U.S.C. § 608a(6), and the Federal Milk Marketing Order Regulating Milk in the Western Marketing Area¹, whereby it is alleged by Plaintiffs that when Country Classic sold and delivered packaged milk in the greater Salt Lake City area in 2002, it was required, but failed, to make monthly payments to the Federal Milk Market Administrator for the Western Marketing Order for the producer-settlement fund.

The Western Marketing Order (7 C.F.R. 1135 *et seq.*) was terminated on April 1, 2004. *See* 69 Fed.Reg. 8327 (February 24, 2004). However, the obligations which arose thereunder continue enforceable. 7 C.F.R. § 1000.26(c).

II. SUMMARY JUDGEMENT STANDARD

Under Fed.R.Civ.P. 56, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The burden of establishing the

¹ The Agricultural Marketing Agreement Act authorizes the Secretary of Agriculture to promulgate federal milk marketing orders, 7 U.S.C. § 608c(1),(2) and (4), requiring handlers (milk processing plants) to pay specified minimum prices to dairy farmers (known as producers) and to remit certain minimum payments to the producers or the federal milk market administrator in furtherance of the regulatory program. *Id.* §§ 608c(5) and (7) and 610.

nonexistence of a genuine issue of material fact is on the moving party.² E.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. See 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727 (2d ed.1983).

The central inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”*Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Celotex*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202.

III. DISCUSSION

A. Country Classic's Motion for Summary Judgment

1. Statute of Limitations-Failure to Exhaust Administrative Remedies.

The primary basis for Country Classic's motion is that the Complaint filed by the United States was filed after the applicable statute of limitations expired and, therefore, should be dismissed.

The Court does not reach the merits of Country Classic's position because the Court agrees with Plaintiffs that, having failed to exhaust its

² Whether a fact is material is determined by looking to relevant substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

administrative remedies as required by statute, Country Classic is barred from raising its statute of limitations defense. As Plaintiffs correctly note, a handler may not wait to raise its defenses for the first time in a 7 U.S.C. § 608(a)6 enforcement procedure, but instead must first exhaust its administrative remedies.

The controlling case is *United States v. Ruzicka*, 329 U.S. 287, 294 (1946). In that landmark case the Court held that because the milk handlers had not availed themselves of the administrative review process provided by 7 U.S.C. § 608c(15)(A), they could not justify their failure to comply with an order of the Secretary of Agriculture on grounds of improper testing and inspection in a 7 U.S.C. § 608(a)6 enforcement action. Specifically, the Court stated:

The procedure devised by Congress explicitly gave to an aggrieved handler an appropriate opportunity for the correction of errors or abuses by the agency charged with the intricate business of milk control. In addition, if the Secretary fails to make amends called for by law the handler may challenge the legality of the Secretary's ruling in court. Handlers are thus assured opportunity to establish claims of grievances while steps for the industry as a whole may go forward.

...

Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law. The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with factors that call for understanding of the milk industry. 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., 329 U.S. at 292-294. *See also Lion Raisins, Inc., v. United States*, 416 F.3d 1356, 1371 (Fed.Cir.2005) (exclusive remedy of handler

alleging a claim against an agency for a violation of the Takings Clause was administrative and judicial review mechanism of the Agriculture Marketing Agreement Act); *United States v. Lamars Dairy, Inc.*, 500 F.2d 84, 85 (7th Cir.1974) (only forum open to defendants to adjudicate their affirmative defenses to enforce milk order was a 608c(15) administrative hearing before the Secretary of Agriculture); *United State. v. Daylight Dairy Products, Inc.*, 822 F.2d 1 (1st Cir.1987) (“[a] long line of legal authority, beginning with *United States v. Ruzicka*... makes clear that [608c(15)(A)] administrative procedure is exclusive in the sense that a district court, when enforcing a marketing order, cannot consider legal challenges to the order until after the handler has pursued his administrative remedy”); *United States v. United Dairy Farmers Cooperative Ass’n*, 611 F.2d 488, 491 (3rd Cir.1979) (“[t]he cases are clear ... that a handler must exhaust its administrative remedies before challenging the Secretary’s Order, even if the challenge is only by way of defense to the Secretary’s enforcement action in federal court); and, *Alabama Dairy Products Ass’n, Inc. v. Yeutter*, 980 F.2d 1421, 1423 (11th Cir.1993)(district court had no subject matter jurisdiction over handlers’ claim when they did not exhaust remedies under 7 U.S.C. § 608c(15)(A)).³

2. Alleged Non-compliance with the Small Business Regulatory Fairness Act of 1996-Failure to Exhaust Administrative Remedies

As an alternative position, Country Classic asserts that Plaintiffs’ claims should be dismissed or limited in equity for failure to comply with regulations governing small businesses. Its argument is that under the Contract with America Act (Pub.L. No. 104-121, 110 Stat. 857 (1996), also known as the Small Business Regulatory Enforcement Fairness Act

³Country Classic’s argument to the contrary is rejected, as is its reliance on *United States v. Tapor-Ideal Dairy Co.*, 175 F. Supp 678 (N.D.Ohio, 1959), *aff’d*, 283 F.2d 869 (6th Cir.1960). See Intervenor-Plaintiffs’ Reply pp. 7-8.

(“SBREFA”), the United States Department of Agriculture was required, but failed, to publish formal “small entity compliance guides”, SBREFA § 212, and to informally respond to questions of a small entity with information and advice about the application of the regulations to specific set of facts, SBREFA § 213. Country Classic further contends that “in any civil ... action against” a small entity for violation of regulatory requirements, “the content of the small entity compliance guide,” as well as “guidance given by an agency applying the law to facts provided by the small entity,” may be considered by the court “as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages.”*Id.*

The Court, likewise, does not reach the merits of Country Classic’s position here. As noted above, because it failed to exhaust its administrative remedies, Country Classic is barred from raising the defense in this proceeding.⁴

B. Plaintiffs’ Motions for Summary Judgement

The Court agrees with Plaintiffs that the material facts are not in dispute. The Western Marketing Order regulated distributing plants, defined in 7 C.F.R. §§ 1135.5 and 1000.5, when distributions from such plants came into the geographic area of the Western Marketing Order as defined.⁵ Country Classic was a distributing plant as defined. Distributing plants became subject to full regulation and pooling obligations under the Western Marketing Order when such plants met the pool plant definitions of 7 C.F.R. § 1135.7, which describe a touchstone

⁴Even if Country Classic were not barred from raising its defense for failure to exhaust administrative remedies, the Court agrees with Plaintiffs’ that the payments sought here are not “fines, penalties, or damages”, SBREFA § 213, and therefore, SBREFA does not apply.

⁵The Western Marketing Order covered Utah and portions of Idaho, Oregon, Nevada, and Wyoming. 7 C.F.R. § 1135.2 (2002).

threshold for such full regulation of hitting or exceeding the 25% distribution level to outlets in the marketing area of the Western Marketing Order.

For each month from September of 2002 through December of 2002, Country Classic sold more than 25 percent of the packaged fluid milk from its Bozeman plant in the greater Salt Lake City area, thus resulting in regulation under the Western Marketing Order.⁶ Therefore, Country Classic's Bozeman plant was deemed a fully-regulated pool plant under the Western Marketing Order for those four months.

The Milk Market Administrator for the Western Marketing Order, James R. Daugherty, determined that Country Classic owed the Western Marketing Order Producer Settlement Fund the following principal amounts: \$140,946.00 for September, 2002; \$105,239.31 for October, 2002; \$147,887.68 for November, 2002; and \$165,697.54 for December, 2002, totaling \$559,770.53 plus administrative and late fees. Country Classic has refused or otherwise failed to pay the amounts due.

Because the material facts are not in dispute and because Country Classic has no defenses which the court may consider, Plaintiffs are entitled to summary judgment.⁷

⁶ The breakdown of such sales in the Western Order marketing area was 25.20% in September, 2002; 25.19% in October, 2002; 25.58% in November, 2002; and 26.41% in December, 2002.

⁷ Country Classic's objection to portions of the declarations supporting Plaintiffs' Motions for Summary Judgment are rejected. Any potential problems with the Codd and Daugherty Declarations are cured by the filing of supplemental declarations of those two declarants. The Court agrees with Plaintiffs that the identified paragraphs of the Conover Declaration are not legal conclusions, but descriptions of how the United States Department of Agriculture determine the amount owed by Country Classic to the producer settlement fund and for administrative fees, and a description of Country Classic's administrative action. Finally, Country Classic fails to proffer any evidence that contradicts the sworn statements of by Gibbons and Wright.

IV. CONCLUSION

For the foregoing reasons, as well as generally for the reasons outlined by Plaintiffs in their pleadings,

IT IS HEREBY ORDERED that Country Classic's Motion for Summary Judgment (Doc. # 111) is DENIED, and the Motions for Summary Judgment of Plaintiff United States of America (Doc. # 96) and of the Intervenor-Plaintiffs Utah Dairymen's Association and others (Doc. # 100) are GRANTED.

LION RAISINS, INC. v. USDA.
C.A.9 (Cal.), 2007.
No. 05-17299.
Filed April 30, 2007.

(Cite as: 231 Fed. Appx 565).

AMAA – FOIA – Disclosure, grounds for withholding.

Lion Raisin (Independent handler of California raisins) brought action pursuant to the Freedom of Information Act (FOIA) seeking to compel the United States Department of Agriculture (USDA) to produce documents related to USDA's criminal investigation of raisin handler. Pursuant to 5 U.S.C. 552(b)(7)(A), the District Court granted summary judgment to the USDA based upon publically disclosed affidavits by the USDA investigator that the FOIA "enforcement" exemption was justification for the withholding of the investigation reports.

United States Court of Appeals

Ninth Circuit

Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

In an earlier appeal, we reversed in part and remanded the district

court's grant of summary judgment in favor of the U.S. Department of Agriculture ("USDA") in an action brought under the Freedom of Information Act, 5 U.S.C. §§ 552, et seq. ("FOIA"). *Lion Raisins Inc. v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1085 (9th Cir.2004). Lion Raisins Inc. ("Lion") challenges the district court's ruling on remand, which approved the withholding of two administrative reports of an investigation of Lion (the "Reports"). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.¹

The USDA's publicly-submitted affidavits provided an adequate factual basis from which the district court could have concluded that the withheld portions of the Reports were exempt from disclosure under FOIA's law enforcement exemption, 5 U.S.C. § 552(b)(7)(A). *Doyle v. FBI*, 722 F.2d 554, 555 (9th Cir.1983); *Church of Scientology v. U.S. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir.1979). The Agricultural Marketing Service's David Trykowski was personally involved in both investigations underlying the Reports and provided detailed and specific information supporting the application of the law enforcement exemption. This testimony was corroborated by the testimony of Office of Inspector General Senior Special Agent Sharon Yamaguchi. The USDA's evidence that the criminal investigation remains ongoing, and that release of the Reports would jeopardize that investigation, therefore, meets the applicable standard. *See Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.1987) ("If the affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption, the district court need look no further.") (quotation marks omitted).²

¹ Because the parties are familiar with the facts and procedural history of this case, we do not recite them, except to the extent necessary to aid in understanding this disposition.

² Because the record discloses no evidence of bad faith on the part of USDA, moreover, Lion's attempt to undermine the factual basis in this manner fails. *See, e.g., Minier v. CIA*, 88 F.3d 796, 803 (9th Cir.1996) (" -he mere allegation of bad faith.ould not -ermine the sufficiency of agency submissions..fore rejecting the affidavits, -re must be tangible evidence of bad faith.. (citation omitted).

In addition, the district court did not clearly err in its ultimate decision that the law enforcement exemption applied. *Lewis*, 823 F.2d at 379; *Church of Scientology*, 611 F.2d at 743. The public information before the district court adequately supported its finding that the withheld portions of the Reports were exempt from disclosure, both through the USDA's extensive testimony to this effect and Lion's agreement to extend the statutes of limitations for prospective, potential criminal proceedings. The district court properly concluded that the Reports, if disclosed to Lion, would improperly give Lion a premature view of the government's theory of the case and evidence, an understanding-which it presently lacks-of the investigation's narrow focus and specific scope, and an opportunity to devise methods to circumvent the prospective prosecution.³

Because the district court had an adequate factual basis for the application of the law enforcement exemption and did not clearly err in its decision that the Reports were properly withheld, the district court's grant of summary judgment in favor of the USDA is

AFFIRMED.

³ Lion's failure to show that it already knows the scope of the government's investigation counts strongly against disclosure. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (“[E]ven without intimidation or harassment a suspected violator with advance access to the [agency’s] case could construct defenses which would permit violations to go unremedied.”) (citations and quotation marks omitted); *Lewis*, 823 F.2d at 380 (“-A was not intended to function as a private discovery tool, ... [and] we cannot see how FOIA’s purposes would be defeated by deferring disclosure until after the Government has “presented its case in court.” (quoting *Robbins Tire*, 437 U.S. at 242, 98 S.Ct. 2311).

**LION RAISINS, INC. v. USDA.
C.A.9 (Cal.),2007., No. 05-17449.
Filed April 30, 2007.**

(Cite as: 231 Fed. Appx 563).

AMAA – FOIA – Disclosure, grounds for withholding.

Lion Raisin (Independent handler of California raisins) brought action pursuant to the Freedom of Information Act (FOIA) seeking to compel the United States Department of Agriculture (USDA) to produce documents (Worksheets for Certificates of Quality) related to USDA’s criminal investigation of raisin handler. Pursuant to 5 U.S.C. 552(b)(7)(A), the District Court granted summary judgment to the USDA based upon publically disclosed affidavits by the USDA investigator that the FOIA “enforcement” exemption was justification for the withholding of the investigation reports.

**United States Court of Appeals
Ninth Circuit.**

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

Appeal from the United States District Court for the Eastern District of California, Robert E. Coyle, District Judge, Presiding. DC No. CV 05-0062 REC.

Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

This case concerns a request by Lion Raisins Inc. (“Lion”), pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552, et seq. (“FOIA”), for documents relating to the U.S. Department of Agriculture’s (“USDA”) inspections of raisins at Lion’s facility in connection with an investigation of Lion. Lion challenges the district court’s grant of summary judgment in favor of the USDA, which approved the withholding of “Work Sheets for Certificates of Quality and Condition for Raisins” (“Worksheets”) under FOIA’s law enforcement exemption, 5 U.S.C. § 552(b)(7)(A). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.¹

In reviewing FOIA cases, we ask two questions: “(1) whether the district court had a factual basis adequate to make a decision, and (2) if it did, whether the decision below was clearly erroneous.” *Doyle v. FBI*, 722 F.2d 554, 555 (9th Cir.1983).

With respect to whether there was an adequate factual basis for the district court’s decision, “[c]ourts can rely solely on government affidavits so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government’s claim.” *Lion Raisins Inc. v. U.S. Dep’t of Agric.*, 354 F.3d 1072, 1079 (9th Cir.2004) (“Lion Raisins I”) (citing *Church of Scientology v. U.S. Dep’t of the Army*, 611 F.2d 738, 742 (9th Cir.1979)). The USDA submitted detailed public testimony from a lead investigator, which described the ongoing proceedings and explained how disclosure of the Worksheets would provide the only means by which Lion could determine the precise nature of the USDA’s investigation. This testimony provided an adequate factual basis for the district court’s decision that the law enforcement exemption applied here. *Doyle*, 722 F.2d at 555; *Church of Scientology*, 611 F.2d at 742.

¹ Because the parties are familiar with the facts of this case, we do not recite them, except to the extent necessary to aid in understanding this disposition.

In addition, the district court's determination that the Worksheets fell within the law enforcement exemption was not clearly erroneous or based on an incorrect interpretation of the law. *Lewis v. IRS*, 823 F.2d 375, 379 (9th Cir.1987); *Church of Scientology*, 611 F.2d at 743. To the contrary, the district court correctly concluded that the Worksheets fell within the law enforcement exemption, given the submitted testimony and likely interference with the administrative proceedings.² “ ‘FOIA was not intended to function as a private discovery tool.’ ” *Lewis*, 823 F.2d at 380 (quoting *Robbins Tire*, 437 U.S. at 242, 98 S.Ct. 2311); *see also Robbins Tire*, 437 U.S. at 241, 98 S.Ct. 2311 (describing the situation of “giving a party litigant earlier and greater access to the [agency's] case than he would otherwise have” as “the kind of harm that Congress believed would constitute an ‘interference’ with [the agency's] enforcement proceedings”).

Because the district court had an adequate factual basis for its decision and its conclusions of law were accurate, the district court's grant of summary judgment in favor of the USDA is

AFFIRMED.

² Despite Lion's arguments, it is apparent from the record that the Worksheets are not identical to any items that Lion already has in its possession, and they are therefore distinguishable from the Line Check Sheets at issue in *Lion Raisins I*; their disclosure would provide Lion with additional information about the ongoing proceedings, and interfere therewith. “[E]ven without intimidation or harassment[,] a suspected violator with advance access to the [agency's] case could construct defenses which would permit violations to go unremedied.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) (internal quotation marks and citation omitted).

AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

**In re: LANCO DAIRY FARMS COOPERATIVE.
2006 AMA Docket No. M-4-1.
Decision and Order
Filed January 11, 2007.**

AMA – Milk Marketing Agreement – Blend price.

Sharlene Deskins for AMS.
John H. Vetne for Respondent.
Decision and Order by Peter M. Davenport Administrative Law Judge

DECISION AND ORDER

Introduction

In this action, the Petitioner Lanco Dairy Farms Cooperative (“Lanco”) seeks review of the Market Administrator’s (“MA”) interpretation and application of 7 C.F.R. §1001.13(b), contending that the MA has misconstrued, misapplied, or abused his discretion by: (1) giving one meaning to the term “reporting unit” as used in 7 C.F.R. §1001.7(c)(3) and §1001.13(b)(1), and another meaning to the term “reporting unit” in §1001.13(b)(2); and (2) adopting a construction of §1001(b)(2) that was not noticed or considered in any rulemaking proceeding, nor supported by any rulemaking decision. The Respondent Administrator, Agricultural Marketing Service (“AMS”): (1) denied generally the material allegations of the Petition; (2) asserted that the Petition failed to state a claim upon which relief can be granted, and; (3) affirmatively stated that the Agricultural Marketing Act of 1937, as amended, and the milk marketing orders, as interpreted by the MA, are fully in accordance with law and binding upon the Petitioner.

An oral hearing was held on September 26, 2006 in Washington, D.C. The Petitioner was represented by John H. Vetne, Esquire of Raymond, New Hampshire and the Respondent was represented by Sharlene Deskins, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. Both parties have submitted proposed Findings of Fact, Conclusions of Law and Briefs in support of their respective positions and the matter is ripe for disposition.

Discussion

The Northeast marketing area is defined in 7 C.F.R. § 1001.2 and includes all of the territory within the bounds of the states of Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont, and the District of Columbia, as well as all counties in Maryland except Allegheny and Garrett, all of the counties and townships in New York except those specifically excepted, and specified counties in Pennsylvania and Virginia. Lanco was formed in 1998 with 30 members¹ (Tr. 13) and is a [Capper-Volstead]² “cooperative association” within the meaning of 7 C.F.R. §1000.8 of the General Rules applicable to Federal Milk Marketing Orders. The Petitioner has been a “handler” as defined in 7 C.F.R. §1001.9(c) since prior to January 1, 2000. *Id.* Lanco’s primary customers for its members’ Class I milk³ historically have been four bottling pool plants⁴

¹ Testimony provided at the hearing on November 14, 2006 indicates that Lanco has grown significantly and currently has 825 farm members. Tr. 15.

² *See* 7 U.S.C. § 291 et seq.

³ Class I milk is defined in 7 C.F.R. § 1001.40(a) and generally refers to consumer fluid milk products.

⁴ *See* “pool plant” definition below.

located in Maryland, Delaware, Pennsylvania and New Jersey, each of which have their own independent suppliers. Their purchases of Lanco's milk are seasonal, in effect making Lanco a supplemental and balancing supplier for those plants. Lanco also sells milk which is not sold for Class I consumption to Saputo Cheese. Any additional milk, with the exception of some small customers, was delivered to the Laurel, Maryland pool plant. (Tr. 17-18). Pooling entitles Lanco's farmer members to receive the same "blend price" as other producers supplying milk to the market, but in order for them to do so, it is necessary for the milk sold by Lanco to qualify for the market-wide revenue pool as "producer milk" under the marketing order. Qualification for the "blend price" requires that specified percentages of milk which vary by season be included in the pool and limits the amount of milk that can be diverted to nonpool plants. Up until June of 2005, Lanco had shipped sufficient quantities of milk to qualify for inclusion in the pool for the Northeast Order.

Effective June 1, 2005, the Northeast Milk Order was amended⁵ by reducing the volume of producer milk eligible for diversion in § 1001.13, and increasing supply plant shipment requirements in § 1001.7.

7 C.F.R. § 1001.13(b) specifies that the milk received by a handler must satisfy the shipping standards specified for a supply plant. It provides:

Producer milk means the . . . milk . . .

(b) Received by the operator of a pool plant or a handler described in §1000.9(c) in excess of the quantity delivered to pool plants subject to the following conditions:

(1) The producers whose farms are outside of the states included in the marketing area and outside the states of Maine or West Virginia shall be organized into state units and each such unit shall be reported separately; and

⁵ See also, *White Eagle Cooperative Association, et al. v. USDA*, 396 F. Supp. 2d 954, 64 Agric. Dec. 1227 (2005)

(2) For pooling purposes, each reporting unit must satisfy the shipping standards specified for a supply plant pursuant to §1001.7(c);

7 C.F.R. § 1001.7(c) contains the shipping standards for supply plants:

Pool plant means . . .

(c) A supply plant from which fluid milk products are transferred or diverted to plants described in paragraph (a) or (b) of this section subject to the additional conditions described in this paragraph. In the case of a supply plant operated by a cooperative association handler described in §1000.9(c), fluid milk products that the cooperative delivers to pool plants directly from producers' farms shall be treated as if transferred from the cooperative association's plant for the purpose of meeting the shipping requirements of this paragraph.

(1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than 10 percent of the total quantity of milk (except the milk of a producer described in §1001.12(b)) that is received at the plant or diverted from it pursuant to §1001.13 during the month;

(2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in §1001.12(b)) that is received at the plant or diverted from it pursuant to §1001.13 during the month;

The above amendments were the result of a multi-day, rulemaking

hearing which considered a number of amendments regarding the quantity of milk that must be delivered or transferred to a distributing plant in order for the milk to be included in the pool. A final decision issued on January 31, 2005 containing the above changes (70 *Fed Reg.* 4932) became effective after receiving a favorable vote by at least two thirds of the producers engaged in the production of milk for sale in the marketing area. 70 *Fed Reg.* at 18962 (April 12, 2005).

In early July of 2005, Lanco was notified that it had failed to meet the pooling percentage requirements because its deliveries to the Laurel, Maryland pool plant during the month of June were not considered as being qualifying deliveries for meeting pool eligibility requirements.⁶ Lanco was advised that while no penalty would be exacted for June, the eligibility requirements would be enforced for July. Tr. 20-21.

After being informed of the MA's position, John Vetne, Lanco's counsel submitted a memorandum to the MA and requested reconsideration, explaining the hardship that fulfilling the requirements of the "new" interpretation would cause. (Attachment A to Petition; PE 1). By letter dated July 15, 2005, the MA reaffirmed his position and rejected Lanco's request. (Attachment B to Petition, PE 2). Lanco then sought review by the AMS Dairy Programs Administrator requesting that the Market Administrator's interpretation be overruled. The Market Administrator's interpretation was affirmed in an undated letter from the AMS Dairy Programs Acting Deputy Administrator John Mengel. (Attachment C to Petition; PE 3). During the month of July, Lanco also met with and unsuccessfully pleaded their case with Dairy Programs personnel, including Dana Coale, the Administrator, John Mengel, Gino Tosi and an individual believed to be Dave Jamison. Tr. 25.

In order to continue to qualify for the revenue sharing from pooling, Lanco initially made arrangements to meet the pooling requirements by purchasing milk from the independent suppliers to the four bottling

⁶ It is primarily this loss of qualification that has required Lanco to alter the way it does business. While the Laurel, Maryland plant is a pool supply plant, it is not a pool distributing plant as the Market Administrator has determined is required by the regulations for qualification. This distinction is determinative of the outcome of the case.

plants, delivering Lanco milk to the bottling plant and delivering the same amount of the purchased independent supplier's milk to Saputo Cheese. Thereafter, Lanco entered into a contractual agreement with Maryland-Virginia Milk Producers ("MVMP"), another cooperative which exacted a pooling accommodation fee of .05 cents per hundred weight of fluid milk on member volume to divert Lanco's milk to one of MVMP's Class I customers to allow Lanco to meet the pool qualification requirements. (Tr. 32-33). Thus, Lanco's cost of qualification includes both the accommodation fee as well as the increased cost of milk transportation.

Lanco maintains that in order to comply with the MA's "interpretive" requirements regarding pool plant percentages requirements, it has had to incur additional costs of \$26,000.00 to \$30,000.00 per month in transportation and pooling accommodation fees in order to market its members' milk. Tr. 35.

Although the locations of every one of Lanco's farmer members were not specifically identified, Lanco indicates that it has not received any producer milk from dairy farms outside the states included in the Northeast marketing area or outside the states of Maine or West Virginia and specifically did not receive any such outside milk during June of 2005.

Having considered all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order are entered.

Findings of Fact

1. Lanco Dairy Farms Cooperative is a non-profit dairy farmer cooperative association with members in Pennsylvania, Maryland, and West Virginia that markets the raw milk of its producer members to milk plants in the Northeast marketing area, and is a "small entity" within the meaning of the Regulatory Flexibility Act. It is a [Capper-Volstead] "cooperative association" and has been a "handler" since prior to January 1, 2000.

2. In order for Lanco's farmer members to receive the same "blend price" as other producers supplying milk to the market, it is necessary

that the milk sold by Lanco qualify for the market-wide revenue pool as “producer milk” under section 13 of the Northeast Milk Marketing Order, 7 C.F.R. § 1001.13.

3. Prior to the month of June of 2005, the milk sold by Lanco qualified for revenue sharing purposes as “producer milk” and its members received the same “blend price” as other producers supplying milk to the market.

4. As a result of a multi-day, rulemaking hearing conducted in September of 2002 during which interested parties were afforded the opportunity to submit comments evidence and post hearing briefs, a recommended decision was published by AMS in the Federal Register⁷ which was followed by a referendum favorably voted on by the regulated parties, the Northeast Milk Marketing Order was amended, effective June 1, 2005.

5. In July of 2005, the MA informed Lanco that it had failed to qualify for revenue sharing purposes for the month of June of 2005 as it had failed to meet the performance standards for pooling by delivering the required percentage of milk to a pool distributing plant,⁸ as was required by the amendment of the Northeast Milk Marketing Order, but that the requirement would be waived for June of 2005, but not for subsequent months.

6. In order to meet the post-amendment performance standards, Lanco has incurred additional monthly expenses of \$26,000.00 to \$30,000.00 in additional transportation costs and pooling accommodation fees, from July of 2005 up until the date of the hearing on November 14, 2006.

⁷ 70 *Fed.Reg.* 4932 (January 31, 2005).

⁸ Prior to June of 2005, Lanco had qualified by delivering the required percentages of milk to the Laurel, Maryland pool supply plant. Under the Market Administrator’s interpretation of the amendment, after June 1, 2005, only deliveries of milk to pool distributing plants would qualify to meet the performance standards.

Conclusions of Law

1. 7 C.F.R. § 1001.13(b)(2) incorporates by reference 7 C.F.R. § 1001.7(c) in requiring 7 C.F.R. § 1000.9(c) cooperatives to comply with pool supply plant shipping standards to distributing plants (which vary from 10% to 20% depending upon the month).

2. "Reporting units" as defined in 7 C.F.R. § 1001.13(b) must satisfy the performance standards contained in Section 1001.7(c) in order for to have milk from that reporting unit included in the pool for the Northeast Milk Marketing Order.

3. The Market Administrator's interpretation of the performance requirements contained in the Northeast Milk Marketing Order is consistent with the language of the Regulations and as such is in accordance with law.

Order

For the above reasons, the Petition is DISMISSED.

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

In re: COUNTRY CLASSIC DAIRIES, INC.
2005 AMA Docket No.M-4-3.
Decision and Order.
March 30, 2007.

AMA – Milk Marketing Agreement – Marketwide pool – Deference to reasonable Agency interpretation – 25% rule.

John Vetne for Petitioner.
Sheila Deskins for AMS.
Decision and order by Chief Administrative Law Judge Marc R. Hillson

Decision

In this decision, I find that Petitioner has not met its burden of demonstrating that the interpretation of 7 C.F.R. § 1000.76 by the Market Administrator is not in accordance with the law. Accordingly, the petition is denied.

Procedural Background

Country Classic Dairies, Inc. (Petitioner) filed a “Petition Contesting Interpretation and Application of Certain Federal Milk Order Regulations and of Obligations Assessed to Petitioner Thereunder” pursuant to 7 U.S.C. § 608c (15) (A) on August 22, 2005. The Administrator of the Agricultural Marketing Service, United States Department of Agriculture (Respondent) filed an answer on October 11, 2005.

I conducted a hearing in this matter on July 12, 2006 in Bozeman, Montana. John H. Vetne, Esq. represented Petitioner and Sharlene Deskins, Esq. represented Respondent. At the hearing Charles English, Esq. requested that the Utah Dairymen’s Association (UDA) be allowed

to participate in the case as an amicus pursuant to 7 C.F.R. § 900.57.¹ The motion was granted without opposition. At the hearing, Petitioner called four witnesses and three witnesses were called by Respondent.

Following the hearing, Petitioner filed its opening brief on September 8, 2006, Respondent and amicus filed separate briefs on November 3, 2006 and Petitioner filed its reply brief on December 1, 2006.

Statutory and Regulatory Background

The world of milk pricing is a byzantine one to say the least. Portions of the country are subject to federal milk orders which control the pricing of milk, while others are not. However, milk handlers who ship milk from a non-federal order area into a federal order area are subject to varying degrees of regulation depending on the volume and nature of the milk shipped. As one witness testified, one of Respondent's auditors told him, only semi-facetiously, "that the Federal Order is so complicated, that only five people know about it; four of them are dead, and one of them is in jail." Tr. 82.

Milk, among many other agricultural commodities, has been pervasively regulated for decades. The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq. (Act), laid the groundwork for a system to protect the interests of farmers against "the disruption of the orderly exchange of commodities in interstate commerce" by protecting farmers and the public against "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602 (4). With respect to milk, the Act and the regulations promulgated thereunder authorize the Secretary to establish marketing orders regulating minimum prices of milk within a geographic area based on classifying the milk according to

¹ The rule provides: 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.

the purpose for which it is used. A market administrator establishes and maintains a fund into which producers and handlers of milk within the market order area pay assessments calculated pursuant to a complex formula. Each month accounts are settled so that there is a uniform milk price for each of the several classes of milk within the marketing order area.

Marketing orders only cover a portion of the country. In many cases, states have their own orders regulating the price of milk, while in other areas the price of milk is not subject to a marketing order. However, milk that is produced outside of a federal marketing order area but is sold in an area subject to a federal marketing order is also subject to the pricing controls of the marketing area in which it is sold. A handler who sells over 25% of its milk into a federal marketing order area is considered fully regulated and all of its milk is subject to the controls in that area. A handler who sells less than 25% of its milk into a marketing order area is considered partially regulated, and the milk it sells in the marketing order area is subject to that order.

The regulations at 7 C.F.R. § 1000.76 provide several different approaches to calculate the payments made by or to a handler who operates a partially regulated plant. Three options are made available, and the question of which applies is the central issue of this case. Petitioner contends that it should be allowed to use the methods provided in paragraphs (a) or (b) of 1000.76. However, 1000.76 provides that “A partially regulated distributing plant that is subject to marketwide pooling of producer returns under a State government’s milk classification and pricing program shall pay the amount computed pursuant to paragraph (c) of this section.”

The State of Montana, where Petitioner is located, unquestionably has a milk pooling and pricing program. The Montana program is similar in complexity to the Federal program,² although obviously on a smaller scale. Montana has three classifications for milk, rather than the four in

² One of Petitioner’s witnesses testified that “approximately 56 linked spreadsheets” were utilized in Montana’s pooling system. Tr. 133.

the Federal marketing orders. Montana has a Milk Control Bureau under the Montana Department of Livestock, and the Bureau is responsible for pricing and pooling programs for milk produced and sold within the State.

Whether Montana's milk pooling and pricing program is a "marketwide" one is the key issue to be resolved in this case. Neither the Act nor the regulations defines "marketwide."

Facts

Petitioner Country Classic Dairies, Inc. is a non-profit association of dairy farmers that operates a milk processing and distributing plant in Bozeman, Montana. Petitioner employed 54 people as of the date of the hearing.³ Beginning in 2002 Petitioner began selling some of its milk outside the State of Montana, including areas covered by one or more federal milk orders.⁴ Petitioner was apparently unaware of the federal milk orders until it was visited on a number of occasions, beginning in 2002, by audit teams of the Milk Order Administrator. Tr. 76-80. At that time, Petitioner was apparently shipping over 25% of its milk to federal milk order areas, and was informed that it was fully regulated under the Act and regulations. Tr. 83. Shortly after receiving this information, and being informed of substantial payments it accordingly owed to the pool, Petitioner altered its milk distribution so as to sell less than 25% of its milk into areas covered by federal milk orders. Tr. 84-85. As such, Petitioner became a partially regulated handler of milk, subject to the provisions of 7 C.F.R. § 1000.76.⁵

³ Petitioner also operates a plant in Belgrade, Montana, but the operations of that plant are not relevant to this decision.

⁴ The Pacific Northwest, Arizona-Nevada and Central orders.

⁵ For a period of time not relevant to this decision, Petitioner's shipments of milk to areas under a federal marketing order exceeded 25% of its production, and for that period of time it was considered fully regulated.

Additionally, Petitioner now purchases milk from producers who are outside Montana and not governed by a federal milk order. The parties are in accord that Petitioner has the option of accounting for this portion of its milk under the provisions of 1076(a) or (b).

Several witnesses addressed the issue of whether the Montana pooling and pricing program was marketwide. Monte Nick, Chief of the Milk Control Bureau, Montana Department of Livestock, testified that Montana had a statewide pool, and not a marketwide one. P. Ex. 10. While he testified that Montana did not fix a regulated classified price for milk produced in Montana and shipped out of state, he also stated that “net revenues from such sales may be contributed to the pool for redistribution to Montana dairy farmers,” *Id.* at paragraph 7. While he stated in his declaration that Montana did not fix a classified price for milk shipped out of state, he admitted on cross-examination that Montana puts a Class III value on milk shipped out of state. Tr. 58. Further, handlers receive transportation credits for milk they ship out of state. Tr. 64-65.

Jana Magee, an expert consultant for the dairy industry, also testified that Montana operated a statewide pool, because “[i]t only covers milk produced in Montana and sold in Montana.” Tr. 215, but that it was not a marketwide pool. However, she also agreed that if a program had milk classification pricing and pooling then it could be a marketwide pooling program. Tr. 245-246.

Gary Jablonski, an assistant market administrator for USDA, testified that Montana did indeed have a marketwide pooling program. Tr. 260. Looking at the Montana pooling sheet attached to PX 7, he stated that it indicated that all the milk produced in Montana was classified and that the calculations of the combined totals were utilized in reaching producer pay prices. Tr. 263. He pointed out that Montana’s own regulations included out-of-state sales of milk produced in the state in the calculations of the pool price. Tr. 270.

John Mykrantz, a marketing specialist with the Milk Market Administrator’s Office also concluded that Montana operated a marketwide pool. Tr. 317.

Discussion

After all is said and done, this case boils down to one rather basic issue. Is Montana's milk pooling and pricing program a marketwide pool so that use of 1000.76(c) is mandated?⁶ I conclude Respondent's determination answering that question in the affirmative is supported by the evidence, the Act and regulations, as well as the pertinent rules of statutory and regulatory construction.

Given that the concept of a "marketwide" pool is so pivotal to the application of 1000.76(c), it would have been nice if the statute or the regulations provided a definition of "marketwide." However, no such definition is provided. The courts and USDA, however, have applied the concept of "marketwide pool" for decades, and their interpretation is more consistent with the position of USDA (and the UDA) than with Petitioner. It has long been recognized that a pool can be marketwide without accounting for every drop of milk produced in the market. "It is customary in connection with milk orders for the Secretary to determine which milk handlers and handling of milk shall be included in a marketwide pool, and which dairy farmers shall be included as 'producers' whose milk is to be pooled." *County Line Cheese*, 44 Ag. Dec. 63, 124 (1985). Thus, it is evident that not all milk produced in a given area need be included in the area's pool for the pool to be considered marketwide. "[T]he Secretary, in promulgating a milk marketing order, must determine which handling of milk shall be isolated for the purpose of regulation." *Id.*, quoting *In re Yadkin Valley Coop.*⁷ Failure to include every drop of every category of milk produced in a marketing area does not render the pool non-marketwide. This would

⁶ Petitioner concedes that "plants which are subject to a state milk pricing program that imposes marketwide pooling and classified pricing for the milk distributed in the federal order market" has no choice other than to be subject to section 1000.76(c). Pet. Br., p. 7.

⁷ *In re Yadkin Valley Dairy Coop., Inc.*, 22 Agric. Dec. 970, 978 (1963), decision on remand, 26 Agric. Dec. 218 (1967), *aff'd* sub nom. *Yadkin Valley Dairy Coop., Inc. v. Freeman* (M.D.N.C. Apr. 16, 1969), printed in 28 Agric. Dec. 398 (1969).

render any pool that exempted any segment of producer groups, e.g., small producer-handlers, as non-marketwide. In fact, as Respondent points out, “milk orders have never been totally inclusive of all milk and all dairy farmers, since for example the orders only apply to Grade A milk and not to exempt plants with a route disposition of less than 150,000 pounds.” Resp. Br. at 16-17. Since it appears that every milk marketing order exempts at least some milk from inclusion as part of a pool, the logic of Petitioner’s argument would lead to a conclusion that there was no such thing as a marketwide pool—a conclusion clearly inconsistent with the Act and the regulations.

Thus, it would appear reasonable for USDA to consider Montana’s pool to be marketwide even if some milk shipped out of state were not counted as part of the pool. While specific definitions in the regulations would obviously be preferable, there is nothing to indicate that USDA is subject to the type of limitation suggested by Petitioner in terms of the extent of the market necessary to be deemed marketwide. There is nothing in the Montana regulations that would appear to be inconsistent with the USDA interpretation that the Montana program is indeed marketwide.

However, here it appears that Montana in fact does account for milk shipped out of state. While it appears that such milk is given a Class III classification rather than a value based on its actual end use, it appears that all fluid milk produced in Montana is in fact accounted for so that even under Petitioner’s narrower suggested interpretation of “marketwide” it is reasonable to conclude that it is subject to a marketwide pool. While the milk was not categorized as Class I, all the milk produced in Montana is priced. Tr. 257. For a period of time relevant to this petition the price for milk shipped outside of the state was calculated at Class III plus \$2. Tr. 276-278. Since it was the price used by the state, it was considered by the market order administrator to be a proper basis from which to calculate the compensatory payment due from Country Classic. Tr. 286-289. The Milk Order Administrator’s determination that Montana operated a marketwide pool as per 7 C.F.R. § 1000.76 appears totally valid on its face.

Petitioner’s arguments in its reply brief that the plain meaning of a marketwide pool requires that such a pool must include all milk by all

handlers is unpersuasive. The notion that a marketwide pool must include all milk is flatly contradicted by numerous portions of federal milk orders, including provisions that only include Grade A milk, exempt small producer-handlers, etc. Since there is a great deal of leeway in describing what a market is, the fact that the term is not totally inclusive is not inconsistent with its common usage or definition.

The rules of statutory and regulatory construction likewise support the position of Respondent. This is just the type of situation where the agency's interpretation of its own regulations must be accorded deference. That was not the case in *In re. HP Hood, LLC*, 64 Agric. Dec. 1282 (2005), where I held that the specific language of the regulation in question as to what constituted a fluid milk product was inconsistent with the interpretation advanced by the Agency, and that the Agency was not entitled to deference because of the absence of ambiguity and the fact that the Agency had consistently interpreted the regulation in a manner contrary to what it was advocating in that case. Here, there is no specific definition of "marketwide pool" and the Agency is adhering to its consistent, long-term interpretation. Thus, to the extent that the regulation may be ambiguous, the Agency's interpretation must be accorded deference. *Lawson Milk Co. v. Freeman*, 358 F. 2d 647, 650 (C.A. 6, 1966); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). Where, unlike in the HP Hood case, the Agency's interpretation has been consistent over a period of decades, the interpretation is particularly entitled to deference, and must be given controlling weight unless plainly erroneous or inconsistent with the regulation. *Id.*, *Stone Forest Industries, Inc. v. Robertson*, 936 F. 2d 1072, 1074 (C.A. 9, 1991). "This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.' *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)." *Thomas*

Jefferson University, 512 U.S. at 512.⁸

Thus, I conclude that the Milk Market Administrator's determination that the State of Montana operates a marketwide pool is reasonable and should be accorded deference, and that therefore the payment provisions of 7 C.F.R. § 1000.76(c) apply to Petitioner.

Petitioner further contends that the Market Administrator's interpretation of 1000.76(c) constitutes an unlawful trade barrier under the Agricultural Marketing Agreement Act and/or violates the Petitioner's constitutional rights to Due Process and Equal Protection. I find this argument to be without merit.

Petitioner has essentially presented no evidence to support this argument. The mere fact that the application of the Market Administrator's interpretation of "marketwide pool" has the potential of costing Petitioner more than Petitioner's interpretation is no basis for concluding that an unlawful trade barrier exists or that constitutional rights have been violated. Early in the hearing, Petitioner suggested it was going to introduce direct evidence of economic harm, which it requested be kept confidential, to the extent that it contended that counsel for the UDA should not be present when the information was discussed, and that the record concerning this information be sealed. Counsel for both Respondent and the UDA vigorously opposed this request, noting that 7 C.F.R. § 900.210(e)(2) specifically exempted information, in cases brought under 15(A) challenging the validity of a marketing order, that would normally be considered confidential, from the protections against disclosure that would normally apply. While I initially indicated I thought Petitioner's position meritorious, a review of the cited regulation convinced me otherwise. Apparently counsel for Petitioner felt the same way as he indicated, after we had taken a short break, that the interpretation of counsel for UDA and Respondent was correct. Tr. 39.

⁸ See also *White Eagle Cooperative Association, et al v. USDA*, 396 F. Supp. 2d 954, 64 Agric. Dec. 1227, 1233 (2005) ". . . the court's deference to administrator's expertise rises to a zenith in connection with the intricate complex of regulation of milk marketing."

However, rather than introducing pertinent evidence to document financial losses sustained by Petitioner as a result of Respondent's interpretation, Petitioner elected to introduce a few spread sheets to illustrate the differences between applying various combinations of 1000.76(a), (b) and (c) would apply to various *hypothetical* situations. There is not a shred of evidence introduced by Petitioner which would show the actual impact of the decisions of the Market Administrator on Petitioner's operations, let alone whether such decisions resulted in an unlawful trade barrier or unconstitutional denial of due process and equal protection rights.

Petitioner cites *Lehigh Valley Cooperative v. United States*, 370 U.S. 76 (1962) to support its claim that the Market Administrator's interpretation would constitute an unlawful trade barrier. *Lehigh Valley* presents a far different scenario, however. In that case the petitioners, as milk handlers, put on specific evidence clearly demonstrating the economic impact of the compensatory costs being imposed on their milk, and showed that the assessment the Secretary was trying to exact would result in them paying far more for milk sold within the market order than the producers located within the market order. The Court held that this approach imposed "unnecessary hardships, virtual 'trade barriers.'" 370 U.S. at 86-87.

Here, the only hard economic facts presented demonstrated that Petitioner, if its position would be sustained, appeared to be on the receiving end of substantial economic benefits vis-à-vis Meadow Gold—the only other handler subject to the Montana Pool. Exhibits RX1 and RX3 demonstrated that for most months Petitioner received payments from the Montana pool, and that this result was favorably impacted by its shipping milk from Montana into the federal milk market order areas. Adopting the Market Order Administrator's conclusion that Montana operates a marketwide pool would apparently result in a situation where Petitioner's compensatory payments would put it in an economic position comparable to Meadow Gold for the months where it was a partially regulated handler, a result which appears consistent with the aims of the Act, and one which is significantly different from that the Supreme Court declared constituted a trade barrier in *Lehigh Valley*. On

this record, I have no basis to find that the Market Administrator's interpretation that 1000.76(c) establishes an unlawful trade barrier or violates the due process or equal protection clauses of the constitution.

Findings and Conclusions

1. Petitioner Country Classic Dairies, Inc., is a cooperative association of dairy farmers which operates milk distributing plants in Bozeman and Belgrade, Montana. As of the date of the hearing, it employed 54 people.

2. Petitioner ships fluid milk to areas outside of Montana that are governed by a federal milk marketing order. During the time period relevant to this case, Petitioner shipped less than 25% of its production to areas governed by a federal milk marketing order.

3. During the time period relevant to this decision, Petitioner operated a partially regulated plant in Bozeman.

4. The State of Montana operates a statewide pooling order for milk produced in Montana. All fluid milk produced in Montana is accounted for in this pool.

5. The pool operated by the State of Montana is a marketwide pool.

6. Even if the State of Montana did not account for all milk shipped out of state, Respondent's conclusion that Montana operates a marketwide pool is a reasonable one, which should be deferred to.

7. The methodology contained in 7 C.F.R. 1000.76(c) governs the calculations of payments to the pool by Petitioner.

8. The Market Administrator's application of 7 C.F.R. 1000.76(c) to Petitioner does not constitute an illegal trade barrier, nor does it violate Petitioner's due process or equal protection rights.

Wherefore, the relief requested by Petitioner is denied and the petition is dismissed.⁹

⁹ On March 12, 2007 the Hearing Clerk received a Motion to Amend Petition and to Reopen Hearing. Since I had virtually completed the writing of this decision, and since delaying the issuance of this decision would serve no good purpose, the motion is denied.

Cont.

The provisions of this order shall become effective on the first day after this decision becomes final. This is my final decision on the merits of this case. 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.

Petitioner should file a new petition if it wishes to pursue the claims presented in its Motion to Amend.

In re: MARVIN and LAURA HORNE, d/b/a RAISIN VALLEY FARM; DON DURBAHAN; RAISIN VALLEY FARMS MARKETING ASSOCIATION, RAISIN VALLEY FARMS MARKETING, LLC, LASSEN VINEYARDS, LLC, and LASSEN VINEYARDS.

2007 AMA Docket No. F & V 989-0069.

Decision and Order.

Filed May 15, 2007.

AAMA – Processor of “off-grade” raisins – Regulations, being subject to vs. applicable to – Handler, standing due to applicability of regulation.

Brian C. Leighton for Petitioners.

Frank Martin, Jr. for AMS.

Decision and Order by Administrative Law Judge Peter M. Davenport.

ORDER

This matter is before the Administrative Law Judge upon the Motion of the Respondent to Dismiss the Petition for Review. The Respondent has filed its Opposition to Respondent’s Motion to Dismiss.

The Petitioners filed their Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition To Exempt Petitioners From Various Provisions of the Raisin Marketing Order and Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law on March 5, 2007. On March 23, 2007, the Respondent moved to dismiss the Petition, arguing that Petitioners lack standing to file a Petition pursuant to Section 8c(15)(A) of the Agricultural Marketing Act of 1937 (AMAA), 7 U.S.C. §601, *et seq.*, that the Petitioners are precluded under the doctrine of *res judicata* from relitigating claims and issues adjudicated in a prior litigation, and that the Petitioner’s petition was not filed in good faith. The Petitioners’ Opposition to the Respondent’s Motion to Dismiss addresses each of the Respondent’s arguments. The Respondent’s argument that the Petitioners lack standing to file the Petition for Review appears contrary

to the holding of *Midway Farms v. United States Department of Agriculture*, 188 F. 3d 1136 (9th Cir. 1999), 58 Agric. Dec. 714 (1999). In that case, Midway was the purchaser of off-grade raisins and various raisin residue matter that raisin handlers grade out of the raisins intended for human consumption. Midway then processed those products into other than human consumption products, including distillery material, cattle feed and concentrate material. Midway had been asked to complete and submit certain forms to the Raisin Administrative Committee because it was considered a processor and, as such, a “handler” subject to the Raisin Marketing Order. Midway took the position that it was not a “handler,” and completed and submitted the forms, but filed an administrative petition with the Secretary seeking a declaration that it was not subject to the Raisin Marketing Order. As in the instant case, the Department filed a motion to dismiss the petition, arguing that the plain language of section 608c(15)(A) made clear that only a “handler” could file an administrative petition and that Midway did not qualify as it was claiming *not* to be a handler.

The Department’s motion to dismiss was granted without prejudice in an Initial Decision and Order by former Chief Administrative Law Judge Victor W. Palmer. In that decision, Judge Palmer held that he lacked the requisite power to conduct an *in camera* inspection of the Petitioner’s records which had been subpoenaed by the Department, and without producing its records, the Petitioner could not show itself to be a handler having standing to bring the action.

The Petitioner appealed to the Judicial Officer. In his decision, Judicial Officer William G. Jenson modified the decision by the former Chief Administrative Law Judge and dismissed the petition with prejudice. *In re Midway Farms*, 56 Agric. Dec. 102 (1997). The Petitioner again sought review, filing a petition for review with the United States District Court for the Eastern District of California which denied Petitioner’s motion for summary judgment and granted summary judgment in favor of the Department. *Midway Farms v. United States Department of Agriculture*, CV F 97-5460 (E.D. Cal. May 18, 1998). Further review was sought, and on appeal, the Court of Appeals for the

Ninth Circuit reversed and remanded the case.

In holding that Midway had standing to file an administrative petition with the Secretary, the Ninth Circuit court noted:

The operative statute allows “[a]ny handler subject to an order” to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A). The term “handler” is defined by regulation for the purposes of section 608c(15)(A) as “any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51(i). Neither party contends, for the purposes of this action, that Midway is a “person who, by the terms of the marketing order, is subject thereto.” Thus, the sole question is whether Midway is a “person... to whom a marketing order is sought to be made applicable.” 7 C.F.R. § 900.51(i). (Footnotes omitted).

While in *Midway* the forms were sent to Midway by the Committee, there, as here, the Department sought additional information by subpoena. Despite the Department’s assurances in this action that neither the Raisin Advisory Committee nor the Department have told the Petitioners that they are subject to the marketing order (Respondent’s Motion to Dismiss, Exhibits 1 and 2), those declarations also make it abundantly clear that the purpose of the investigation being pursued is to determine whether the AMAA and the Raisin Marketing Order have been violated. *Id.* As it is difficult to conceive how a person to whom the marketing order is not applicable would have violated the Act or the order, The Department’s actions are consistent with an overt intention to make the Petitioners persons to whom the marketing order is being sought to be made applicable. As such, the Petitioners will be found to have the standing to file the administrative petition and have the ultimate merits determined.

The Respondent also argues that *res judicata* applies and that the Petitioners should be barred from relitigating the issues decided in *In re Marvin D. Horne, et al.*, AMAA Docket No. 04-0002 (Decision and Order by Judge Victor W. Palmer, December 8, 2006) 65 Agric. Dec. 805 (2006). As the Petitioner notes in their Opposition to the Motion to Dismiss, Judge Palmer’s decision is limited to the years 2002 to 2003-4. As the previously cited Exhibits indicate that the period of inquiry is

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2003 to 2006, the doctrine of *res judicata* is inapplicable.

The Respondent's last argument indicates that the Petitioners have not filed their Petition in good faith. As the points advanced by the Respondent fail to rise to the level required to demonstrate a lack of good faith, the argument will be rejected at this time.

Being sufficiently advised, it is

ORDERED the Respondent's Motion to Dismiss is **DENIED**.

ANIMAL QUARANTINE ACT

ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: MICHAEL LEE MCBARRON, d/b/a T&M HORSE COMPANY.

A.Q. Docket No. 06-0003.

Decision and Order.

Filed May 10, 2007.

AQ – Slaughter horse transportation – Equine for Slaughter Act – Respondent superior – Back-tags, lack of –Owner-shipper certificate, improper.

Thomas Neil Bolick for APHIS

Mark J. Calabria for Respondent.

Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

I decide that Michael Lee McBarron, doing business as T&M Horse Company, was an owner/shipper of horses (9 C.F.R. § 88.1) who, during 2003 and 2004, failed to comply with the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder, when he (and/or his partner or their agents) commercially transported horses for slaughter to Dallas Crown, Inc., in Kaufman, Texas. The testimony of Dr. Timothy Cordes (D.V.M.) persuades me that a \$21,000 civil penalty (9 C.F.R. § 88.6), for remedial purposes, is appropriate, justified, necessary, proportionate and not excessive.

Procedural History

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein “APHIS” or “Complainant”). The Complaint, filed on December 5, 2005, alleged violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note (frequently herein the “Act”),

and the regulations promulgated thereunder (9 C.F.R. § 88 et seq.) (frequently herein the “Regulations”).

3. APHIS is represented by Thomas Neil Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

4. The Respondent, Michael Lee McBarron, d/b/a T&M Horse Company (frequently herein “Respondent McBarron” or the “Respondent”), represented himself at the hearing (appeared *pro se*) and is represented by Mark J. Calabria, Esq., 201 W. Mulberry, Kaufman, Texas 75142.

5. Respondent McBarron’s Answer, filed on June 14, 2006, generally denied the allegations of the Complaint. The Answer also raised general defenses, that Respondent McBarron was not the true owner/shipper of the horses in question because he did not pay for them until after they had been unloaded, weighed, and processed at the horse slaughter plant; and that Respondent McBarron was not present when the horses were loaded onto conveyances for commercial transportation to slaughter and thus was unaware of (and cannot be held accountable for) violations involving those horses.

6. The hearing was conducted by audio-visual telecommunication¹ between the Little Rock, Arkansas site and the Washington, D.C. site, on February 27, 2007, Administrative Law Judge Jill S. Clifton presiding. The record includes one transcript volume (379 pages), prepared by Neal R. Gross & Co., Inc., Court Reporters, received by the Hearing Clerk on March 20, 2007.

7. The following exhibits (Complainant’s exhibits) were admitted into evidence: CX 1 through CX 25, CX 27, CX 32, and CX 38 through CX 41.

¹ See section 1.141 of the Rules of Practice (7 C.F.R. § 1.141) regarding using audio-visual telecommunication.

Introduction

8. Four shipments of horses are addressed here, two from Clovis Livestock, Inc., in Clovis, New Mexico (one in 2003 and one in 2004); and two from Southwest Livestock Auction in Los Lunas, New Mexico (one in 2003 and one in 2004). The two most serious allegations (for which APHIS asks \$5,000 apiece) involve the same horse, a palomino horse (the yellow horse) that Respondent McBarron bought for \$25 from Clovis Livestock on August 24, 2003 (CX 10), that was then transported on or about August 25, 2003 to Dallas Crown, Inc., in Kaufman, Texas. CX 13.

9. The yellow horse had a bad left rear leg, and two days after Respondent McBarron bought the yellow horse in New Mexico, the yellow horse was evaluated and photographed at Dallas Crown, Inc., in Kaufman, Texas. The yellow horse was obviously not weight-bearing on all four limbs on August 26, 2003. CX 20, CX 15. Mr. Joey Astling testified that the yellow horse was not able to bear weight on all four limbs, not at all, that the way it walked was to hop on three legs. Tr. 172-73.

10. Respondent McBarron testified that he knew the yellow horse had a leg injury when he bought the horse but that it² was weight-bearing on all four limbs (even if the hurt leg was not bearing as much weight as the other 3 legs). Tr. 311-12, CX 25. A statement taken from the Clovis Livestock Night Manager, Samuel Drager, showed agreement with Respondent McBarron that the yellow horse had a hurt leg but was able to walk and put weight on the leg when he brought the horse from the holding area to the loading area which is about 100 yards away. CX 22.

11. But the yellow horse could not have borne weight on that left rear leg

² The yellow horse (sale barn tag 1141) was identified as a gelding by the Clovis Livestock "Purchase Sheet" (CX 10), and as a mare on the VS 10-13 Fitness to Travel Certificate signed by Brian Jones (back tag 691, CX 13).

when Respondent McBarron bought it at Clovis Livestock, based on the evidence from two veterinarians, T. R. Tunnell, D.V.M., and Timothy Cordes, D.V.M. Both veterinarians concluded that the chronic injury to the bone of the horse's left hind leg, disclosed by x-ray (CX 24), precluded weight-bearing and had existed for at least several weeks before the horse arrived at Dallas Crown. CX 23. Tr. 191-95. Dr. Tunnell wrote: "Based on Radiograph information I feel this horse was probably non-weight bearing and unable/unwilling to walk or support weight on this leg. As such, it would have been very difficult and painful for this horse to endure forced movement or a trailer ride in which the horse would have to use this leg for balance or support of body weight." CX 23.

12. The first noncompliance regarding the yellow horse was the failure to take the horse to a veterinarian immediately upon purchase, and the second noncompliance was subjecting the yellow horse to transport when it did not have the use of all its legs to stand on. The swelling and infection in the left hind leg were grotesque when the yellow horse was photographed on August 26, 2003 at Dallas Crown; even if Respondent McBarron is correct in his testimony that the swelling and infection were not that bad when he bought the horse two days before, they were certainly bad enough to require having the horse seen by a veterinarian and making sure that the horse was not transported.

13. The next most serious allegation is the failure to segregate each stallion (an estimated seven unsegregated stallions, for which APHIS asks another \$5,000 in civil penalty) during the shipping of 43 horses in commercial transportation on June 10, 2003, from Southwest Livestock Auction in Los Lunas, New Mexico, to Dallas Crown, Inc., in Kaufman, Texas. CX 1 - CX 9.

Animal Health Technician Chandler was responsible for identifying stallions, and he observed external genitalia on from seven to ten stallions in the trailer load that arrived at Dallas Crown on June 10, 2003.³ Dr. Cordes used the lower figure (seven stallions), calculated the

Cont.

civil penalty at \$800 per unsegregated stallion,⁴ and rounded down to the nearest thousand, equaling \$5,000. Tr. 300.

14. APHIS requested another \$5,000 for transporting 43 horses from Southwest Livestock Auction to Dallas Crown with (a) no owner/shipper certificates (\$100 each for the lack of owner/shipper certificates (VS 10-13s), rounded down to the nearest thousand, equaling \$4,000) and (b) no back tags (\$25 each for the lack of back tags, rounded down to the nearest thousand, equaling \$1,000).

15. The remaining \$1,000 requested by APHIS involved noncompliant paperwork regarding a total of 85 horses.

16. Respondent McBarron found the total of \$21,000 recommended by APHIS for the noncompliance to be “just absolutely preposterous,” and “highly preposterous and unethical,” stating that \$21,000 takes a man’s livelihood from him. Tr. 318-20, 358. Respondent McBarron stated that he did not feel that he owed money, that he would hate to give \$500, but that \$5,000 would be all that he could pay. Tr. 368-71.

Findings of Fact and Conclusions

17. Paragraphs 18 through 27 contain intertwined Findings of Fact and Conclusions.

18. The Secretary of Agriculture has jurisdiction.

19. Respondent Michael Lee McBarron is an individual with a mailing address of 154 Stanley Road, Hamburg, Arkansas 71646.

³ Mr. Leslie Chandler testified that studs were mixed in the load, in the shipment - stallions, intact males, adult male horses. Mr. Chandler specifically checked for testicles and personally thought that he counted roughly seven to ten stallions in the load. Mr. Chandler added that the brand inspector, who checked to make sure there were no stolen horses (for the Texas Southwest Cattle Raisers Inspection Report), noticed there were at least four stallions in the load. Tr. 106-108.

⁴ APHIS does not hold Respondent McBarron responsible for what happened in the yard at Dallas Crown, the savaging of a mare by one of those stallions, savaging so severe that the mare had to be euthanized. The incident in the Dallas Crown yard does illustrate the need for the requirement that stallions be segregated. Tr. 298-99.

20. Respondent McBarron is now, and at all times material herein was, a commercial buyer and seller of slaughter horses who on the dates set forth below, was doing business in partnership with Trent Wayne Ward as T&M Horse Company, 1037 Lakeview Circle, Kaufman, Texas 75142.⁵

21. Respondent McBarron is responsible not only for what he himself did or failed to do in violation of the Act and Regulations, but also for what others did or failed to do on his behalf, as his agents, in violation of the Act and Regulations. His agents include not only his partner Trent Wayne Ward acting in furtherance of partnership activities, but also others acting as agents on behalf of Respondent McBarron or his partner or the partnership. Thus, actions described below as having been done by Respondent McBarron may have been done by such agents. 22.

After careful consideration of all the evidence, I find credible the testimony of Mr. Wesley James Cummings, Mr. David Green, Mr. Leslie Chandler, Mr. Joseph Thomas Astling, Dr. Timothy Cordes, and Respondent McBarron, except that I find Respondent McBarron was mistaken in thinking the yellow horse was weight-bearing on all four limbs when he bought it.

23. On or about June 10, 2003, Respondent McBarron shipped 43 horses in commercial transportation from Southwest Livestock Auction in Los Lunas, New Mexico, to Dallas Crown, Inc., in Kaufman, Texas:

- (a) for slaughter without applying a USDA back tag to each horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(2).
- (b) for slaughter without the required owner-shipper certificate, VS Form 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(i-x).
- (c) for slaughter, including in the shipment at least seven (7) stallions,

⁵ In his answer, Respondent McBarron stated that he had not been affiliated with T&M Horse Company since October 2005. *But see* Tr. 27-28, 32-33. The evidence proved that the transactions involved here (all of which occurred during 2003 and 2004) were T&M Horse Company transactions while Respondent McBarron was the partner of Trent Wayne Ward in that business.

and Respondent McBarron did not load the horses on the conveyance so that each stallion was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

24. On or about August 25, 2003, Respondent McBarron shipped 30 horses from Clovis Livestock, Inc., in Clovis, New Mexico, to Dallas Crown, Inc., in Kaufman, Texas:

(a) for slaughter, and one of the horses, a palomino gelding with USDA back tag # USAZ 0691 (and sale barn tag #1141),⁶ had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet Respondent McBarron shipped the horse in commercial transportation to the slaughtering facility in spite of its injuries. By transporting it in this manner, Respondent McBarron failed to handle the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

(b) for slaughter, and one of the horses, a palomino gelding with USDA back tag # USAZ 0691 (and sale barn tag #1141), had an old injury to its left hind foot such that it could not bear weight on all four limbs, yet Respondent McBarron shipped the horse in commercial transportation to the slaughtering facility in spite of its injuries. By reason of the above, the injured horse was in obvious physical distress, yet Respondent McBarron failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(c) for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13, which form had the following deficiencies:

- (1) the owner/shipper's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(i);
- (2) the license plate number of the conveyance was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv);
- (3) the time the horses were loaded onto the conveyance was not listed,

⁶ CX 40 is back tag USAZ 0691, and CX 41 is sale barn tag 1141.

in violation of 9 C.F.R. § 88.4(a)(3)(ix); and
(4) one of the horses, a palomino gelding with USDA back tag # USAZ 0691 (and, at Dallas Crown, also a plant tag # 1141), had an old injury to its left hind foot such that it could not bear weight on all four limbs; yet Respondent McBarron did not describe this pre-existing injury on the VS 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

25. On August 26, 2003, Joey Astling observed the yellow horse at Dallas Crown, and his testimony described the horse as emaciated, and the horse's ankle appeared to be fused, and it had two holes oozing pus. Tr. 172, CX 15, CX 20.

26. On or about March 14, 2004, Respondent McBarron shipped 15 horses in commercial transportation from Southwest Livestock Auction in Los Lunas, New Mexico, to Dallas Crown, Inc., in Kaufman, Texas:

(a) for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: the prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

CX 32.

27. On or about March 21, 2004, Respondent McBarron shipped 40 horses from Clovis Livestock, Inc., in Clovis, New Mexico, to Dallas Crown, Inc., in Kaufman, Texas, for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: it did not indicate the breed or type of each horse, one of the physical characteristics that could be used to identify each horse, in violation of 9 C.F.R. § 88.4(a)(3)(v).

CX 38.

Discussion

28. Respondent McBarron testified that he has been in the horse business practically all his life, that he is a horseman, and a horse lover. This excerpt of his testimony is from Tr. 305-07.

Mr. McBarron: And I do everything in my power to save one's life before I put them on one of them trucks to get killed. There is no telling how many of them I've got off in my life from getting killed. Back to business, I used to live there in Kaufman,

everybody knows that. I sent horses to Dallas Crown. There would be people bringing horses to the packing house to be killed, and before this USDA business took over, I would switch like a horse I had, I would go to the owner of the plant and I'd say, look, that horse don't need to be killed. That's a good horse, and I would switch the horses. You with me. I'd put a bad horse in for a good one. So, I mean, I'm horse-minded. I mean, I feel like I'm a professional in this business. I mean, I've been doing it all my life, it's all I know how to do.

I understand everybody makes mistakes. We're all human, and I'm not going to say that I haven't made any mistakes since this USDA business has took place. But for the crimes that I'm being accused of here today, I, myself, have specifically not committed them crimes.

Now my name was in the way of the paperwork as it all funneled through, and got down to the final person in the food chain, but as far as me specifically committing any of these crimes, I don't feel like I've committed them.

Tr. 305-07.

29. Respondent McBarron does not feel responsible for what Dennis Chavez did. Dennis Chavez at Southwest Livestock Auction in Los Lunas, New Mexico (20 to 30 miles south of Albuquerque, Tr. 42) loaded 43 horses on June 10, 2003, without segregating the stallions and without the back tags and without the proper paperwork. Tr. 307-09. See paragraph 23. Respondent McBarron testified that he told Dennis Chavez not to put studs in the load, and that he told Dennis Chavez the horses "had to have them green tags on there, they had to be wrote up in paperwork, and the whole nine yards." Tr. 307. Respondent McBarron testified that the 43 horses belonged to Dennis Chavez until they got to the Dallas Crown plant. Tr. 307-308. I find to the contrary, that Respondent McBarron bought the horses from Dennis Chavez over the phone, sight unseen, before Dennis Chavez loaded them, and that Dennis Chavez was Respondent McBarron's agent during the loading of those horses for shipping to Dallas Crown. Tr. 331-337. I conclude that Respondent McBarron was the owner/shipper of the 43 horses and responsible for purposes of the Act, for Dennis Chavez's failure to

segregate each stallion from the other horses, Dennis Chavez's failure to applying a USDA back tag to each horse in the shipment, and Dennis Chavez's failure to initiate and forward the required owner-shipper certificate (VS Form 10-13), which required Respondent McBarron's signature.

30. I disagree with and reject Respondent McBarron's defense that he was not the true owner/shipper of the horses in question because he did not pay for them until after they had been unloaded, weighed, and processed at the horse slaughter plant. Tr. 54. CX 1. I find that Respondent McBarron's purchase occurred when he made his deal over the phone, even though he did not pay for the horses until later.

31. I disagree with and reject Respondent McBarron's defense that, if he was not present when the horses were loaded onto conveyances for commercial transportation to slaughter and thus was unaware of any violations involving those horses, he cannot be held accountable for those violations. To the contrary, Respondent McBarron remains responsible for errors and omissions of those who acted as agents on his behalf, or on behalf of his partner, or on behalf of the partnership. Tr. 344-345. Respondent McBarron's agents include: regarding paragraph 23, Dennis Chavez; regarding paragraph 24, Respondent McBarron himself and his partner, and their truckers and paperwork completers (including but not limited to Brian Jones and his wife, plus whoever drove "the gooseneck load" (CX 21, p. 2), including whoever drove the yellow horse); and, regarding paragraphs 26 & 27, Charlie Battles.

32. When Brian Jones or his wife, or Charlie Battles, or others doing work on behalf of Respondent McBarron or his partner or his partnership, failed to complete paperwork in compliance with the Act and Regulations (Tr. 313-14), they were acting as agents on behalf of Respondent McBarron, or on behalf of his partner, or the partnership, thereby making Respondent McBarron responsible for the noncompliance, even when Respondent McBarron had instructed them properly. Respondent McBarron testified, "But the stuff that I'm getting charged for here today, I personally have not done. I promise to God, or under oath, or whatever you want me to say. I didn't do none of it personally. It got funneled down through my name." Tr. 315.

Respondent McBarron was a good witness, and I believe his testimony, except that I find he was mistaken when he thought the yellow horse was weight bearing on all four limbs. As a businessman, as an owner/shipper, Respondent McBarron is responsible to control the work being done in connection with transporting horses to slaughter.

33. Dr. Timothy Cordes is Senior Staff Veterinarian with USDA APHIS Veterinary Services, where he has worked for 12 years. Tr. 187. Dr. Cordes is the National Coordinator for Equine Programs within the agency. Tr. 187. Dr. Cordes' background is impressive, as found at Tr. 187-88.

Mr. Bolick: Can you please describe your educational background and any training that you've received that enabled you to perform your duties in this capacity?

Dr. Cordes: I did my undergrad at the University of Illinois, with a Bachelor of Science. I did my graduate school at the University of Illinois College of Veterinary Medicine. I'm a Doctor of Veterinary Medicine with post-graduate work in orthopedic surgery. I did both an internship and a residency in equine surgery at Iowa State University. I then went on to own and operate my own surgical referral practice for 20 years, most of that time being a veterinarian to the United States Equestrian Team. I currently still continue as Federation Equestrian Internationale Veterinarian. This is a group of select veterinarians that oversee olympic-level competitions.

Tr. 187-88.

34. Dr. Cordes explained what he saw looking at the X-ray marked as CX 24, which showed a portion of the yellow horse's severed left hind leg. Tr. 191-195.

Mr. Bolick: I just want your opinion of that film.

Dr. Cordes: Well, first of all, I would point out that neither Dr. Tunnell, nor I, were attending, and so Dr. Tunnell, of course, simply saw the severed extremity, and read the radiographs, as I have done. I probably have the advantage in that I am also looking at photographs, and I see two draining lesions draining very purulent material. The x-rays clearly reveal a chronic injury, a tremendous amount of periosteal new bone production, and

while it might be caused by any number of different possible entities, the end result is a longstanding fusion of the joint most likely based on the radiographic evidence, caused by sepsis. And by that, I mean an infection of the joint itself.

The reason I say that is that the periosteal new bone growth, and the radiographic changes that are evident here are so dramatic that we rarely see radiographic lesions of this nature unless there's an infection within the joint itself. The bacteria literally eats away at the bone, and literally causes the sort of erosions and the sort of new bone growth that is demonstrated here.

I believe that radiographic opinion is corroborated by the photographs which show at least one, possibly two draining tracks. Mr. Bolick: Dr. Cordes, you referred to photographs showing those draining tracks. Can you identify where in the evidence you saw those photographs?

Dr. Cordes: Sure. I believe Mr. Astling referred to page 5 of 6 on Exhibit 15. And, clearly, you see the anterior medial, the front inside of the left hind leg at the metacarpal phalangeal bone, or what we call the ankle, the fetlock. You see a very swollen joint with a very thick viscous purulent discolored substance coming out of the joint, as opposed to joint fluid, which would be clear.

Mr. Bolick: Dr. Cordes, does this look like an injury that likely occurred during transportation?

Dr. Cordes: Absolutely not. The radiographic lesions would put it at a minimum, a minimum of three weeks. I would think it was much longer standing than that.

Mr. Bolick: So, in your opinion, this horse had to be like this at the time it was loaded.

Dr. Cordes: Correct.

Mr. Bolick: And in your opinion, was this horse able to bear weight on all four limbs?

Dr. Cordes: Absolutely not. A joint infection always is excruciating in nature.

Mr. Bolick: In your opinion, should this horse have been loaded for transportation to slaughter?

Dr. Cordes: Never should have been put on the truck in the first place.

Mr. Bolick: Okay. And, again, in your opinion, should this horse have received some kind of veterinary attention?

Dr. Cordes: Well, the veterinarian -- yes. I'm sorry, the answer is yes. Whether or not, from an orthopedic standpoint that surgery and levaging that joint would affect the outcome at all, is highly unlikely.

Mr. Bolick: So what would you say was the recommended course of treatment had it received veterinary treatment?

Dr. Cordes: Well, the attending veterinarian would have immediately noticed that this horse was not able to bear weight. Not only that, but if the horse in a swaying trailer were forced to step on that limb, it would probably fall down, as it tried to get all of its weight off it. And, of course, these results could be catastrophic in a situation where there are other horses around, because when one horse goes down, of course, you can have that horse knocking other horses down, not only as it goes down, but additionally as it scrambles and attempts to get up.

Mr. Bolick: Okay.

Dr. Cordes: So the course of treatment would undoubtedly have been euthanasia, in the sale barn setting.

Tr. 191-95.

Order

35. The **cease and desist** provisions of this Order (paragraph 36) shall be effective on the first day after this Decision and Order becomes final.⁷

The remaining provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final.

36. Respondent McBarron, and his agents and employees, successors and

⁷ See paragraph 43.

assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*).

37. Respondent McBarron is assessed a civil penalty of **\$21,000.00** (twenty-one thousand dollars),⁸ which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States.**"

38. Respondent McBarron shall reference **A.Q. Docket No. 06-0003** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

United States Department of Agriculture
APHIS, Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403.

39. Paragraph 40 offers Respondent McBarron an opportunity to cut in half the civil penalty he must pay, on certain conditions; and paragraph 41 offers Respondent McBarron an opportunity to pay that one-half in installments, on those same conditions.

40. One-half (\$10,500.00) of Respondent McBarron's civil penalty is **held in abeyance** on condition that Respondent McBarron pay \$10,500.00 of his civil penalty **in full, timely, as required**; and on condition that Respondent McBarron, during the 5 years following the hearing, that is, **through February 27, 2012, commit no further violations** of the Act and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*). If Respondent McBarron fails to comply with either

⁸ The Slaughter Horse Transport Program recommended a \$21,000.00 civil penalty. The Program recommendations were presented by Dr. Timothy Cordes (D.V.M.), the National Coordinator of Equine Programs within USDA APHIS Veterinary Services. Tr. 286-304, 187.

of these two conditions, the remaining balance of the full \$21,000.00 civil penalty will become due and payable 60 days following APHIS's filing of an application herein, supported by Declaration. Respondent McBarron shall file with the Hearing Clerk any change in mailing address or other contact information; otherwise, a copy of any filings will be sent to Respondent McBarron at the address in paragraph 19.

41. So long as Respondent McBarron complies with paragraph 40, with regard to the \$10,500.00 of his civil penalty that he shall pay within the 60 days following the effective date of this Order [*see* paragraph 35], he may, at his option, pay the \$10,500.00 of his civil penalty in installments, as follows:

\$2,500.00 within the 60 days following the effective date of this Order;

\$2,500.00 within the year thereafter;

\$2,500.00 within the year thereafter;

\$2,500.00 within the year thereafter; and

\$500.00 within the 90 days thereafter.

If Respondent McBarron fails to meet the conditions specified in paragraph 40 and is consequently required to pay his full \$21,000.00 civil penalty, Respondent McBarron's obligation shall be reduced by the amount of civil penalty paid by Trent Wayne Ward in this case as of the date APHIS's application and Declaration are filed (*see* paragraph 40).

42

Finality

43. 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. **Respondent McBarron shall be served both at his own address (paragraph 19) and his attorney's address (paragraph 4).**

* * *

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 UNDERVARIOUS 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: WILLIAM RICHARDSON.
A.Q. Docket No. 05-0012.
Decision and Order.
Filed June 13, 2007.

A.Q. – Commercial Transportation of Equine for Slaughter Act – Maximum civil penalty – History of violations – Timeliness of enforcement action.

The Judicial Officer found William Richardson (Respondent) committed 408 violations

of the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) and assessed Respondent a \$77,825 civil penalty. The Judicial Officer construed 9 C.F.R. § 88.6 as allowing the Secretary of Agriculture to assess up to a \$5,000 civil penalty for each violation of 9 C.F.R. pt. 88. The Judicial Officer found that 9 C.F.R. pt. 88 requires the Secretary of Agriculture to base the amount of the civil penalty on the severity of the violations and the history of the violator's compliance with 9 C.F.R. pt. 88. The Judicial Officer concluded an ongoing pattern of violations over a period of time establishes a violator's history of compliance with 9 C.F.R. pt. 88, even if the violator has not been previously found to have violated 9 C.F.R. pt. 88. The Judicial Officer also stated the decision of whether and when an agency must exercise its enforcement powers is left to agency discretion, except to the extent determined by Congress. The Judicial Officer held Congress has not mandated the timing of enforcement actions under Commercial Transportation of Equine for Slaughter Act and neither the Commercial Transportation of Equine for Slaughter Act nor 9 C.F.R. pt. 88 makes relevant the timing of the filing of a complaint to the determination of the appropriate civil penalty.

Thomas Neil Bolick, for Complainant.

Respondent, Pro se.

Initial Decision issued by Marc R. Hillson, Chief Administrative Law Judge.

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 the Administrator], instituted this disciplinary administrative proceeding by filing a complaint on September 2, 2005. The Administrator instituted the proceeding under sections 901-905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 1901 note) [hereinafter the Commercial Transportation of Equine for Slaughter Act]; the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on 10 occasions, during the period from on or about August 26, 2003, through on or about November 23, 2004, William Richardson shipped horses in commercial transportation to Dallas Crown, Inc., in Kaufman, Texas, for slaughter, in violation of the

Commercial Transportation of Equine for Slaughter Act and the Regulations.¹ On October 12, 2005, Mr. Richardson filed an answer denying the material allegations of the complaint.

On June 28-29, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an audio-visual hearing in Washington, DC, and Sherman, Texas. Thomas Neil Bolick, Office of the General Counsel, United States Department of Agriculture, represented the Administrator. William Richardson appeared pro se.²

On August 31, 2006, the Administrator filed Complainant's Proposed Findings of Fact, Conclusions, and Brief and Order In Support Thereof. William Richardson did not file a post-hearing brief. On December 19, 2006, the Chief ALJ filed a Decision [hereinafter Initial Decision] concluding Mr. Richardson violated the Regulations as alleged in the complaint and assessing Mr. Richardson a \$30,000 civil penalty.³

On January 26, 2007, the Administrator appealed to the Judicial Officer. William Richardson did not file a response to the Administrator's appeal petition, and on March 15, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I conclude William Richardson violated the Regulations as alleged in the complaint and assess Mr. Richardson a \$77,825 civil penalty. The Administrator's exhibits are designated "CX" and references to the transcript are designated "Tr."

DECISION

¹ Compl. ¶¶ III-XII.

² William Richardson arrived after the initial testimony of Dr. Timothy Cordes and during the initial testimony of Joseph Astling. Mr. Astling briefly summarized the testimony he had given before Mr. Richardson's arrival (Tr. 55), and, when Dr. Cordes was recalled, he likewise summarized his previous day's testimony (Tr. 425-31).

³ Initial Decision at 16-17, 19.

Statutory and Regulatory Background

The Commercial Transportation of Equine for Slaughter Act is intended to assure the humane transportation of equines for slaughter. Congress authorized the Secretary of Agriculture to issue guidelines for the regulation of the commercial transportation of equines for slaughter by persons regularly engaged in that activity. On December 7, 2001, the United States Department of Agriculture published the Regulations with an effective date of February 5, 2002.⁴

The Regulations define the term “owner/shipper” as an individual that engages in the commercial transportation of more than 20 equines a year to slaughtering facilities.⁵ An owner/shipper is subject to a number of requirements designed to assure the health and well-being of equines transported for slaughter. The Regulations include standards for designing, constructing, and maintaining conveyances, so that equines can be safely loaded, unloaded, and transported,⁶ requirements for the care of equines before and during transportation,⁷ and requirements for the care of equines at the slaughtering facility.⁸ Equines transported to a slaughtering facility must be fit to travel, in that they must be able to bear weight on all four legs, must not be blind in both eyes, must be able to walk unassisted, must be older than 6 months of age, and must not be likely to give birth during the trip.⁹ Equines must be transported in a manner so as not to cause injury¹⁰ and must be observed not less than

⁴ 66 Fed. Reg. 63,588-617 (Dec. 7, 2001).

⁵ 9 C.F.R. § 88.1.

⁶ 9 C.F.R. § 88.3.

⁷ 9 C.F.R. § 88.4.

⁸ 9 C.F.R. § 88.5.

⁹ 9 C.F.R. § 88.4(a)(3)(vii).

¹⁰ 9 C.F.R. § 88.4(a)(4), (b)-(e)

once every 6 hours while being transported.¹¹

Prior to the commercial transportation of equines to a slaughtering facility, the owner/shipper must apply a United States Department of Agriculture backtag to each equine in the shipment.¹² In addition, each equine must be accompanied by an owner-shipper certificate which contains information about the owner/shipper, the receiver, the conveyance, and the equine, including a statement of fitness to travel.¹³

The Administrator made a significant effort to inform regulated parties of their obligations under the Commercial Transportation of Equine for Slaughter Act. Thus, Dr. Timothy Cordes, a senior staff veterinarian for the Animal and Plant Health Inspection Service, the National Coordinator for Equine Programs, and the Director of the Slaughter Horse Transportation Program, explained that United States Department of Agriculture employees developed public outreach materials, including videos, which were distributed to each known shipper of equines for slaughter. The materials included United States Department of Agriculture backtags and owner-shipper certificates. (Tr. 34-39.) William Richardson received these materials. In addition, Joseph Astling, an animal health technician with the Slaughter Horse Transportation Program, directly assisted Mr. Richardson on a number of occasions with the completion of owner-shipper certificates and otherwise educated Mr. Richardson on various aspects of the Regulations (Tr. 39-40, 46-49).

The Slaughter Horse Transportation Program assigns an animal health technician to each of the equine slaughtering facilities so that each equine is inspected for compliance with the Regulations (Tr. 31-33).

Discussion

¹¹ 9 C.F.R. § 88.4(b)(2).

¹² 9 C.F.R. § 88.4(a)(2).

¹³ 9 C.F.R. § 88.4(a)(3).

The testimony established that on 10 occasions, during the period August 26, 2003, through November 23, 2004, William Richardson was the owner/shipper of horses which were transported to Dallas Crown, Inc., in Kaufman, Texas, for slaughter. In most of these instances, Mr. Richardson either directly delivered the horses to Dallas Crown, Inc., 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 Mr. Richardson, who was seeking to circumvent a quota imposed on him by Dallas Crown, Inc., and, in at least one other instance, Mr. Richardson apparently let another individual use his name to enable that individual to obtain a higher price from Dallas Crown, Inc., for which Mr. Richardson was paid a commission.

The Administrator demonstrated that on August 26, 2003, as part of a shipment of 16 horses, William Richardson transported a paint mare that was blind in both eyes. Joseph Astling, the animal health technician assigned to the Dallas Crown, Inc., facility, observed this horse being led off the truck (CX 3; Tr. 50). Mr. Astling noticed her locomotion was “very unstable” and, as the horse came closer, “it was pretty obvious that she was being led for the reason that she couldn’t see at all.” (Tr. 63.) Mr. Astling took photographs of the horse (CX 4) and testified that those photographs depict a horse with eyes which are bluish in color and have no pupil, which he stated is characteristic of blind horses (Tr. 63-64). Mr. Astling also testified that the horse had cuts on her face—a sign she was bumping into things because she was blind (Tr. 64-65). Dianne Ramsey, a United States Department of Agriculture investigator who also observed the horse, corroborated Mr. Astling’s testimony (Tr. 75-77).

William Richardson did not dispute that the horse was blind, but rather contended that he was not the owner/shipper. Mr. Richardson indicated that Dale Gilbreath was the driver of the shipment and the owner/shipper as well. (CX 10; Tr. 375.) Mr. Richardson testified that he authorized Mr. Gilbreath to use his name on the paperwork accompanying that shipment, so that Mr. Gilbreath could receive a significantly higher rate per pound for the horses and for which Mr. Gilbreath would pay Mr. Richardson a commission (Tr. 374). Mr. Richardson never called Mr. Gilbreath to testify at the hearing, and it

is evident that Mr. Richardson, who regularly employed Mr. Gilbreath as a driver, was, at the very least, a partner or joint venturer in this transaction, and is thus the owner/shipper of this horse.

The Administrator demonstrated that on January 27, 2004, William Richardson transported for slaughter, as part of a load of 43 horses, an Appaloosa that was blind in both eyes. The manager at Dallas Crown, Inc., noted the horse's condition, isolated the horse in a pen, and informed Joseph Astling that the horse was blind in both eyes (CX 44; Tr. 277-78). Mr. Astling observed the horse walking into pipes and otherwise showing signs that the horse was not aware of its surroundings (Tr. 278). Mr. 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. 453-55.)

William Richardson countered by stating he thought the horse might have been blind in one eye and Appaloosas have trouble seeing at night (CX 37; Tr. 302, 393-95). However, 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. 422-23). Accordingly, I find the evidence establishes that Mr. Richardson transported for slaughter a blind Appaloosa on January 27, 2004.

The Administrator demonstrated that on several occasions William Richardson transported horses to Dallas Crown, Inc., that were injured and unable to travel without discomfort, stress, physical harm, or trauma. Thus, on August 26, 2003, a load of horses for which Mr. Richardson was the owner/shipper, which was transported by Troy Ressler, included a horse which, according to Mr. Ressler, had been reloaded at the direction of Mr. Richardson, even though the horse had an injured leg (CX 3; Tr. 79-80, 86). When the shipment arrived at Dallas Crown, Inc., Joseph Astling observed the horse lying in the back of the trailer (CX 3, CX 11; Tr. 79-80). Mr. Astling believed the horse was "profusely sweating" and in a state of shock. Mr. Astling observed the horse attempt to stand up to exit the trailer and then collapse. He ordered the

horse to be euthanized. (CX 3, CX 11; Tr. 79-80, 86, 418.) Mr. 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 that the horse had suffered the equivalent of a surgical resection and that the horse bled so much it went into shock (Tr. 432-33).

William Richardson acknowledged that the horse was injured at the time he loaded the horse onto his trailer, but then said the injury was not serious and that the horse was able to walk onto his trailer (CX 10; Tr. 87-88, 91, 376-78, 401-05). He claimed the injury was like trimming one's toenails a little too close (Tr. 405), but the photographs in CX 11 indicate otherwise. Mr. Richardson further claimed the horse stuck its leg through a hole in the loading chute upon arriving at Dallas Crown, Inc., but both Joseph Astling and Dianne 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. 412-18, 434).

On October 7, 2003, William Richardson transported a load of 47 horses to Dallas Crown, Inc., 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 (CX 3, CX 10; Tr. 138-61). According to Joseph Astling, Troy 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. 139-45). After the horses had been unloaded from his truck, Mr. Ressler notified Mr. 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, Mr. Astling directed Dallas Crown, Inc., to euthanize the horse (CX 3, CX 24; Tr. 140-43). Dr. Cordes testified that the photographs indicated this horse could not bear weight on all four legs, as required by the Regulations (Tr. 445-50).

Later that same day, William Richardson arrived at Dallas Crown, Inc., with the load of horses that he was transporting (CX 3; Tr. 146-47, 157). Mr. Richardson notified Joseph Astling that there were two horses

in the back of his trailer which he thought Mr. Astling should examine (CX 3; Tr. 146-48). Mr. Astling noted that one of the horses was missing a substantial portion of its left hind foot (CX 3, CX 25; Tr. 145-48). Mr. Richardson indicated to Mr. Astling that, while the horse was injured when the ramp collapsed, the horse could still bear weight on all four limbs, but Mr. Astling observed that the horse was bleeding and could not bear weight on the injured foot, even though the horse was able to walk out of the trailer (Tr. 147-48, 150). Mr. Astling allowed the horse to be slaughtered at Dallas Crown, Inc., rather than euthanized, only because the horse was very close to the entrance of the slaughtering facility (CX 3; Tr. 150-51, 158).

Joseph Astling then noticed that another horse transported by William Richardson had severe lacerations on both left legs and less severe lacerations on the right legs (CX 3; Tr. 157-59). The photographs taken by Mr. Astling illustrate the severity of at least two of the lacerations (CX 26). In particular, the laceration on the left hind leg was deep enough so that bone was visible and the left forelimb had lacerations deep enough that the knee was visible (Tr. 152-55). Mr. Astling testified that the horse could only bear weight on the severely injured limbs with “[l]ots of pain and difficulty.” (Tr. 155.) He also testified that the horse should have been euthanized or should have been given the prompt medical attention required by the Regulations (Tr. 155-56).

With respect to the three injured horses transported to Dallas Crown, Inc., on October 7, 2003, William Richardson’s principal explanation was that the loading chute collapse happened around 3:00 a.m. and that he did not realize the horses were injured (CX 10; Tr. 165-68, 386-87, 406). Mr. Richardson also denied that the horse transported by Tony Ressler on October 7, 2003, suffered a broken leg before it was transported, testifying that the horse was led up the chute and into the truck (Tr. 386-87, 406-07). Even if the chute collapsed in the dark of night, there is no excuse for not examining the horses after the occurrence of an event that would have a propensity to cause injury. Moreover, the owner-shipper certificate signed by Mr. Richardson (CX 23) states the horses were loaded at 6:00 a.m., when there would have been enough light to determine whether any horses were injured. The

evidence overwhelmingly supports a finding, with respect to these three horses, that either they were unable to bear weight on all four limbs or they 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. § 88.4(c).

The Administrator also demonstrated that on September 30, 2003, William Richardson transported to Dallas Crown, Inc., two horses, out of a shipment of 30, which had pre-existing injuries that rendered them unable to bear weight on all four limbs. Personnel at Dallas Crown, Inc., notified Joseph Astling that there was a horse he should examine. Mr. Astling observed and photographed a roan mare with significant injuries to her right front foot and lower right leg (CX 19, CX 22; Tr. 119-20). Both Mr. Astling and Dr. Cordes, who testified based on Mr. Astling’s photographs, were of the opinion that the horse was suffering from an old injury seriously impacting the horse’s ability to walk. 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 the horse’s right front limb. (Tr. 118-24, 435-45.) Dr. Cordes was of the opinion that this horse would not be able to maintain her balance and equilibrium when being transported (Tr. 436-37). Mr. Richardson acknowledged shipping this horse, but maintained that the horse 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 photographs taken by Mr. Astling, that the horse would have difficulty bearing weight on her extremely swollen front right limb. At best, the horse could only step gingerly on the injured extremity, and the horse would have had to endure unnecessary discomfort in the course of being transported to Dallas Crown, Inc., which would violate the prohibition in 9 C.F.R. § 88.4(c).

The other horse Joseph Astling observed on September 30, 2003, was a paint mare which had an old injury to her left hind ankle as well as a fresh cut on her left hind tendon (CX 19, CX 21; Tr. 120). The left hind ankle injury was “a longstanding chronic lesion” (Tr. 442) 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 her foot (Tr. 442-43). Both Mr. 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, 443-45.) Dr. Cordes testified "this horse should never have been loaded" (Tr. 443), the horse would have had difficulty maintaining her equilibrium while traveling, and the fresh cut on her 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" in 9 C.F.R. § 88.4(c).

On October 21, 2003, at Dallas Crown, Inc., Joseph Astling and David Green, a senior inspector employed by the United States Department of Agriculture, observed a black and white paint horse, one of 14 horses in a shipment owned by William Richardson. The horse was holding its left hind foot off the ground and appeared to be unable to place any weight on it (CX 31-CX 33; Tr. 184-91, 199-200). Mr. 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. 189-90). The photographs at CX 33 indicate the horse was unable to bear weight on this leg. Mr. Richardson'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 Mr. Stokes may have been Mr. Richardson's agent or employee does not change the fact that Mr. Richardson is the owner/shipper of this horse and is thus responsible for complying with the Commercial Transportation of Equine for Slaughter Act and the Regulations.

With respect to each of the seven injured horses discussed in this Decision and Order, *supra*, the Administrator also established that William Richardson did not comply with the requirement that "the owner/shipper must obtain veterinary assistance as soon as possible from an equine veterinarian for any equines in obvious physical distress."¹⁴

¹⁴9 C.F.R. § 88.4(b)(2).

Since each of the seven injured horses was in obvious physical distress and since Mr. Richardson did not request veterinary assistance, the Administrator easily met his burden of proof.

Along with the two blind and seven injured horses which were transported in violation of the Regulations, William Richardson was cited for a number of other violations. When Joseph Astling asked to examine a horse that he thought was blind on October 7, 2003, Mr. Richardson first tried to take the horse into the slaughtering facility, but was stopped by Mr. Astling who informed Mr. Richardson that he wanted to examine the horse. Instead, Mr. Richardson argued with Mr. Astling, took the horse back to his trailer, and subsequently left the premises with the horse. (CX 3; Tr. 157-58, 161-63.) Mr. Richardson testified he thought the horse could see, but did not deny that he removed the horse from the premises rather than allow Mr. Astling to examine the horse (CX 10; Tr. 166, 387). Mr. Richardson's refusal to allow Mr. Astling access to the horse is inconsistent with the requirement that the owner/shipper must "[a]llow a USDA representative access to the equines for the purpose of examination[.]"¹⁵ Mr. Astling also testified that Mr. Richardson was the owner/shipper of 17 horses delivered to Dallas Crown, Inc., at 3:15 a.m. on September 16, 2003. Mr. Richardson left the premises and did not return. Mr. Astling reported to duty at Dallas Crown, Inc., between 9:30 a.m. and 10:00 a.m., and never saw Mr. Richardson. (CX 12, CX 15; Tr. 108-10.) The Regulations allow the owner/shipper to leave the premises of a slaughtering facility if he arrives outside of normal business hours, but require him to return to the facility to meet the United States Department of Agriculture representative. Thus, Mr. Richardson's conduct was inconsistent with the requirements of 9 C.F.R. § 88.5(b).

The Administrator also demonstrated that William Richardson failed to apply United States Department of Agriculture backtags to each horse prior to the commercial transportation of horses to a slaughtering facility. On three occasions, the horses transported by Mr. Richardson did not

¹⁵9 C.F.R. § 88.5(a)(3).

have the required backtags. On one of these occasions, August 26, 2003, Joseph Astling and Dianne Ramsey observed no backtag on a blind paint mare (CX 3; Tr. 57-59, 75-76). On another occasion, November 23, 2003, none of the horses in Mr. Richardson's shipment of 42 horses from Billings, Montana, was backtagged (Tr. 329-32). Mr. Richardson stated that he called a United States Department of Agriculture inspector and told the inspector he was unable to have the backtags applied due to weather problems, but it is undisputed that the backtags were not applied to the horses (CX 57; Tr. 329-32, 356-58). With respect to another shipment of 43 horses, Mr. Richardson called Leslie Chandler, an animal health technician employed by the United States Department of Agriculture, and told him he was unable to backtag the horses because he was in a snowstorm. Mr. Chandler consulted with Mr. Astling and told Mr. Richardson that he could ship the horses to Dallas Crown, Inc., without backtags if he assigned each horse a backtag number on the owner-shipper certificate and provided the backtags to the inspector upon arrival at Dallas Crown, Inc. (CX 44-CX 45; Tr. 268-70, 285-87.) Mr. Richardson agreed, but then never provided the backtags, stating he threw them away and admitting he was at fault (Tr. 389-90).

The Administrator further demonstrated that William Richardson failed to complete an owner-shipper certificate for each horse prior to the commercial transportation of horses to a slaughtering facility. The Administrator demonstrated that on January 27, 2004, and November 23, 2004, Mr. Richardson failed to provide an owner-shipper certificate to accompany horses in commercial transportation to Dallas Crown, Inc., for slaughter, and on August 26, 2003, September 16, 2003, September 30, 2003, October 7, 2003, October 21, 2003, February 1, 2004, and June 30, 2004, Mr. Richardson provided incorrect or partially completed owner-shipper certificates to accompany horses in commercial transportation to Dallas Crown, Inc., for slaughter. Omissions included failing to sign the certificate, failing to indicate the fitness of the horses, failing to complete the shipper's address or telephone number, and failing to provide the full backtag number for each horse. (CX 3, CX 5-CX 6, CX 9-CX 10, CX 15-CX 16, CX 19-CX 20, CX 23, CX 30-CX 31, CX 37, CX 44-CX 45, CX 54,

CX 56-CX 58.)

Findings of Fact

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

2. Dallas Crown, Inc., in Kaufman, Texas, is a commercial establishment that slaughters horses.

3. William Richardson was the owner/shipper of all of the horses transported to Dallas Crown, Inc., for slaughter which are referenced in findings of fact numbers 4 through 28.

4. On or about August 26, 2003, William Richardson shipped one horse, a paint mare, in commercial transportation to Dallas Crown, Inc., for slaughter without a backtag. (9 C.F.R. § 88.4(a)(2).)

5. On or about August 26, 2003, William Richardson shipped 16 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

6. On or about August 26, 2003, William Richardson shipped one horse, a paint mare, which was blind in both eyes, in commercial transportation to Dallas Crown, Inc., for slaughter with other horses. (9 C.F.R. § 88.4(c).)

7. On or about August 26, 2003, William Richardson shipped 15 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

8. On or about August 26, 2003, William Richardson shipped one horse in obvious physical distress in commercial transportation to Dallas Crown, Inc., for slaughter, without obtaining veterinary assistance as soon as possible from an equine veterinarian. (9 C.F.R. § 88.4(b)(2).)

9. On or about August 26, 2003, William Richardson shipped one horse, with serious leg injuries, in commercial transportation to Dallas Crown, Inc., for slaughter. At the time the horse was observed at Dallas Crown, Inc., the horse had collapsed and was in shock. (9 C.F.R. § 88.4(c).)

10. On or about September 16, 2003, William Richardson shipped 17 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

11. On or about September 16, 2003, William Richardson shipped 17 horses in commercial transportation to Dallas Crown, Inc., for slaughter. William Richardson arrived at Dallas Crown, Inc., outside normal business hours, unloaded the 17 horses, left Dallas Crown, Inc.'s premises, and failed to return to Dallas Crown, Inc.'s premises to meet the United States Department of Agriculture representative upon his arrival. (9 C.F.R. § 88.5(b).)

12. On or about September 30, 2003, William Richardson shipped 30 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

13. On or about September 30, 2003, William Richardson shipped one horse, backtag number USAU 0599, with serious leg injuries, in commercial transportation to Dallas Crown, Inc., for slaughter. (9 C.F.R. § 88.4(c).)

14. On or about September 30, 2003, William Richardson shipped one horse, backtag number USAP 5600, with a serious leg injury, in commercial transportation to Dallas Crown, Inc., for slaughter. (9 C.F.R. § 88.4(c).)

15. On or about October 7, 2003, William Richardson shipped 47 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

16. On or about October 7, 2003, William Richardson shipped three horses in obvious physical distress in commercial transportation to Dallas Crown, Inc., for slaughter, without obtaining veterinary assistance as soon as possible from an equine veterinarian. (9 C.F.R. § 88.4(b)(2).)

17. On or about October 7, 2003, William Richardson shipped three injured horses in commercial transportation to Dallas Crown, Inc., for slaughter. (9 C.F.R. § 88.4(c).)

18. On or about October 7, 2003, William Richardson shipped

47 horses in commercial transportation to Dallas Crown, Inc., for slaughter, and, upon arrival at Dallas Crown, Inc., failed to allow a United States Department of Agriculture representative access to one roan mare for the purpose of examination. (9 C.F.R. § 88.5(a)(3).)

19. On or about October 21, 2003, William Richardson shipped 14 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

20. On or about October 21, 2003, William Richardson shipped one injured horse, backtag number USA Y 5161, in commercial transportation to Dallas Crown, Inc., for slaughter. (9 C.F.R. § 88.4(c).)

21. On or about January 27, 2004, William Richardson shipped 43 horses in commercial transportation to Dallas Crown, Inc., for slaughter without backtags. (9 C.F.R. § 88.4(a)(2).)

22. On or about January 27, 2004, William Richardson shipped 43 horses in commercial transportation to Dallas Crown, Inc., for slaughter without an owner-shipper certificate. William Richardson initially shipped these 43 horses from their point of origin to his establishment in Whitesboro, Texas, without an owner-shipper certificate; William Richardson subsequently shipped the 43 horses from Whitesboro, Texas, to Dallas Crown, Inc. (9 C.F.R. § 88.4(a)(3).)

23. On or about January 27, 2004, William Richardson shipped 43 horses in commercial transportation to Dallas Crown, Inc., for slaughter without an owner-shipper certificate. William Richardson initially shipped these 43 horses from their point of origin to his establishment in Whitesboro, Texas; William Richardson subsequently shipped the 43 horses from Whitesboro, Texas, to Dallas Crown, Inc., without preparing a second owner-shipper certificate. (9 C.F.R. § 88.4(b)(4).)

24. On or about January 27, 2004, William Richardson shipped one horse, an Appaloosa, which was blind in both eyes, in commercial transportation to Dallas Crown, Inc., for slaughter with other horses. (9 C.F.R. § 88.4(c).)

25. On or about February 1, 2004, William Richardson shipped 28 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

26. On or about June 30, 2004, William Richardson shipped 12 horses in commercial transportation to Dallas Crown, Inc., for slaughter without a properly completed owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

27. On or about November 23, 2004, William Richardson shipped 42 horses in commercial transportation to Dallas Crown, Inc., for slaughter without backtags. (9 C.F.R. § 88.4(a)(2).)

28. On or about November 23, 2004, William Richardson shipped 42 horses in commercial transportation to Dallas Crown, Inc., for slaughter without an owner-shipper certificate. (9 C.F.R. § 88.4(a)(3).)

Conclusions of Law

1. On or about August 26, 2003, January 27, 2004, and November 23, 2004, William Richardson shipped a total of 86 horses in commercial transportation to Dallas Crown, Inc., for slaughter without backtags, in violation of 9 C.F.R. § 88.4(a)(2).

2. On or about August 26, 2003, September 16, 2003, September 30, 2003, October 7, 2003, October 21, 2003, February 1, 2004, and June 30, 2004, William Richardson shipped a total of 179 horses in commercial transportation to Dallas Crown, Inc., for slaughter without properly completed owner-shipper certificates, in violation of 9 C.F.R. § 88.4(a)(3).

3. On or about August 26, 2003, September 30, 2003, October 7, 2003, October 21, 2003, and January 27, 2004, William Richardson failed to handle a total of nine horses in commercial transportation to Dallas Crown, Inc., for slaughter as expeditiously and carefully as possible in a manner that did not cause unnecessary discomfort, stress, physical harm, or trauma to the horses, in violation of 9 C.F.R. § 88.4(c).

4. On or about August 26, 2003, and October 7, 2003, William Richardson shipped a total of four horses in obvious physical distress in commercial transportation to Dallas Crown, Inc., for slaughter, without obtaining veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

5. On or about September 16, 2003, William Richardson shipped 17 horses in commercial transportation to Dallas Crown, Inc., for slaughter.

William Richardson arrived at Dallas Crown, Inc., outside normal business hours, unloaded the 17 horses, left Dallas Crown, Inc.'s premises, and failed to return to Dallas Crown, Inc.'s premises to meet the United States Department of Agriculture representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

6. On or about October 7, 2003, William Richardson shipped 47 horses in commercial transportation to Dallas Crown, Inc., for slaughter, and, upon arrival at Dallas Crown, Inc., failed to allow a United States Department of Agriculture representative access to one horse for the purpose of examination, in violation of 9 C.F.R. § 88.5(a)(3).

7. On or about January 27, 2004, and November 23, 2004, William Richardson shipped a total of 85 horses in commercial transportation to Dallas Crown, Inc., for slaughter without an owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3).

8. On or about January 27, 2004, William Richardson shipped 43 horses in commercial transportation to Dallas Crown, Inc., for slaughter without an owner-shipper certificate. William Richardson initially shipped these 43 horses from their point of origin to his establishment in Whitesboro, Texas, and subsequently shipped the 43 horses from Whitesboro, Texas, to Dallas Crown, Inc., without preparing a second owner-shipper certificate, in violation of 9 C.F.R. § 88.4(b)(4).

Sanction

The Commercial Transportation of Equine for Slaughter Act authorizes the Secretary of Agriculture to “establish and enforce appropriate and effective civil penalties.”¹⁶ The Regulations provide that the Secretary of Agriculture “is authorized to assess civil penalties of up to \$5,000 per violation of any of the regulations in [9 C.F.R. pt. 88].”¹⁷

¹⁶ 7 U.S.C. § 1901 (note).

¹⁷ 9 C.F.R. § 88.6.

The preamble of the final rulemaking document promulgating 9 C.F.R. pt. 88 states the amount of the civil penalty is to be based on the severity of the violations and the history of the owner/shipper's compliance with the Regulations.¹⁸

I find extremely severe William Richardson's failures: (1) on August 26, 2003, and October 7, 2003, to obtain veterinary assistance for four horses in obvious physical distress, in violation of 9 C.F.R. § 88.4(b)(2); and (2) on August 26, 2003, September 30, 2003, October 7, 2003, October 21, 2003, and January 27, 2004, to handle nine horses as expeditiously and carefully as possible in a manner that does not cause unnecessary discomfort, stress, physical harm, or trauma, in violation of 9 C.F.R. § 88.4(c). The Commercial Transportation of Equine for Slaughter Act and the Regulations are designed to assure the humane transportation of equines for slaughter. Each of Mr. Richardson's violations of 9 C.F.R. § 88.4(b)(2) and (c) strikes at the heart of the Commercial Transportation of Equine for Slaughter Act and the Regulations. I also find extremely severe Mr. Richardson's October 7, 2003, failure to allow a United States Department of Agriculture representative access to a horse for the purpose of examination, in violation of 9 C.F.R. § 88.5(a)(3). This violation thwarts the Secretary of Agriculture's ability to carry out the purposes of the Commercial Transportation of Equine for Slaughter Act and the Regulations. I find less severe, but still very significant, Mr. Richardson's September 16, 2003, failure, after delivering 17 horses outside of normal business hours, to return to Dallas Crown, Inc.'s premises to meet the United States Department of Agriculture representative upon his arrival, in violation of 9 C.F.R. § 88.5(b). I find less severe, but nonetheless significant, Mr. Richardson's numerous failures to have each horse transported in commercial transportation to Dallas Crown, Inc., accompanied by a complete and accurate owner-shipper certificate, in

¹⁸ 66 Fed. Reg. 63,606 (Dec. 7, 2001).

violation of 9 C.F.R. § 88.4(a)(3) and to apply a United States Department of Agriculture backtag to each horse prior to the commercial transportation of the horse to Dallas Crown, Inc., in violation of 9 C.F.R. § 88.4(a)(2).

I also find William Richardson's ongoing pattern of violations during the period from on or about August 26, 2003, through on or about November 23, 2004, establishes a history of previous violations for the purposes of the Regulations.

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.

The Administrator appealed the \$30,000 civil penalty assessed by the Chief ALJ. I find the reasoning of the Chief ALJ in determining the amount of the civil penalty to be erroneous. I conclude 9 C.F.R. § 88.6 provides the Secretary of Agriculture may assess a maximum civil penalty of \$5,000 for each violation of the Regulations and the Secretary of Agriculture may assess the maximum civil penalty for each violation that affects a single equine. I have consistently held under the Animal

Welfare Act¹⁹ that an ongoing pattern of violations over a period of time establishes a violator's "history of previous violations," even if the violator has not been previously found to have violated the Animal Welfare Act.²⁰ I find no reason to treat an ongoing pattern of violations under the Commercial Transportation of Equine for Slaughter Act any differently than I treat an ongoing pattern of violations under the Animal Welfare Act. Therefore, I conclude William Richardson's ongoing pattern of violations during the period from on or about August 26, 2003, through on or about November 23, 2004, establishes Mr. Richardson's history of a failure to comply with the Regulations. Finally, I reject the Chief ALJ's conclusion that a civil penalty otherwise warranted in law and justified by the facts must be reduced because an agency official could have initiated an enforcement action prior to the date the action was actually initiated. The decision of whether and when an agency must exercise its enforcement powers is left to agency discretion, except to the extent determined by Congress.²¹ Congress has not mandated the timing of enforcement actions under Commercial Transportation of Equine for Slaughter Act. Moreover, neither the Commercial Transportation of Equine for Slaughter Act nor the Regulations makes

¹⁹ 7 U.S.C. §§ 2131-2159.

²⁰ *In re Jerome Schmidt*, __ Agric. Dec. __, slip op. at 55 (Mar. 26, 2007); *In re Karen Schmidt*, 65 Agric. Dec. 971, 984, slip op. at 17 (2006); *In re For The Birds, Inc.*, 64 Agric. Dec. 306, 359 (2005).

²¹ *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869); *Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001); *Massachusetts Pub. Interest Research Group v. U.S. Nuclear Regulatory Comm'n*, 852 F.2d 9, 14-19 (1st Cir. 1988); *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949, 952-53 (3d Cir. 1987).

relevant the timing of the filing of a complaint to the determination of the appropriate civil penalty.

The Administrator seeks assessment of an \$85,000 civil penalty against William Richardson.²² I find Mr. Richardson committed at least 408 violations of the Regulations. After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the severity of Mr. Richardson's violations and Mr. Richardson's history of compliance with the Regulations, the remedial purposes of the Commercial Transportation of Equine for Slaughter Act, and the recommendations of the administrative officials, I conclude assessment of a \$77,825 civil penalty is appropriate and necessary to ensure Mr. Richardson's compliance with the Regulations in the future, to deter others from violating the Commercial Transportation of Equine for Slaughter Act and the Regulations, and to fulfill the remedial purposes of the Commercial Transportation of Equine for Slaughter Act.²³

For the foregoing reasons, the following Order is issued.

ORDER

²² Complainant's Proposed Findings of Fact, Conclusions, Brief and Order In Support Thereof at 67-74.

²³ I assess William Richardson: (1) a \$5,000 civil penalty for each of the four horses for which he failed to obtain veterinary assistance and for each of the nine horses which he failed to handle as expeditiously and carefully as possible, in violation of 9 C.F.R. § 88.4(b)(2), (c); (2) a \$2,500 civil penalty for his failure to allow a United States Department of Agriculture representative access to a horse for the purpose of examination, in violation of 9 C.F.R. § 88.5(a)(3); (3) a \$500 civil penalty for his failure, after delivering horses outside of normal business hours, to return to the slaughtering facility premises, in violation of 9 C.F.R. § 88.5(b); (4) a \$2,150 civil penalty for his failure to apply United States Department of Agriculture backtags to 86 horses, in violation of 9 C.F.R. § 88.4(a)(2); and (5) a \$7,675 civil penalty for his failure to have 307 horses accompanied by complete and accurate owner-shipper certificates, in violation of 9 C.F.R. § 88.4(a)(3).

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William Richardson is assessed a \$77,825 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 William Richardson. William Richardson shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 05-0012.

ANIMAL WELFARE ACT

ANIMAL WELFARE ACT

COURT DECISION

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS v. USDA.**Civil Action No. 06-930 (RMC).****Filed June 11, 2007.****(Cite as 2007 WL 1720136).****AWA – FOIA – Summary judgment appropriate – Exemptions.**

People for the Ethical Treatment of Animals (PETA) challenged USDA's denial of their FOIA request in several cases. Challenges to FOIA requests are properly handled in a summary judgment setting. The Agency must release records unless one of nine exceptions applies. PETA's challenge was not rendered moot because the agency acquiesced and provided the requested information in a largely unredacted form. But the case may be moot if the Agency can demonstrate that the activity complained of is not likely to be repeated. The public's right to have access to agency activities, legal or otherwise, does not necessarily include the knowledge of the identity of the agency employee. If the Agency invokes Exemption 7(C), [law enforcement purposes], the Court may require a balancing of public interest against privacy interest. The Court discussed the Agency's rationale for redaction under 5 U.S.C. 522(b).

MEMORANDUM OPINION

ROSEMARY M. COLLYER, United States District Judge.

The People for the Ethical Treatment of Animals ("PETA") filed this case under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against the U.S. Department of Agriculture ("USDA"). PETA seeks release of (1) the redacted portions of documents related to the identity of inspectors who allegedly engaged in misconduct while inspecting a slaughterhouse operated by AgriProcessors, Inc. ("AgriProcessors"); (2) a CD recording of a witness's phone call to USDA regarding the tiger attack on performer Roy Horn; and (3) the redacted portion of affidavits naming the location where alleged Animal Welfare Act violations by Law Enforcement Military Ammunition Sales took place. PETA also

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alleges that USDA violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, through its alleged practice of withholding witness statements in their entirety instead of merely redacting the names of the witnesses. USDA filed a motion to dismiss or for summary judgment asserting that the information withheld was not subject to disclosure under FOIA and PETA has failed to state an APA claim. PETA filed a cross-motion for summary judgment. As explained below, the Court will grant in part and deny in part the parties’ motions.

I. BACKGROUND FACTS

PETA is an animal protection organization dedicated to ending cruelty to animals. Am. Compl. R As part of its mission, PETA monitors USDA’s enforcement activities and advocates for stronger protection for animals through enforcement of the Animal Welfare Act, 7 U.S.C. §§ 2131-2159, and the Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901-1906.*Id.* R 1 & 3. PETA regularly requests information from USDA regarding investigations and conveys this information to the public. *Id.* R In this action, PETA challenges the USDA’s response to three FOIA requests.¹

¹ PETA originally alleged a fourth claim, that USDA improperly withheld records responsive to PETA’s April 6, 2005 request related to the death of two elephants from the Culpepper and Merriweather Circus. Am. Compl. _ 13; Joint Rule 16.3 Report, filed Sept. 11, 2006. USDA in its motion to dismiss or for summary judgment detailed its search for these records, described its release of records, and explained its reasons for withholding certain information pursuant to various FOIA exemptions. PETA did not contradict USDA’s motion on this issue, and thus it is conceded.”It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.”*Hopkins v. Women’s Div., General Bd. of Global Ministries*, 238 F.Supp.2d 174, 178 (D.D.C.2002) (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C.Cir.1997)).

First, on June 28, 2005, PETA submitted a FOIA request to Animal and Plant Health Inspection Service (“APHIS”), a component of USDA, seeking APHIS’s final report concerning a white tiger’s mauling of performer Roy Horn during the Las Vegas show “Siegfried and Roy.” Am. Compl. R; Def.’s Mem. of P. & A. in Supp. of Mot. to Dismiss or for Summ. J. (“Def.’s Mem.”) Ex 1, Decl. of Lesia Banks (“Banks Decl.”)² R On July 14, 2005, APHIS disclosed to PETA portions of the report. Am. Comp. R; Banks Decl. R APHIS withheld several supporting affidavits, citing the personal privacy provisions set forth in FOIA Exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) & (7)(C). Am. Compl. R. APHIS also withheld a CD recording of a telephone message from a witness regarding the tiger attack. *Id.*

Second, PETA submitted a FOIA request on August 15, 2005, seeking a copy of USDA’s report of the investigation regarding the alleged violation of the Animal Welfare Act by Law Enforcement Military Ammunition Sales (“Le Mas”).*Id.* R.PETA alleges that Le Mas, an ammunition distributor, shot and killed pigs to demonstrate the efficacy of its bullets to U.S. military and law enforcement agencies. *Id.* On January 12, 2006, USDA released responsive records but withheld two witness affidavits under FOIA Exemptions 5, 6, and 7(C), 5 U.S.C. § 552(b)(5), (6) & (7)(C).*Id.* R;*see also* Banks Decl. R.

Third, on October 26, 2005,³ PETA submitted a FOIA request to the Office of Inspector General (“OIG”), USDA, seeking the OIG’s report of the investigation of AgriProcessors related to alleged violations of the

²The Banks Declaration is the statement of Lesia M. Banks. Ms. Banks is employed by USDA as the Director of the Freedom of Information and Privacy Act Staff, Legislative and Public Affairs, in APHIS.

³ PETA originally made this request on July 7, 2005, but was told that documents could not be provided because the documents related to an open investigation. PETA then made this same request again on October 26, 2005, after the investigation had closed. Def.’s Mem. Ex. 3, MacNeil Decl. __ 5, 12-13.

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Humane Methods of Livestock Slaughter Act. Am. Compl. R. OIG released some responsive records on February 28, 2006, but withheld thirteen witness statements, alleging they were exempt from disclosure under the Privacy Act, §§ 552a(j)(2) and 552a(k)(2).*Id.*

PETA appealed the partial denials of its four FOIA requests. *Id.* R 14, 18, 21, 23. It did not receive a response within twenty days, and as a result, PETA filed this lawsuit on May 17, 2006. *Id.* R. PETA then filed a two-count First Amended Complaint on June 15, 2006. In count one, PETA challenges the USDA's response to the FOIA requests described above. *Id.* R 27-29. In count two, PETA alleges a claim under the APA contending that USDA has an arbitrary practice or policy of withholding witness statements in their entirety, instead of releasing them with personal information redacted. *Id.* R 30-31. PETA's First Amended Complaint seeks declaratory and injunctive relief.⁴ *Id.*, Prayer for Relief at 10.

Subsequently, on July 17, 2006, APHIS released the witness statements and affidavits relating to the tiger attack and the Le Mas ammunition testing described above, but redacted the names and personal identifying information pursuant to Exemptions 6 and 7(C). Def.'s Mem. Ex. 1, Banks Decl. R 13-15; *id.* Ex. 2, Vaughn Index.⁵ APHIS continued to withhold in its entirety the CD audio

⁴ PETA asks that the Court declare that USDA violated FOIA by improperly withholding records; that USDA violated the APA by adopting a policy and practice of withholding entire witness affidavits and statements; and that the Court order USDA to release the requested records.

⁵ The D.C. Circuit's decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) requires agencies to prepare an itemized index correlating each withheld document, or portion thereof, with a specific FOIA exemption and the agency's nondisclosure justification.

recording regarding the tiger attack. Def.'s Mem. Ex. 1, Banks Decl. R. On July 14, 2006, OIG released the witness statements and report relating to the AgriProcessors investigation, but also redacted the names and personal identifying information pursuant to Exemptions 6 and 7(C). Def.'s Mem. Ex. 3, MacNeil Decl. R.

USDA filed a motion to dismiss or for summary judgment arguing that it has fully and adequately complied with PETA's FOIA requests and that PETA does not have a viable APA claim. PETA filed a cross-motion for summary judgment. The motions are fully briefed and ready for decision.

II. STANDARD OF REVIEW

In presenting its motion to dismiss or for summary judgment, USDA relies on information outside the pleadings, such as the Banks and MacNeil declarations and the Vaughn Index. Because matters outside the pleadings are presented, the Court must treat the motion as one for summary judgment under Rule 56.Fed.R.Civ.P. 12(b)(6).

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *see also Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C.Cir.1995). Moreover, summary judgment is properly granted against a party who "after adequate time for discovery and upon motion ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the

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nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C.Cir.1999). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Id.* at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

FOIA cases are typically and appropriately decided on motions for summary judgment. *Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir.1993); *Rushford v. Civiletti*, 485 F.Supp. 477, 481 n. 13 (D.D.C.1980). In a FOIA case, the Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C.Cir.1981); *see also Gallant v. NLRB*, 26 F.3d 168, 171 (D.C.Cir.1994). An agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly [or partially] exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978) (internal citation and quotation marks omitted). An agency's declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Services v. SEC*, 926 F.2d 1197, 1200 (D.C.Cir.1991) (internal citation and quotation marks omitted).

III. ANALYSIS

A. Personal Privacy Under FOIA Exemptions 6 and 7(C)

Under FOIA, federal agencies must release agency records upon request, unless one of nine exemptions applies. 5 U.S.C. § 552. “[D]isclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Even though FOIA “strongly favors prompt disclosure, its nine enumerated exemptions are designed to protect those legitimate governmental and private interests that might be harmed by release of certain types of information.” *August v. FBI*, 328 F.3d 697, 699 (D.C.Cir.2003) (internal quotation marks omitted). The exemptions should be narrowly construed. *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

To prevail in a FOIA case, the plaintiff must show that an agency has (1) improperly (2) withheld (3) agency records. *Tax Analysts*, 492 U.S. at 142. If the agency believes that an exemption applies, the agency still is required to disclose “any reasonably segregable portion of the record” that is not exempt from disclosure. PETA complains that APHIS and OIG improperly redacted information that was not exempt from release. USDA contends that because the personal privacy provision set forth in FOIA Exemptions 6 and 7(C) applies, APHIS and OIG properly withheld information.

Exemption 6 permits an agency to withhold from disclosure “personnel and medical files and similar files” if their disclosure would “constitute a clearly *unwarranted invasion of personal privacy*.” 5 U.S.C. § 522(b)(6) (emphasis added). Exemption 7(C) also exempts disclosure of information based on privacy concerns by permitting an agency to withhold from disclosure information that is “compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an *unwarranted invasion of personal privacy*.” 5 U.S.C. § 522(b)(7)(C) (emphasis added). Unlike Exemption 6, which allows nondisclosure only when a document would constitute a “clearly” unwarranted invasion of privacy, Exemption 7(C) does not require a

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balance tipped in favor of disclosure. *Stern v. FBI*, 737 F.2d 84, 91 (D.C.Cir.1984). While USDA cites both exemptions, its motion relies on the broader exemption, Exemption 7(C).

Generally, government employees and officials, especially law enforcement personnel, have a privacy interest in protecting their identities because disclosure “could subject them to embarrassment and harassment in the conduct of their official duties and personal affairs.” *Halpern v. FBI*, 181 F.3d 279,296-97 (2d Cir.1999)⁶. “[A]n employee has at least a minimal privacy interest in his or her employment history and job performance evaluations. That privacy interest arises in part from the presumed embarrassment or stigma wrought by negative disclosures. But it also reflects the employee’s more general interest in the nondisclosure of diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has obtained and kept in the employee’s personnel file.” *Stern*, 737 F.2d at 91 (citations omitted).

To determine whether an agency has properly invoked the personal privacy exemption, the court must balance the public interest in disclosure against the privacy interest the exemption is intended to protect. *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989) (balancing test applies to Exemption 7(C)); see also *Dep’t of State v. Ray*, 502 U.S. 164, 175 (1991) (balancing test applies to Exemption 6). In applying this balancing test, courts consider the nature of the document at issue and the document’s relation to the core purpose of FOIA, that is, “to open agency action to the light of

⁶ Individuals have an even stronger privacy interest insofar as the material suggests that they were at some time subject to criminal investigation. *Halpern*, 181 F.3d at 297 (citing *Reporters Comm.*, 489 U.S. at 767); *Stern*, 737 F.2d at 92. Further, innocent parties whose names appear in law enforcement records are entitled to the highest degree of privacy. *Iglesias v. CIA*, 525 F.Supp. 547, 563 (D.D.C.1981).

public scrutiny.” *Reporters Comm.*, 489 U.S. at 774. The purpose of FOIA “is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct.” *Id.* at 773. Thus, in *Reporters Committee*, the Supreme Court held that Exemption 7(C) protected from disclosure the FBI rap sheets of individuals accused of improperly obtaining defense contracts through a corrupt Congressman. The Court explained that while there was some public interest in obtaining the information, disclosure would not fall within the central purpose of FOIA because it would reveal nothing about the behavior of the Congressman or the Department of Defense. *Id.* at 774.

In *O’Keefe v. Dep’t of Defense*, 463 F.Supp.2d 317 (E.D.N.Y.2006), the court balanced the privacy interest that government employees have in protecting their identities against the public interest in disclosure. In that case, an Army soldier sought the disclosure of the names and other identifying information that had been redacted from documents the soldier had received pursuant to a FOIA request. The information redacted could be used to identify Department of Defense employees who had investigated the soldier’s allegations of misconduct by his commanding officers. Because release of the identities of the Department of Defense employees could subject them to harassment or embarrassment and because the release of the names would “shed little, if any, light on how the DOD conducted [the] investigation” of alleged misconduct, the court found that the information was exempt from disclosure under Exemption 7(C). *Id.* at 324.

1. Release of Inspectors’ Identities

PETA contends that USDA should disclose the names of the federal inspectors stationed at an AgriProcessors kosher slaughter facility. According to an OIG report, Food Safety Inspection Service (FSIS) inspectors observed the inhumane slaughter of cattle and did nothing to

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stop it. Pl.'s Mem. in Supp. of Pl.'s Mot. for Summ. J. and in Opp'n to Def.'s Mot. ("Pl.'s Mem.") Ex. 48, OIG Report.⁷ The report further found that certain inspectors accepted meat products from AgriProcessors' employees and "engaged in other acts of misconduct." *Id.* at 2. OIG discussed the investigation with an Assistant U.S. Attorney ("AUSA") for the Northern District of Iowa; the AUSA declined to prosecute. *Id.* According to a news report, as a result of this investigation USDA suspended one of its inspectors and gave warning letters to two others. Pl.'s Mem. Ex. 46, Donald G. McNeil, Jr., *Inquiry Finds Lax Federal Inspections at Kosher Meat Plant*, N.Y. Times, Mar. 10, 2006. Relying on *Stern*, 737 F.2d 84, PETA argues that the identity of the inspectors should be released because the public has an overriding interest in knowing how USDA employees are performing their jobs.

PETA reads *Stern* too broadly. In *Stern*, the plaintiff sought disclosure of the names of three FBI employees who were investigated in connection with an alleged cover-up of illegal FBI surveillance of political activists. *Id.* at 86. The FBI had withheld the identities of its employees pursuant to the privacy provision of Exemptions 6 and 7(C). *Id.* The D.C. Circuit explained that in determining whether the privacy exemption applied, the court must consider both the level of responsibility held by the federal employee and the activity for which the employee had been censured. *Id.* at 92. Thus, although the public has an interest in knowing that a government investigation was comprehensive and that disciplinary measures were adequate, the court held that the FBI was not required to disclose the identity of two low-level employees who were not directly responsible for the alleged cover-up, but were only

⁷ PETA alleges that AgriProcessors slaughtered cattle inhumanely. According to a news report, after cattle were cut by a Rabbi pursuant to kosher slaughter methods, other workers pulled out the animals' tracheas with a hook to speed bleeding. Pl.'s Mem. Ex. 46, Donald G. McNeil, Jr., *Inquiry Finds Lax Federal Inspections at Kosher Meat Plant*, N.Y. Times, Mar. 10, 2006.

culpable for inadvertence and negligence. *Id.* at 92-93. The court stated, “[w]hile ... the public has a strong interest in the airing of the FBI’s unlawful and improper activities, we find that the public interest in knowing the identities of employees who became entwined inadvertently in such activities is not as great.” *Id.* at 93. In contrast, the Circuit held that the identity of a higher-level official had to be disclosed. The official was a Special Agent in Charge who was found to have participated knowingly and deliberately in the cover-up. *Id.* Applying the balancing test, the court held that “[t]he public has a great interest in being enlightened about ... malfeasance by this senior FBI official—an action called “intolerable” by the FBI—an interest that is not outweighed by his own interest in personal privacy.” *Id.* at 94.

More recently, the D.C. Circuit distinguished *Stern* in a case where the court did not require the release of records relating to the alleged criminal conduct of an AUSA. In *Jefferson v. Dep’t of Justice*, 284 F.3d 172 (D.C.Cir.2002), the court emphasized that the *Stern* court only required the release of the identity of a high-level official in the midst of a well-publicized scandal. In contrast, the court held in *Jefferson* that Exemption 7(C) protected from disclosure Department of Justice Office of Professional Responsibility records relating to the investigation into an AUSA’s alleged criminal wrongdoing. The court found that the AUSA was not a high-level official and that the public interest in knowing about the AUSA’s prosecution of an individual was not comparable to the public interest in the scandal in *Stern*. 284 F.3d at 180.

At issue in this case is the identity of low-level FSIS inspectors who engaged in misconduct in performing slaughterhouse inspections. Unlike *Stern*, the facts of this case do not present high-level employees or a well-publicized scandal. The inspectors have a privacy interest in records relating to disciplinary action against them, and disclosure of such records could subject them to embarrassment or harassment. *Halpern*, 181 F.3d at 296-97; *Stern*, 737 F.2d at 91. Moreover, disclosure of this information would not serve FOIA’s purpose since it would do little to shed light on the activities of the USDA. PETA already has information related to how the USDA inspectors performed their duties and how they

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were disciplined. Release of the identities of the inspectors would not add to this in any meaningful way. *See O'Keefe*, 463 F.Supp.2d at 324 (release of identities of investigators would do little to demonstrate how the DOD conducted the investigation). Thus, the identity of the FSIS inspectors in this case is exempt from disclosure under Exemption 7(C).

2. CD Recording of Witness's Telephone Call

PETA also seeks release of a CD audio recording of a witness's phone call to the USDA regarding the tiger attack on Roy Horn. USDA contends that the entire CD is exempt from disclosure based on the privacy interest of the caller because the caller could be identified by the sound of his/her voice. USDA further alleges that the information on the CD reveals nothing about USDA activities. Because the witness's privacy interest outweighs the public interest in disclosure, USDA claims the CD was exempt from disclosure. PETA contends that USDA's conclusory assertion that the CD does not relate to agency activities is insufficient to support a claim of exemption. The Court cannot determine based on the information before it whether the recording relates in any way to agency activities. Accordingly, USDA shall submit the CD recording to the Court for an in camera review.

3. Le Mas Location Information

PETA complains that USDA has redacted from affidavits the name of the state where the Le Mas ammunition testing on pigs took place. *See* Pl.'s Mem. Exs. 42 & 43. USDA has not cited a reason for such non-disclosure. Although USDA explained in its Vaughn Index that it redacted the names of federal employees and the names and addresses of persons being investigated, information that PETA does not seek with respect to the Le Mas claim, USDA does not acknowledge that it also redacted the information regarding the location of the incident being investigated. USDA does not address this issue in its motion to dismiss or for summary judgment or in its response to PETA's cross-motion.

Because USDA has not met its burden of showing that an exemption applies, the Court will require USDA to disclose this information. *See Goland*, 607 F.2d at 352 (agency must demonstrate that each document requested either has been produced, is unidentifiable, or is exempt).

B. APA Claim

PETA contends that USDA acted in an arbitrary and capricious manner in violation of the APA by “adopting a policy and practice of withholding, under FOIA Exemption 6, FOIA Exemption 7(C), and the Privacy Act, witness affidavits and statements gathered as part its investigations of possible violations of ... statutes administered by the agency....” Am. Compl. R. PETA alleges that Ms. Banks, Director of the Freedom of Information and Privacy Act Staff of APHIS, explained at a March 15, 2006, meeting with animal protection groups that she had changed practices put in place by her predecessor and that now APHIS redacted entire witness statements to protect the privacy of the witness. Pl.’s Statement of Facts R 58-59. After PETA filed this suit, USDA released the witness statements and affidavits that PETA sought in its FOIA requests, with identifying information redacted.⁸

The APA authorizes judicial review only when the challenged agency action is final and when there is no other adequate remedy. 5 U.S.C. §§ 703-704; *see also Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (APA does not provide additional remedies where adequate remedies are already provided). Thus, an APA claim is precluded where a remedy under FOIA is available. *Sierra Club v. Dep’t of Interior*, 384 F.Supp.2d 1, 30 (D.D.C.2004).

PETA contends that it may proceed under the APA because it is seeking prospective injunctive relief; it seeks an order from the Court

⁸ PETA asserts that it was required to expend considerable resources to file appeals and to file this suit in order to obtain these documents. Kettler Decl. _ 13 & 24.

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precluding USDA from withholding the statements in their entirety in the future. USDA contends that it does not have a policy or practice of withholding witness statements in their entirety. In support of this contention, USDA submitted the Declaration of Ms. Banks on behalf of APHIS and the Supplemental Declaration of Ms. MacNeil on behalf of USDA OIG. Ms. Banks indicated, "APHIS considers FOIA requests and appeals on a case by case basis. APHIS does not have an official policy or practice of categorically withholding documents, particularly witness statements or affidavits, in response to FOIA requests and appeals." Def.'s Mem. Ex. 1, Banks Decl. R. Similarly, Ms. MacNeil indicated, "USDA OIG has not adopted a regulation or a policy and practice of withholding in their entirety statements of witnesses and USDA employees with regard to FOIA requests. FOIA requests received by USDA OIG are evaluated individually and processed according to the requirements of the FOIA and the Privacy Act, 5 U.S.C. § 552, 5 U.S.C. § 552a." Def.'s Mem. Ex. 5, MacNeil Supp. Decl. R

PETA's APA claim is moot. Pursuant to Article III of the Constitution, federal courts are limited to deciding "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Even where a suit presented a live controversy when filed, the mootness doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will not affect the parties' rights presently and will not have a "more-than-speculative" chance of affecting them in the future. *Clarke v. United States*, 915 F.2d 699, 701 (D.C.Cir.1990). A case is moot if a defendant can demonstrate that two conditions have been met: (1) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation; and (2) there is no reasonable expectation that the alleged wrong will be repeated. *Doe v. Harris*, 696 F.2d 109, 111 (D.C.Cir.1982) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be

compelled to leave the defendant free to return to his old ways.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 189 (2000) (citations omitted; internal quotations and ellipses omitted). Even though the voluntary cessation of allegedly illegal conduct does not make a case moot, “[t]he case may nevertheless be moot if the defendant can demonstrate that -re is no reasonable expectation that the wrong will be repeated.. *United States v. W.T. Grant Co.*, 345 U.S.630, 632 (1953) (citation omitted). Thus, in a suit to obtain prospective injunctive relief, a plaintiff must show a real and immediate threat of future injury in order to establish a viable case or controversy. *City of Los Angeles*, 461 U.S. at 103-04; see *Aulenback, Inc. v. Federal Highway Admin.*, 103 F.3d 156, 166-67 (D.C.Cir.1997) (a case seeking injunctive and declaratory relief is not ripe for review where the plaintiff did not face direct and immediate sanctions, but only speculated as to potential future harm).

Here, PETA made a FOIA request for witness statements, and after initially withholding them, USDA released the witness statements with identifying information redacted. Release of the witness statements satisfied PETA’s FOIA request. Further, there is no reasonable expectation that the alleged wrong will be repeated, as APHIS and OIG indicated that they do not have a practice of withholding entire witness statements and they review FOIA requests on an individual basis. At most PETA has presented evidence of a *past* practice of withholding entire witness statements. PETA has not demonstrated a threat of an immediate future injury.⁹ *City of Los Angeles*, 461 U.S. at 103-04. In sum, because interim relief has eradicated the effects of the alleged

⁹ If PETA had shown that the practice was ongoing, PETA likely would be able to challenge the practice. See e.g., *Payne Enters. Inc. v. U.S.*, 837 F.2d 486, 491 (D.C.Cir.1988) (Air Force had illegal practice of violating FOIA by routinely refusing to release information requested until an appeal was filed; such a practice caused an unreasonable delay that could be challenged under the APA); *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 93 (D.C. Cir.1986) (plaintiff can make a facial challenge to DOJ’s practice regarding fee waiver requests, even though the practice was informal, because the agency planned to continue the practice).

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violation and there is no reasonable expectation that the alleged wrong will be repeated, *see Doe v. Harris*, 696 F.2d at 111, PETA's APA claim is moot. Accordingly, the APA claim will be dismissed.

IV. CONCLUSION

For the foregoing reasons, USDA's motion to dismiss or for summary judgment [Dkt. # 19] and PETA's cross-motion for summary judgment [Dkt.21 & 29]¹⁰ will be granted in part and denied in part as follows: (1) the identities of the FSIS inspectors who inspected the AgriProcessors facility are exempt from disclosure; (2) the CD recording of the phone call to USDA from the witness to the tiger attack on Mr. Horn shall be submitted to the Court for an in camera inspection no later than June 25, 2007; (3) the information regarding the location of the Le Mas ammunition testing shall be disclosed no later than June 25, 2007; and (4) PETA's APA claim will be dismissed. A memorializing order accompanies this Memorandum Opinion.

¹⁰ PETA's motion for summary judgment [Dkt. # 29] amended its original filing [Dkt. # 21].

ANIMAL WELFARE ACT
DEPARTMENTAL DECISIONS

In re RANDALL JONES.
AWA Docket No. 05-0030.
Decision and Order.
Filed January 19, 2007.

AWA – License – Policy, One time exemption.

Frank Martin, Jr. for APHIS.
Respondent Pro se.

Decision and Order by Administrative Law Judge Victor W. Palmer.

Decision and Order

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159; “the Act”), that was instituted by a complaint filed on August 5, 2005, by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), United States Department of Agriculture (“USDA”). The complaint alleged that Randall Jones, Respondent, violated the Act and the regulations issued under it (9 C.F.R. § 1.1 *et seq.*; “Regulations”), by selling dogs after the revocation of his dealer’s license required under the Act for anyone selling animals in commerce. I held a transcribed hearing in Memphis, Tennessee on September 19, 2006. Complainant was represented by Frank Martin, Jr., Esquire, Office of the General Counsel, USDA, and Randall Jones appeared *pro se*.

Upon consideration of the testimony given at the hearing and the exhibits that were received, I have concluded that Mr. Jones violated the Act and the regulations by selling puppies when he no longer held a valid dealer’s license, and that the appropriate sanction is the entry of a cease and desist order to not sell animals without a requisite license in the future. APHIS has also requested that I assess a \$23,000 civil penalty

against Mr. Jones. For the reasons discussed in this decision, I have decided that the requested civil penalty is unwarranted.

Findings of Fact

1. Randall Jones, 565 County Road 131, Black Rock, Arkansas 72444, had his dealer's license that is required by the Act for anyone selling dogs in commerce, revoked by an order of the Judicial Officer issued on October 1, 2003 (AWA Docket No. 03-0013; CX-1).

2. From April 30, 2004 through September 27, 2004, while unlicensed as a dealer, Randall Jones sold 23 puppies in order to close out his business and liquidate his kennel (CX-2; CX-3; CX-4; CX-5; CX-6; Transcript at 9-10, 12-13, 14-17, 22-24).

3. There is no evidence that after the revocation of his dealer's license, Mr. Jones purchased, bred or in anyway acquired additional dogs that he then sold in continuation of his business.

4. APHIS allows a one-time exemption from the requirement for a dealer's license to persons who need to sell all of their dogs so as to liquidate their kennels and leave the business. If Mr. Jones had requested such an exemption it probably would have been taken under advisement by APHIS (Transcript at 50). However, he did not know of the availability of this exemption and, for that reason, did not request it (Transcript at 62).

Conclusions

1. Randall Jones violated the Act and the Regulations (9 C.F.R. § 2.1(a)(1)) when he sold 23 puppies in commerce from April 30, 2004 through September 27, 2004, after his dealer's license had been revoked.

2. The appropriate sanction under the circumstances of this case is the issuance of an order requiring Randall Jones to cease and desist from engaging in any activity for which a license is required under the Act without being licensed. It is not appropriate to additionally impose civil penalties upon Mr. Jones.

Discussion

Randall Jones is a fiercely, individualistic American who has served his country with pride, but at a cost. In his own words:

I joined the Army in 1976 when I was 17. I earned the rank of E-4 in sixteen months. Earned the "Expert Infantry Badge". Graduated from the Primary Noncommissioned Officers School.... I was going to join the Ranger Battalion. Then I had a severe head injury which took the eye sight in my right eye. The orders to go to the Ranger Battalion were canceled. This was at the age of nineteen. The doctor said "Randall do you want me to retire you?" I said no.

It was a major mistake. I got no compensation for the injury.

When I got out of the Army I got a job at Lockheed Aerospace in Burbank California. I got a secret clearance and worked (on)...the U-2 Spyplane, the SR-71 Blackbird and the F-117 Stealth Fighter....(Transcript at 52-53 confirming the letter with exhibits he filed as his Answer).

When he later moved to Arkansas, he went into business for himself by starting a kennel. He held a dealer's license with a woman who kept her dogs at another site. Problems with conditions at her site led to a disciplinary action being filed and the entry of a default decision and order against them both that they unsuccessfully appealed. Their dealer's license was revoked and both were permanently disqualified from being licensed under the Act by the Judicial Officer's order of October 1, 2003 (CX-1).

Wanda McQuary, Mr. Jones' partner on the revoked dealer's license, was elderly and has since died (Transcript at 56). After the dealer's license was revoked, Mr. Jones sold his dogs and at the time of the hearing was still looking for work.

I'm looking for work. I was trying to get on boat jobs that, you know, you need good eyesight for that. And I've been out of the workforce for nine or ten years and it's hard to get back into it. People don't want to hire you. I usually do mechanic work (Transcript at 58).

When asked if he denied he had sold 23 dogs, he was candid:

No sir. Like I said, I needed to feed dogs. I wish I knew about that one-time extension. I would have sold out (Transcript at 61-62).

He first learned that APHIS allows a one-time exemption from being a licensed dealer to persons who are selling their dogs to liquidate a kennel, from testimony given by an APHIS official at the hearing.

The APHIS official acknowledged that in recommending the assessment of a \$23,000 civil penalty against Mr. Jones, no mitigating factors were considered, and that a one-time exemption to sell all of his dogs to get out of the business would have been taken under advisement, if Mr. Jones had contacted APHIS.

The fact that Mr. Jones did not ask for the one-time exemption is understandable. Its availability is not published anywhere and no one told Mr. Jones about it. He is not the type person who would think to ask. To subject him to a civil penalty when other more sophisticated, questioning persons who lose their licenses are not, would be unconscionable.

For these reasons an Order is being entered that will require Mr. Jones to cease and desist from selling animals in the future when unlicensed, but shall not impose a civil penalty upon him for doing what APHIS probably would have allowed if he had known to ask.

ORDER

Randall Jones, his agents and employees, successors and assigns, directly or through any corporate or other device, shall not violate the Act (7 U.S.C. § 2131 *et seq.*) and the Regulations issued under the Act (9 C.F.R. § 1.1 *et seq.*), and in particular, shall not engage in any activity for which a license is required under the Act and Regulations without being licensed.

As provided in the Rules of Practice at 7 C.F.R. 1.142(c)(4), this

decision and order shall be come final and effective, without further proceedings, 35 days after the date of its service upon the respondent, Randall Jones, unless either complainant or respondent, within 30 days after service of this decision and order upon the respondent, appeals the decision to the Judicial Officer pursuant to 7 C.F.R. 1.145(a).

Copies of this decision and order shall be served upon the parties.

**In re: PETER GRONBECK and ROSEMARY GRONBECK, d/b/a
L & J KENNELS.
AWA DOCKET NO. 05-0018.
Decision and Order.
Filed February 27, 2007.**

**AWA – Admission of facts through non-appearance – License, voluntary surrender
– License, operating without.**

Babak Rastgoufard, for APHIS.

Peter Gronbeck, Pro Se.

Rosemary Gronbeck, Pro se.

Decision and Order by Administrative Law Judge, Peter M. Davenport.

DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.) (the “Act”), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations and standards (9 C.F.R. § 1.1 et seq.) (the “Regulations”) issued thereunder.

On May 8, 2006, respondents Peter Gronbeck and Rosemary Gronbeck were personally served with a copy of the Complaint. (*See* Notice of Service, filed May 30, 2006.) Respondents were also provided a copy of the rules of practice (*see id.* Exs. 1-2), section 1.141(e) of which provides that, “[a] respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have

waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint.” 7 C.F.R. § 1.141(e).

On February 14, 2007, a hearing was convened in Washington, D.C. Respondents, who had been duly notified, failed to appear at the hearing;¹ thus, the material facts alleged in the Complaint, which are admitted by Respondents’ default, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to sections 1.141(e) and 1.139 of the Rule of Practice. 7 C.F.R. §§ 1.141(e), 1.139.

The Act and the Regulations authorize the Secretary of Agriculture, among other things, to impose civil penalties and to revoke an Animal Welfare Act license and thus disqualify persons from becoming licensed. *See* 7 U.S.C. § 2149(b); *In re: Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991) (“The power to require and issue licenses under the Animal Welfare Act includes power to deny a license, to suspend or revoke a license, to disqualify a person from becoming licensed, and to withdraw a license.”). In imposing a civil penalty, however, the Act requires the Secretary to give due consideration to the appropriateness of the penalty with respect to the gravity of the violations, the size of the business of the person involved, the person’s good faith and the person’s history of previous violations. 7 U.S.C. § 2149(b).

The gravity of the violations herein is great, as the violations frustrate the purposes of the Act. The purposes of the Act are “(1) to insure that animals intended...for pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in

¹ Pursuant to the Order, dated January 30, 2007, personal appearance by Respondents was not required: “At their option, the Respondents may appear in person or to participate by telephone, provided they provide counsel for Complainant and the Hearing Clerk’s Office with a telephone number at which they may be reached on the date of the hearing.” *See* Order, dated Jan. 30, 2007. Respondents were served with a copy of said Order by overnight delivery. *See id.*

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.” 7 U.S.C. § 2131. Respondents violated the Act and the Regulations by operating as an unlicensed dealer and selling, in commerce, at least 176 dogs and puppies, of various breeds, including sales to licensed dealers.² Such violations are serious as they undercut the Secretary’s ability to carry out the purposes of the Act and ensure that animals intended for use in commerce “are provided humane care and treatment” and thus risked the health and well-being of their animals. The failure to maintain “an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers.” *In re: Shaffer*, 60 Agric. Dec. 444, 478 (2001).

The Respondents operated a medium-size business, selling no fewer than 176 dogs and puppies of at least 14 different breeds during the 8½-month period (March 2003 - January 2004) described herein and grossing at least \$40,000 from selling 230 animals between February 2001 and February 2002, Respondents demonstrated a disregard for, and unwillingness to abide by, the requirements of the Act and the Regulations. Specifically, despite having voluntarily surrendered their license, Respondents continued to engage in regulated activity without a license and sold numerous dogs and puppies, of various breeds, including sales to licensed dealers. Such an ongoing pattern of violations demonstrates an abject lack of good faith for purposes of section § 2149(b) of the Act, 7 U.S.C. § 2149(b).

² The Respondents’ Answer suggests that some of these unlicensed sales may have taken place wholly within the State of Iowa; however, that fact does not “does not preclude the jurisdiction of the Secretary of Agriculture”. *In re Marilyn Shepard*, 61 Agric. Dec. 478, 482 (2002), (citing, *inter alia*, 3 Att’y Gen. Mem. 326, available at 1979 WL 16592); see also *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 168-169, (1990) (opinion of Judicial Officer holding wholly-intrastate transaction to affect interstate commerce and thus fall within the jurisdiction of the Secretary of Agriculture under the Animal Welfare Act).

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d/b/a L & J KENNELS
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Accordingly, after considering the entire record herein, section 2149(b) of the Act, and the recommendations of the Complainant, the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

Respondent Peter Gronbeck is an individual whose mailing address is 3906 410th Avenue, Emmetsburg, Iowa 50536.

Respondent Rosemary Gronbeck is an individual whose mailing address is 3906 410th Avenue, Emmetsburg, Iowa 50536.

Respondents Peter Gronbeck and Rosemary Gronbeck, collectively and individually do business as L & J Kennels, believed to be an unincorporated association or partnership with the mailing address 3906 410th Avenue, Emmetsburg, Iowa 50536.

Respondents Peter Gronbeck, Rosemary Gronbeck and L & J Kennels (collectively, "Respondents"), at all material times mentioned herein, were operating as dealers as defined in the Act and the Regulations.

Between February 28, 2002 and March 11, 2003, Respondents held Animal Welfare Act license number 42-B-0202, issued to "PETER & ROSEMARY GRONBECK DBA: L & J KENNELS."

On March 11, 2003, Respondents voluntarily surrendered said license.

Respondents operated a medium-sized business, selling no fewer than 176 dogs and puppies of at least 14 different breeds during the 8½-month period (March 2003 - January 2004) described herein. According to information contained on the Respondents application for an Animal Welfare Act license, they sold 230 animals and grossed at least \$40,000 from the sales of those animals between February 2001 - February 2002.

Respondents have no previous history of violations; however, Respondents' conduct over the period described herein reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Act and the Regulations. Despite having voluntarily surrendered their license, Respondents continued to engage in regulated activity

without a license and sold numerous dogs and puppies, of various breeds, including to licensed dealers.

On or about March 26, 2003, only a few weeks after voluntarily terminating their license, Respondents, without being licensed, sold, in commerce, at least 20 puppies of various breeds to Betty Curb, a licensed dealer d/b/a Betty's Puppies (Animal Welfare Act license number 33-B-0349) ("Curb"), for resale for use as pets or breeding purposes.

On or about March 26, 2003, Respondents, without being licensed, sold, in commerce, at least 71 assorted dogs and puppies of various breeds, including Jack Russell Terriers, Australian Cattle Dogs, English Springer Spaniels, German Pointers, Labrador Retrievers, Golden Retrievers and Rottweilers, to Rhonda Mandat, for resale for use as pets.

On or about May 22, 2003, Respondents, without being licensed, sold, in commerce, at least 46 puppies of various breeds, including Cocker Spaniels, Miniature Schnauzers, English Springer Spaniels, Labrador Retrievers, Jack Russell Terriers, German Short Hair Pointers, Silkie/Cocker Mixes, Dachshunds, Bichons, Scottish Terriers, Australian Cattle Dogs and Rottweilers, to Curb, for resale for use as pets or breeding purposes.

On or about August 13, 2003, Respondents, without being licensed, sold, in commerce, at least 24 adult dogs to Paul and Shelia Haag, licensed dealers d/b/a Valley View Kennels (Animal Welfare Act license number 41-A-0281), for resale for use as pets or breeding purposes.

On or about January 7, 2004, Respondents, without being licensed, sold, in commerce, at least 15 dogs of various breeds, including Australian Cattle Dogs and English Springer Spaniels, to Ross and Sandra Jurgenson, licensed dealers d/b/a Jurgenson Kennels (Animal Welfare Act license number 41-B-0229), for resale for use as pets or breeding purposes.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

Between March 2003 and May 2003, only a few weeks after voluntarily surrendering their license, Respondents, violated the Act and the Regulations by selling in commerce at least 66 puppies of various

breeds to Betty Curb, a licensed dealer d/b/a Betty's Puppies (Animal Welfare Act license number 33-B-0349), for resale use as pets or breeding purposes, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b). These violations took place on or about the following dates: March 26, 2003 and May 22, 2003.

On or about March 26, 2003, also only a few weeks after voluntarily surrendering their license, Respondents, violated the Act and the Regulations by selling in commerce at least 71 assorted dogs and puppies of various breeds, including Jack Russell Terriers, Australian Cattle Dogs, English Springer Spaniels, German Pointers, Labrador Retrievers, Golden Retrievers and Rottweilers, to Rhonda Mandat, for resale for use as pets, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b).

On or about August 13, 2003, Respondents, violated the Act and the Regulations by selling in commerce at least 24 adult dogs to Paul and Shelia Haag, licensed dealers d/b/a Valley View Kennels (Animal Welfare Act license number 41-A-0281), for resale for use as pets or breeding purposes, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b).

On or about January 7, 2004, Respondents, without being licensed, sold, in commerce, at least 15 dogs of various breeds, including Australian Cattle Dogs and English Springer Spaniels, to Ross and Sandra Jurgenson, licensed dealers d/b/a Jurgenson Kennels (Animal Welfare Act license number 41-B-0229), for resale for use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b).

ORDER

Respondents' AWA license, license number 42-B-0202, issued to "PETER & ROSEMARY GRONBECK DBA: L & J KENNELS," is hereby revoked and Respondents are hereby disqualified from obtaining an AWA license.

Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations issued thereunder, and, in particular, shall cease and desist from engaging in activities for which an Animal Welfare Act license is required.

Respondents are jointly and severally assessed a civil penalty of \$10,400.00, of which \$8,400 shall be suspended and held in abeyance, provided Respondents do not engage in any activity regulated under the Act and/or Regulations, and \$2,000 shall be paid within 45 days of service of this order by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW.
Washington, DC 20250-1417

Respondent shall state on the certified check or money order that the payment is in reference to AWA Docket No. 05-0018.

The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice. Copies of this decision shall be served upon the parties.

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In re: JAMES BRANDON GARRETSON, d/b/a JUNGLE PARADISE ZOO and GARRETSON FAMILY TIGERS; and NICOLE LYNETTE AMMON, d/b/a INTERNATIONAL WILDLIFE CENTER.

AWA Docket No. 04-A032 (formerly AWA 04-0032)

Decision and Order

Filed March 22, 2007.

AWA – Feeding pattern interrupted – Minimal risk of harm, failure to – Maintain sufficient distance, failure to – Handle as careful as possible, failure to.

Coleen A. Carroll for APHIS.

Respondents, Pro se.

Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

Decision Summary

1. I decide that both Respondents committed numerous violations of the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.* (frequently herein the “AWA” or the “Act”). Respondent Nicole Lynette Ammon (frequently herein “Respondent Ammon”) failed to handle seven tigers as carefully as possible and caused the tigers behavioral stress and unnecessary discomfort in late March through April 2, 2003, north of Adair, Oklahoma, placing the tigers in a position where on April 2, 2003, the tigers were extraordinarily hungry and were able from inside their enclosure to grab a young woman who was standing just outside their enclosure, to tear off and carry away within their enclosure the arm of the young woman, causing her death, in willful¹ violation of sections

Cont.

2.100(a) and 2.131(a)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(a)(1)). [9 C.F.R. § 2.131(a)(1) is currently renumbered as 2.131(b)(1).] This handling violation of Respondent Ammon's was alone so serious as to require AWA license revocation, revocation of the privilege to engage in activities that require an AWA license, and permanent disqualification from obtaining, holding, or using any AWA license. As Respondent Ammon's agent who was responsible for or participated in violations upon which the revocation of Respondent Ammon's license is based, Respondent James Brandon Garretson (frequently herein "Respondent Garretson") will not be licensed during the period in which Respondent Ammon's revocation is in effect, in accordance with section 2.9 of the Regulations (9 C.F.R. § 2.9). Further, I decide that Respondent Garretson, while an applicant for an initial AWA license, threatened, verbally abused, and harassed Dr. Gaj, an official of the Animal and Plant Health Inspection Service (APHIS official) in the course of carrying out his duties, on June 25, 2004, at Lake City, Florida, in willful² violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). This violation of Respondent Garretson's concerning an APHIS official was alone so serious, particularly in light of Respondent Garretson's pattern of threatening, verbally abusing, and harassing APHIS officials in the course of carrying out their duties, as to require revocation of the privilege to engage in activities that require an AWA license, and permanent disqualification from obtaining, holding, or using any AWA license. These revocations and permanent disqualifications of both Respondents, and, in addition, civil penalties for both Respondents, are appropriate, justified, and necessary.

Introduction

¹ The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

² The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

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, filed on August 31, 2004, alleged violations of the AWA; 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”). Small portions of the Complaint were amended during the hearing and by my Order filed March 7, 2006. Tr. 736, 1362, 1363.

3. Each of the two Respondents is an individual, and each represents herself or himself (appears *pro se*). The two Respondents are Nicole Lynette Ammon, an individual doing business as International Wildlife Center; and James Brandon Garretson, an individual doing business as Jungle Paradise Zoo and Garretson Family Tigers. The “Respondents” refers to the two Respondents, collectively. Respondent Ammon’s Answer (timely filed on January 3, 2005), and Respondent Garretson’s Answer (timely filed on November 1, 2004), denied the allegations of the Complaint.³

4. The hearing is summarized by my “Rulings,” issued March 3, 2006, attached as Appendix 3. “Complainant’s Motion Re Admitted Exhibits.” filed March 16, 2006, is granted; “Complainant’s Motion to Correct Transcript,” filed April 12, 2006, is granted. The “Declaration of Dr. Elizabeth Goldentyer” (CX 43), filed March 16, 2006, is admitted into evidence. The “Declaration of Nicole Lynette Ammon,” filed May 31, 2006, is admitted into evidence. Respondent Ammon’s “List of questions” for Dr. Elizabeth Goldentyer, filed May 31, 2006, has been carefully considered, together with the evidence and briefs.

³ The record file begins with Vols. I and II of AWA 04-0032, and continues with Vols. I and II of AWA 04-A032.

5. Respondent Ammon had had her Animal Welfare Act license for less than two years when, in the spring of 2003, her handling violations led to catastrophe. Ms. Ammon's license application had initially been denied. The following excerpt is from a letter on USDA⁴ stationery:

June 20, 2001
Nicole L. Ammon
4778 FM 639 North
Frost, TX 76641

Dear Ms. Ammon:

Your application for a license under the Animal Welfare Act is hereby denied. This action is taken because Mr. James Garretson is involved in the operation and the issuance of a license would circumvent an Order disqualifying him from being licensed.

You may request a hearing regarding the denial of this license. You must notify this office, in writing, by certified mail, within 20 days from the receipt of this letter, if you desire a hearing, and a hearing will be held in due course. Failure to request a hearing within 20 days from receipt of this letter will be deemed a waiver of such hearing.

You are reminded that buying and selling, transporting, or exhibiting regulated animals without a valid license is an illegal activity under the Animal Welfare Act.

⁴ United States Department of Agriculture, Marketing and Regulatory Programs, Animal and Plant Health Inspection Service, Animal Care, Western Region.

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Sincerely,

W. A. Christensen, D.V.M.
Asst. Director - Animal Care
Western Region

CX 3, p. 6.

A compromise was reached (CX 3, p. 9), and Respondent Ammon was issued a license. Respondent Ammon relied on Respondent Garretson; the actions of the two Respondents were intertwined during Respondent Ammon's licensure under the Animal Welfare Act. In many ways Respondent Ammon was doing Respondent Garretson's bidding; yet, because Respondent Ammon is the licensee, she is responsible not only for what she herself did or failed to do in violation of the Animal Welfare Act, but also for what Respondent Garretson did or failed to do "on her behalf," as her agent, in violation of the Animal Welfare Act. 7 U.S.C. § 2139.

Findings of Fact and Conclusions

6. Paragraphs 7 through 70 contain intertwined Findings of Fact and Conclusions.
7. The Secretary of Agriculture has jurisdiction.
8. Respondent Nicole Lynette Ammon, also known as Nicole Ammon, an individual, was licensed as and operated as a "Class C Exhibitor" from July 10, 2001, through June 8, 2004 (Tr. 736, 1345-46), under Animal Welfare Act license number 74-C-0521. The AWA license was issued to "Nicole Ammon DBA: International Wildlife CTR" (CX 3, p. 16). [The term "exhibitor" 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).]

9. Respondent James Brandon Garretson, also known as James Garretson, an individual, was operating either as the agent of an exhibitor, or as an exhibitor, as that term is defined in the Act and the Regulations, at all times material herein, except as otherwise specified.

10. Respondent Nicole Lynette Ammon's current address is 225 NE 1st Street, High Spring, Florida 32643; her mailing address at the time of the hearing was 2109 W. U.S. Hwy 90, #170-152, Lake City, Florida 32055; and her former addresses include 2525 Preston Road, No. 821, Plano, Texas 75093.

11. Respondent Nicole Lynette Ammon has done business variously as International Wildlife Center, International Wildlife Center, Inc. (although International Wildlife Center was never a corporation, Tr. 1384), and Garretson Family Tigers.

12. Respondent James Brandon Garretson is an individual whose current address is 763 SW Churchill Way, Lake City, Florida 32025; whose former addresses included the mailing address 2109 U.S. Highway 90, Suite 170-107, Lake City, Florida 32055; and whose addresses at the time of the hearing included both 763 SW Churchill Way, Lake City, Florida 32025, and 818 SW Churchill Way, Lake City, Florida 32025.

13. Respondent James Brandon Garretson has done business, does business, or purports to do business variously as Jungle Paradise Zoo, Garretson Family Tigers, International Wildlife Center, International Wildlife Center, Inc. (although International Wildlife Center was never a corporation, Tr. 1384), International Wildlife Refuge, GFT, GFT, Inc., GFT Zoo, Inc., and James Garretson Trucking.

14. The name International Wildlife Center was used by the Respondents to describe not only Respondent Ammon's business enterprise (which Respondent Ammon at times considered her own, "a sole proprietorship," Tr. 407, 1386, CX 11), but also a business enterprise jointly owned by Respondent Ammon and Respondent Garretson (CX 5, p. 12; CX 19e, Tr. 646; CX 19c, p. 1; Tr. 648), and also a business enterprise owned primarily by Respondent Garretson (CX 18a, pp. 2, 5).

15. Respondent Ammon is the licensee and is responsible not only for what she herself did or failed to do in violation of the Animal Welfare Act, but also for what Respondent Garretson did or failed to do "on her

behalf,” as her agent, in violation of the Animal Welfare Act. 7 U.S.C. § 2139.

16. My remaining Findings of Fact and Conclusions are organized by topic.⁵ The first of these topics is the Respondents’ leaving their animals in Oklahoma. APHIS argues that the Respondents “abandoned” their animals in Oklahoma; I believe “warehoused” to be more accurate.

Topic One: the Respondents’ leaving their animals in Oklahoma in 2003 (February into April).

17. Respondent Ammon and her agent Respondent Garretson “wintered” some of their animals, including dangerous animals such as tigers,⁶ north of Adair, Oklahoma. Simultaneously the Respondents took their traveling exhibit of other animals to other places, including Laredo, Texas (February 13-21, 2003); Brownsville, Texas (February 24 - March 2, 2003); Sarasota, Florida (March 2003); and Green Cove Springs, Florida (arriving about April 2, 2003). Tr. 1185-1194. The multiple locations stretched the Respondents’ already thin resources very thin, concerning personnel, and nutrition, housing and medical care for the animals. The Respondents allowed the feeding pattern of the tigers (Neko, Charm, Copper, Jade, Tommy, Splash, and Kojac) housed north of Adair, Oklahoma to be interrupted; instead of being fed at least every other day the legs of calves that had died (which were available at no charge), the tigers were being fed about every four days chicken that had to be paid for. On April 2, 2003, the tigers north of Adair, Oklahoma had not been fed for approximately four days and were extraordinarily

⁵ The arrangement is neither in chronological order nor in sequence by regulation number.

⁶ Tigers are an example of “dangerous animals” in 9 C.F.R. § 2.131(c)(3), currently renumbered as § 2.131(d)(3).

hungry. The Respondents were not present because they were in Florida tending to the exhibition of other animals. The Respondents, present or not, are responsible for what occurred: the Respondents allowed their tigers to reach through the openings in the tigers' enclosure made of cattle fence and to grab by her jeans a young woman named Lynda Brackett who was standing too close to their enclosure. The tigers grabbed at Ms. Brackett in a feeding-like frenzy with their upper paws, which could fit through the 8" high openings. CX 19a, p. 15. During the struggle by Ms. Brackett and Ms. Amanda Sternke to free Ms. Brackett from the tigers' grasp, Ms. Brackett's arm slipped through one of the 8" high openings in the cattle fence into the tigers' enclosure; and the tigers ripped off and carried away Ms. Brackett's arm. Ms. Brackett died from the trauma within about two hours. CX 18, CX 19a, CX 19b, CX 19c, CX 19d, CX 19e. Tr. 651-57, 692, 701, 1395.

18. Handling Violation Proved, involving human fatality: When the Respondents allowed the feeding pattern of their tigers to be interrupted, and the hungry tigers were able to reach through the openings in their cattle fence enclosure and to grab a human who stood too close, Respondent Ammon and her agent Respondent Garretson failed to handle tigers as carefully as possible and caused the tigers behavioral stress and unnecessary discomfort in or about late March 2003 through April 2, 2003, north of Adair, Oklahoma, in willful⁷ violation of sections 2.100(a) and 2.131(a)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(a)(1)).

[9 C.F.R. § 2.131(a)(1) is currently renumbered as 2.131(b)(1).] CX 18, CX 19. Tr. 651-57, 692, 701, 1395.

19. Amanda Sternke's Affidavit (CX 19d), incorporated into her testimony (Tr. 690-92), is credible and includes in part the following, which I adopt as Findings of Fact:

⁷ The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

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When James and Nicole first arrived at Safari Joe's around December of 2002, they were providing adequate amount of meat for their tigers. They normally feed every other day and cleaned every two to three days. By the time that James and Nicole had left they were gone around a month or longer and Nicole had came (*sic*) back for one day to care for the animals, we had been going to a ranch to cut off legs of calves to feed the cats with. After they had left I had been going to the ranch to cut legs, haul them back, and feed them out by myself. After a period of time there were not enough calf legs to adequately feed the cats with. I had brought this to Joe's attention that there was a shortage of meat and that we need to purchase meat in the near future, but nothing was done about it.

On April 2, 2003 Lynda and I went to the barn to water the cats around 1:50 p.m. I had noticed that the tigers were pacing the way that they do when they are hungry. We were watering for approximately 10 minutes before the attack occurred. She was standing in approximately the same spot that I as well as James and Nicole normally stood on numerous occasions. The cats were hungry because they had not been fed in four days due to the shortage of meat. Then while we were watering we were also talking and I had turned around to pick up the water bucket and as I looked back out of the corner of my eye I saw that the white tiger "Splash" was reaching out as far as he could and grabbed Lynda by her jeans with his claws and pulled her to the cage, the second that this had occurred they were all grabbing at her in a feeding-like frenzy. It had recently occurred to me that before the attack had happened they were not cuffing (a sound of contentment) as they normally do. We were both screaming and I tried banging the cage telling them to get back and was trying to pull her away but

it was no good. At one point I almost had her around the waist and she had me around the neck, but because the tigers had claws they pulled us both back against the cage, this is when she reached out with her hand to stop herself and her arm slipped through the holes in the cage . . .

CX 19d.

20. Feeding Violation Proved: The Respondents failed to meet the minimum standards for feeding in or about late March 2003 through April 2, 2003, north of Adair, Oklahoma, by feeding their tigers an insufficient quantity of food, in willful⁸ violation of sections 2.100(a) and 3.129(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.129(a)). CX 19.

Topic Two: the Respondents' placing a 230-235 pound tiger on a human's lap, in El Paso, Texas on April 3, 2002.

21. The photograph created during this April 3, 2002, handling by the Respondents of the 230-235 pound tiger is duplicated from CX 15, p. 2 and attached as Appendix 1. Appendix 1 and CX 15 show Senior Investigator J. David Neal somewhat dwarfed by the tiger.

22. Handling Violation Proved (involving no physical harm): the Respondents failed to maintain minimal risk of harm to the 230-235 pound tiger and to the public (Mr. Neal) on whose lap the tiger was placed. Respondent Ammon, through her agent Respondent Garretson, failed to handle a 230-235 pound tiger during public exhibition so there was minimal risk of harm to the tiger and to the public, when the Respondents placed the 230-235 pound tiger on the lap of a human for a photograph, on April 3, 2002, in El Paso, Texas (at the 21st Century Midway, a fair/carnival-type attraction located in the parking lot at the Cielo Vista Mall), in violation of sections 2.100(a) and 2.131(b)(1) of the

⁸ The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)). CX 15, 16. [9 C.F.R. § 2.131(b)(1) is currently renumbered as 2.131(c)(1).]

23. The Regulations and Standards require sufficient distance and/or barriers between the animals and the general viewing public, which is not the same as the public, as the terms are used in 9 C.F.R. § 2.131(b)(1). I have determined that the two different terms (general viewing public and public) convey two different meanings. Furthermore, APHIS, historically, construed the two different terms differently, as discussed in my decision *Bridgeport Nature Center, Inc., Heidi M. Berry Riggs, and James Lee Riggs, d/b/a Great Cats of the World*,⁹ 65 Agric. Dec. 1039, (2006).

24. Alleged Handling Violation Not Proved: failing to maintain sufficient distance and/or barriers between the tiger and the general viewing public, regarding the 230-235 pound tiger placed on a human's lap. When Respondent Ammon, through her agent Respondent Garretson, placed the 230-235 pound tiger on the lap of a human (Mr. Neal) for a photograph, on April 3, 2002, in El Paso, Texas (at the 21st Century Midway, a fair/carnival-type attraction located in the parking lot at the Cielo Vista Mall), there is no evidence that the Respondents violated that portion 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)) that requires the Respondents to maintain sufficient distance and/or barriers between their animals and the general viewing public. I conclude that the individual who entered the exhibit to have a close encounter with the tiger (Mr. Neal) was a member of the public while inside the exhibit but

⁹ AWA Docket No. 00-0032: my decision is on appeal to the Judicial Officer. See Complainant's Appeal Petition, filed March 15, 2007. My decision is reviewable on the USDA website:
http://www.usda.gov/da/oaljdecisions/initdecisions-archive_pre2007.htm

See AWA Docket No. 00-0032, 65 Agric. Dec. 1039, 1041-43, 1054-57, 1065-68, 1073-77, 1083-84, 1089-95 (2006).

was no longer a member of the general viewing public. Consequently, I conclude that the allegation that the Respondents, by placing the 230-235 pound tiger on the lap of a human for a photograph, 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)) by failing to maintain sufficient distance and/or barriers between the tiger and the general viewing public, was **not proved**. CX 15, CX 16. [9 C.F.R. § 2.131(b)(1) is currently renumbered as 2.131(c)(1).]

Topic Three: the Respondents' additional violations in El Paso, Texas on April 3, 2002.

25. On April 3, 2002, Respondent Ammon, through her agent Respondent Garretson, failed to handle two five-month old tigers and two juvenile bears during public exhibition so there was minimal risk of harm to the tigers, the bears, and to the public (including children and infants), in El Paso, Texas (at the 21st Century Midway, a fair/carnival-type attraction located in the parking lot at the Cielo Vista Mall), in violation of 9 C.F.R. § 2.131(b)(1) (currently renumbered as 2.131(c)(1)). Tr. 307-64, CX 16.

26. On April 3, 2002, Respondent Ammon, through her agent Respondent Garretson, failed to maintain sufficient distance and/or barriers between five adult tigers that they housed in El Paso, Texas (at the 21st Century Midway, a fair/carnival-type attraction located in the parking lot at the Cielo Vista Mall) and the general viewing public, in violation of 9 C.F.R. § 2.131(b)(1) (currently renumbered as 2.131(c)(1)). Tr. 307-64, CX 16.

Topic Four: Respondent Garretson's behavior toward APHIS officials in the course of carrying out their duties.

27. Lt. Kenneth Avinon, Investigation Supervisor, Florida Fish and Wildlife Conservation Commission, testified about his observations of Mr. Garretson's behavior on June 25, 2004. Tr. 82-83.

Lt. Avinon: Dr. Gaj then told Mr. Garretson the reason for the visit, which was he'd give him a cancellation of his USDA permit. At that time Mr. Garretson became very agitated, wadded the notice up and threw it over the fence and began to, cursing Dr. Gaj and the USDA and everybody else he could think of for taking his livelihood away from him and things like that.

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Ms. Carroll: And, anything else you remember about what Mr. Garretson did upon receiving the letter from Dr. Gaj?

Lt. Avinon: Well, besides the verbal abuse that he was giving to Dr. Gaj, he broke down and cried numerous times. There were several times during this whole incident that tempers were right on the edge, and it was my opinion, from my experience in law enforcement, that there was a possibility that Mr. Garretson may take some kind of action against Dr. Gaj; some kind of physical action.

And I, at least twice I can remember stepping between Dr. Gaj and Mr. Garretson to prevent anything from happening to Dr. Gaj. Mr. Garretson never did do anything, but he was to a point that in my opinion I felt that he could.

Ms. Carroll: Was his voice raised?

Lt. Avinon: Extremely.

Ms. Carroll: And was he using profanity?

Lt. Avinon: Absolutely.

Tr. 82-83.

28. Respondent Garretson invested years and money in his animal exhibitions, so it is understandable that he would respond emotionally when confronted with adverse determinations by APHIS. Respondent Garretson's behavior was totally unacceptable, however, on several occasions. Elizabeth Goldentyer, Doctor of Veterinary Medicine (Tr. 1404), the Eastern Regional Director for USDA, APHIS, Animal Care, described Respondent Garretson's behavior on some of those occasions. Tr. 1423-26.

Ms. Carroll: What information did you have or have you had, Dr. Goldentyer, concerning this type of activity by Mr. Garretson?

Dr. Goldentyer: There have been several occasions when Mr. Garretson behaved inappropriately, aggressively, toward the inspectors. It came out in the inspection reports that Mr. Ramsey and Dr. Sabala were asked to leave the premises. Dr. Gaj felt threatened by Mr. Garretson.

.....

In addition, Mr. Garretson on more than occasion called our office, both the Western Regional Office and the Eastern Regional Office, and made

abusive statements to our staff in the offices. Mr. Garretson has called the Headquarters of APHIS and has also made threatening statements.

Mr. Garretson has made threatening statements to me personally that he would take some action to get what he wanted. He's made abusive statements to me and threatened to stay on the phone all day long, threatened to have my job type of thing. Mr. Garretson also threatened to bring his animals up here and set them loose on the National Mall if he was not given his license.

Judge Clifton: Dr. Goldentyer, to whom did he make the statement that he would set his animals loose on the National Mall if he were not given his license?

Dr. Goldentyer: I believe that was to our Headquarters staff. I had a phone message from Dr. Jodie Kulpa-Eddy who I believe was the Acting Staff Director of Animal Care for that day and I have a message from her to that effect that he had threatened to bring the animals here.

....

Judge Clifton: And as far as statements that Mr. Garretson made to you personally, recall as carefully as you can and as closely as you can, what was said?

Dr. Goldentyer: Mr. Garretson, he repeated over and over again that he was being discriminated against by us, that we had no right to not give him his license, that this was inappropriate, discriminating and I remember telling him that he should file a complaint if he was not happy with our actions, that what he needed to do was write that down and send it in and file a complaint. That was not what Mr. Garretson wanted to hear. He hung up on me. I remember that.

He called back, called repeatedly to our office, demanding to speak to me again. I did speak to him and he said he was going to just stay on that telephone all day long, whatever it would take. If he couldn't have that license, he would have my job, that I would be sorry that I discriminated against him and treated him in this way. And I know it went on a lot longer than that but I don't remember any more details.

Judge Clifton: Now you called it abusive. What about those words was abusive or the repetition or the length of time? What about it did you consider to be abusive?

Dr. Goldentyer: The tone. The lying. The language and the demanding, constant phone calls to where it was very disruptive to our office, upsetting our staff

Tr. 1423-26.

29. During May 2002 telephone calls, Respondent Garretson complained of years of “problems” with APHIS, accused APHIS of discriminating against him, announced that he would travel to Fort Collins to “get satisfaction,” and predicted: “Today it will come to an end.” Dr. Raymond Michael Flynn (D.V.M.) testified about the actions that APHIS took in response, including conducting a threat assessment, upgrading security arrangements at the office, and sending out a cautionary message to other office employees. Dr. Flynn thought that Mr. Garretson’s statement “might mean that Mr. Garretson might be contemplating some sort of action against the agency” “Physical threat.” CX 17. Tr. 737-49.

30. Interference Violation Proved: On June 25, 2004, Respondent Garretson, while an applicant for an initial AWA license, threatened, verbally abused, and harassed an APHIS official, Dr. Gaj, in the course of carrying out his duties, at Lake City, Florida, in willful¹⁰ violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). CX 29, Tr. 82-93, 95-96.

31. Interference Violation Proved: On April 10, 2003, Respondent Ammon, through her agent Respondent Garretson, threatened, verbally abused, and harassed APHIS officials (APHIS Animal Care Inspector Roy Ramsey; and Mr. Ramsey’s supervisor, APHIS Supervisory Animal Care Specialist Dr. David Sabala), in the course of carrying out their duties, by loudly arguing and instructing them “not to write this violation up” and abruptly and rudely asking them to leave the premises, north of

¹⁰ The term “willful” used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

Adair, Oklahoma, in willful¹¹ violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). CX 19a, Tr. 606. [APHIS Investigator¹² Lewis Robert (“Bob”) Stiles, Jr., accompanied Inspectors Ramsey and Sabala, carrying out duties on behalf of APHIS.]

32. **Interference Violation Proved:** During May 2002, and particularly on May 20, 2002, Respondent Ammon, through her agent Respondent Garretson, threatened, verbally abused, and harassed APHIS officials in APHIS’s Western Region office in Fort Collins, Colorado, in the course of carrying out their duties, in a series of telephone calls, in willful¹³ violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). Tr. 738-49, CX 17a, CX 17b.

Topic Five: the Respondents’ allowing a tiger cub which appeared to weigh less than 50 pounds to have direct contact with the Respondents’ customers, in Fort Smith, Arkansas, on September 25, 2002.

33. **Alleged Handling Violation (involving no physical harm) Not Proved: the evidence fails to prove more than a minimal risk of harm to the tiger cub and to the public, when the Respondents used a tiger cub which appeared to weigh less than 50 pounds in photographs with the public.** Respondent Ammon and her agent Respondent Garretson handled a tiger cub which “appeared to weigh less than 50 pounds” in photographs with the public on September 25, 2002, at the Arkansas/Oklahoma Fair in Fort Smith, Arkansas. Although the tiger cub was exhibited to the public by placing it in a position to have direct contact with the Respondents’ customers, the evidence fails to

¹¹ The term “willful” used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

¹² APHIS Investigative and Enforcement Services

¹³ The term “willful” used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

prove more than a minimal risk of harm to the tiger cub and to the public; consequently, no violation was proved 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)). CX 16, p. 11. [9 C.F.R. § 2.131(b)(1) is currently renumbered as 2.131(c)(1).]

34. Alleged Handling Violation (involving no physical harm) Not Proved: the evidence fails to prove that the Respondents failed to handle as carefully as possible, so that the tiger cub would not suffer trauma, behavioral stress, physical harm or unnecessary discomfort, the tiger cub which appeared to weigh less than 50 pounds. When Respondent Ammon and her agent Respondent Garretson handled a tiger cub which “appeared to weigh less than 50 pounds” in photographs with the public on September 25, 2002, at the Arkansas/Oklahoma Fair in Fort Smith, Arkansas, the evidence fails to prove that the Respondents failed to handle the tiger cub as carefully as possible, so that the tiger cub would not suffer trauma, behavioral stress, physical harm or unnecessary discomfort; consequently, no violation was proved of sections 2.100(a) and 2.131(a)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(a)(1)). CX 16, p. 11. [9 C.F.R. § 2.131(a)(1) is currently renumbered as 2.131(b)(1).]

Topic Six: Respondent Garretson’s exhibiting animals without holding a license, and without being authorized by a licensee.

35. Respondent Garretson, while anticipating a license being issued to Respondent Ammon, but before that license had been issued, violated 7 U.S.C. § 2149(b) at two events in 2001, failing to obey the cease and desist order issued by the Secretary (*In re James B. Garretson*, CX 1), by exhibiting animals without holding a license, and without being authorized by a licensee.

36. Respondent Ammon was licensed beginning July 10, 2001. Thus, Respondent Garretson was not the agent of licensee Respondent Ammon when he was operating as an exhibitor in 2001 before Respondent Ammon was licensed (on June 9; and on June 30 and July 1).

37. On June 9, 2001, in Dublin, Texas, with Eric Drogosch, Respondent Garretson operated as an exhibitor without a license, doing business as

International Wildlife Refuge, at the Dr. Pepper Bottling Company, in willful¹⁴ violation of 9 C.F.R. § 2.1(a)(1). CX 4. Tr. 713-727.

38. On June 30 - July 1, 2001, in Texas (Cedar Hill area), Respondent Garretson operated as an exhibitor without a license, doing business as International Wildlife Center and as International Wildlife Center Inc., at PETCO, Cedar Hill, in willful¹⁵ violation of 9 C.F.R. § 2.1(a)(1). [Even more alarming to me, Respondent Garretson represented International Wildlife Center Inc. to be a 501(c)(3) non-profit organization, for which contributions would be tax deductible, which was not true; also, International Wildlife Center Inc. was never incorporated.]

CX 5, Tr. 706-711, 392-407.

39. Respondent Ammon was licensed until June 8, 2004. I find that Respondent Garretson operated as Respondent Ammon's agent and consequently did not operate as an exhibitor without a license on April 3, 2002, during exhibition in El Paso, Texas, at Cielo Vista Mall; on September 25, 2002, during exhibition at Fort Smith, Arkansas; and on or about May 3, 2004, during transport of animals for use in exhibition at Attalla, Alabama. Consequently, I find that violations of 9 C.F.R. § 2.1(a)(1) on those occasions were not proved.

Topic Seven: the 2001 inspections, Respondent Ammon's facility (Frost, Texas).

40. When Respondent Ammon's exhibitor license was issued (July 10, 2001), her business (in Frost, Texas) was inspected or investigated four times during the remaining half of 2001:

August 21, 2001 (CX 7, CX 12),

October 2, 2001 (CX 8, CX 12, CX 14),

October 31, 2001 (CX 10-11, Tr. 405-452), and

¹⁴ The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

¹⁵ The term "willful" used here includes such gross neglect of a known duty as to be the equivalent of an intentional misdeed.

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December 19, 2001 (CX 13, CX 14, Tr. 506).

Jeanne M. Kjos, D.V.M. (Tr. 455-560) inspected on August 21, October 2, and December 19. Senior Investigator¹⁶ David Green investigated and took photographs on October 31. Dr. Kjos is, and was during the 2001 inspections, a Veterinary Medical Officer with the United States Department of Agriculture, APHIS, Animal Care. Tr. 457. Dr. Kjos had 15 years experience with Animal Care at the time of the hearing. Tr. 457. Dr. Kjos' testimony that I include hereafter, I adopt as Findings of Fact.

41. The Respondents' lions' small water bucket was dry on October 2, 2001. CX 12, p. 9. Dr. Kjos, the APHIS inspector, who noted the deficiency, is a veterinarian whose opinions are worthy of respect. Dr. Kjos wrote:

The sixth noncompliant item noted on the October 2, 2001, inspection report was Section 3.130 watering. I observed the three adult lions in the north pen having only one small bucket to provide water. This bucket was empty at the time of this inspection. A better system needed to be provided to assure potable water for the three adult lions housed in the north pen. The correction date given for this noncompliant item was October 5, 2001.

CX 12, p. 9.

On October 2, 2001, the Respondents failed to meet the minimum standards for watering animals (three adult lions), in violation of sections 2.100(a) and 3.130 of the Regulations and Standards. 9 C.F.R. §§ 2.100(a) and 3.130.

¹⁶ United States Department of Agriculture, Animal and Plant Health Inspection Service, Investigative and Enforcement Services, Senior Investigator. Tr. 378.

42. Dr. Kjos described weather conditions that necessitated shelter for the animals in Ms. Ammon's Frost location. Tr. 498-99.

Dr. Kjos: In North Texas we can get very cold temperatures, also, and freezing ice. Icy conditions. So they'd also need to get in a box, you know, if the weather turns very inclement. Which it can all in one day go from being a nice beautiful sunny day to very cold, very icy. So it could happen very suddenly.

Judge Clifton: Can you give me an estimate as to how the range of temperatures might be throughout the year or what the range of conditions might be throughout the year?

Dr. Kjos: Are you asking me specifically in December?

Judge Clifton: No, throughout the year. You know, what might you be concerned about in the Fall. What might you be concerned about in the Winter, in the Spring, and so forth.

Dr. Kjos: Well, in the summer quite often we get over 100 degrees. And that's not even, that can be in the shade it can be over 100 degrees. So in the direct sunlight, you know, that's way over 100 degrees in the direct sunlight.

And then in the Winter months we can get down to the single digits. Like I said, and then you add on to that a lot of wind or ice or rain or snow. And then we've got snow. So they can get very inclement, too.

And typically a season of heavy rains in the Spring months, and then another season of heavy rains in the Fall months. Not this year, but typically we do.

Tr. 498-99.

43. The Respondents argue that the animals shared the available shelter, that each animal did not need its own den. I respect Dr. Kjos' judgment and find that the shelter space was inadequate. Tr. 500-01.

Ms. Carroll: Dr. Kjos, do animals also need sufficient space to be able to get away from the other animals if they want to?

Dr. Kjos: Yes. Especially in a breeding situation with, you know, a male and females. Intact animals. I don't remember if these were intact animals.

Ms. Carroll: And --

Dr. Kjos: But the lion might get very possessive of one of the two lionesses or at any one particular time. So there can be an inner aggression even among these animals, depending on the breeding season.

Ms. Carroll: So where the regulation in Section 3.128 refers to normal postural and social adjustments, does the postural mean just the physical ability to stretch out and have space to move around?

Dr. Kjos: Yes.

Ms. Carroll: And the social adjustments, is that what you're referring to about the ability to escape from other animals, if you will?

Dr. Kjos: Yes.

Ms. Carroll: Okay. Let me ask you about the last item on the first page of your inspection report, which is CX-13, page two, about the additional gate to facilitate routine cleaning in the north lion pen. You documented that as not having been corrected since the last inspection?

Dr. Kjos: That's correct.

Ms. Carroll: The next item, outdoor facilities, which is I guess what Judge Clifton was asking you about, the shelter from sunlight?

Dr. Kjos: Yes.

Ms. Carroll: Is that referenced also to the same six tigers that you took the pictures of in the exercise pen, with no shelters or shade?

Dr. Kjos: Yes. Yes, it is.

Tr. 500-01. [*See also* Tr. 494-95.]

44. The property in Frost, Texas used by Respondent Ammon and her agent Respondent Garretson, was purchased by Respondent Ammon's parents in January or February 2001, and remained in her parents' names. Tr. 1025-26. The property, 12 acres, had been an emu farm, and six acres were fenced with chain link. Tr. 1025. There were runs and shelters already there. Tr. 1025-26. Respondent Ammon had a rescue center in mind, intending to take in animals that needed a place to stay. Tr. 1026. There was no electricity at the property when Respondent Ammon moved her trailer house onto the property. Tr. 1027.

45. Respondent Ammon and her agent Respondent Garretson failed to meet the minimum standards for space, in violation of sections 2.100(a)

and 3.128 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.128), in Frost, Texas, on or about the following dates in 2001:

- a. August 21, 2001: Inadequate space for an adult lioness.
- b. October 2, 2001: Inadequate space for six adult lions and three juvenile tigers.
- c. October 31, 2001: Inadequate space for six adult lions and three juvenile tigers.
- d. December 19, 2001: Inadequate space for six adult lions and three juvenile tigers.

46. On August 21, 2001, Respondent Ammon and her agent Respondent Garretson failed to meet the minimum standards for housing for llama and blackbuck antelope, in Frost, Texas, in violation of 9 C.F.R. §§ 2.100(a), 3.125(a). CX 7, CX 12.

47. Respondent Ammon and her agent Respondent Garretson failed to meet the minimum standards for outdoor housing facilities for felids and hoofstock, in violation of sections 2.100(a) and 3.127 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.127), in Frost, Texas, on or about the following dates in 2001:

- a. August 21, 2001: Inadequate shelter for three adult lions (9 C.F.R. § 3.127(b)).
- b. August 21, 2001: Inadequate protection from sunlight for three adult lions (9 C.F.R. § 3.127(a)).
- c. August 21, 2001: Inadequate perimeter fence for three lions (9 C.F.R. § 3.127(d)).
- d. October 2, 2001: Inadequate shelter for six adult lions and three juvenile tigers (9 C.F.R. § 3.127(b)).
- e. October 2, 2001: Inadequate protection from sunlight for three adult lions and three juvenile tigers (9 C.F.R. § 3.127(a)).
- f. October 31, 2001: Inadequate shelter for six adult lions, three juvenile tigers and a llama and a sheep (9 C.F.R. § 3.127(b)).
- g. October 31, 2001: Inadequate protection from sunlight for three adult lions and a llama and a sheep (9 C.F.R. § 3.127(a)).
- h. December 19, 2001: Inadequate perimeter fence for six tigers and one cougar (9 C.F.R. § 3.127(d)).
- i. December 19, 2001: Inadequate protection from sunlight for six adult tigers and three juvenile tigers (9 C.F.R. § 3.127(a)).

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j. December 19, 2001: Inadequate shelter for six adult lions and three juvenile tigers (9 C.F.R. § 3.127(b)).

Tr. 456-560, CX 7, CX 12.

48. The perimeter fence is required to be an eight foot perimeter fence. Tr. 501-02, 504. The Respondents had a six foot perimeter fence.

49. Respondent Ammon took in a variety of animals, including some that were not in good condition. Respondent Ammon thereby assumed the burden to improve their condition, a burden that could be difficult and expensive, requiring intensive nutrition and veterinary care. At times Respondent Ammon and her agent Respondent Garretson failed to carry the burden.

50. Respondent Ammon and her agent Respondent Garretson failed to establish and maintain a program of adequate veterinary care, in violation of section 2.40(b) of the Regulations (9 C.F.R. § 2.40(b)) in Frost, Texas, on or about the following dates:

- a. October 2, 2001 9 C.F.R. § 2.40(b)(2) (inadequate methods to prevent injuries - 1 bear)
- 9 C.F.R. § 2.40(b)(4) (inadequate guidance to personnel regarding handling and care - 1 bear)

51. Respondent Ammon and her agent Respondent Garretson failed to provide adequate veterinary care to animals, in violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a)) in Frost, Texas, on or about the following dates in 2001:

- a. August 21, 2001 (three tigers and one lion);
- b. October 2, 2001 (one lion); and
- c. December 19, 2001 (one tiger, one lion, one cougar).

52. **Not proved:** From the facts before me (CX 12, p. 7, CX 8, p. 11, Tr. 555-56), I do not find a violation on October 2, 2001, of failing to meet the minimum standards for feeding. Respondent Ammon intended, on or about October 2, 2001, to feed the tiger cubs in Frost, Texas, with the chicken in two packages that she was thawing directly on the dirt (instead of thawing in a water bath or refrigerator); one of the packages had a hole in it where one of the dogs had gotten hold of the package. The improper thawing and the hole in the package raise the concern that

the chicken was not “wholesome, palatable, and free from contamination,” as required by sections 2.100(a) and 3.129(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.129(a)). The evidence falls short, however, of proving (by a preponderance) that the chicken was not “wholesome, palatable, and free from contamination.” CX 12, p. 7, CX 8, p. 11, Tr. 555-56.

53. On October 31, 2001, the Respondents failed to meet the minimum standards for dogs, in violation of 9 C.F.R. §§ 3.4(a), 3.4(b), 3.4(b)(3), 3.8.

54. On December 19, 2001, Respondent Ammon and her agent Respondent Garretson failed to meet the minimum standards for housekeeping at Frost, Texas, because they cluttered the food storage area with non-food paraphernalia (Tr. 502, CX 13, p. 24); and they used the shelter structure for a llama, pig, cow, and sheep to store unused building supplies, equipment, and other paraphernalia (Tr. 503, CX 13, p. 23); in violation of 9 C.F.R. § 2.100(a) 9 C.F.R. § 3.131(c).

55. Not Proved: alleged handling violation on December 19, 2001, involving no physical harm; six tigers in exercise pen at home facility in Frost, Texas. Respondent Ammon and her agent Respondent Garretson kept six tigers in an enclosure made of cattle fencing (with 8” high openings) without a perimeter fence on December 19, 2001, at the home facility in Frost, Texas. [The Respondents did have a six foot high perimeter fence, but an eight foot high perimeter fence is required.] December 19, 2001 was a day that Veterinary Medical Officer Jeanne Kjos inspected Respondent Ammon’s facility, after Respondent Ammon permitted her access through a locked gate;¹⁷ the evidence fails to show any exhibiting to the public or presence of others on December 19, 2001. Alleged handling violations assert that the six tigers were exhibited to the public; that exhibiting six juvenile tigers in enclosures constructed of cattle fencing, with insufficient distance and/or barriers between the animals and the public, would permit the animals to have direct contact

¹⁷ Dr. Kjos wrote facilities violations, not handling violations.

with people (and vice versa). While I agree that close proximity of any human to the tigers' enclosure would likely have been dangerous, presenting more than a minimal risk of harm to the tigers and to the public, I conclude that no violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)) on December 19, 2001 was proved; the missing element is the close proximity of any human. CX 13. [9 C.F.R. § 2.131(b)(1) is currently renumbered as 2.131(c)(1).]

Topic Eight: Respondent Ammon's failure to readily disclose three tiger cubs, on August 21, 2001, during inspection at Respondent Ammon's facility (Frost, Texas).

56. On August 21, 2001, Respondent Ammon failed to show three tiger cubs to Dr. Kjos and Dr. Sabala while they were inspecting Respondent Ammon's facility in Frost, Texas, having denied at least twice that they (she and her agent Respondent Garretson) had any other animals, until asked directly where the tiger cubs were located. The three tiger cubs were in outdoor pens outside Respondent Ammon's trailer house on the back of the property. The three tiger cubs appeared thin, especially Kojac, and in need of being seen by a veterinarian. Respondent Ammon's failure to readily disclose the tiger cubs is a form of untruthfulness to the APHIS inspectors. Tr. 477-479. CX 7, CX 12, p. 5.

Topic Nine: Respondent Garretson's additional violations on June 30 - July 1, 2001, at PETCO Cedar Hill, Texas.

57. On June 30 - July 1, 2001, Respondent Garretson allowed the public to have direct contact with very young (six-week old) tigers, allowing customers to play with the tigers, and exhibiting the tigers in a manner and for periods of time inconsistent with their good health and well-being, in violation of 9 C.F.R. § 2.131(a)(1) (currently renumbered as 2.131(b)(1)); and in violation of 9 C.F.R. § 2.131(b)(1) (currently renumbered as 2.131(c)(1)); and in violation of 9 C.F.R. § 2.131(b)(3) (currently renumbered as 2.131(d)(3)). CX 5, Tr. 706-711, 392-407.

Topic Ten: the April 10, 2003 inspection, north of Adair, Oklahoma.

58. On April 10, 2003, Respondent Ammon and her agent Respondent Garretson failed to meet the minimum standards for housing for tigers,

north of Adair, Oklahoma, because the perimeter fence they provided for their tigers was inadequate, in violation of sections 2.100(a) and 3.127(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.127(d)). Tr. 601-627, CX 19a.

59. On April 10, 2003, Respondent Ammon and her agent Respondent Garretson failed to meet the minimum standards for housing for lions, north of Adair, Oklahoma, because they housed two juvenile lions in a travel crate that measured 4 feet by 7 feet which did not allow the lions adequate space or freedom of movement, in violation of sections 2.100(a) and 3.128 of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.128). Tr. 601-627, CX 19a.

60. On April 10, 2003, Respondent Ammon and her agent Respondent Garretson failed to make, keep and maintain records, in violation of sections 2.100(a) and 2.75(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.75(b)(1)). Tr. 601-627, CX 19a.

Topic Eleven: additional alleged violations in 2003 and 2004.

61. On or about the following dates, the Respondents failed to provide adequate veterinary care to animals, in violation of 9 C.F.R. § 2.40(a):

- a. April 10, 2003 (two lions);
- b. January 5, 2004 (one tiger); and
- c. March 7, 2004 (one bear, one wolf-hybrid, one tiger).

62. On March 7, 2004, respondents failing to employ an attending veterinarian, as required, in violation of 9 C.F.R. § 2.40(a)(1).

63. On the following dates, the Respondents failed to establish and maintain a program of adequate veterinary care, in violation of 9 C.F.R. § 2.40(b), by :

- a. March 1 - April 2, 2003 9 C.F.R. § 2.40(b)(1) (inadequate personnel, facilities and equipment - 2 lions and 9 tigers)
9 C.F.R. § 2.40(b)(4) (inadequate guidance to personnel regarding handling and care - 2 lions and 9 tigers)
- b. March 7, 2004 9 C.F.R. § 2.40(b)(1) (inadequate facilities and equipment - 11 tigers, 1 bear, 1 lion, 1 wolf-dog hybrid)

64. On or about March 3, 2004, the Respondents failed to meet the minimum standards for transportation because the lion being transported in a trailer was exposed to holes in the wall; and the bears being

transported in a trailer were exposed to holes in the door, in violation of 9 C.F.R. §§ 2.100(a), 3.138(a). CX 27.

65. The Respondents failed to meet the minimum standards for feeding on or about March 7, 2004, in Florida, at the Volusia County Fairgrounds, by feeding their tigers an unbalanced diet of only chicken and beef, with no dietary or vitamin-mineral supplement to prevent the occurrence of metabolic disease, in violation of sections 2.100(a) and 3.129(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.129(a)). CX 27

Topic Twelve: Respondent Garretson's Truthfulness June 8, 2004, in Attalla, Alabama

66. APHIS has indicated that Respondent Garretson was not truthful in response to APHIS inquiries on June 8, 2004, in Attalla, Alabama, at Ty Harris's property, during a prelicense inspection by APHIS. APHIS believes that Respondent Garretson did not reveal 3 of his tigers, which were in poor condition. *See* CX 39, admitted into evidence in part (all, except for the first 2 paragraphs under Comments) and rejected in part (the first 2 paragraphs under Comments) Tr. 1434-1439. On cross-examination (Tr. 1228), Ms. Carroll questioned Respondent Garretson: Ms. Carroll: And you said you had no other animals, but in fact you had tigers that you had placed in another area at Mr. -- at Mr. Harris'. Isn't that correct?

Tr. 1228.

67. In response, Respondent Garretson testified that he "had given Ty Harris those tigers." Tr. 1228. Mr. Garretson had also stated in a July 12, 2004 interview that he gave the tigers to Ty Harris "(t)he first of May, before the inspection." CX 28b, p. 11. Ty Harris did not testify, but his Affidavit is in evidence, although he was not available for cross-examination. As Mr. Harris's Affidavit states (CX 28a), Respondent Garretson had given Mr. Harris the four young tigers. The four young tigers were in terrible condition (CX 28a) when Respondent Garretson brought them to Ty Harris's property, and Ty Harris's intervention was of great benefit to the four young tigers.

68. I conclude that Respondent Garretson was truthful, that the young tigers were not in Respondent Garretson's inventory during the June 8, 2004 inspection; that he had previously given the four young tigers to Ty Harris. Thus, during the prelicense inspection on June 8, 2004, Respondent Garretson was not required to disclose the three young tigers that remained on Ty Harris's property (one of the four, Emma, was at Central Valley Animal Hospital).

Topic Thirteen: Respondent Garretson's Prior Enforcement Action

69. This is the second enforcement action brought against Respondent Garretson for failing to comply with the Act, the Regulations and the Standards. CX 1.

Topic Fourteen: Respondent Garretson's "Alter Ego"?

70. APHIS asks me to find that Jungle Paradise Zoo, Inc., an Animal Welfare Act licensee beginning about September 20, 2005, is an alter ego of Respondent Garretson. I do not so find. Respondent Garretson was the moving force behind Jungle Paradise Zoo, Inc., and Respondent Garretson's method of operating with Ms. Nicole H. Demers appeared to me to be similar to his method of operating with Respondent Ammon. I find that Ms. Nicole H. Demers was a significant participant in the activities of Jungle Paradise Zoo, Inc., and in providing the real estate occupied by the animals, so significant as to preclude my finding that Jungle Paradise Zoo, Inc., is an alter ego of Respondent Garretson. Whether Sandra J. Garretson (Respondent Garretson's mother) participated significantly in Jungle Paradise Zoo, Inc., is unknown to me. What the corporate records would reveal is unknown to me. The evidence before me is inadequate to find that Jungle Paradise Zoo, Inc., is an alter ego of Respondent Garretson.

Discussion

71. Elizabeth Goldentyer, Doctor of Veterinary Medicine (Tr. 1404), having heard the testimony from the outset of the hearing (Tr. 1406), provided APHIS's rebuttal testimony. Tr. 1404-1507. Dr. Goldentyer is

the Eastern Regional Director for USDA, APHIS, Animal Care. Dr. Goldentyer explained, in general terms, the impact of behavior such as that in evidence of Respondent Ammon and Respondent Garretson. Tr. 1431-34.

Ms. Carroll: Is it a problem as far as enforcement of the Animal Welfare Act when a dealer or exhibitor is verbally abusive to inspectors?

Dr. Goldentyer: Yes, it is a problem.

Ms. Carroll: Why?

Dr. Goldentyer: Well, it's a problem because we have to be concerned about the safety of our inspectors. So we have to send more than one person which takes some coordination since the inspectors are spread out throughout the country. So we have to get people together so that no one is going by themselves which means it's harder to get these inspections done.

It's also very difficult to be able to look at the facilities and calmly evaluate what's going on, ask questions so that you understand what the circumstances are and get answers so that you can make a decision about compliance. If you are having to be subject to this kind of verbal abuse and kind of behavior, it really makes it very difficult to do a good inspection.

Ms. Carroll: And you heard testimony from Dr. Kjos and I should, I'll just mention that Dr. Kjos specifically, about the inquiry she made about the bear that had apparently died and also notation that she made regarding tiger cubs that were not presented for inspection until she pressed Ms. Ammon and Mr. Garretson about their whereabouts. Is it a problem as far as enforcement of the Animal Welfare Act for the Agency when there is apparently, when licensees or exhibitors or dealers are not forthcoming and forthright with the Agency?

Dr. Goldentyer: Yes. When an inspector is out there, they're really seeing a snapshot of the facility. They are going through and trying to make decisions about the care and use of the animals that they're seeing in one moment in time. They have to be able to get good information about what's going on with these animals and if it's conflicting information, if it's just whatever is a convenient answer, if they are not

shown all the animals or they're not shown all the facilities, all the places where food is stored or something, it's virtually impossible for the inspector to be able to do a good inspection, evaluate the facility and make sure that the animals are getting good care.

Ms. Carroll: And what about the Agency's ability to trust what exhibitors and dealers are telling them about their facility and their animals and their records and their set-up, is it a problem when it appears that a dealer and an exhibitor is not truthful?

Dr. Goldentyer: Well, it brings into question all of the information that you're getting about the animals and their care if you're not getting accurate information about what's going on. Particularly if on top of not getting accurate information verbally during the inspection, you don't have good medical records that make sense to help you validate the fact that there is care given. You really have no way of knowing whether there's any care or not. And if you add that to seeing animals that need care, it really brings into question the whole management of the facility and it's clearly a violation not to give the inspector accurate information about what's going on.

Tr. 1431-34.

72. Dr. Goldentyer has expressed precisely why being responsible and trustworthy are essential attributes of an Animal Welfare Act licensee who will perform the duties that are required. The following excerpt from Ms. Ammon's testimony reveals to me a lack of being responsible and trustworthy. This testimony is found at Tr. 1200-09.

73. ALJ: I'd like you to respond to one of the sentences in Ms. Sternke's affidavit, if you will, that's on --

Ms. Ammon: Okay.

ALJ: RX 16, page seven. When you come down in the first full paragraph to about the fourth line, and it says the cats were hungry, because they had not been fed in four days due to shortage of meat, were you aware of any shortage of meat at about that time?

Ms. Ammon: No. I was also not aware that Lynda Brackett was going to be anywhere near my cats. I did not know she was hired. We wouldn't -- we did not hire her. I did not say let's have Lynda Brackett come and help Amanda with my cats. I did not instruct Lynda Brackett to be anywhere near my cats. I didn't show her how to water my cats. I

didn't show her how to feed my cats. Four days is not that long of a time for a tiger -- normally you would fast -- one to two days a week is normal. Four days I know is longer than two days or a -- a day, but that's not enough for them to -- health wise, they were not written up for being thin or malnourished. They didn't write up in any report that I saw that they were too skinny or thin. We had been feeding them meat -- red meat from cow legs that were at least 20 to 40 pounds. And then they'd go to -- once that dropped off, they would go back to chicken legs. And we would normally feed them 10 pounds, 10 to 15 pounds. Some of the males got a little bit more. So they were basically just gorging out. We were feeding them a lot of meat, and then all of a sudden, they had to go back to eating about 10 or 15 pounds apiece. So -- I mean they're going to -- it's going to be a little harder to, you know, if you start -- like Thanksgiving and Christmas when people eat a lot, and then they have to go back to oh, we got to not eat as much. So when anybody came into that barn, it was either to feed or to water or to clean. So, of course, they're going to think every time somebody comes, they're going to think it's time to eat. Every time Amanda would back her truck up into that barn, they would start pacing, because they knew it was about time to eat. So anytime they saw us, they were basically getting fed, or getting water, or getting something, because -- you know, normally in our exhibits that we would do all year, they would just lay there, and they'd see millions of people all day long, and they won't care. but when in this situation, they didn't see anybody else but us, and most of the time when they saw us, we were either feeding or cleaning or giving them water. So they're going to start pacing, and they're going to think something's going to happen because there's -- there's people. I was not aware there was a shortage of meat. There was 26 cats, so I'm not sure who was getting the majority of the meat or whatnot.

ALJ: Was the money you sent from Brownsville the last money you sent for food?

Ms. Ammon: Yes. As far as I know, yes.

ALJ: And was that about a month before the incident? A month or more?

Ms. Ammon: February -- somewhere in between February -- it would have been either the first, after the first or second weekend.

ALJ: Do you recall how much money you sent?

Ms. Ammon: It was a thousand dollars cash, Western Union. And I believe I showed Mr. -- or Bob Stiles the receipt. I don't have it now, but I believe when I did my affidavits, I showed him the Western Union receipts.

ALJ: And how long did you expect that to last?

Ms. Ammon: I don't know. I don't remember. He was getting -- I don't remember how much -- how many cents a pound, but he had a pretty good supplier of chicken leg quarters out of Tulsa, and I'm not really sure. I had not gone there. I know Mr. Garretson had picked up meat there before, but I had not typically gone to pick up the meat, so I'm not sure about how much it was.

ALJ: Did you have any conversation with Mr. Estes as to how far -- how long that thousand dollars was expected to last?

Ms. Ammon: No. I didn't actually speak with Mr. Estes that much. Most of it was -- he would talk to Mr. Garretson directly unless I was there because -- except the whole time I was there at his facility, because we would talk to him every day until when we left. Most of the time it was Mr. Garretson that called him, not me so.

ALJ: Do you have any evidence that Mr. Garretson called him during the month of absence?

Ms. Ammon: Oh, when he called me and I would talk to Safari Joe -- I'm just saying when we had both gone together, Mr. Estes would usually talk to Mr. Garretson. I'm not sure if he called him -- I'm -- I'm sure he called him. I don't have evidence that he called him, but I mean I would talk to Joe every day when I was on the property, and I would stay in contact with James by phone every time he was gone.

ALJ: And when you were also gone, did you have any conversation with Mr. Estes?

Ms. Ammon: Not -- that's what I'm saying. Not as much. It would be through James or, you know, like I -- I wouldn't call him usually up myself. James would talk to him or I would talk to them while he was on the phone.

ALJ: What were your instructions to Amanda Sternke as to how often to feed the big cats?

Ms. Ammon: It really just depended on the meat and what they were going to feed. We mostly -- when we did the cow legs, it was Monday through Friday, we would go and get them. So being fed that much, they wouldn't have to be fed every day, and that's why some of the days we missed, because we couldn't go out there, because it took too long to do it. It was just whenever they had -- I don't recall actually saying, you know, feed on this particular day or these particular days.

ALJ: When you heard that your cats had not been fed in four days, were you upset?

Ms. Ammon: Yes. I -- I mean I don't even think I actually ever was told that until, I believe, I think -- I don't know if I read it from Amanda. I'd-- I'd not -- had not talked to Amanda myself directly after the accident. I know she had spoken with Mr. Estes and Mr. Garretson and had heard stuff through them. So I never heard it directly from her how they were being fed or what they were being fed or how often.

ALJ: Did you have any way to call her when you were away?

Ms. Ammon: I'm talking about after the accident when she had left.

ALJ: And I'm talking about --

Ms. Ammon: Yes.

ALJ: -- before the --

Ms. Ammon: Yes.

ALJ: accident. Did you have

Ms. Ammon: -- Yes.

ALJ: -- any way to get a hold of her

Ms. Ammon: Yes.

ALJ: What was that? How would you reach her?

Ms. Ammon: The direct line that went to the trailer that we were staying in. I don't remember the phone number, but it's different than Safari Joe's cell phone number.

ALJ: And -- and she stayed there, too?

Ms. Ammon: Yes. There's a trailer that she was staying in that was separate from Safari Joe's house, and then when we stayed there, we stayed in the trailer with -- where Amanda was -- we're living.

ALJ: How often did you communicate with her, for example, while you were in Brownsville, Texas?

Ms. Ammon: I don't think -- I don't think I had called her directly. We spoke mostly through Mr. Estes.

ALJ: All right.

Ms. Ammon: When I came back, you know, we would -- I helped her with a bunch of things, and she helped me clean the cats and whatnot.

ALJ: And in -- while you were in Sarasota, Florida, how often did you contact Amanda Sternke, if you recall?

Ms. Ammon: I don't recall. I think most of it was through Mr. Estes. We talked to him, maybe not on a daily basis, but I know we talked to him often. I don't think I specifically called Amanda herself.

ALJ: When you say often, how often do you think you are aware of you or Mr. Garretson talking with Mr. Estes about your cats during the time you were in Sarasota?

Ms. Ammon: I don't know. That's hard to say. Because we -- Mr. Garretson and myself both had different cell phones, so I don't know exactly --

Tr. 1200-09.

74. Dr. Goldentyer's testimony that the Respondents' provisions for their animals in Adair, Oklahoma were deficient is found at Tr. 1411-14:

Ms. Carroll: Let me ask you . . . the issue of careful handling of dangerous animals like tigers. Why is that important?

Dr. Goldentyer: Tigers as we've heard are incredibly dangerous and they can even just in an instant cause tremendous damage to each other, to people, any other animal that comes in contact with them. Often times when a large cat is involved in some kind of an incident that results in injury to a person, there is consequences to the animal. Either some of them have to be euthanized. Some of them have to be housed separately or they don't get adequate care after that kind of thing happens. So really to assure the humane care and use of the animal, you have to protect both the animal and any people that are going to come in contact with the animal.

Ms. Carroll: Not just customers?

Dr. Goldentyer: Anyone that would come in contact with the animal.

Ms. Carroll: Do you have an opinion about whether the Respondents' decisions in connection with the housing and care of the animals in Adair, Oklahoma met the regulation requirements as far as care and prevention of injury?

Dr. Goldentyer: Yes.

Ms. Carroll: What's the basis for your opinion?

Dr. Goldentyer: Well, based on my understanding of these animals and the testimony that I've heard and my understanding of the regulations.

Ms. Carroll: And what is your opinion?

Dr. Goldentyer: These animals were not handled appropriately.

Ms. Carroll: Why not?

Dr. Goldentyer: There was insufficient personnel there to adequately get them fed, get them handled so as to avoid any injury, insufficient barriers and distance to keep people safe.

Ms. Carroll: Even people who worked there?

Dr. Goldentyer: Yes.

Ms. Carroll: What about the ability of the barn itself to prevent people from coming in? Does that play a part?

Dr. Goldentyer: In my opinion, the barn was not adequately secured to protect both the people and the animals.

Ms. Carroll: What kinds of things could Respondents have done to handle the animals more carefully in that circumstance in Adair?

Dr. Goldentyer: There are a lot of things that they could have done. There is fencing and other types of security, securing the door. There are locks, attendants. There are a lot of things you can do to make an area secure so that there is no chance of someone getting in there or getting in there inappropriately.

Ms. Carroll: Do you have an opinion whether leaving one's animals to the care of persons not under your control constitutes careful handling?

Dr. Goldentyer: Yes.

Ms. Carroll: And the basis for your opinion?

Dr. Goldentyer: Well, my understanding of the regulations and the care that's required for these animals, it's not careful handling to leave these animals like that. A lot of things can happen. You have to be able to respond to assure that nothing bad happens to them. You can't just depend on someone else to take the responsibility. These animals are a huge responsibility and as an owner and exhibitor of these animals, you're responsible for them and you need to provide for them. It's inappropriate and inadequate handling to go off and do something else and leave those animals behind without adequate care.

Tr. 1411-14.

75. Respondent Ammon's behavior showed, at times, a failure to appreciate the needs of the animals and a failure to accept correction from APHIS officials. Respondent Ammon's failures resulted not only from inadequate funds, a contributing factor, but also from her failure to take charge of the business that she operated under the license issued to her. Respondent Ammon was responsible for the activities undertaken under her Animal Welfare Act license, but Respondent Ammon's testimony reveals her dependence and her failure to take responsibility as required to manage the magnificent but very expensive and time consuming animals. Respondent Ammon relied heavily on Respondent Garretson and his contacts among exhibitors, including, for example, Mr. Joseph M. ("Joe") Estes, also known as "Safari Joe" (CX 2, CX 19, CX 24), Mr. Eric John Drogosch (CX 4); and Mr. Marcus Cook (Tr. 929-933).

76. The Respondents did correct many mistaken practices but nevertheless repeatedly failed to accept and exercise the responsibility that must be exercised to remain in compliance with the Animal Welfare Act. It is striking that Respondent Ammon, in her Declaration filed May 31, 2006, so frequently refers to the alleged violations as minuscule. I conclude that Animal Welfare Act license revocation and the other remedies found in my Order (paragraphs 77 through 89) are necessary, and that lesser remedies would not be adequate

Order

77. Animal Welfare Act license number 74-C-0521, issued to Respondent “Nicole Ammon dba: International Wildlife Ctr.,” is **revoked**, effective on the day after this Decision becomes final.¹⁸ [Respondent Ammon’s Animal Welfare Act license has not been valid since June 8, 2004; license revocation is nevertheless the appropriate remedy.¹⁹] Further, Respondent Ammon’s privilege to engage in activities that require an Animal Welfare Act license is **revoked**, effective on the day after this Decision becomes final. [See footnote 18.]

78. Further, Respondent Ammon is permanently disqualified from becoming licensed under the Animal Welfare Act or from otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly, or through any corporate or other device or person, effective on the day after this Decision becomes final. [See footnote 18.]

79. Under the Animal Welfare Act, revocations and permanent disqualifications are equally permanent. If the revocations and permanent disqualifications specified in paragraphs 77 through 78 are vacated on appeal or for any other reason, no Animal Welfare Act license shall be issued to Respondent Ammon until she has met all requirements of the Animal Welfare Act, the Regulations (including but not limited to 9 C.F.R. §§ 2.1 through 2.12), and the Standards; until she has fully met her obligation to pay civil penalties imposed under the Animal Welfare Act; until she has established a pattern of

¹⁸ See paragraph 90. to determine the day on which this Decision becomes final.

¹⁹ See *Eric John Drogosch, et al.*, 63 Agric. Dec. 623, 648-49 (2004), in which the Judicial Officer concluded that if a person holds a valid Animal Welfare Act license at the time he or she violates the Animal Welfare Act or the Regulations and Standards, the Secretary of Agriculture is authorized by section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) to revoke that violator’s Animal Welfare Act license even if the violator’s Animal Welfare Act license is cancelled prior to revocation.

trustworthiness in meeting obligations similar to those imposed upon Animal Welfare Act licensees; and until she has established a pattern of cooperation with authorities who have functions similar to those of APHIS officials.

80. Respondent James Brandon Garretson will not be licensed during the revocation described in paragraph 77 because Respondent Garretson was Respondent Ammon's agent who was responsible for or participated in the violations upon which Respondent Ammon's license revocation is based. *See* section 2.9 of the Regulations (9 C.F.R. § 2.9). [On January 10, 2006, I entered a "failure to appear" Decision and Order, filed January 12, 2006, which contained no provisions such as those contained in this paragraph. If it is found on appeal that I erred on January 11, 2006, when I set aside the "failure to appear" Decision and Order (Tr. 253), then the remedies entered on January 10, 2006 regarding Respondent Garretson will control; the provisions contained in this paragraph will be stricken from the within Order.]

81. Further, Respondent Garretson's privilege to engage in activities that require an Animal Welfare Act license is **revoked**, effective on the day after this Decision becomes final. [See footnote 18.] [On January 10, 2006, I entered a "failure to appear" Decision and Order, filed January 12, 2006, which contained no provisions such as those contained in this paragraph. If it is found on appeal that I erred on January 11, 2006, when I set aside the "failure to appear" Decision and Order (Tr. 253), then the remedies entered on January 10, 2006 regarding Respondent Garretson will control; the provisions contained in this paragraph will be stricken from the within Order.]

82. Further, Respondent Garretson is permanently disqualified from becoming licensed under the Animal Welfare Act or from otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly, or through any corporate or other device or person, effective on the day after this Decision becomes final. [See footnote 18.]

83. Under the Animal Welfare Act, revocations and permanent disqualifications are equally permanent. If the revocations and permanent disqualifications specified in paragraphs 80 through 82 are vacated on appeal or for any other reason, no Animal Welfare Act license shall be issued to Respondent Garretson until he has met all

requirements of the Animal Welfare Act, the Regulations (including but not limited to 9 C.F.R. §§ 2.1 through 2.12), and the Standards; until he has fully met his obligation to pay civil penalties imposed under the Animal Welfare Act; until he has established a pattern of trustworthiness in meeting obligations similar to those imposed upon Animal Welfare Act licensees; and until he has established a pattern of cooperation with authorities who have functions similar to those of APHIS officials. [On January 10, 2006, I entered a “failure to appear” Decision and Order, filed January 12, 2006, which contained no provisions such as those contained in this paragraph. If it is found on appeal that I erred on January 11, 2006, when I set aside the “failure to appear” Decision and Order (Tr. 253), then the remedies entered on January 10, 2006 regarding Respondent Garretson will control; the provisions contained in this paragraph will be stricken from the within Order.]

84. The following **cease and desist** provisions of this Order (paragraphs 85 and 86) shall be effective on the day after this Decision becomes final. [See footnote 18.]

85. Respondent Nicole Lynette Ammon, Respondent James Brandon Garretson, and her/his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder.

86. Respondent Nicole Lynette Ammon, Respondent James Brandon Garretson, and her/his 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.

87. Respondent Nicole Lynette Ammon is assessed a civil penalty of **\$20,940**, which she shall pay by certified check(s), cashier’s check(s), or money order(s), made payable to the order of “**Treasurer of the United States**,” within 60 days after this Decision becomes final. [See footnote 18.]

88. Respondent James Brandon Garretson is assessed a civil penalty of **\$32,560**, to 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,**” within 60 days after this Decision becomes final. [See footnote 18.] [On January 10, 2006, I entered a “failure to appear” Decision and Order, filed January 12, 2006, which assessed Respondent Garretson a civil penalty of \$15,000. If it is found on appeal that I erred when I set aside the “failure to appear” Decision and Order, on January 11, 2006 (Tr. 253), then the remedies entered on January 10, 2006 regarding Respondent Garretson will control; the provisions contained in this paragraph will be stricken from the within Order.]

89. Respondents shall reference **AWA Docket No. 04-A032** on their certified check(s), cashier’s check(s), or money order(s). Payments of the civil penalties **shall be sent by a commercial delivery service, such as FedEx or UPS**, to, and received by, Colleen A. Carroll, Esq., at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Colleen A. Carroll, Esq.
South Building, Room 2343, Stop 1417
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1417.

Finality

90. 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 3).

91. Respondent Garretson sent me email, several times, without copying Ms. Ammon or Ms. Carroll or the Legal Secretary who works with me, while I was working on this Decision and Order. Respondent Garretson’s emails that failed to copy the other parties and the Legal Secretary are *ex parte* communications with the judge, forbidden by section 1.151 of the Rules of Practice (7 C.F.R. § 1.151). I had previously instructed Respondent Garretson to copy the other parties and the Legal Secretary on any email to me. *Ex parte* emails from Respondent Garretson came so frequently beginning in mid-November

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2006, that I chose not to take the time to forward them to the other parties; I have ignored them for the purpose of my Decision and Order. Copies of those *ex parte* emails from Respondent Garretson are attached as Appendix 2, so that the parties are aware of them, and so that, if any party wishes to address the *ex parte* emails in an appeal to the Judicial Officer, that party may do so.

Copies of this Decision and Order, including the 4 appendices, shall be served by the Hearing Clerk upon each of the parties. Attention, Hearing Clerk: Nicole Lynette Ammon's current record address is 225 NE 1st Street, High Springs, Florida 32643 (the zip code is mistaken in Respondent Ammon's filed email, dated April 26, 2006); James Brandon Garretson's current record address is 763 SW Churchill Way, Lake City, Florida 32025. The appendices shall be omitted by the *Agriculture Decisions* Editor, from *Agriculture Decisions* (books and CDs), and from the USDA website.

In re: JEROME SCHMIDT, d/b/a TOP OF THE OZARK AUCTION.

AWA Docket No. 05-0019.

Decision and Order.

Filed March 26, 2007.

AWA – Animal Welfare Act – Burden of proof – Preponderance of the evidence – Selective enforcement – Frequency of inspections – Inspections unaccompanied by licensees – Post-inspection exit briefings – Public officers presumed to properly discharge duties – Authority of administrative law judge.

The Judicial Officer reversed Administrative Law Judge Peter M. Davenport's (ALJ) decision dismissing the Complaint. The Judicial Officer concluded the Administrator proved by a preponderance of the evidence that Dr. Schmidt committed 30 violations of the regulations and standards issued under the Animal Welfare Act (Regulations and Standards), assessed a \$6,800 civil penalty against Dr. Schmidt, and ordered Dr. Schmidt to cease and desist from violations of the Regulations and Standards. The Judicial Officer concluded Dr. Schmidt was not the subject of selective enforcement; held there were no limits under the Animal Welfare Act on the frequency with which the Secretary of Agriculture could inspect an Animal Welfare Act dealer's place of business, facilities,

and animals; held, prior to August 13, 2004, there was no requirement that an Animal Welfare Act dealer make a responsible adult available to accompany USDA inspectors during the inspection process; held USDA inspectors were not required by the *Animal Care Resource Guide, Dealer Inspection Guide* to conduct post-inspection exit briefings with Animal Welfare Act dealers or their designated representatives; and held, absent clear evidence to the contrary, USDA inspectors are presumed to have properly discharged their duty to accurately document violations of the Animal Welfare Act. The Judicial Officer also held the ALJ did not have authority to direct the Administrator to take corrective action with respect to future inspections conducted under the Animal Welfare Act.

Frank Martin, Jr., 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 the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on June 22, 2005. The Administrator 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].

The Administrator alleged that on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Jerome Schmidt, d/b/a Top of the Ozark Auction [hereinafter

Dr. Schmidt], willfully violated the Regulations and Standards.¹ On July 18, 2005, Dr. Schmidt filed an answer denying the material allegations of the Complaint.

On December 6, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a hearing in Springfield, Missouri. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Dr. Schmidt appeared pro se, assisted by his wife, Karen Schmidt. The Administrator called four witnesses; Dr. Schmidt called 12 witnesses, including himself; and the ALJ admitted 28 exhibits into evidence, all of which were introduced by the Administrator.

On February 10, 2006, after the Administrator and Dr. Schmidt filed post-hearing briefs, the ALJ filed a Decision and Order [hereinafter Initial Decision] dismissing the Complaint and directing the Administrator “to take appropriate corrective action to insure that published Departmental policy and procedures as expressed in the *Federal Register* and the Animal Care Resource Guide, Dealer Inspection Guide are followed by APHIS personnel in future inspections.”²

On April 11, 2006, the Administrator appealed to the Judicial Officer.³ On May 19, 2006, Dr. Schmidt filed a response to the Administrator’s appeal petition.⁴ On May 22, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ’s

¹ Compl. ¶¶ II-XI.

² Initial Decision at 11.

³ Complainant’s Appeal of the ALJ’s Decision and Order, and Brief in Support Thereof [hereinafter Appeal Petition].

⁴ Respondent’s Response to Complainant’s Appeal of Administrative Law Judge’s Decision and Order.

February 10, 2006, Initial Decision. Therefore, I reverse the ALJ's Initial Decision. The Administrator's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 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 A—LICENSING

....

§ 2.4 Non-interference with APHIS officials.

A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

....

Subpart 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.

(b) The use of a room, table, or other facilities necessary for

the proper examination of the records and inspection of the property or animals must be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

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:

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

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

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

(3) *Cleaning.* Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in § 3.11(b)(3) for primary enclosures.

(d) *Water and electric power.* The housing facility must have reliable electric power adequate for heating, cooling, ventilation, and lighting, and for carrying out other husbandry requirements in accordance with the regulations in this subpart. The housing facility must provide adequate running potable water for the dogs' and cats' drinking needs, for cleaning, and for carrying out other husbandry requirements.

.....
(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation,

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

§ 3.6 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;

. . . .

(iii) Contain the dogs and cats securely;

. . . .

(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). On or after January 21,

2000, all primary enclosures must be in compliance with the requirements in this paragraph (a)(2). If the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than $\frac{1}{8}$ 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.

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.

....

TRANSPORTATION STANDARDS

....

§ 3.14 Primary enclosures used to transport live dogs and cats.

Any person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) must not transport or deliver for transport in commerce a dog or cat unless the following requirements are met:

(a) *Construction of primary enclosures.* The dog or cat must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate. Primary enclosures used to transport dogs and cats must be constructed so that:

....

(9) The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray under a slatted or mesh floor that prevents seepage of waste products, such as excreta and body fluids, outside of the enclosure. If a slatted or mesh floor is used in the enclosure, it must be designed and constructed so that the

animal cannot put any part of its body between the slats or through the holes in the mesh. Unless the dogs and cats are on raised slatted floors or raised floors made of mesh, the primary enclosure must contain enough previously unused litter to absorb and cover excreta. The litter must be of a suitably absorbent material that is safe and nontoxic to the dogs and cats.

.....
(e) *Space and placement.* (1) Primary enclosures used to transport live dogs and cats must be large enough to ensure that each animal contained in the primary enclosure has enough space to turn about normally while standing, to stand and sit erect, and to lie in a natural position.

9 C.F.R. §§ 1.1; 2.4, .100(a), .126; 3.1(a), (c)-(d), (f), .6(a)(2)(i), (iii), (xi), (xii), .11(a), (c)-(d), .14(a)(9), (e)(1).

DECISION

Discussion

Introduction

Dr. Schmidt is a veterinarian who has held an Animal Welfare Act dealer's license since 1997.⁵ Dr. Schmidt does business as Top of the Ozark Auction. Dr. Schmidt's address is 6740 Highway F, Hartsville, Missouri 65667.⁶ Dr. Schmidt conducts dog auctions, which are open to dog dealers and the general public, in a multi-purpose steel building.⁷ Approximately half of the building contains cages for holding the dogs that are being auctioned and is also used for storage. The other half of the building has an auction stand and an area for auction attendees.⁸

Dr. Schmidt conducts approximately six or seven auctions each year, exclusive of full dispersal sales.⁹ Dr. Schmidt auctioned 890 dogs in 2000; 1,219 dogs in 2001; 1,342 dogs in 2002; 1,214 dogs in 2003; and 1,325 dogs in 2004.¹⁰ Dr. Schmidt earned commissions and fees of \$15,500 in 2000; \$22,520 in 2001; \$20,130 in 2002; \$24,423 in 2003; and \$44,149 in 2004.¹¹

In accordance with the Animal Welfare Act, the United States Department of Agriculture conducted approximately 15 to 20 inspections of Dr. Schmidt's facility during the period from 1997 through

⁵Tr. 209-10, 290.

⁶CX 1-CX 5.

⁷Tr. 212.

⁸Tr. 213-14.

⁹Tr. 212.

¹⁰CX 1-CX 5.

¹¹CX 1-CX 5.

November 2005.¹² The Administrator alleged that Dr. Schmidt committed 39 violations of the Regulations and Standards during the period April 22, 2001, through September 12, 2004.¹³ The Administrator's allegations that Dr. Schmidt violated the Regulations and Standards are based upon 10 inspections conducted by Sandra K. Meek, an experienced United States Department of Agriculture inspector, who inspected Dr. Schmidt's facility and found violations of the Regulations and Standards on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004.¹⁴ The Administrator withdrew two of the allegations during the December 6, 2005, hearing.¹⁵ The Administrator did not request findings with respect to a third allegation.¹⁶ Thus, 36 of the 39 violations of the Regulations and Standards alleged in the Complaint are at issue.¹⁷

¹² Tr. 290-91.

¹³ Compl. ¶¶ II-XI.

¹⁴ CX 7-CX 16, CX 37-CX 48; Tr. 12-75.

¹⁵ The Administrator withdrew the allegation that, on November 4, 2001, Dr. Schmidt housed dogs in enclosures that had bare wire strand floors in violation of section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)) (Compl. ¶ IV(A)(4)) and the allegation that, on November 2, 2003, Dr. Schmidt failed to hold dogs obtained from an individual for 5 days in violation of section 2.101(a) of the Regulations and Standards (9 C.F.R. § 2.101(a)) (Compl. ¶ VIII(A)(2)) (Tr. 62).

¹⁶ The Administrator did not request findings with respect to the allegation that, on October 13, 2002, Dr. Schmidt's primary enclosures for dogs did not provide sufficient space to allow each dog to stand or sit in a comfortable position in violation of section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)) (Compl. ¶ VI(A)(3)) (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof).

¹⁷ The following 36 willful violations alleged by the Administrator are at issue in this proceeding: (1) on April 22, 2001, Dr. Schmidt failed to remove excreta from primary enclosures to prevent soiling of the animals, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) (Compl. ¶ II(A)); (2)-(3) on October 14, 2001, and November 4, 2001, Dr. Schmidt failed to provide housing facilities that were structurally sound and in good repair, as required by section 3.1(a) of the Regulations and

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Standards (9 C.F.R. § 3.1(a)) (Compl. ¶¶ III(A)(1), IV(A)(1)); (4)-(7) on October 14, 2001, November 4, 2001, June 6, 2004, and September 12, 2004, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points, as required by section 3.1(c)(1)(ii) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(ii)) (Compl. ¶¶ III(A)(2), IV(A)(2), X(A)(3), XI(A)(1)); (8)-(9) on October 14, 2001, and November 4, 2001, Dr. Schmidt failed to provide a waste disposal system that would keep animals free from contamination and allow them to stay clean and dry, as required by section 3.1(f) of the Regulations and Standards (9 C.F.R. § 3.1(f)) (Compl. ¶¶ III(A)(3), IV(A)(3)); (10)-(12) on October 14, 2001, November 4, 2001, and March 17, 2002, Dr. Schmidt failed to keep housing facilities clean and in good repair to facilitate husbandry practices, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) (Compl. ¶¶ III(A)(5), IV(A)(5), V(A)(4)); (13)-(14) on March 17, 2002, and October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that were structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) (Compl. ¶¶ V(A)(1), VI(A)(1)); (15)-(16) on March 17, 2002, and October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that contained the dogs securely, as required by section 3.6(a)(2)(iii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(iii)) (Compl. ¶¶ V(A)(2), VI(A)(2)); (17) on March 17, 2002, Dr. Schmidt failed to provide primary enclosures that had sufficient space to allow each dog to stand or sit in a comfortable position, as required by section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)) (Compl. ¶ V(A)(3)); (18) on March 23, 2003, Dr. Schmidt failed to spot-clean and sanitize hard surfaces with which dogs came in contact, as required by section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)) (Compl. ¶ VII(A)(1)); (19)-(21) on March 23, 2003, March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide an effective program for the control of insects and rodents, as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) (Compl. ¶¶ VII(A)(2), IX(A)(3), X(A)(6)); (22)-(23) on November 2, 2003, and June 6, 2004, Dr. Schmidt violated section 2.4 of the Regulations and Standards (9 C.F.R. § 2.4) by interfering with Animal and Plant Health Inspection Service officials while they were carrying out their duties (Compl. ¶¶ VIII(A)(1), X(A)(1)); (24) on November 2, 2003, Dr. Schmidt violated section 2.126(a)(4) of the Regulations and Standards (9 C.F.R. § 2.126(a)(4)) by refusing to allow Animal and Plant Health Inspection Service officials access to animals for the purpose of photographing them (Compl. ¶ VIII(A)(3)); (25)-(28) on November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) (Compl.

Cont.

The Administrator seeks an order assessing Dr. Schmidt a \$15,000 civil penalty and requiring Dr. Schmidt to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.¹⁸ As the proponent of an order, the Administrator has the burden of proof in this proceeding¹⁹ and the standard of proof by which the burden of persuasion is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.²⁰

¶¶ VIII(A)(4), IX(A)(2), X(A)(5), XI(A)(2)); (29)-(30) on November 2, 2003, and September 12, 2004, Dr. Schmidt housed dogs in enclosures without suitable absorbent material to absorb and cover excreta, as required by section 3.14(a)(9) of the Regulations and Standards (9 C.F.R. § 3.14(a)(9)) (Compl. ¶¶ VIII(A)(5), XI(A)(3)); (31)-(32) on November 2, 2003, and March 21, 2004, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had sufficient space to stand and sit erect, as required by section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) (Compl. ¶¶ VIII(A)(6), IX(A)(4)); (33)-(34) on March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide sufficient lighting to conduct an inspection of the animals and facilities, as required by section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) (Compl. ¶¶ IX(A)(1), X(A)(4)); (35) on June 6, 2004, Dr. Schmidt violated section 2.126(a)(4) of the Regulations and Standards (9 C.F.R. § 2.126(a)(4)) by refusing to allow Animal and Plant Health Inspection Service officials access to animals for the purpose of inspection (Compl. ¶ X(A)(2)); and (36) on October 14, 2001, Dr. Schmidt housed dogs in enclosures that had bare wire strand floors, as prohibited by section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)) (Compl. ¶ III(A)(4)).

¹⁸ Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 8-9.

¹⁹ 5 U.S.C. § 556(d).

²⁰ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re The Int'l Siberian Tiger Found.* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79 n.3 (2002); *In re Reginald Dwight Parr* (Order Denying Respondent's Pet. for Recons.), 59 Agric. Dec. 629, 643-44 n.8 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec.

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The Administrator's Evidence of Dr. Schmidt's Violations

Sandra Meek testified she inspected Dr. Schmidt's facility on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, and, on each occasion, found violations of the Regulations and Standards.²¹ Ms. Meek's testimony included a description of each of the violations which she found and her

242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 58 Agric. Dec. 742 (1999); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), *printed in* 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (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. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 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 Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *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 Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

²¹ Tr. 12-75.

assessment of the seriousness of each of those violations.²² Ms. Meek documented each inspection of Dr. Schmidt's facility at the time of the inspection with an inspection report, which contains a detailed description of each of Dr. Schmidt's violations and a reference to the section of the Regulations and Standards which Ms. Meek found Dr. Schmidt violated.²³ The ALJ admitted each of these 10 inspection reports into evidence. Jan R. Feldman, another experienced United States Department of Agriculture inspector, assisted Ms. Meek during five of the 10 inspections at issue in this proceeding: namely, the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspections of Dr. Schmidt's facility.²⁴ Ms. Feldman testified that, based on her observations at Dr. Schmidt's facility, she agreed with all of the violations cited by Ms. Meek on the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspection reports.²⁵ Moreover, Ms. Meek took photographs of some of Dr. Schmidt's violations during two of the 10 inspections at issue: namely, the March 21, 2004, and June 6, 2004, inspections of Dr. Schmidt's facility.²⁶ The photographs confirm violations cited by Ms. Meek on the March 21, 2004, and the June 6, 2004, inspection reports. The Administrator also introduced evidence that, during the November 2, 2003, and the June 6, 2004, inspections of Dr. Schmidt's facility, Dr. Schmidt interfered with Ms. Meek while she was carrying out her duties at Dr. Schmidt's facility.²⁷

The Administrator introduced relevant, reliable, credible, and probative evidence of 34 of the 36 alleged violations of the Regulations and Standards that are at issue. I do not find the evidence introduced by

²² Tr. 12-75.

²³ CX 7-CX 16.

²⁴ Tr. 77-79.

²⁵ Tr. 79.

²⁶ CX 37-CX 48.

²⁷ CX 13, CX 15; Tr. 36-37, 40-41.

the Administrator supports a finding that Dr. Schmidt violated section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) on March 21, 2004, and June 6, 2004. The Administrator alleged that, on March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide sufficient lighting to conduct an inspection of the animals and facilities in violation of section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)).²⁸ Section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) does not require dealers to provide sufficient lighting to conduct inspections of animals and facilities. Instead, section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) provides that housing facilities for dogs and cats must have reliable electric power adequate for heating, cooling, ventilation, and lighting and for carrying out other husbandry requirements in accordance with sections 3.1 through 3.19 of the Regulations and Standards (9 C.F.R. §§ 3.1-19). The Administrator did not introduce any evidence regarding the reliability or adequacy of Dr. Schmidt's electric power; therefore, I dismiss paragraphs IX(A)(1) and X(A)(4) of the Complaint. I limit my discussion of Dr. Schmidt's rebuttal evidence to the 34 alleged violations of the Regulations and Standards supported by the relevant, reliable, credible, and probative evidence introduced by the Administrator.

Dr. Schmidt's Rebuttal Evidence

Dr. Schmidt called 12 witnesses to rebut the evidence introduced by the Administrator. John Randal McCray, an electrician who attended an auction at Dr. Schmidt's facility on February 17, 2001, testified he did not know if he was present at Dr. Schmidt's facility on any of the dates of the inspections that are the subject of the instant proceeding, and he had no knowledge of the condition of Dr. Schmidt's facility on the dates

²⁸ Compl. ¶¶ IX(A)(1), X(A)(4).

of those inspections.²⁹

Rae Sanborn, an owner of a dog kennel licensed by the State of Missouri, who attended auctions at Dr. Schmidt's facility, testified he was not at Dr. Schmidt's facility during the April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, or October 13, 2002, inspections; he was not certain whether he was at Dr. Schmidt's facility during the March 23, 2003, or September 12, 2004, inspections; he believed he was at Dr. Schmidt's facility during the March 21, 2004, and June 6, 2004, inspections; and he was certain he was at Dr. Schmidt's facility during the November 2, 2003, inspection.³⁰ Mr. Sanborn testified, when he was at Dr. Schmidt's facility, he did not accompany the United States Department of Agriculture inspectors during their inspections of Dr. Schmidt's facility and had no knowledge of the violations of the Regulations and Standards relating to the condition of Dr. Schmidt's facility.³¹

Mr. Sanborn testified he witnessed an exchange between Dr. Schmidt and a United States Department of Agriculture inspector during the November 2, 2003, inspection which gave rise to the Administrator's allegations that, on November 2, 2003, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties and refused to allow Animal and Plant Health Inspection Service officials access to animals for the purpose of photographing them.³² Mr. Sanborn testified that Dr. Schmidt did not interfere with the inspector while she was carrying out her duties under the Animal Welfare Act.³³

Mark Anthony Landers, an Animal Welfare Act licensee, testified he was not certain what dates he was at Dr. Schmidt's facility, but he may

²⁹ Tr. 93-94.

³⁰ Tr. 118-22.

³¹ Tr. 118-22.

³² Compl. ¶¶ VIII(A)(1), VIII(A)(3).

³³ Tr. 114.

have been at Dr. Schmidt's facility during the April 22, 2001, inspection. Mr. Landers stated, even if he had been at Dr. Schmidt's facility on April 22, 2001, he had no knowledge of the violation of the Regulations and Standards Dr. Schmidt is alleged to have committed on April 22, 2001, and he could not testify as to whether Dr. Schmidt committed the violation or not.³⁴

Margie S. White, an independent pet carrier and one of Dr. Schmidt's employees, testified she was at Dr. Schmidt's facility during each of the inspections that are the subject of this proceeding, except the April 22, 2001, inspection.³⁵ Ms. White stated she has been employed in the office at Dr. Schmidt's facility, she never accompanied the United States Department of Agriculture inspectors on any of their inspections of Dr. Schmidt's facility, and she could not testify regarding the violations of the Regulations and Standards found by the inspectors.³⁶

Barbara McCoy, an Animal Welfare Act licensee, stated she was at Dr. Schmidt's facility during each of the inspections that are the subject of this proceeding, but she did not accompany the United States Department of Agriculture inspectors during the inspections and she could not testify regarding the violations of the Regulations and Standards relating to the condition of Dr. Schmidt's facility.³⁷

With respect to the Administrator's allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties on November 2, 2003, and June 6, 2004,³⁸ Ms. McCoy testified that on November 2, 2003, "there was some commotion in the back, and [Dr. Schmidt] went back there to talk to

³⁴ Tr. 131-32.

³⁵ Tr. 145.

³⁶ Tr. 146-47.

³⁷ Tr. 158-59.

³⁸ Compl. ¶¶ VIII(A)(1), VIII(A)(3), X(A)(1), X(A)(2).

somebody”³⁹ and that on June 6, 2004, Dr. Schmidt told the Animal and Plant Health Inspection Service inspector “[y]ou can’t take pictures in here”⁴⁰ and “[you do not] have a right to be there . . . without [my] knowledge.”⁴¹ Ms. McCoy testified Dr. Schmidt did not know he was speaking to an Animal and Plant Health Inspection Service inspector when he told the inspector not to take pictures and, when Dr. Schmidt realized who was taking pictures, he told the Animal and Plant Health Inspection Service inspector she could finish her inspection.⁴²

Jessica Lea Ann Vandergrift, one of Dr. Schmidt’s employees, testified she was at Dr. Schmidt’s facility during each of the inspections that are at issue in this proceeding; however, Ms. Vandergrift testified she did not accompany the United States Department of Agriculture inspectors during any of their inspections and had no knowledge of the inspectors’ findings relating to the condition of Dr. Schmidt’s facility.⁴³ Ms. Vandergrift testified she did not remember the November 2, 2003, incident giving rise to the Administrator’s allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials carrying out their duties,⁴⁴ but she did remember a June 6, 2004, incident during which Dr. Schmidt attempted to confiscate a camera. Ms. Vandergrift testified Dr. Schmidt does not allow cameras or video, audio, or recording devices in his facility. Ms. Vandergrift added that, in her opinion, Dr. Schmidt did not know an Animal and Plant Health Inspection Service inspector was the person taking pictures of his facility and Dr. Schmidt’s statement that no cameras or audio, video, or recording devices are allowed in his facility did not apply to United

³⁹ Tr. 153.

⁴⁰ Tr. 154.

⁴¹ Tr. 156.

⁴² Tr. 155-56.

⁴³ Tr. 171.

⁴⁴ Compl. ¶¶ VIII(A)(1), VIII(A)(3).

States Department of Agriculture inspectors.⁴⁵

Katherine M. Peaker, an inspector for the American Kennel Club, testified she was at Dr. Schmidt's facility during the November 2, 2003, inspection and most likely at Dr. Schmidt's facility during the March 21, 2004, June 6, 2004, and September 12, 2004, inspections. Ms. Peaker testified she did not accompany the United States Department of Agriculture inspectors on the inspections of Dr. Schmidt's facility and could not comment on the inspectors' findings regarding the condition of Dr. Schmidt's facility.⁴⁶ Ms. Peaker testified she remembered a November 2, 2003, incident giving rise to the Administrator's allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials carrying out their duties,⁴⁷ but she did not observe any interaction between Dr. Schmidt and the Animal and Plant Health Inspection Service inspector.⁴⁸

Anette Turner, an inspector for the American Kennel Club, testified she was at Dr. Schmidt's facility as late as March 23, 2003, but she did not remember the dates she was at Dr. Schmidt's facility. Ms. Turner saw United States Department of Agriculture inspectors at Dr. Schmidt's facility on occasion, but did not accompany them during the inspections and had no reason to question the United States Department of Agriculture inspectors' findings.⁴⁹

Ronnie Lee Williams, a security guard employed by Dr. Schmidt, testified he began working at Dr. Schmidt's facility in September 2004.⁵⁰ Mr. Williams was employed at Dr. Schmidt's facility during the

⁴⁵ Tr. 167-69.

⁴⁶ Tr. 185-86.

⁴⁷ Compl. ¶¶ VIII(A)(1), VIII(A)(3).

⁴⁸ Tr. 181-82.

⁴⁹ Tr. 188, 194-95.

⁵⁰ Tr. 199, 203-04.

September 12, 2004, inspection of Dr. Schmidt's facility and accompanied Ms. Meek during her September 12, 2004, inspection of Dr. Schmidt's facility,⁵¹ however, Mr. Williams did not testify regarding the condition of Dr. Schmidt's facility during the September 12, 2004, inspection or any other inspection that is the subject of this proceeding.

Clifford Lansdown testified he was at Dr. Schmidt's facility on November 2, 2003, and June 6, 2004. Mr. Lansdown did not testify regarding the condition of Dr. Schmidt's facility, but, instead, limited his testimony to the Administrator's allegations that, on November 2, 2003, and June 6, 2004, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials carrying out their duties.⁵² Mr. Lansdown testified he did not remember the November 2, 2003, incident; however, with respect to the June 6, 2004, incident, Mr. Lansdown testified Dr. Schmidt, in response to a United States Department of Agriculture inspector taking photographs, stated that "no one's to be taking pictures."⁵³ However, Mr. Lansdown also heard Dr. Schmidt state that the United States Department of Agriculture inspectors could finish their inspection.⁵⁴

Jerry Eber, a veterinarian employed by the Missouri Department of Agriculture as supervisor of the Missouri kennel inspection program, testified he was at Dr. Schmidt's facility sometime during 2003. Dr. Eber did not indicate that he was at Dr. Schmidt's facility during the inspections at issue in this proceeding or that he knew of the condition of Dr. Schmidt's facility on the dates of the inspections.⁵⁵

Dr. Schmidt testified he was at his facility during each of the 10 inspections at issue in this proceeding; however, he did not accompany the United States Department of Agriculture inspectors on

⁵¹ CX 16 at 2.

⁵² Compl. ¶¶ VIII(A)(1), VIII(A)(3), X(A)(1), X(A)(2).

⁵³ Tr. 207.

⁵⁴ Tr. 207.

⁵⁵ Tr. 243-48.

any of the 10 inspections.⁵⁶ Dr. Schmidt testified he received the inspection reports for each of the 10 inspections that are the subject of the instant proceeding in the mail between 5 and 8 days after the United States Department of Agriculture conducted the inspection. After receipt of each inspection report, Dr. Schmidt examined his facility to identify the violations cited on the inspection report.⁵⁷ Dr. Schmidt testified that he agrees with some of the violations cited on the inspection reports and disagrees with some of the violations cited on the inspection reports.⁵⁸ Dr. Schmidt did not identify the violations which he believes he committed but did identify some of the violations with which he disagreed. However, Dr. Schmidt did not specifically address each of the alleged violations, and I find much of Dr. Schmidt's testimony was not relevant to the instant proceeding.⁵⁹

Dr. Schmidt addressed the Administrator's allegations that on March 23, 2003, Dr. Schmidt failed to spot-clean and sanitize hard surfaces with which dogs came in contact in violation of section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)) and failed to provide an effective program for the control of insects and rodents in violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).⁶⁰ The March 23, 2003, inspection report states Dr. Schmidt had eight ground enclosures, containing a total of 13 adult dogs, topped with

⁵⁶ The April 22, 2001, inspection report (CX 7) indicates Dr. Schmidt accompanied Sandra Meek during the inspection; however, I conclude, based on Dr. Schmidt's and Ms. Meek's testimony, Dr. Schmidt did not accompany Ms. Meek during the April 22, 2001, inspection (Tr. 14-15, 49, 296).

⁵⁷ Tr. 227, 300.

⁵⁸ Tr. 300-02.

⁵⁹ In this regard, I generally agree with the ALJ's assessment of Dr. Schmidt's testimony: "Dr. Schmidt . . . you've given me a long narration of your problems with USDA instead of addressing the issues which are before me." (Tr. 302.)

⁶⁰ Compl. ¶ VII.

various types of sheet metal on which was an accumulation of dirt and rodent droppings, indicating a lack of an effective program for the control of rodents.⁶¹ Dr. Schmidt testified he sprays the sheet metal with a non-toxic chemical that mice will not walk on.⁶² Dr. Schmidt's testimony that he sprays the sheet metal in question with a chemical does not rebut the evidence that there was an accumulation of dirt and rodent droppings on the sheet metal. Based on the condition of the sheet metal and Dr. Schmidt's testimony, I find Dr. Schmidt had a program for the control of rodents, but that program was not effective. Therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violations of sections 3.1(c)(3) and 3.11(d) of the Regulations and Standards (9 C.F.R. §§ 3.1(c)(3), .11(d)) on March 23, 2003.

Dr. Schmidt also addressed four of the six allegations that he violated the Regulations and Standards on November 2, 2003. The Administrator alleged that on November 2, 2003, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties and refused to allow those Animal and Plant Health Inspection Service officials access to the animals for the purpose of photographing them in violation of sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)).⁶³ The November 2, 2003, inspection report states Dr. Schmidt refused to allow Sandra Meek to take a photograph of a Mastiff.⁶⁴ Dr. Schmidt testified he did not refuse to allow Ms. Meek to take a photograph of the Mastiff in question. Dr. Schmidt explained that Ms. Meek's request to take a picture of the Mastiff was contingent upon his auctioning the Mastiff and he did not auction the Mastiff.⁶⁵ Katherine Peaker testified she did not

⁶¹ CX 12.

⁶² Tr. 234-35.

⁶³ CX ¶¶ VIII(A)(1), VIII(A)(3).

⁶⁴ CX 13 at 1.

⁶⁵ Tr. 235-39.

observe any interaction between Dr. Schmidt and the United States Department of Agriculture inspector, but she confirmed Dr. Schmidt's assertion that he did not auction the Mastiff in question.⁶⁶ Mr. Sanborn testified, during the November 2, 2003, auction, he witnessed the exchange between Dr. Schmidt and a United States Department of Agriculture inspector and observed that Dr. Schmidt did not interfere with the inspector while she was carrying out her duties.⁶⁷ After reviewing the Administrator's evidence and Dr. Schmidt's rebuttal evidence, I find the Administrator failed to prove by a preponderance of the evidence that Dr. Schmidt violated sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)), on November 2, 2003; therefore, I dismiss paragraphs VIII(A)(1) and VIII(A)(3) of the Complaint.

The Administrator alleged that on November 2, 2003, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash in violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).⁶⁸ The November 2, 2003, inspection report states Dr. Schmidt's premises contained trash on or adjacent to enclosures containing dogs, as follows: (1) a Coca Cola can on top of a wire raised enclosure containing two adult dogs; (2) a Dr. Pepper can on top of a ground enclosure containing one adult dog; (3) a coffee cup on top of a raised wire enclosure containing two adult dogs; (4) a discarded water bottle on top of a raised wire enclosure containing one adult dog; and (5) an accumulation of discarded materials, including a candy package, a Mountain Dew can, and a water bottle on top of a roll of wire in contact with a raised wire enclosure containing two adult dogs.⁶⁹ Dr. Schmidt

⁶⁶ Tr. 182.

⁶⁷ Tr. 114.

⁶⁸ CX ¶ VIII(A)(4).

⁶⁹ CX 13 at 2.

admitted that his premises did contain trash but testified that the purpose for the United States Department of Agriculture inspector's citing him for this violation was retaliation.⁷⁰ Even if I were to find the United States Department of Agriculture inspector cited Dr. Schmidt for the purpose of retaliation (which I do not so find), I would not dismiss the alleged violation. The purpose for the United States Department of Agriculture inspector's citation of Dr. Schmidt's violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) does not negate the fact that the violation occurred. I find Dr. Schmidt's testimony merely confirms that he violated section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)); therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) on November 2, 2003.

The Administrator alleged that on November 2, 2003, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had space to stand and sit erect in violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)). The November 2, 2003, inspection report states Dr. Schmidt housed six dogs in primary enclosures that were too small to allow the animals to stand, sit, or lie in a natural position.⁷¹ Dr. Schmidt testified that one of these dogs (an adult male Pug) was in the owner's transport cage when observed by Ms. Meek.⁷² Even if I were to find that Dr. Schmidt was not responsible for the November 2, 2003, violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) with respect to the adult male Pug, I would not find that Dr. Schmidt's testimony rebuts the Administrator's evidence of Dr. Schmidt's violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) as it relates to the other five dogs.

⁷⁰ Tr. 239-41.

⁷¹ CX 13 at 3.

⁷² Tr. 294-96.

Further, Dr. Schmidt addressed the Administrator's allegation that on March 21, 2004, he (Dr. Schmidt) failed to provide an effective program for the control of insects and rodents in violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).⁷³ The March 21, 2004, inspection report states an accumulation of spider webs, a bird nest, bird droppings, and flying insect nests indicate a lack of an effective program for the control of insects, external parasites, and pests.⁷⁴ The Administrator introduced pictures of spider webs found during the March 21, 2004, inspection.⁷⁵ Dr. Schmidt testified that the spider webs were not located in the animal holding area and stated, as support for this contention, that Ms. Meek could not answer Dr. Schmidt's questions regarding the location of the spider webs depicted in CX 37.⁷⁶ However, the record reveals that Ms. Meek did answer Dr. Schmidt's questions regarding the location of the spider webs in CX 37,⁷⁷ each picture of the spider webs identified during the March 21, 2004, inspection contains a description of the location of the spider webs which indicates the spider webs were located in the animal holding area,⁷⁸ and one of the pictures depicting the spider webs depicts a cage containing a dog.⁷⁹ Therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on March 21, 2004.

The Administrator alleged that on March 21, 2004, Dr. Schmidt failed

⁷³ CX ¶ IX(A)(3).

⁷⁴ CX 14 at 2-3.

⁷⁵ CX 37-CX 39.

⁷⁶ Tr. 262.

⁷⁷ Tr. 71.

⁷⁸ CX 37-CX 39.

⁷⁹ CX 38.

to provide enclosures large enough to ensure that each animal had space to stand and sit erect in violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)).⁸⁰ The March 21, 2004, inspection report states one enclosure in the animal holding area contained an adult Min Pin that was not able to stand erect with its head in a normal position.⁸¹ The Administrator also introduced a picture depicting an adult Min Pin in an enclosure too small to enable the dog to stand erect with its head in an upright position.⁸² Dr. Schmidt testified the picture is a “set-up” and “shows nothing” and the angle at which the photograph was taken merely causes the enclosure to appear to be too small to ensure that the dog had space to stand erect with its head in a normal position.⁸³ I find Dr. Schmidt’s testimony that the picture is a “set-up” mere speculation unsupported by any evidence. Moreover, I disagree with Dr. Schmidt’s testimony that the picture “shows nothing.” Instead, I find the picture shows an enclosure that is not large enough to enable a dog to stand erect with its head in a natural position. Therefore, I conclude Dr. Schmidt’s testimony is not sufficient to rebut the Administrator’s specific, detailed evidence of Dr. Schmidt’s violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) on March 21, 2004.

The Administrator alleged that on June 6, 2004, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties and refused to allow those Animal and Plant Health Inspection Service inspectors access to the animals for the purpose of inspecting them in violation of sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)).⁸⁴ The June 6, 2004, inspection report states Dr. Schmidt

⁸⁰ CX ¶ IX(A)(4).

⁸¹ CX 14 at 3.

⁸² CX 41.

⁸³ Tr. 260-61.

⁸⁴ CX ¶¶ X(A)(1), X(A)(2).

ordered a United States Department of Agriculture inspector not to take photographs, demanded that the United States Department of Agriculture inspector give him the camera she was using, and ordered the United States Department of Agriculture inspectors to leave the facility.⁸⁵ Dr. Schmidt explained he approached Ms. Meek after one of his employees reported that someone was taking pictures in the animal holding area, but, as soon as he determined that it was Ms. Meek taking pictures, he did not interfere with her duties.⁸⁶ Dr. Schmidt's explanation of the events surrounding his confrontation with Ms. Meek is generally consistent with Ms. McCoy's testimony⁸⁷ and Ms. Vandergriff's testimony.⁸⁸ After reviewing the Administrator's and Dr. Schmidt's evidence, I find the Administrator failed to prove by a preponderance of the evidence that Dr. Schmidt violated sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)), on June 6, 2004; therefore, I dismiss paragraphs X(A)(1) and X(A)(2) of the Complaint.

The Administrator alleged on June 6, 2004, primary surfaces coming in contact with animals were not free of jagged edges or sharp points in violation of section 3.1(c)(1) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)).⁸⁹ The June 6, 2004, inspection report states Dr. Schmidt had two ground enclosures that had several wire ties which had sharp ends protruding into the enclosures, each of which contained a dog.⁹⁰ The Administrator introduced a picture purportedly depicting a metal wire with sharp ends protruding into one of the enclosures.⁹¹ Ms. Meek

⁸⁵ CX 15 at 1-2.

⁸⁶ Tr. 249-52, 259.

⁸⁷ Tr. 155.

⁸⁸ Tr. 167-69.

⁸⁹ CX ¶ X(A)(3).

⁹⁰ CX 15 at 4.

⁹¹ CX 48.

testified, while “a little hard to see[,]” the picture depicts one of the wires with a sharp end protruding into an enclosure “down at the bottom.”⁹² Dr. Schmidt testified the picture depicts a pig ring “up to the top and off to the left, first row going down.”⁹³ Given Ms. Meek’s description of the location of the wire in question and Dr. Schmidt’s description of the location of the pig ring, I find Dr. Schmidt did not address the wire which formed part of the basis for the allegation that Dr. Schmidt’s violated section 3.1(c)(1) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)) on June 6, 2004. Therefore, I conclude Dr. Schmidt’s testimony is not sufficient to rebut the Administrator’s specific, detailed evidence of Dr. Schmidt’s violation of section 3.1(c)(1) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)) on June 6, 2004.

The Administrator alleged that on June 6, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash and failed to provide an effective program for the control of insects and rodents in violation of section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)).⁹⁴ The June 6, 2004, inspection report states Dr. Schmidt’s animal holding area contained a dirty tarp next to 22 enclosures containing 17 adult dogs and 24 puppies; had spiders and spider webs on the walls, enclosures containing dogs, and the enclosure support framing; had flying insect nests on the north wall and on the enclosure support on the east wall; had an enclosure, which contained one animal, with dark dried matter on the front metal fencing panel; and had a vine growing in the framing of two adjoining enclosures housing two dogs. The inspection report states the number of spiders, the accumulation of spider webs, and the flying insect nests indicate a lack of an effective program for the control of insects and rodents.⁹⁵ The Administrator introduced four pictures to support the allegations that

⁹² Tr. 43.

⁹³ Tr. 258.

⁹⁴ Compl. ¶¶ X(A)(5), X(A)(6).

⁹⁵ CX 15 at 4.

Dr. Schmidt violated section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)).⁹⁶ Dr. Schmidt admitted at least some of the spider webs and an insect nest were in his facility, but Dr. Schmidt testified that the spider webs and the insect nest posed no danger to the dogs. Dr. Schmidt's testimony regarding the risk that his violations of section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)) posed to dogs, does not rebut the Administrator's evidence that Dr. Schmidt violated section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)) on June 6, 2004. Therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violations of section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)) on June 6, 2004.

In conclusion, I find the Administrator proved by a preponderance of the evidence that Dr. Schmidt committed 30 of the 39 violations alleged in the Complaint.

⁹⁶ CX 44-CX 47.

Findings of Fact

1. Dr. Schmidt is an individual doing business as Top of the Ozark Auction. Dr. Schmidt's address is 6740 Highway F, Hartsville, Missouri 65667.⁹⁷

2. At all times material to this proceeding, Dr. Schmidt operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations and Standards.⁹⁸

3. At all times material to this proceeding, Dr. Schmidt held Animal Welfare Act license number 43-B-0305.⁹⁹

4. Dr. Schmidt conducts approximately six or seven auctions each year, exclusive of full dispersal sales. Dr. Schmidt auctioned 890 dogs in 2000; 1,219 dogs in 2001; 1,342 dogs in 2002; 1,214 dogs in 2003; and 1,325 dogs in 2004. Dr. Schmidt earned commissions and fees of \$15,500 in 2000; \$22,520 in 2001; \$20,130 in 2002; \$24,423 in 2003; and \$44,149 in 2004.¹⁰⁰

5. The United States Department of Agriculture conducted approximately 15 to 20 inspections of Dr. Schmidt's facility during the period from 1997 through November 2005. Sandra K. Meek, an experienced United States Department of Agriculture inspector, inspected Dr. Schmidt's facility on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004. Jan R. Feldman, an experienced United States Department of Agriculture inspector, assisted Ms. Meek during the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspections of Dr. Schmidt's facility.¹⁰¹

⁹⁷ CX 1-CX 5.

⁹⁸ CX 1-CX 6; Tr. 290.

⁹⁹ CX 1-CX 6.

¹⁰⁰ CX 1-CX 5; Tr. 212.

¹⁰¹ CX 7-CX 16, CX 37-CX 48; Tr. 12-79, 290-91.

6. On April 22, 2001, Dr. Schmidt failed to remove excreta from primary enclosures to prevent soiling of animals. Specifically, Dr. Schmidt maintained stacked cages and waste material from the upper cages ran down onto the animals in the lower cages, affecting 13 adult dogs.¹⁰² (9 C.F.R. §§ 2.100(a); 3.11(a).)

7. On October 14, 2001, Dr. Schmidt failed to provide housing facilities for dogs that were structurally sound and in good repair. Specifically, Dr. Schmidt housed three adult dogs in an enclosure that had a front panel that had detached from the bottom panel, and Dr. Schmidt housed one adult dog in an enclosure that had a right side panel that had detached from the bottom panel.¹⁰³ (9 C.F.R. §§ 2.100(a); 3.1(a).)

8. On October 14, 2001, Dr. Schmidt failed to provide housing facilities with interior surfaces that were free of jagged edges or sharp points that might injure animals. Specifically, Dr. Schmidt had 10 enclosures with broken wires that protruded into the enclosures which contained adult dogs.¹⁰⁴ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

9. On October 14, 2001, Dr. Schmidt failed to provide a waste disposal system that would keep animals free from contamination and allow them to stay clean and dry. Specifically, Dr. Schmidt maintained stacked cages without a catch-basin and waste material from the upper enclosures ran down onto the animals in the lower enclosures, affecting 18 adult dogs.¹⁰⁵ (9 C.F.R. §§ 2.100(a); 3.1(f).)

10. On October 14, 2001, Dr. Schmidt housed dogs in enclosures that had bare wire strand floors. Specifically, Dr. Schmidt housed four adult

¹⁰² CX 7; Tr. 17-18.

¹⁰³ CX 8 at 1; Tr. 19-20.

¹⁰⁴ CX 8 at 1; Tr. 20-21.

¹⁰⁵ CX 8 at 1; Tr. 21-22.

dogs in two enclosures with bare wire strand floors.¹⁰⁶ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xii).)

11. On October 14, 2001, Dr. Schmidt failed to keep housing facilities clean and in good repair to facilitate husbandry practices. Specifically, Dr. Schmidt's animal enclosures contained dirt and spider webs; Dr. Schmidt's animal holding area contained debris, such as soda bottles, a rubbing alcohol bottle, and a food receptacle; and 10 of Dr. Schmidt's cages had sheet metal, a metal ladder, and two fans piled on top of the cages.¹⁰⁷ (9 C.F.R. §§ 2.100(a); 3.11(c).)

12. On November 4, 2001, Dr. Schmidt failed to ensure that housing facilities were structurally sound and in good repair. Specifically, Dr. Schmidt had one ground enclosure with a panel top with 8-inch by 6-inch openings that allowed an adult dog to stick its head and front legs through the openings.¹⁰⁸ (9 C.F.R. §§ 2.100(a); 3.1(a).)

13. On November 4, 2001, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points. Specifically, Dr. Schmidt had 15 enclosures with broken wires that protruded into the enclosures, affecting 25 adult dogs.¹⁰⁹ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

14. On November 4, 2001, Dr. Schmidt failed to provide a waste disposal system that would keep animals free from contamination and allow them to stay clean and dry. Specifically, Dr. Schmidt maintained stacked cages with catch pans turned upside down and the waste from the upper cages ran down into the lower enclosures, affecting six puppies.¹¹⁰ (9 C.F.R. §§ 2.100(a); 3.1(f).)

15. On November 4, 2001, Dr. Schmidt failed to provide housing facilities that were clean and in good repair to facilitate husbandry

¹⁰⁶ CX 8 at 2; Tr. 22.

¹⁰⁷ CX 8 at 2; Tr. 23.

¹⁰⁸ CX 9 at 1; Tr. 26.

¹⁰⁹ CX 9 at 1; Tr. 24-25.

¹¹⁰ CX 9 at 1; Tr. 25-26.

practices. Specifically, Dr. Schmidt's animal holding area contained dirt, spider webs, and an empty wasp nest; and 10 of Dr. Schmidt's ground enclosures, containing 17 adult dogs, had a metal ladder, two fans, and large metal pans on top of the enclosures.¹¹¹ (9 C.F.R. §§ 2.100(a); 3.11(c).)

16. On March 17, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that were structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs. Specifically, Dr. Schmidt had three primary enclosures, each containing two adult dogs, that had broken wires protruding into the enclosures.¹¹² (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)

17. On March 17, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that contained the dogs securely. Specifically, Dr. Schmidt had one enclosure, containing two adult dogs, with a metal fence panel top with 4-inch by 6-inch openings that allowed the dogs to stick their heads through the openings.¹¹³ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(iii).)

18. On March 17, 2002, Dr. Schmidt failed to provide primary enclosures that had sufficient space to allow each dog to stand and sit in a comfortable position. Specifically, Dr. Schmidt had one enclosure, containing two adult dogs, that did not provide enough space for the dogs to hold their heads upright.¹¹⁴ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xi).)

19. On March 17, 2002, Dr. Schmidt failed to provide housing facilities that were clean and good repair to facilitate husbandry practices. Specifically, the walls of Dr. Schmidt's auction building

¹¹¹ CX 9 at 2; Tr. 27.

¹¹² CX 10 at 1; Tr. 28-29.

¹¹³ CX 10 at 1; Tr. 29-30.

¹¹⁴ CX 10 at 1; Tr. 30.

directly adjacent to the animal enclosures had an accumulation of dirt, spider webs, and a few mud dauber nests; and six of Dr. Schmidt's ground enclosures, containing nine adult dogs, had a metal fence post, a metal ladder, a fan, wooden planks, and large metal pans on top of the enclosures.¹¹⁵ (9 C.F.R. §§ 2.100(a); 3.11(c).)

20. On October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that were structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs. Specifically, Dr. Schmidt had four primary enclosures, containing a total of nine dogs, that had wires protruding into the enclosures.¹¹⁶ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)

21. On October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that contained the dogs securely. Specifically, Dr. Schmidt had a ground enclosure, containing one dog, with a metal fence panel across the top with a 6-inch by 8-inch opening that allowed the dog to put its head through the opening. Dr. Schmidt also had a ground enclosure, containing one dog, that had a front panel that the dog had opened approximately 4 inches and a top panel with a 4-inch by 8-inch opening through which the dog could extend its head.¹¹⁷ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(iii).)

22. On March 23, 2003, Dr. Schmidt failed to spot-clean and sanitize hard surfaces with which dogs came in contact. Specifically, Dr. Schmidt had eight ground enclosures, containing a total of 13 adult dogs, topped with sheet metal on which was an accumulation of dirt and rodent droppings.¹¹⁸ (9 C.F.R. §§ 2.100(a); 3.1(c)(3).)

23. On March 23, 2003, Dr. Schmidt failed to provide an effective program for the control of insects and rodents. Specifically, Dr. Schmidt had eight ground enclosures topped with sheet metal on which was an

¹¹⁵ CX 10 at 2; Tr. 31.

¹¹⁶ CX 11 at 1; Tr. 33.

¹¹⁷ CX 11 at 1; Tr. 34.

¹¹⁸ CX 12; Tr. 34.

accumulation of rodent droppings, indicating a lack of an effective program for the control of rodents.¹¹⁹ (9 C.F.R. §§ 2.100(a); 3.11(d).)

24. On November 2, 2003, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's premises contained trash on or adjacent to enclosures containing dogs, as follows: (1) a Coca Cola can on top of a wire raised enclosure containing two adult dogs; (2) a Dr. Pepper can on top of a ground enclosure containing one adult dog; (3) a coffee cup on top of a raised wire enclosure containing two adult dogs; (4) a discarded water bottle on top of a raised wire enclosure containing one adult dog; and (5) an accumulation of discarded materials, including a candy package, a Mountain Dew can, and a water bottle on top of a roll of wire in contact with a raised wire enclosure containing two adult dogs.¹²⁰ (9 C.F.R. §§ 2.100(a); 3.11(c).)

25. On November 2, 2003, Dr. Schmidt housed dogs in enclosures without suitable absorbent material to absorb and cover excreta. Specifically, Dr. Schmidt housed one adult Sheltie in a transport carrier and one adult Doberman in a ground enclosure without suitable absorbent material to absorb and cover excreta.¹²¹ (9 C.F.R. §§ 2.100(a); 3.14(a)(9).)

26. On November 2, 2003, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had sufficient space to stand and sit erect and to lie in a natural position. Specifically, Dr. Schmidt housed at least five dogs in primary enclosures that were too small to enable the dogs to stand and sit erect and lie in a normal position.¹²² (9 C.F.R. §§ 2.100(a); 3.14(e)(1).)

¹¹⁹ CX 12; Tr. 34-35.

¹²⁰ CX 13 at 2; Tr. 36.

¹²¹ CX 13 at 2-3; Tr. 36-37.

¹²² CX 13 at 3; Tr. 37.

27. On March 21, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's facility contained dirt on the tops of animal enclosures, spider webs on perimeter walls and enclosure support structures, flying insect nests, a bird nest, dead bugs, bird droppings, and a dirty tarp.¹²³ (9 C.F.R. §§ 2.100(a); 3.11(c).)

28. On March 21, 2004, Dr. Schmidt failed to provide an effective program for the control of insects and rodents. Specifically, an accumulation of spider webs, a bird nest, bird droppings, and flying insect nests indicated a lack of an effective program for the control of insects and rodents.¹²⁴ (9 C.F.R. §§ 2.100(a); 3.11(d).)

29. On March 21, 2004, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had space to stand erect. Specifically, Dr. Schmidt housed one adult Min Pin in an enclosure that was too small to allow the dog to stand erect with its head in a normal position.¹²⁵ (9 C.F.R. §§ 2.100(a); 3.14(e)(1).)

30. On June 6, 2004, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points. Specifically, Dr. Schmidt had two ground enclosures, each containing an animal, that had wire ties with sharp points protruding into the enclosures.¹²⁶ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

31. On June 6, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's facility contained a dirty tarp, spiders, spider webs, dirt on the interior building wall surfaces and raised enclosure support framing, dark dried matter on the front metal fencing panel of a ground enclosure, and a vine growing in the framing of two adjoining enclosures.¹²⁷ (9 C.F.R. §§ 2.100(a);

¹²³ CX 14 at 2.

¹²⁴ CX 14 at 2, CX 37-CX 38; Tr. 38-39.

¹²⁵ CX 14 at 3, CX 41; Tr. 38-39.

¹²⁶ CX 15 at 4, CX 48; Tr. 41-42.

¹²⁷ CX 15 at 4.

3.11(c).)

32. On June 6, 2004, Dr. Schmidt failed to provide an effective program for the control of insects and rodents. Specifically, an accumulation of spiders, spider webs, and flying insect nests indicated a lack of an effective program for the control of insects.¹²⁸ (9 C.F.R. §§ 2.100(a); 3.11(d).)

33. On September 12, 2004, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points. Specifically, Dr. Schmidt had one ground enclosure, containing three animals, that contained triangular-shaped material with rough edges and one ground enclosure, containing one animal, that had sharp wires protruding into the enclosure.¹²⁹ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

34. On September 12, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's facility contained an accumulation of metal and hay that was not associated with the husbandry of the animals, dirt, dead insects, insect nests, and spider webs.¹³⁰ (9 C.F.R. §§ 2.100(a); 3.11(c).)

35. On September 12, 2004, Dr. Schmidt housed dogs in enclosures without suitable absorbent material to absorb and cover excreta. Specifically, Dr. Schmidt housed one animal in an enclosure with no material to absorb and cover excreta.¹³¹ (9 C.F.R. §§ 2.100(a); 3.14(a)(9).)

¹²⁸ CX 15 at 4, CX 45-CX 47; Tr. 41-43.

¹²⁹ CX 16 at 2; Tr. 43-44.

¹³⁰ CX 16 at 1; Tr. 43-44.

¹³¹ CX 16 at 2; Tr. 43-44.

Conclusions of Law

1. By reason of the Findings of Fact, Dr. Schmidt has willfully violated the Regulations and Standards as set forth in paragraphs 2 through 15 of these Conclusions of Law.

2. On April 22, 2001, Dr. Schmidt 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 to prevent soiling of animals, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

3. On October 14, 2001, and November 4, 2001, Dr. Schmidt 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 in good repair, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

4. On October 14, 2001, November 4, 2001, June 6, 2004, and September 12, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to ensure that primary surfaces coming in contact with animals were free of jagged edges or 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 October 14, 2001, and November 4, 2001, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide a waste disposal system that would keep animals free from contamination and allow the animals to stay clean and dry, as required by section 3.1(f) of the Regulations and Standards (9 C.F.R. § 3.1(f)).

6. On October 14, 2001, November 4, 2001, and March 17, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep housing facilities clean and in good repair to facilitate husbandry practices, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

7. On March 17, 2002, and October 13, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures for dogs that were

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structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

8. On March 17, 2002, and October 13, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures for dogs that contained the dogs securely, as required by section 3.6(a)(2)(iii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(iii)).

9. On March 17, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures that had sufficient space to allow each dog to stand and sit in a comfortable position, as required by section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)).

10. On March 23, 2003, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to spot-clean and sanitize hard surfaces with which dogs came in contact, as required by section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)).

11. On March 23, 2003, March 21, 2004, and June 6, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide an effective program for the control of insects and rodents, as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).

12. On November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain housing facilities so as to keep them free of trash, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

13. On November 2, 2003, and September 12, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing dogs in enclosures without suitable absorbent material to absorb and cover excreta, as required by section 3.14(a)(9) of the Regulations and Standards (9 C.F.R. § 3.14(a)(9)).

14. On November 2, 2003, and March 21, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide enclosures large enough to ensure each animal had sufficient space to stand and sit erect, as required by section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)).

15. On October 14, 2001, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing dogs in enclosures which had bare wire strand floors, as prohibited by section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)).

Sanctions

The Animal Welfare Act 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.¹³²

Dr. Schmidt conducts approximately six or seven auctions each year, exclusive of full dispersal sales.¹³³ Dr. Schmidt auctioned 890 dogs in 2000; 1,219 dogs in 2001; 1,342 dogs in 2002; 1,214 dogs in 2003; and 1,325 dogs in 2004.¹³⁴ Dr. Schmidt earned commissions and fees of \$15,500 in 2000; \$22,520 in 2001; \$20,130 in 2002; \$24,423 in 2003; and \$44,149 in 2004.¹³⁵ Based on the number of dogs auctioned by Dr. Schmidt and the amount of the earned commissions and fees, I find Dr. Schmidt operates a large business.

I find one of Dr. Schmidt's violations minor,¹³⁶ but the remainder are

¹³² 7 U.S.C. § 2149(b).

¹³³ Tr. 212.

¹³⁴ CX 1-CX 5.

¹³⁵ CX 1-CX 5.

¹³⁶ I find Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) minor. While I order Dr. Schmidt to

significant violations that could have resulted in harm to the animals at his facility. Dr. Schmidt's ongoing pattern of violations over a period of more than 3 years 4 months establishes Dr. Schmidt's disregard for the requirements of the Regulations and Standards, Dr. Schmidt's "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), and Dr. Schmidt's lack of good faith.

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

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.¹³⁷

cease and desist violations of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)), I assess no civil penalty for Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

¹³⁷ *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean*

The Administrator seeks assessment of a \$15,000 civil penalty against Dr. Schmidt and a cease and desist order.¹³⁸ However, the Administrator bases his recommendation on the Administrator's contention that Dr. Schmidt committed 36 violations of the Regulations and Standards and the Administrator's belief that the Animal Welfare Act authorizes a maximum civil penalty of \$3,750 for each of Dr. Schmidt's violations of the Regulations and Standards.¹³⁹ I find the Administrator proved by a preponderance of the evidence that Dr. Schmidt committed 30 violations of the Regulations and Standards and Dr. Schmidt could be assessed a

Williams (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), appeal dismissed, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), enforced as modified, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); *In re Fred Hodgins* (Decision and Order on Remand), 60 Agric. Dec. 73, 88 (2001), *aff'd*, 33 F. App'x 784 (6th Cir. 2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd* per curiam, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd* in part and transferred in part, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), appeal withdrawn, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.* (Order Denying Pet. for Recons.), 56 Agric. Dec. 942, 953 (1997); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

¹³⁸ Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 23.

¹³⁹ *Id.*

maximum civil penalty of \$2,750 for each of his 30 violations of the Regulations and Standards.¹⁴⁰ Moreover, as discussed in this Decision and Order, *supra*, I do not assess a civil penalty for Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)). 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 \$6,800 civil penalty are appropriate and necessary to ensure Dr. Schmidt's compliance with 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.

¹⁴⁰ 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, effective September 2, 1997, 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) (2005); 62 Fed. Reg. 40,924 (July 31, 1997)). Subsequently, 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 occurring after June 23, 2005, by increasing the maximum civil penalty from \$2,500 to \$3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). None of Dr. Schmidt's violations of the Regulations and Standards occurred after June 23, 2005; therefore, I reject the Administrator's contention that the maximum civil that may be assessed against Dr. Schmidt for each violation of the Animal Welfare Act and the Regulations and Standards is \$3,750.

The Administrator's Appeal Petition

The Administrator raises seven issues in his Appeal Petition. First, the Administrator asserts the ALJ erroneously dismissed the Complaint. The Administrator asserts the record establishes the Administrator proved by a preponderance of the evidence that Dr. Schmidt violated the Regulations and Standards, as alleged in the Complaint.¹⁴¹

The Administrator seeks an order assessing Dr. Schmidt a civil penalty and requiring Dr. Schmidt to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.¹⁴² As the proponent of an order, the Administrator has the burden of proof in this proceeding¹⁴³ and the standard of proof by which the burden of persuasion is met in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.¹⁴⁴ As discussed in this Decision and Order, *supra*, I find the Administrator introduced relevant, reliable, credible, and probative evidence of 34 of the 36 alleged violations of the Regulations and Standards at issue in this proceeding and the Administrator proved 30 of these violations by a preponderance of the evidence. Therefore, I agree with the Administrator that the ALJ erroneously dismissed the Complaint.

Second, the Administrator contends the ALJ erroneously found Dr. Schmidt was the subject of selective enforcement.¹⁴⁵

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation;¹⁴⁶ however, sometimes

¹⁴¹ Administrator's Appeal Pet. at 2-5.

¹⁴² Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 8-9.

¹⁴³ See note 19.

¹⁴⁴ See note 20.

¹⁴⁵ Administrator's Appeal Pet. at 5-8.

¹⁴⁶ *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Dr. Schmidt in this proceeding) proves that the prosecutor (the Administrator in this proceeding) singled out a defendant because of membership in a protected group or exercise of a constitutionally protected right.¹⁴⁷

Dr. Schmidt bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.¹⁴⁸ In order to prove a selective enforcement claim, Dr. Schmidt must show one of two sets of circumstances. Dr. Schmidt must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.¹⁴⁹ Dr. Schmidt has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Dr. Schmidt must show: (1) he exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Dr. Schmidt for exercise of the

¹⁴⁷ *Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), cert. denied sub nom. *Futernick v. Caterino*, 519 U.S. 928 (1996).

¹⁴⁸ *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

¹⁴⁹ *See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), cert. denied sub nom. *Futernick v. Caterino*, 519 U.S. 928 (1996).

protected right.¹⁵⁰ Dr. Schmidt has not shown any of these circumstances.

Third, the Administrator contends the ALJ erroneously found Sandra Meek did not conduct the inspections of Dr. Schmidt's facility in accordance with Animal and Plant Health Inspection Service procedures and guidelines.¹⁵¹

The ALJ found Sandra Meek conducted inspections of Dr. Schmidt's facility more frequently than warranted under the Animal and Plant Health Inspection Service's risk-based inspection system.¹⁵² Neither the Animal Welfare Act nor the Regulations and Standards limits the frequency with which the Secretary of Agriculture may conduct inspections. Section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) provides that the Secretary of Agriculture shall make such inspections as the Secretary deems necessary to determine whether any dealer subject to section 12 of the Animal Welfare Act (7 U.S.C. § 2142) has violated or is violating the Animal Welfare Act or the Regulations and Standards. Section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) also provides, in order to make such inspections, the Secretary of Agriculture shall have, at all reasonable times, access to the place of business, the facilities, and the animals of the dealer being inspected. Similarly, section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)) provides that each dealer shall, during business hours, allow Animal and Plant Health Inspection Service officials to enter the dealer's place of business to inspect and photograph facilities, property, and animals and to document, by taking photographs and other means, the conditions and areas of noncompliance.

The ALJ based his conclusion that Sandra Meek inspected Dr. Schmidt's facility too frequently on the following statement in the *Federal Register*: "APHIS uses a risk-based assessment to determine

¹⁵⁰ *Id.*

¹⁵¹ Administrator's Appeal Pet. at 8-12.

¹⁵² Initial Decision at 4-9.

minimum inspection frequency.”¹⁵³ I reject the ALJ’s conclusion that the Animal and Plant Health Inspection Service’s risk-based inspection system to determine *minimum inspection frequency* in any way limits the maximum frequency with which the Secretary of Agriculture may inspect a dealer’s place of business, facilities, and animals or in any way limits the Secretary of Agriculture’s authority to inspect a dealer’s place of business, facilities, and animals at all reasonable times.

The ALJ also found Sandra Meek conducted her inspections of Dr. Schmidt’s facility without being accompanied by Dr. Schmidt or Dr. Schmidt’s designated representative, as required by the Animal and Plant Health Inspection Service’s risk-based inspection system. The record establishes Ms. Meek conducted the September 12, 2004, inspection accompanied by Dr. Schmidt’s designated representative, Ronnie Williams.¹⁵⁴ Ms. Meek conducted the remaining nine inspections unaccompanied by Dr. Schmidt or Dr. Schmidt’s designated representative.

Section 2.126(b) of the Regulations and Standards (9 C.F.R. § 2.126(b)) was amended, effective August 13, 2004, to require dealers to make a responsible adult available to accompany Animal and Plant Health Inspection Service officials during the inspection process.¹⁵⁵ During the only inspection that occurred after the effective date of this amendment, the September 12, 2004, inspection, Dr. Schmidt made Ronnie Williams available to accompany Ms. Meek during the inspection process.¹⁵⁶

The ALJ also found Sandra Meek failed to conduct post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt’s designated

¹⁵³ 69 Fed. Reg. 42,094 (July 14, 2004).

¹⁵⁴ CX 16 at 2.

¹⁵⁵ 69 Fed. Reg. 42,089, 42,102 (July 14, 2004).

¹⁵⁶ CX 16 at 2.

representative in violation of the *Animal Care Resource Guide, Dealer Inspection Guide*.¹⁵⁷ The *Animal Care Resource Guide, Dealer Inspection Guide* sets forth procedures for post-inspection exit briefings with the Animal Welfare Act licensee or the facility representative. Dr. Schmidt testified he learned of the results of the 10 inspections that are the subject of the instant proceeding when he received the inspection reports for the inspections in the mail between 5 and 8 days after the United States Department of Agriculture conducted the inspections.¹⁵⁸ Moreover, I find nothing in the record establishing that Ms. Meek conducted post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt's designated representative. However, I do not find that Ms. Meek was required by the *Animal Care Resource Guide, Dealer Inspection Guide* to conduct post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt's designated representative. The *Animal Care Resource Guide, Dealer Inspection Guide* states that it is "a useful tool to improve the quality and uniformity of inspections, documentation, and enforcement of the Animal Care Program" and "[i]t does *not* add to, delete from, or change current regulatory requirements or standards – nor does it establish policy."¹⁵⁹ Moreover, I find Ms. Meek's failure to conduct post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt's designated representative has no bearing on whether Dr. Schmidt violated the Regulations and Standards, as alleged in the Complaint.

Fourth, the Administrator contends the ALJ erroneously concluded Sandra Meek's "findings in the ten inspection reports 'are exaggerated, biased and unsupported by sufficient credible objective evidence of such non-compliance as would warrant punitive action or imposition of a pecuniary penalty against [Dr. Schmidt]'" (Initial Decision at 13).¹⁶⁰

In the absence of clear evidence to the contrary, public officers are

¹⁵⁷ Initial Decision at 6-7.

¹⁵⁸ Tr. 227, 300.

¹⁵⁹ Animal Care Resource Guide, Dealer Inspection Guide at 1.2.1.

¹⁶⁰ Administrator's Appeal Petition at 13-15.

presumed to have properly discharged their official duties.¹⁶¹ Animal

¹⁶¹ See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating, although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), cert. denied, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating, without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), cert. denied, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Frank Craig*, ___ Agric. Dec. ___, slip op. at 22-25 (Feb. 21, 2007) (stating the complainant is presumed to have

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instituted the proceeding to carry out the purposes of the Federal Meat Inspection Act and the Poultry Products Inspection Act and not to cover up slander, sexual harassment, bribery, and witness intimidation); *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand), 61 Agric. Dec. 389, 399 (2002) (stating an administrative law judge is presumed to have considered the record prior to the issuance of his or her decision); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 435 (2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), cert. denied, 544 U.S. 904 (2005); *In re Karl Mitchell* (Order Granting Complainant's Pet. for Recons.), 60 Agric. Dec. 647, 665-67 (2001) (holding, in the absence of clear evidence to the contrary, Animal and Plant Health Inspection Service inspectors are presumed to be motivated only by the desire to properly discharge their official duties); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd* in part and transferred in part, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), appeal withdrawn, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *aff'd*, 294 F.3d 1001 (8th Cir. 2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions

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and Plant Health Inspection Service inspectors are presumed to be motivated only by a desire to properly discharge their official duties and to have properly discharged their duty to document violations of the Animal Welfare Act accurately.

Sandra Meek testified she was employed by the United States Department of Agriculture as an animal care inspector.¹⁶² Based upon Ms. Meek's employment status, I infer she was a salaried United States Department of Agriculture employee and her salary, benefits, and continued employment by the United States Department of Agriculture were not dependent upon her findings during the inspections of Dr. Schmidt's facility. Ms. Meek appears to have had no reason to record her findings in other than an impartial fashion, and I find nothing in the record indicating the 10 inspection reports are exaggerated or reflect bias.

Moreover, I find the conditions at Dr. Schmidt's facility, as reflected on the 10 inspection reports, which were prepared contemporaneously with Sandra Meek's observations, corroborated by other evidence in the

are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), remanded, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), order on remand, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated nunc pro tunc), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting the respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit the respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd* mem., 614 F.2d 770 (3d Cir. 1980).

¹⁶² Tr. 12.

record. Ms. Meek testified as to the accuracy of the inspection reports.¹⁶³ Jan R. Feldman, another experienced United States Department of Agriculture inspector, assisted Ms. Meek during five of the 10 inspections at issue in this proceeding: namely, the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspections.¹⁶⁴ Ms. Feldman testified that, based on her observations at Dr. Schmidt's facility, she agreed with all of the violations cited by Ms. Meek on the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspection reports. Moreover, Ms. Meek took photographs of some of Dr. Schmidt's violations during two of the 10 inspections at issue in this proceeding: namely, the March 21, 2004, and June 6, 2004, inspections.¹⁶⁵ The photographs confirm violations cited by Ms. Meek on the inspection reports that relate to the March 21, 2004, and June 6, 2004, inspections. Further still, Dr. Schmidt testified that he agreed with some of the violations cited in the inspection reports.¹⁶⁶

Fifth, the Administrator contends the ALJ's characterization of the nature and seriousness of Dr. Schmidt's violations of the Regulations and Standards is error.¹⁶⁷

The ALJ characterized some of the violations alleged in the Complaint as "inconsequential" and "subjective" in nature;¹⁶⁸ however, the ALJ does not identify which violations he found inconsequential and subjective.

The ALJ characterized the allegations that, on March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide sufficient lighting to conduct

¹⁶³ Tr. 12-75.

¹⁶⁴ Tr. 77-79.

¹⁶⁵ CX 37-CX 48.

¹⁶⁶ Tr. 300-02.

¹⁶⁷ Administrator's Appeal Pet. at 15-19.

¹⁶⁸ Initial Decision at 4.

an inspection of the animals and facilities as trivial, if not frivolous.¹⁶⁹ For the reasons discussed in this Decision and Order, *supra*, I dismiss the allegations that Dr. Schmidt failed to provide sufficient lighting to conduct inspections of the animals and facilities on March 21, 2004, and June 6, 2004.¹⁷⁰

The ALJ also characterized the allegations that on March 21, 2004, March 23, 2004, and June 6, 2004, Dr. Schmidt had cobwebs in his facility as trivial, if not frivolous.¹⁷¹ As an initial matter, the Administrator did not allege that Dr. Schmidt violated the Regulations and Standards on March 23, 2004. Moreover, the Administrator does not allege that Dr. Schmidt violated the Regulations and Standards on March 21, 2004, and June 6, 2004, merely because he had cobwebs in his facility. Instead, the evidence establishes that on March 21, 2004, Dr. Schmidt's facility contained dirt on the tops of animal enclosures, spider webs on perimeter walls and enclosure support structures, flying insect nests, a bird nest, dead bugs, bird droppings, and a dirty tarp¹⁷² and on June 6, 2004, Dr. Schmidt's facility contained a dirty tarp, spiders, spider webs, dirt on the interior building wall surfaces and raised enclosure support framing, dark dried matter on the front metal fencing panel of a ground enclosure, and a vine growing in the framing of two adjoining enclosures¹⁷³ in violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)). Therefore, I disagree with the ALJ's characterization of Dr. Schmidt's March 21, 2004, and June 6, 2004, violations of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) as trivial, if not frivolous.

¹⁶⁹ Initial Decision at 8-9.

¹⁷⁰ Compl. ¶¶ IX(A)(1), X(A)(4).

¹⁷¹ Initial Decision at 8-9.

¹⁷² CX 14 at 2.

¹⁷³ CX 15 at 4.

Further, the ALJ characterized the allegations that, on November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Dr. Schmidt had trash in his facility as trivial, if not frivolous because, the ALJ concluded, the trash accumulated from the general public during the course of auction sales.¹⁷⁴ Based on the description of the trash found during the November 2, 2003, inspection of Dr. Schmidt's facility, I find the trash accumulated from the general public during the course of the November 2, 2003, auction sale.¹⁷⁵ I find this violation minor, and I assess no civil penalty for Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)). As for Dr. Schmidt's March 21, 2004, June 6, 2004, and September 12, 2004, violations of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)), the nature of the trash in Dr. Schmidt's facility indicates the trash was not merely minor amounts of trash left by auction patrons, as the ALJ concluded.¹⁷⁶

Sixth, the Administrator contends the ALJ erroneously found "[t]he testimony of numerous witnesses, including a veterinarian employed by

¹⁷⁴ Initial Decision at 8-9.

¹⁷⁵ The November 2, 2003, inspection report states Dr. Schmidt's premises contained trash on or adjacent to enclosures containing dogs, as follows: (1) a Coca Cola can on top of a wire raised enclosure containing two adult dogs; (2) a Dr. Pepper can on top of a ground enclosure containing one adult dog; (3) a coffee cup on top of a raised wire enclosure containing two adult dogs; (4) a discarded water bottle on top of a raised wire enclosure containing one adult dog; and (5) an accumulation of discarded materials, including a candy package, a Mountain Dew can, and a water bottle on top of a roll of wire in contact with a raised wire enclosure containing two adult dogs (CX 13 at 2).

¹⁷⁶ The March 21, 2004, inspection report states Dr. Schmidt's facility contained dirt on the tops of animal enclosures, spider webs on perimeter walls and enclosure support structures, flying insect nests, a bird nest, dead bugs, bird droppings, and a dirty tarp (CX 14 at 2). The June 6, 2004, inspection report states Dr. Schmidt's facility contained a dirty tarp, spiders, spider webs, dirt on the interior building wall surfaces and raised enclosure support framing, dark dried matter on the front metal fencing panel of a ground enclosure, and a vine growing in the framing of two adjoining enclosures (CX 15 at 3-4). The September 12, 2004, inspection report states Dr. Schmidt's facility contained an accumulation of metal and hay that was not associated with the husbandry of the animals, dirt, dead insects, insect nests, and spider webs (CX 16 at 1).

the Missouri Department of Agriculture and two individuals associated with the American Kennel Club, all tend to dispute the general conditions of non-compliance which are alleged” (Initial Decision at 9).¹⁷⁷

Dr. Schmidt called 12 witnesses to rebut the evidence introduced by the Administrator. Some of the witnesses could not testify with certainty that they were at Dr. Schmidt’s facility during the inspections at issue in this proceeding and 11 of the 12 witnesses did not accompany the United States Department of Agriculture inspectors during the inspections of Dr. Schmidt’s facility.¹⁷⁸ Moreover, except for Dr. Schmidt, none of the 12 witnesses addressed the alleged violations that relate to the conditions at Dr. Schmidt’s facility during the 10 inspections in question.¹⁷⁹ Jerry Eber, the veterinarian employed by the Missouri Department of Agriculture referred to by the ALJ, testified he was at Dr. Schmidt’s facility sometime during 2003. Dr. Eber did not indicate that he was at Dr. Schmidt’s facility during the inspections at issue in this proceeding or that he knew of the condition of Dr. Schmidt’s facility on the dates of the inspections.¹⁸⁰ Katherine M. Peaker, one of the individuals associated with the American Kennel Club referred to by the ALJ, testified she was at Dr. Schmidt’s facility during the November 2, 2003, inspection and most likely at Dr. Schmidt’s facility during the March 21, 2004, June 6, 2004, and September 12, 2004, inspections. Ms. Peaker testified she did not accompany the United States Department of Agriculture inspectors on the inspections of Dr. Schmidt’s facility and

¹⁷⁷ Administrator’s Appeal Pet. at 19-20.

¹⁷⁸ Ronnie Williams accompanied Sandra Meek during the September 12, 2004, inspection of Dr. Schmidt’s facility.

¹⁷⁹ Six of the witnesses testified with respect to Administrator’s allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials while they were carrying out their duties.

¹⁸⁰ Tr. 243-48.

could not comment on the inspectors' findings during those inspections.¹⁸¹ Anette Turner, the other individual associated with the American Kennel Club referred to by the ALJ, testified she was at Dr. Schmidt's facility as late as March 23, 2003, but she did not remember the dates she was at Dr. Schmidt's facility. Ms. Turner saw United States Department of Agriculture inspectors at Dr. Schmidt's facility on occasion, but did not accompany them during the inspections and had no reason to question the United States Department of Agriculture inspectors' findings.¹⁸²

Therefore, I reject the ALJ's finding that the testimony of numerous witnesses, including a veterinarian employed by the Missouri Department of Agriculture and two individuals associated with the American Kennel Club, tend to dispute the general conditions of Dr. Schmidt's facility alleged in the Complaint.

Seventh, the Administrator contends the ALJ did not have authority to direct him (the Administrator) to take corrective action in future inspections.¹⁸³

The ALJ directed the Administrator "to take appropriate corrective action to insure that published Departmental policy and procedures as expressed in the *Federal Register* and the Animal Care Resource Guide, Dealer Inspection Guide are followed by APHIS personnel in future inspections."¹⁸⁴

Neither the Administrative Procedure Act nor the Rules of Practice authorizes the ALJ to order the Administrator to take corrective action in future inspections under the Animal Welfare Act. Under the Administrative Procedure Act, an administrative law judge has two principal functions: (1) to preside at the taking of evidence and (2) to

¹⁸¹ Tr. 185-86.

¹⁸² Tr. 188, 194-95.

¹⁸³ Administrator's Appeal Pet. at 20-22.

¹⁸⁴ Initial Decision at 11.

issue an initial decision.¹⁸⁵ The administrative law judge's role in an administrative proceeding is to consider the evidence and the filings and issue an initial decision. The powers conferred on an administrative law judge are listed in the Administrative Procedure Act,¹⁸⁶ and I find no provision conferring authority on an administrative law judge to order an agency employee to take action unrelated to the proceeding before the administrative law judge. Similarly, the Rules of Practice identifies the powers conferred on an administrative law judge,¹⁸⁷ and I find no provision conferring authority on an administrative law judge to order an agency employee to take action unrelated to the proceeding before the administrative law judge.

Moreover, the authority of administrative law judges employed by the United States Department of Agriculture is limited to that authority delegated by the Secretary of Agriculture, and a review of that delegation of authority reveals that the Secretary of Agriculture has not delegated United States Department of Agriculture administrative law judges any authority to direct the Administrator to take corrective action in future inspections conducted under the Animal Welfare Act.¹⁸⁸

Finally, a review of the Animal Welfare Act and the Regulations and Standards reveals that neither the Animal Welfare Act nor the Regulations and Standards confers authority on administrative law judges to direct the Administrator to take corrective action with respect to inspections conducted under the Animal Welfare Act.

Based on my review of the Administrative Procedure Act, the Rules of Practice, the Secretary of Agriculture's delegations of authority to administrative law judges, the Animal Welfare Act, and the Regulations

¹⁸⁵ 5 U.S.C. §§ 556 and 557.

¹⁸⁶ 5 U.S.C. § 556(c).

¹⁸⁷ 7 C.F.R. § 1.144(c).

¹⁸⁸ 7 C.F.R. § 2.27(a)(1).

and Standards, I find the ALJ exceeded his authority by ordering the Administrator to take corrective action with respect to future inspections conducted under the Animal Welfare Act. Therefore, I do not adopt the ALJ's order directing the Administrator to take corrective action with respect to future inspections conducted under the Animal Welfare Act.

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

ORDER

1. Dr. Schmidt, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Regulations and Standards, and in particular shall cease and desist from:

(a) Failing to remove excreta from primary enclosures to prevent soiling of animals;

(b) Failing to provide housing facilities that are structurally sound and in good repair;

(c) Failing to ensure that primary surfaces coming in contact with animals are free of jagged edges or sharp points that might injure the animals;

(d) Failing to provide a waste disposal system that keeps animals free from contamination and allows the animals to stay clean and dry;

(e) Failing to keep housing facilities clean and in good repair to facilitate husbandry practices;

(f) Failing to provide primary enclosures for dogs that are structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs;

(g) Failing to provide primary enclosures for dogs that contain the dogs securely;

(h) Failing to provide primary enclosures which have sufficient space to allow each dog to stand and sit in a comfortable position;

(i) Failing to spot-clean and sanitize hard surfaces with which

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dogs come in contact;

(j) Failing to provide an effective program for the control of insects and rodents;

(k) Failing to maintain housing facilities so as to keep them free of trash;

(l) Failing to house dogs in enclosures with suitable absorbent material to absorb and cover excreta;

(m) Failing to provide enclosures large enough to ensure each animal has sufficient space to stand and sit erect; and

(n) Housing dogs in enclosures which have bare wire strand floors.

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

2. Dr. Schmidt is assessed a \$6,800 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:

Frank Martin, Jr.
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, Frank Martin, Jr., within 60 days after service of this Order on Dr. Schmidt. Dr. Schmidt shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0019.

RIGHT TO JUDICIAL REVIEW

Dr. Schmidt 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. Dr. Schmidt must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁸⁹ The date of entry of the Order in this Decision and Order is March 26, 2007.

¹⁸⁹ 7 U.S.C. § 2149(e).

LORENZA PEARSON d/b/a
L & L EXOTIC ANIMAL FARM
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**In re: LORENZA PEARSON d/b/a L & L EXOTIC ANIMAL
FARM AND LORENZA PEARSON.
AWA Docket No. 02-0020.
AWA Docket No. D-06-0002.
Decision and Order.
Filed April 6, 2007.**

AWA – Willfulness – Written warnings, when required.

Frank Martin, Jr. for APHIS
William T. Whitaker for Respondent.
Decision and Order by Administrative Law Judge Victor W. Palmer

Decision and Order

Preliminary Statement

This is a consolidated proceeding that includes a disciplinary complaint (AWA Docket No. 02-0020), filed on June 14, 2002 and later amended on March 3, 2006, by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), United States Department of Agriculture (“USDA”), and a petition (AWA Docket No. D-06-0002) filed by Lorenza Pearson (“Mr. Pearson”), the respondent in the disciplinary action. The amended complaint in the disciplinary proceeding alleges that Mr. Pearson, a licensed animal exhibitor, willfully violated the Animal Welfare Act (7 U.S.C. §§ 2131-2159; “the AWA” or “the Act”), and the regulations and standards issued under the Act (9 C.F.R. § 1.1 *et seq.*; “the regulations”) for which APHIS seeks a cease and desist order, a civil penalty of \$100,000, the revocation of the exhibitor’s license held by Mr. Pearson and his permanent disqualification from obtaining a future license. Mr. Pearson denies the allegations and seeks dismissal of the disciplinary complaint. An administrative hearing was initially held in Akron, Ohio on September 24-25, 2003 before Administrative Law Judge Leslie B. Holt. Due to

Judge Holt's subsequent unavailability, the case was reassigned to me. I held a reopened hearing in Akron, Ohio on June 20-23, 2006. The transcript of the 2003 hearing shall be referred to as "Tr. 1 at ___". The transcript of the 2006 hearing shall be referred to as "Tr. 2 at ___". APHIS was represented by attorneys of the USDA's Office of the General Counsel: Frank Martin, Jr., Esq. and Nazina Razick, Esq. at the 2003 hearing, and Frank Martin, Jr., Esq. and Babak A. Rastgoufard, Esq. at the 2006 hearing. Mr. Pearson was represented by his attorney, William T. Whitaker, Esq., of Akron, Ohio.

Upon consideration of the evidence of record, the arguments by the parties, the Act, the regulations, and controlling precedent, I have decided that an order should be entered requiring Mr. Pearson to cease and desist from violating the Act and the regulations, revoking his exhibitor's license, and permanently disqualifying him from obtaining a future license. Civil penalties, however, are not being assessed.

Procedural Background and Rulings on Motions

After the initiating complaint was filed on June 14, 2002, various events occurred that delayed the issuance of this decision and order.

Judge Leslie B. Holt who held the hearing on September, 24 and 25, 2003, and took evidence on the allegations contained in the original complaint, became unavailable. As a result, the Chief Judge reassigned the case to me on March 10, 2004. I conducted a teleconference with the attorneys for the parties on April 6, 2004, and again on May 6, 2004, in which we discussed whether a new hearing was needed. Mr. Pearson's attorney stressed his need to interrogate in my presence, the witnesses who had appeared for APHIS so that I could independently assess their credibility. Based on his concerns, a hearing was scheduled for June 8-10, 2004 in Akron, Ohio. That hearing date was later changed to better accommodate the convenience of the parties and their witnesses, to December 6-10, 2004. For similar reasons, those hearing dates were cancelled and the hearing was again rescheduled for April 18-21, 2005.

At a teleconference conducted on March 31, 2005, I was advised that a proceeding pertaining to Mr. Pearson's facility was pending before authorities for the State of Ohio that could resolve the issues in this case.

The attorneys for the parties recommended that the scheduled hearing should, for that reason, be cancelled. This was done and subsequent teleconferences were held to track the matter.

In a teleconference held on September 22, 2005, I determined that a hearing in this case was still needed and scheduled it for March 28-31, 2006 in Akron, Ohio. On March 3, 2006, APHIS moved to file an amended complaint to include allegations respecting inspections conducted after those that were the subject of the 2003 hearing. Teleconferences were held on March 7, 2006 and March 14, 2006. At the first teleconference, the motion by APHIS to file an amended complaint was granted and APHIS was directed to send a new witness list and exhibits to William Whitaker, Esq., Mr. Pearson's attorney, and a teleconference was scheduled for March 14, 2006, to ascertain if it was still feasible to hold the hearing as then scheduled. At the second teleconference, Mr. Whitaker advised that he was overwhelmed by the multitude of allegations in the amended complaint and needed additional time to prepare for the hearing. It was decided to reschedule the hearing for June 20-23, 2006, and to reserve additional hearing days on June 27-28, if needed.

In April, 2006, APHIS filed a Motion in Limine to limit the evidence that Mr. Pearson would be allowed to introduce at the hearing, and a teleconference was conducted, on June 12, 2006, to resolve the Motion in Limine. I decided and ruled that inasmuch as APHIS was calling the same investigators to prove the violations alleged in its amended complaint, ample opportunity would be provided to test their credibility without restating the transcribed testimony they gave at the 2003 hearing. It was also decided that respondent would be allowed to cross-examine them in respect to both the original violations alleged by APHIS and those alleged in the amended complaint. Also, witnesses called on behalf of Mr. Pearson could testify in respect to both the violations originally alleged as well as those added by the amended complaint. It was further decided that the hearing would be treated as a reopened hearing with the transcript of the first hearing being considered as part of the overall proceedings.

On June 15, 2006, Mr. Pearson filed an emergency request for a continuance of the scheduled hearing because his home with papers, notes and pictures had been destroyed by a fire two weeks earlier. I denied this motion on the following basis:

This case involves a complaint initially filed on June 14, 2002, in respect to which a hearing was held on September 24-25, 2003. Judge Leslie B. Holt, who presided over this hearing, became unavailable to decide the case and it was reassigned to me on March 10, 2004. At that time, there was a discussion as to whether another hearing would be needed. It was decided to hold another hearing on the basis of Mr. Whitaker's request. However, time after time, the hearing was postponed and not held. It shall now go forward without further delay.

It would be most inappropriate to grant a continuance in the present circumstances. If photos were destroyed in the fire, they cannot be restored. Witnesses who have lost their notes shall have to rely on their memory of the events when they testify, the same as they would if time were given to reconstruct the lost notes.

I denied a motion to reconsider my denial of the motion for continuance, and the hearing was held as scheduled.

At the hearing, Mr. Pearson's attorney moved again for a continuance in light of the fire. The motion was again denied. A motion was also made at the hearing to reconvene the hearing to obtain testimony from Dr. Faust, a veterinarian, who was out of town at the time of the hearing. The motion was made on the grounds that Mr. Whitaker had just learned that Dr. Faust was the veterinarian who had, on Mr. Pearson's behalf, inspected his bears that were ultimately confiscated (*see* Finding 6, *infra*). This motion was likewise denied. In a hearing so long delayed and so difficult to schedule, it is expected that all potentially helpful witnesses will be identified in advance of the hearing to prevent surprise to opposing counsel and to allow for the issuance and service of any subpoenas needed to compel attendance.

At the conclusion of the hearing, briefing dates were set. Each party subsequently filed unopposed motions for extensions of time to file their

briefs. The extensions were granted in light of the voluminous exhibits that had been filed and the lengthy testimony that had been given.

Briefing was completed on January 5, 2007, and the file was then referred to me for decision. Mr. Pearson's brief renewed his requests to present Dr. Faust's testimony and for a continuance due to the house fire. These requests are again denied.

The Issues and Controlling Precedent

At issue in this case, is whether Mr. Pearson, a licensed animal exhibitor, committed the kind of violations of the Act and the regulations for which the Act (7 U.S.C. § 2149(b)) provides that an order may be entered by USDA requiring a licensee to cease and desist from continuing violations of the Act, assessing civil penalties of up to \$3,750 for each violation (increased from \$2,500 pursuant to 28 U.S.C. § 2461 as implemented by 7 C.F.R. § 3.91(a),(b)(2)(v)), and suspending or revoking the person's license. Moreover, under the regulations, a person whose license has been suspended or revoked may not be licensed within the period during which the order of suspension or revocation is in effect (9 C.F.R. § 2.9(b)).

APHIS argues that Mr. Pearson committed numerous, willful violations under the Act and the regulations for many years, and that I should enter an order against him that contains cease and desist provisions, assesses a civil penalty of \$100,000, revokes Mr. Pearson's exhibitor's license, and permanently disqualifies him from obtaining a license.

Mr. Pearson vigorously denies that he did anything to warrant the revocation of his license or the imposition of a \$100,000 penalty. He argues that his situation is analogous to the one before the Sixth Circuit in *Hodgins v. U.S. Dep't of Agric.*, 238 F.3d 421, 2000 U.S. App. Lexis 29892 (6th Cir. 2000). In the cited case, the Sixth Circuit vacated and remanded a USDA decision that had included a cease and desist order, assessed a civil penalty of \$13,500, and suspended a license issued under the AWA for 14 days with reinstatement dependent on APHIS declaring

that all violations had ended. The USDA decision was set aside for failure to comply with the limitations the Administrative Procedure Act, 5 U.S.C. § 558(c), places on license suspensions and revocations, and for misapplying the Sixth Circuit's standard for willfulness. Inasmuch as Mr. Pearson resides within the Sixth Circuit where his appeal of a USDA decision would eventually lie, *Hodgins* has controlling precedential value in this case.

In *Hodgins*, the Sixth Circuit concluded that the Judicial Officer erroneously based his suspension of the license on a statement of law that it found "...difficult to reconcile with the Administrative Procedure Act, which provides that a license can be suspended for a non-willful violation only if the violator is given written notice and an 'opportunity to demonstrate or achieve compliance with all lawful requirements' 5 U.S.C. § 558(c)". The Court then stated:

The proper rule of law, we believe, is this: Unless, it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action's legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty. This is a principle to which we shall have occasion to turn repeatedly in the discussion that follows.

The question of willfulness is one that must be addressed separately with respect to each specific violation. A blanket finding of willfulness, on the basis of the record before us, is simply not tenable....

2000 U.S. App. Lexis 29892 at 8.

The following findings and conclusions have been made in light of the Sixth Circuit's interpretation of what constitutes willfulness; the court's instruction that willfulness should be addressed separately with respect to each specific violation; and the limitations that the court found the Administrative Procedure Act places upon USDA suspensions and revocations of AWA licenses. In doing so, I have also considered *Fred Hodgins*, 60 Agric. Dec. 73 (2001), the decision on remand in which the

Judicial Officer replaced his previous order with one that continued to impose a cease and desist order, but reduced the civil penalty to \$325 and did not suspend the AWA license. This decision was affirmed in *Hodgins v. USDA*, 33 Fed. Appx. 784, WL 649102, 61 Agric. Dec. 19 (6th Cir. 2002).

Findings

A. Undisputed General Findings

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Mr. Pearson is an exhibitor as defined in the Animal Welfare Act and the regulations who holds Animal Welfare Act license number 31-C-0034, issued to: Lorenza Pearson d/b/a L & L Animal Farm.
3. Mr. Pearson does business as L & L Animal Farm (aka L & L Exotic Animal Farm), an unincorporated association or partnership with the mailing address of 2060 Columbus Avenue, Akron, Ohio 44320.
4. On or about October 5, 2005, APHIS notified Mr. Pearson of its intent to terminate his license pursuant to section 2.12 of the regulations (9 C.F.R. § 2.12).
5. Mr. Pearson operates a medium-sized business. As shown by his applications to renew his AWA exhibitor's license, he has held the following number of animals. Between October 11, 1999 and October 11, 2000, he held fifty-nine animals, including thirty-nine wild/exotic felines and twenty bears (CX-1). Between October 11, 2000 and October 11, 2001, he held 82 animals, including fifty-five wild/exotic felines and twenty-seven bears (CX-2). Between October 11, 2001 and October 11, 2002, he held seventy-four animals, including forty-six wild/exotic felines and twenty-eight bears (CX-151). Between October 11, 2002 and October 11, 2003, he held seventy-five animals, including forty-six wild/exotic felines and twenty-nine bears (CX-150). Between October 11, 2003 and October 11, 2004, he held fifty-eight animals, including thirty-three wild/exotic felines and twenty-five bears (CX148). Finally, between October 11, 2004 and October 11, 2005, Mr. Pearson

held twenty-six bears (CX-147).

6. The periodic inspections of Mr. Pearson's facility that are at issue in this case were conducted by APHIS from May 12, 1999 through February 22, 2006 (CX-5 through CX-143, CX-153 through CX-192, and CX-202). Seven of Mr. Pearson's bears were confiscated by APHIS on May 17, 2005, under section 2146(a) of the Act and section 2.129 of the regulations for his alleged failure to provide those animals requisite care (7 U.S.C. § 2146(a); 9 C.F.R. § 2.129; CX-194-195; Tr. 2 at 662).

B. Findings respecting conditions and practices at Mr. Pearson's Exotic Animal Farm and his traveling animal exhibit from May 12, 1999 through February 22, 2006

7. On May 12, 1999, an APHIS inspector conducted the first inspection at issue in this proceeding, in which the inspector found a "non-compliant item" or "deficiency" (the terms APHIS inspectors alternately use to describe conditions or practices that they believe are at variance with the regulations and standards). It was a routine inspection of Mr. Pearson's facility in which Animal Care Inspector Joseph Kovach observed two lion cubs to have injuries to their noses that in his opinion could develop into infections if untreated. Mr. Pearson was directed to contact his attending veterinarian for treatment advice and to have the injuries treated (CX 5; Tr. 1 at 115-119).

8. On September 9, 1999, Inspector Kovach next conducted an inspection of Mr. Pearson's facility and found that the injuries to the noses of the two lion cubs had been treated. (CX 6, Tr. 1 at 119-120). Inasmuch as four months were allowed to pass before the inspector checked on the cubs' condition, I infer that their injuries were not very serious. Moreover, the injuries could have happened just prior to the inspection. Therefore, I find no violation, willful or otherwise, of the Act or the regulations in respect to the lion cubs' treatment warranting any kind of sanction. Certainly, in light of Mr. Pearson's complete compliance with the notice he received from the inspector, this was not the kind of non-compliant item that constitutes a violation upon which the revocation of his license may be based.

9. At the time of the September 9, 1999 inspection, Inspector Kovach

observed new, non-compliant items. Wires were sticking out of the back wall of an enclosure housing two tigers; there was a hole in the roof of a bobcat enclosure; more shelter, such as a sleeping den box, was needed to protect a fox from bad weather; a trailer housing an adult tiger was too small for its permanent housing; and a transport trailer needed to be cleaned and sanitized. Mr. Pearson was instructed to remove the wires from the wall of the tigers' enclosure; repair the roof of the bobcat's enclosure; provide the fox a sleeping box; and build a cage for the adult tiger (CX 6; Tr. 1 at 120-124).

10. On September 18, 1999, an inspection was made of Mr. Pearson's traveling animal exhibit at a Heinz Corporation employee picnic. The inspection was conducted by Dr. Norma Harlan, Veterinary Medical Officer for APHIS. Mr. Pearson did not have records for two lion cubs owned by an unlicensed facility that were part of the traveling exhibit. A camel pen owned by the unlicensed facility had several sharp wire edges that needed repair and animals owned by it were not accompanied with a copy of their health records or a written program of veterinary care. Therefore, Dr. Harlan could not verify if the two lion cubs it owned that had scrapes on their faces and legs, and appeared to be too thin, had received needed veterinary care and were being fed in accordance with a veterinarian approved regimen. In addition to the problems with the animals owned by the unlicensed facility, pens on Mr. Pearson's trailer housing an adult lion and three tigers that he owned were, at 4 feet by 7 feet 11 inches by 5 feet tall, considered by Dr. Harlan to be too small for the animals to make needed postural adjustments; and there was no exercise area available to these big cats. Mr. Pearson was instructed to have all required paperwork with future exhibitions; provide veterinary care to the two lion cubs and feed them properly; repair the camel pen; and give the big cats adequate space and exercise when part of his traveling exhibit. The following day, September 19, 1999, Dr. Harlan returned to observe the loading of Mr. Pearson's traveling exhibit and saw a camel with matted hair that needed clipping; cages containing a leopard and a juvenile tiger without handholds to assure safe handling; and a leopard cage that was not securely tied down on the truck. Mr.

Pearson was instructed to make corrections (CX-7, Tr. 1 at 347-363 and Tr. 1 at 403-404).

11. On January 5, 2000, Inspector Kovach again inspected Mr. Pearson's permanent facility. The inspector found that the enclosures housing the two tigers and the bobcat had been repaired, the fox had been provided adequate shelter and the dirty transport trailer had been cleaned. I find that none of these non-compliant items, all of which were corrected, were violations that warrant any sanction. Dr. Kovach also found that most of the items identified by Dr. Harlan as non-compliant in the inspection she conducted on the road had been corrected. The veterinary care program was reviewed and found to be up-to-date. The two lion cubs had been treated and later sold. The young camel was not on site and could not be evaluated. Handholds were now on transport cages, and a different transport vehicle was being used. Again, I find none of these items that Mr. Pearson corrected after receiving notice, to be willful violations or violations that warrant sanction. However, Inspector Kovach found that the enclosures housing three tigers identified in early September, 1999, as too small for each animal to have adequate freedom of movement, were still being used. Mr. Pearson was given notice of the fact that these deficiencies had been documented on prior inspections and he was given the opportunity to correct them (CX-8, Tr.1 at 124-127). Mr. Pearson's continued violation of the regulation respecting space requirements for animals (9 C.F.R. § 3.128) to protect them from stress, and behavioral and physical problems, after he was instructed to provide his animals larger pens, meets the Sixth Circuit definition of a willful violation for which the sanctions of license suspension or revocation may be imposed in addition to a civil penalty and the issuance of a cease and desist order (CX-8; Tr. 1 at 126-127; and Tr. 1 at 354-355).

12. On June 12, 2000, Inspector Kovach conducted a routine inspection of Mr. Pearson's facility and found two non-compliant items. The left side of the front gate needed repair so as to protect the animals from injury and to contain the animals as the regulations require (9 C.F.R. § 3.125 (a)), and he instructed Mr. Pearson to repair it within seven days. An enclosure for lions and tigers "had food on the floor with maggots crawling over it, crawling all over it" (Tr.1 at 128). The

inspector characterized the presence of maggot-infested food in the enclosure as significant noncompliance with the Act and the regulations because “maggots could cause parasites” (Tr. 1 at 129). Mr. Pearson was instructed by the inspector that he should avoid this problem by only leaving food out for a limited period of time or giving the animals a feeding period and if they then chose not to eat the food, to retrieve it to protect them from eating infested food (Tr.1 at 129). Inasmuch as there is no further reference to either non-compliant item, it is inferred that Mr. Pearson heeded the instructions. I find that the problem with the gate does not warrant any sanction. In respect to the maggot infested food, Mr. Pearson should have known without receiving instruction, his obligation to prevent contaminated feed from being eaten by his animals; and this is a violation of a controlling regulation (9 C.F.R. § 3.129 (a)) that warrants the imposition of a civil penalty and the issuance of an order to cease and desist from the practice. It also constitutes a willful violation for which the sanctions of license suspension or revocation may be imposed. (CX-9; and Tr.1 at 128-129).

13. On July 19, 2000, Inspector Kovach inspected Mr. Pearson’s traveling animal exhibit at the Crawford County Fair Grounds. He observed that the Ford truck used to haul the animals had front tires with insufficient tread and a cracked windshield. The inspector believed that these defects violated 9 C.F.R. § 3.138 (a), a regulation that provides:

The animal cargo space of primary conveyances used in transporting live animals shall be designed and constructed to protect the health, and ensure the safety and comfort of the live animals therein contained.

Since this regulation deals with cargo space only, I find that the problems with the rest of the truck were within the jurisdiction of State authorities and not USDA. Therefore, no violation of the Act or the regulations is found in respect to the condition of the truck’s tires and windshield. Requisite records respecting the animals and a program of veterinary care for them was not immediately available when the inspector asked to see them, but the records were later furnished; and no

violation is found to have been committed. The inspector found that the five pens on the trailer confining two adult lions, two adult tigers and one adult jaguar were, at 4 feet by 8 feet by 5 feet tall, too small for the animals when they were not in transit. They also were not being provided with an exercise area. This was the same violation of 9 C.F.R. § 3.128, for which Mr. Pearson had been cited on September 18, 1999, and it was still uncorrected. The issuance of an order requiring Mr. Pearson to cease and desist from this practice and assessing civil penalties is warranted for this violation, and since he failed to correct it after being previously told to do so, it may also be considered as a basis for suspending or revoking his license (CX-10; Tr. 1 at 130-134).

14. On January 29, 2001, Inspector Kovach and Dr. Harlan performed a routine inspection of Mr. Pearson's facility. At this inspection the facility housed 8 cougars, 18 lions, 2 lynx, 1 jaguar, 14 tigers, 14 bears, 5 bobcats, 1 fox, 1 goat and 14 rabbits. They were accompanied by Inspector Carl LaLonde, Jr. who photographed the conditions observed at this inspection.

(a) Dr. Harlan testified that the facility lacked sufficient personnel to conduct an adequate care program for the number of animals it housed. Just two persons were there when she and the inspectors arrived. Mr. Pearson arrived afterwards. The program of veterinary care was inadequate in that it did not include information concerning the veterinary care for the 14 bears, 1 fox, 1 goat and 14 rabbits. One of the cougars was in a traveling enclosure that did not provide it sufficient shelter from the wind and the elements; it was wet and could not stay dry and clean; it was ill and lame with an abscess on its left hind leg; and it required immediate veterinary care to live. In a pen housing five lions, two male lions were dirty and wet and appeared thin; and one of them was lame; a female lion appeared thin and had very tender feet; and the pen contained loose stools indicating a slight diarrhea affecting one of the lions. The lions, together with a rabbit with a swollen eye, needed immediate veterinary care. They found a dead badger on top of a shelter that they were told had died sometime in December, 2000. There was no record of the death or cause of death of this animal, nor that of a llama, a black leopard, a bear, a lion and a jaguar, that had died in 2000. They also found a dead tiger in one pen and no one was sure when it had died

but it was frozen and appeared to have been dead for awhile and should have been removed. Female bears were housed inside hibernating boxes set within a large enclosure in which non-hibernating male bears were roaming around the caged female bears. The boxes did not allow the bears inside, that “in this area of the country are partial hibernators”, to be observed so as to check on their condition and determine if they had come out of hibernation and needed food or water. The hibernating box housing one of the female bears was too small and gave her no room for postural adjustments. The storage of the feed and bedding kept at the facility was inadequate in that the hay and bales of straw were on the ground mixed with tires, lawnmowers, tarps and pieces of wood, and were exposed to moisture and contamination. In the food preparation area of the facility, a dead cow was hung up with half of its head missing; the band saw used to cut up meat was covered with dried-up blood; and the area was extremely dirty. Animals were using snow or ice to quench their thirst. The 11 bears in the hibernating dens had not been given access to water since November 2000. The facility did not have a 6 foot high perimeter fence keeping people at least three feet away from the enclosure housing four bobcats and an arctic fox, as required by 9 C.F.R. § 3.127(d). A lion cub and two cougars had not been provided sufficient shelter to protect them from the prevalent, cold, wet and sleeting weather. The cougars were housed in a transport trailer and the lion cub in a smaller travel enclosure that was inadequate as permanent housing because the animals did not have sufficient space to make normal postural adjustments. The food given the big cats and other carnivores was contaminated because butchering of cow carcasses was performed in a dirty area and then tossed into enclosures on top of old carpet, feces and urine. The enclosures appeared not to be cleaned often enough to prevent contamination of the animals and their feed as evidenced by an excessive buildup of wet bedding, feces, bones, feed, waste, and debris in all of the pens. A goat and 14 rabbits were housed in the same block enclosure as a cougar, a predator, in apparent violation of 9 C.F.R. § 3.133 that requires animals in the same primary enclosure to be compatible. There were rodent holes around the base of a lion shelter

building. (CX-11; (photographs taken at time of the inspection: CX-12b through CX-16b, CX-17, CX-18, CX-19b through CX-51b); Tr. 1 at 364-394).

(b) Barbara Brown who supervises much of the work including the recordkeeping at the facility, and who has lived with Mr. Pearson and is the mother of two of his children, testified that the January 29, 2001 inspection took place during a really hard winter of heavy snow and freezing temperatures. The objects that were in piles in the pens had been covered and hidden by snow until it melted so this was a day when cleaning was probably not up to standards. She admitted there may have only been two employees at the facility when the inspection was made. However, she stated it was conducted at 9 AM and six to eight more employees would show up during the rest of the day: "...they didn't ask for a list of how many employees we had. They just said we didn't have enough." She said the 14 bears were not listed on the program of veterinary care because Carl LaLonde, the APHIS inspector who had previously been their inspector for many years, told them that since bears are a native species they need not be listed on their vet papers. The goat wasn't listed because it was a pet and the rabbits were either pets or food for a snake. In respect to written records respecting vaccinations and parasites, those records were kept at the offices of their veterinarian where they were available. They did not know feeding records for the big cats and juvenile cats had to be kept until Dr. David Smith, APHIS Veterinary Medical Officer, who participated in the next inspection conducted two days later, on January 31, 2001, told them they were needed; they then started a log. As to the mountain lion that had been described as being wet, ill and lame and housed in an enclosure that did not provide it sufficient shelter from the wind and rain, she said it had come to them very beat up, battered, bruised and looking like it had been hit by a truck. The shelter they had placed it in had walls on both sides with a partial wall for its back. The front of the enclosure had a removable plywood door that had been removed to enable them to observe this animal that they had isolated in this enclosure in case it had any diseases. The semiannual inspection of the facility by the private practice veterinarian employed by Mr. Pearson, Dr. Connie Ruth Barnes, was scheduled for January 30, 2001, and Ms. Brown believes she was

told by Dr. Barnes to isolate and observe the animal until then. In Ms. Brown's opinion, the lions Dr. Harlan identified as too thin were not, and the female that was limping was nine years old and had arthritis that they would treat with aspirin when it acted up on rainy days. In corroboration, Dr. Barnes testified that when she went to the facility the animals appeared generally healthy and well fed; she did not remember any malnourished animals; and did not see any thin or starving animals (Tr. 2 at 728 and 730). In addition Dr. Harlan stated upon cross-examination that she had observed the tigers in winter and their winter coat camouflages whether or not they are thin (Tr.1 at 412). Ms. Brown testified that the rabbit with the bad eye had been bought for feed for a snake. They had a record of the dead badger that she later showed Dr. Smith who told her he would correct the report but she needed to begin to write a log of such incidents. The badger had been kept to be mounted for display with other mounted animals at the shows Mr. Pearson conducts. The dead badger had probably been left where the APHIS officials found it, because it had become covered with snow and forgotten. The llama that had died had been a pet for 15 years and had never been shown on any of Mr. Pearson's records although the llama had been present when past inspections had been conducted. The other animals that had died in the year 2000, were on a list that recorded the dates of each animal's birth and death, but did not show the cause of deaths. Many of the animals were old when received at the facility and the list of their births and deaths was one of the records that had burned in the house fire. In respect to the absence of a record at the facility of the veterinary care given the animals, she did not know until then that she needed to keep a log containing this information. The dead tiger had died during the night and was in a back cage that was among the last ones scheduled to be cleaned that day. In respect to the hibernating bears, the facility had denned bears for 26 years. The boxes used had doors that could be lifted for viewing the hibernating bears and some of the doors had holes in them allowing the bears to be observed without the doors being lifted open. When the personnel at the facility were outside on warm days they didn't necessarily lift the doors to look at the hibernating

bears but they would observe them by listening for noises indicating motion within the boxes. On cold days and when they did not hear such noises, "we wouldn't mess with them because also if you mess with the female bear and she has babies, she'll kill them." There were some tarps and other stuff mixed with hay for bedding that had always been kept together in a storage shed outside the perimeter fence that did not, however, contain any feed. The dead cow had been obtained from an Amish farmer who assured them that there was nothing wrong with it that could hurt the big cats that would eat its meat. The cow was hung up in the barn which was a customary practice at the facility because it is easier to cut a cow up for meat that way. When asked by the APHIS officials why the cow had died, she told them she did not know but that its meat would not be harmful to the big cats. In respect to the rodent holes, there are rats and weasels out in the country where the facility is located, and they keep after them by putting bait and poison down the holes and then try to cover them up. They would change the poison used every two or three months to prevent the rodents from becoming immune to it. They pursued this rodent control program on a continuing basis. The fact that the water available to the animals was frozen is explained by the fact that the temperature was around 20 degrees or colder. They water the animals during the day and before they leave at night, but the water they set out freezes. They would use steel poles to knock the ice out of the water receptacles and then replace the water. In respect to the absence of a perimeter fence around the enclosure housing bobcats and an arctic fox, they did not know one was needed but they installed one after being so instructed. The lion cub and the two cougars that Dr. Harlan found to have insufficient shelter were being isolated as newly acquired animals in temporary cages until they were sure that they were not sick before being placed in permanent cages and mixed together with the existing population of animals. In respect to the dirty band saw, their practice was not to scrub it clean until just before they again use it to make sure that it is then clean and sanitary. She admitted that the denned bears had not been given food since November, 2000, but that according to articles by the American Bear Association that they had read before they started their denning practices, hibernating bears can go without food and water for up to seven months. Prior to 2001, no one had told

them that food had to be put in the den with the hibernating bear, or that the dens should have windows for observing the bears. In respect to old food, bones and feces being in the cage, she claimed the cages were cleaned every day, but that the animals often dragged their food around and they could have dragged feces into their cages since they are wild animals that don't care about eating neatly. Also the filth and debris could have been buried and hidden under snow before the inspection. She did not believe the fact that the rabbits were housed next to a cougar was a problem because there was a separating wall (Tr. 2 at 874-910).

(c) Ms. Brown's testimony in explanation of what can only be described as appalling conditions and practices at Mr. Pearson's Animal Farm, is insufficient. Even after accepting as plausible every explanation that she gave including some that were at best possible though unlikely, and letting slide any minor infraction or any violation that could, in any sense, be characterized as inadvertent, it is still obvious that Mr. Pearson willfully violated numerous regulations of critical importance to the health and well-being of the animals in his possession. He had animals that needed immediate veterinary care that was unavailable in violation of the requirements of 9 C.F.R. § 2.40:

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

On January 29, 2001, Mr. Pearson, as had been the case on June 12, 2000, was not feeding his animals wholesome food, free from contamination, as required by 9 C.F.R. § 3.129. He was not making clean, potable water accessible to his animals in violation of 9 C.F.R. §

3.130:

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

Mr. Pearson failed to provide several animals with adequate shelter from inclement weather as required by 9 C.F.R. § 3.127 (b):

Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all the animals kept outdoors to provide them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

These were not inadvertent or minor infractions in any sense. An exhibitor who fails to comply with these crucial regulatory requirements for basic hygiene and sanitation, and the proper feeding, watering and sheltering of his animals, should not hold an exhibitor's license. These are willful violations of the Act and the regulations in every sense of the term, as it was defined in *Hodgins*, for which an APHIS license may and should be revoked.

15. On January 31, 2001, Inspector Kovach and Dr. David C. Smith, APHIS Veterinarian Medical Officer, inspected Mr. Pearson's facility and jointly prepared an inspection report. Dr. Smith testified that the program of veterinary care he was given to review, did not include the 14 bears and did not mention that the bears were receiving a heartworm preventative that bears housed outdoors need. Mr. Pearson was advised to consult with his veterinarian and revise the program to include the bears and the procedures needed for their care. A den housing 2 lions had a strong ammonia odor indicative of poor sanitation; and Mr. Pearson was advised to improve its ventilation and increase the frequency of its cleaning. In Dr. Smith's opinion, the condition of the animals and the facilities showed there were insufficient employees at the facility to provide adequate care for the animals. Mr. Pearson was instructed to correct this deficiency by March 29, 2001. Throughout the north side of

the facility old caging, railroad ties, tires and miscellaneous junk had been allowed to accumulate that could harbor pests and contribute to the problem of disease control. Mr. Pearson was instructed to correct this condition by February 15, 2001. All the pens were found to be excessively wet with puddles of water because the facility lacked an adequate system for draining away the melting snow. Mr. Pearson was instructed to improve the drainage by either providing ways for the water to drain away from the pens or to raise the surfaces of the pens. Water in the water receptacles was mostly frozen and all of the receptacles needed to be cleaned. Mr. Pearson was told to clean the receptacles frequently and make sure the water is not frozen. The animal enclosures were not being cleaned and sanitized as frequently as needed and all but two pens had an excessive buildup of wet bedding, feces, bones, feed waste and debris. Many animals were wet and appeared uncomfortable due to the condition of the pens. The area for food preparation was not sufficiently clean. The band saw still had meat, bone and blood residue caked on it and had not been cleaned after each use as it should have been. A dumpster next to the shed where cattle are butchered to be fed to the big cats, was not closed and was overflowing with old carcasses and food waste providing rodents an ideal food supply. The ground of each enclosure on which the animals were fed, was extremely contaminated with old food, bones and feces; and animal feces are a source of bacteria, parasites and may transmit disease upon contaminating food. Mr. Pearson was instructed that food should be fed on clean surfaces and that the pens needed to be cleaned frequently to minimize the accumulation of feces. A mountain lion cub observed on January 29, 2001, to have inadequate bedding shelter and to be lame with an abscess on its left hind leg, now had adequate bedding and shelter. However, its ear margins were frostbitten and there was no record of it having been seen by a veterinarian on January 30, 2001 as it was supposed to have been. So too, there was no record showing that on January 30, 2001, a veterinarian had examined the pen of five lions identified as needing an examination by then. There still was no appropriate way for the denned bears to be monitored daily to be sure they were still in hibernation, still in good

condition and not in need of food and water (Tr.2 at 187-244; CX-52 through CX-69, CX-70b through CX-126b).

16. On March 8, 2001, Mr. Pearson's facility was inspected by Inspectors Kovach and LaLonde and Dr. Smith. Dr. Smith testified respecting the inspection report that addressed the various previously identified non-compliant items (CX-127; Tr. 1 at 245-253).

(a) The following had been corrected:

The 14 bears and the fox had been added to the program of veterinary care with a heartworm preventative being described in the program.

There was no evidence that day of rodent activity and rodent baits were being used.

Post-mortem reports were being prepared by the attending veterinarian on all dying animals and records on animal deaths with written post-mortem reports available for review.

Records showing the attending veterinarian's observations were available.

The animal enclosures were being cleaned more frequently with no excessive buildups of debris and waste being found at the inspection.

Animals were being fed in a more sanitary manner.

The old caging, railroad ties, tires and junk had been removed.

The young mountain lion and a pen of five lions (2 males and three females) were being seen by an attending veterinarian.

(b) Mr. Pearson still had until March 29, 2001 to correct the lack of sufficient personnel at the facility that was needed to conduct an adequate animal care program.

(c) The following non-compliant items found on January 1, 2001, still remained uncorrected:

A den housing 2 lions still had a very strong ammonia odor and Mr. Pearson had failed to improve its ventilation and the

frequency of cleaning.

The 10 denned bears that had not been fed since November 2000, were still without food.

Watering of animals was still insufficient. Four tigers, a Canadian Lynx and a Siberian Lynx had water containers with ice covered with snow, and Mr. Pearson admitted they were not given fresh water the day before. Additionally, several water receptacles needed to be cleaned

Although drainage in some of the pens had improved, drainage was still a problem that was expected to worsen when the snow cover that was present, later melted.

The eight denned bears still could not be observed on a daily basis and none of them could be given water or other care in an emergency.

More than two month's after receiving a written warning and instructions to remedy these conditions, animals were still without adequate drinking water, and animals were in pens that were still wet and subject to flooding because of inadequate drainage. Mr. Pearson's failure to achieve compliance as instructed shows these practices and conditions to be willful violations of the regulations and the Act that not only warrant the issuance of a cease and desist order, but are also grounds for the suspension or revocation of Mr. Pearson's license.

17. Photographs (CX-128b-133b) were received at the hearing on the basis of Dr. Smith's testimony (Tr.1 at 253-255) that they depicted other non-compliant items found at the time of the March 8, 2001 inspection. However, none of these alleged non-compliant items were included as part of the official inspection report given to Mr. Pearson to show him what corrections he still needed to perform at his facility. For that reason, the photographs have not been considered as proof of new violations by

Mr. Pearson. However, CX-131 shows that the band saw used for cutting meat was still covered with blood residue and CX-130 shows the food preparation area was still contaminated with blood residue spread out all over the floor. This condition had been left uncorrected since the written warning given to Mr. Pearson on January 29, 2001, over a month earlier.

18. On June 19, 2001, Inspector Kovach and Dr. Smith inspected Mr. Pearson's facility. They found a mountain lion with an abscess on the right side of its face and the animal was drooling excessively. Dr. Smith believed it was either a superficial abscess or an abscessed tooth that in either event required action by the attending veterinarian. A bear was also found to have superficial cuts on her head and needed to be seen by the attending veterinarian to determine needed treatment. At the time of the inspection, no one working at the facility seemed aware of either problem; and that indicated to Dr. Smith that the animals were not being observed daily to assess their health and well-being as required by the regulations (9 C.F.R. § 2.40(b)(3)). A den housing four lions had a damaged section of plywood that needed repair or replacement to give them adequate shelter and to protect them from injury. The facility also had a section with high weeds that needed to be cut down, and had trash in the form of empty plastic buckets, barrels and tires that needed to be removed (CX-134-142; Tr.1 at 255-262).

In a follow-up visit on June 28, 2001 (CX-162), Dr. Smith verified that the mountain lion and the bear had been appropriately treated by a veterinarian. Inasmuch as it is uncertain how long the animals had observable conditions indicating that a consultation with the attending veterinarian was needed, no violation of the regulation requiring daily observation of the animals is found. Mr. Pearson was given until June 30, 2001 to repair the lions' den and until June 21, 2001 to cut the weeds and remove the trash. Mr. Pearson apparently complied and neither of those conditions is found to be a violation of the Act or the regulations that warrants the imposition of a sanction.

19. On July 26, 2001, Inspector Kovach inspected Mr. Pearson's traveling exhibit and found that a wooden transport for a tiger cub and a lion cub needed hand holds (CX-163; TR 2 at 516-518). This condition was evidently corrected by the next day, and a violation warranting the imposition of a sanction is not found to have been committed.

20. On April 23, 2002, Inspector Kovach inspected Mr. Pearson's facility and testified that he found deficiencies in respect to veterinary care, structural strength, drainage, a perimeter fence, sanitation, separation of animals, and a primary conveyance.

The veterinary care deficiency concerned the lack of a record showing that treatment being given two animals was as directed by the attending veterinarian. However, they apparently were being treated, and the failure to produce a record at the time of the inspection is not a violation warranting the imposition of a sanction of any consequence.

The structural deficiency concerned: (1) an unsecured beam across the ceiling of a lion pen that had become unstable from being chewed; (2) a hole in the guillotine door of another lion pen; (3) protruding wires in pens for lions or tigers; and (4) a damaged section of chain link used as a ceiling for a lion pen. Although Inspector Kovach testified that these structural deficiencies were repeat deficiencies, I have found nothing in his prior investigative reports or elsewhere in the record proving that these particular structural conditions existed before April 23, 2002. Nor is there any evidence showing that they had existed for a sufficient period of time to infer that Mr. Pearson should have known of them and made needed repairs. No violation is therefore found.

The facility still lacked adequate drainage even though Mr. Pearson had been given written warnings by APHIS of the need to correct this deficiency more than a year before on January 31, 2001 and March 8, 2001. As Inspector Kovach testified, the lack of proper drainage gives rise to mosquitoes that carry diseases transmittable to the animals housed at the facility. In every sense, this is a willful violation that supports suspending or revoking Mr. Pearson's license.

Other deficiencies concerning a perimeter fence, the separation between a male tiger and two female tigers in an adjacent enclosure, and the condition of a primary conveyance used to transport animals were apparently correctible conditions of unknown duration that do not appear to warrant the imposition of sanctions. Although the perimeter fence deficiency was reported as being a repeat non-compliant item previously identified during the November 20, 2001 inspection, the deficiency

found on April 23, 2002, apparently involved a different perimeter fence and different construction defects (CX-164; CX-165 pages 1-11; Tr. 2 at 519-526).

21. On August 27, 2002 and May 5, 2003, APHIS investigators attempted to inspect Mr. Pearson's facility but were unable to do so because a responsible person was not available to accompany them (CX-167; CX-168)

22. On September 16, 2003, Inspector Kovach inspected Mr. Pearson's facility. There was still inadequate drainage of and about the pens in violation of 9 C.F.R. § 3.127. Other non-compliant items reported by the Inspector do not appear to be of the type that warrant any sanction (CX-169-170).

23. On January 30, 2004, APHIS inspected Mr. Pearson's facility, and on February 9, 2004, inspected another site where some of his animals were being boarded. It was ascertained that Mr. Pearson was boarding animals at unlicensed and unapproved sites. He was doing so surreptitiously, to prevent the animals from being confiscated. (CX-171; CX-172; Tr. 2 at 1143-1146; Tr. 2 at 90-96; Tr.2 at 100-101).

24. On May 4, 2004, APHIS Animal Care Inspector Randall Coleman conducted a routine inspection of Mr. Pearson's facility. He found two female lions and a tiger requiring veterinary treatment. One of the female lions had a wound that Mr. Pearson testified he failed to observe because she was in heat and being protected by a very, aggressive male lion who had kept her inside the den box at the back of the pen. The attending veterinarian was contacted during the inspection and gave treatment advice for this animal. The other female lion was apparently suffering from arthritis. The tiger had a swollen muzzle with fluid dripping from her nose. The office of the attending veterinarian dispensed antibiotics to these animals two days after the May 4, 2004, inspection. It does not appear that there was a violation of the Act or the regulations in respect to the veterinary care and treatment the lions received that would warrant the imposition of sanctions. However, antibiotics should have been dispensed to the tiger a day earlier according to the testimony of Mr. Pearson's attending veterinarian. Though this violation of the regulations could support the assessment of a civil penalty, it is not deemed sufficient to support license suspension or revocation. The inspector also

noted that there were nails protruding from the underside of a lions' nesting perch. When they were pointed out to Mr. Pearson, he stated that he would correct the condition (CX-173; CX-174; Tr. 2 at 102-109; Tr. 2 at 766-767).

25. On May 12, 2004, Inspector Coleman returned to the facility and found that the animals that were the subject of his May 4th report had been examined by the attending veterinarian and they were under recommended treatment. The perch with the protruding nails had been repaired and all nails removed. He further noted that the perch remained structurally sound. In light of Mr. Pearson's responsiveness to the direction to repair the perch, a violation of the Act warranting the imposition of a sanction is not found (Tr.2 at 110-112; CX-175).

26. On July 16, 2004, Inspector Coleman inspected the facility and found that the bears did not have potable water accessible to them. The water receptacle for the bears was empty, and they eagerly drank water from a hose that was turned on during the inspection. The explanation Mr. Pearson gave for the absence of water was that the bears had not yet been let out to be fed and watered that day. The condition was corrected during the inspection, but Mr. Pearson's failure to provide the bears with water as needed by them, after receiving a prior written warning, is construed to be a knowing and willful violation of the Act and the regulations warranting the imposition of all sanctions authorized by the Act even though he corrected the condition when warned that day by the inspector (CX-176; Tr. 2 at 113-116).

27. On July 22, 2004, Inspector Coleman found a macaque monkey with Mr. Pearson's traveling exhibit that was not included in the program of veterinary care required by 9 C.F.R. § 2.40; and for which there was no program of environment enhancement to promote its psychological well-being as required by 9 C.F.R. § 3.81. Mr. Pearson was given seven days to correct these deficiencies (CX-177; Tr. 2 at 118-122). Mr. Pearson testified that he had borrowed the monkey from a person who was trying to sell it to him, but he does not understand monkeys and only had it for the one show (Tr. 2 at 1141-1142). Inasmuch as there was no follow-up inspection to ascertain whether Mr. Pearson complied with the

warning he received, and in light of his testimony that the monkey was only in his possession for one day, his failure to comply with the cited regulations has not been considered as a basis for suspending or revoking his license or otherwise imposing any sanction against him.

28. On May 11, 2005, Inspector Coleman was unable to inspect Mr. Pearson's facility because no one was present at the facility as required by 9 C.F.R. § 2.126 (CX-182; Tr. 2 at 124-125).

29. On May 12, 2005, Inspector Coleman returned to the facility and found that the program of veterinary care did not include goats, a monkey and a dog. He also found that 12-16 week old bear cubs were being fed 2% milk as their food source which he believed to be insufficient, and he instructed Mr. Pearson to contact his attending veterinarian for appropriate diet recommendations. The inspector also observed three bears that appeared to be thin with areas of hair loss indicative of health problems. Mr. Pearson was instructed to contact his attending veterinarian for the evaluation and treatment of these bears as well. There was no record of acquisition for the monkey and there were other primates at the facility that Mr. Pearson refused to allow the inspector to see because they were not owned by him. The enclosure housing the monkey had open garbage bags, miscellaneous clutter, surfaces that had not been adequately cleaned and were made of materials that could not be sanitized; and no electricity was available for lighting and cooling. Mr. Pearson did not have a program of environment enhancement to promote the monkey's psychological well-being and there was no food or water for it in the enclosure. Mr. Pearson and Ms. Brown testified that Mr. Pearson did not believe he had any responsibility for the monkeys at his facility because they did not belong to him (Tr. 2 at 1010 and 1142-1143). The primary enclosure for 8 adult bears had a rotting, main support post, protruding wires and rusted bars for the back wall of a den box. The perimeter fence around the enclosures for 14 bears had a door that was not secured. Two pygmy goats did not have a primary enclosure. A pup that was either a wolf or a dog, was also inadequately housed, was without water, and looked as if it was not being fed adequately. Ms. Brown testified that the pup was a dog and that she and Mr. Pearson's daughter, Jennifer, owned it. Jennifer was also identified as the owner of the two pygmy goats. Ms. Brown and Mr.

Pearson did not believe these animals were subject to USDA's jurisdiction (Tr. 2 at 1011-1012). The inspector observed accumulations of trash, clutter, weeds, debris, and old piles of burnt materials throughout the facility (CX-181; Tr. 2 at 126-160).

30. On May 13, 2005, the date given to Mr. Pearson by which he was to have his attending veterinarian evaluate the care and feeding of three bears, Inspector Coleman returned to the facility accompanied by Dr. Harlan and Dr. Albert Lewandowski, the zoo veterinarian for the Cleveland Metro Park Zoo. Inspector Coleman found four bears in the enclosure with 4 or 5 pieces of bread on the floor, and all of the bears appeared thin and malnourished. Though Mr. Pearson told the inspector that the bears had been seen by the attending veterinarian who found no problems with them, attempts to contact the veterinarian were unsuccessful. The bears appeared to the inspector to be suffering. Their enclosure had an excessive buildup of excreta on its floor and one of the bears was eating bread that was on the excreta covered floor. The enclosure for three other bears also had a buildup of excreta on its floor and the bears were eating cereal and dog food directly from the excreta covered floor (CX-183; Tr. 2 at 165-167). Dr. Steven Faust, a veterinarian at Sharon Veterinary Hospital employed by Mr. Pearson as attending veterinarian for the facility, did examine an adult bear on May 13, 2005 and found it to have traumatic hair loss and recommended skin scraping if it did not improve (Tr. 2 at 777; EX-AAAA at 2). The inspector also found that the wolf or dog pup was housed in an enclosure that did not protect it from sunlight or inclement weather and had excessive feces on the floor. The pup had feces in his hair from lying in feces; did not have potable water; and appeared malnourished (CX-183; Tr. 2 at 169-170). The inspector also found that two one-year old bears were being housed with two older bears approximately 2-3 years of age, and that the older ones were chasing the younger ones keeping them from receiving their needed share of food and water. Only compatible animals may be housed together (9 C.F.R. § 3.133), and Mr. Pearson was given until May 16, 2005 to place them in separate housing (CX-183; Tr. 2 at 171-172).

31. Dr. Albert Lewandowski, who accompanied Inspector Coleman and Dr. Harlan when they inspected the facility on May 13, 2005, has been the zoo veterinarian for the Cleveland Metro Park Zoo since 1989. After graduating from the Ohio State Veterinary College in 1978, Dr. Lewandowski was in private practice for three years. He then took a residency at the University of Pennsylvania and the Philadelphia Zoo from 1981 to 1983. From 1983 to 1989, he was Chief Veterinarian for the Detroit Zoological Parks. Dr. Lewandowski is a member of the accreditation team for the American Association of Zoological Parks and Aquariums and has routinely inspected zoos throughout the country. He is an eminently qualified expert on the veterinary care and nutrition of animals of the type housed at Mr. Pearson's facility (Tr.2 at 416-422). He set forth his observations that day in a document that was received in evidence as CX-185, in which he concluded: "The facility is squalid." He testified that he would not expect that a facility licensed by USDA would: "...have facilities as bad as this" (Tr. 2 at 427). In his opinion, all three of the bear cubs that were at the facility, appeared to be suffering from inadequate care and nutrition (CX-185; Tr. 2 at 440). Furthermore, the cages containing the bears were inadequate and did not adequately secure them (Tr. at 442). He testified what he meant when he used the term "squalid" to describe the facility:

Dirty, unkept, uncared for, just general neglect, just a facility that had been neglected not just recently, but for a long period of time. The animals were living under conditions that just aren't appropriate for any type of animal.

Bears are an incredibly hardy species, but to maintain them under those conditions over an extended period of time is inappropriate. Tr. 2 at 442-443.

32. Dr. Harlan also prepared a report on her findings at the facility on May 13, 2005, which Dr. Lewandowski read and co-signed as an accurate summary of their observations that day (CX-188, Tr. 2 at 443-444).

33. On May 17, 2005, Inspector Coleman returned to the facility and found that Mr. Pearson had not complied with the written warning he had been given and had not corrected the inadequate veterinary care and inadequate feeding of seven bears specified by Inspector Coleman on

May 12th and 13th. Because these seven bears appeared to be suffering and needed immediate attention to address their nutritional needs, feeding requirements, and overall health status, Inspector Coleman confiscated them. After the confiscation, eight bears remained at the facility, and there were deficiencies respecting their separation, housing conditions, and access to potable water. Though Mr. Pearson had been given until May 16, 2007, to separate two, one-year old bears from two older bears to protect the younger bears, they had not been separated. The inspector also found that the primary enclosure used for three of the confiscated bear cubs needed to be replaced or fixed to be safe and secure. Mr. Pearson was still not furnishing accessible, potable water to the bears, and though wood shavings had been placed over the floor of an enclosure used for three of the confiscated bears, feces was still on the floor (CX-186; Tr.348-350). Mr. Pearson's failure to comply with the written warning he received in respect to needed veterinary care and examinations; the need to provide accessible, potable water and nutritional diets to his animals; and to separate young bears from older, aggressive bears are found to be willful violations of the Act and the regulations that support the suspension or revocation of Mr. Pearson's exhibitor's license.

34. The confiscated bears were examined and wormed on May 17, 2005, by Dr. Lewandowski who prepared health certificates that permitted them to be sent to various zoos and other facilities throughout the country. Dr. Lewandowski found that although the seven bears were in good enough condition to travel, they were undernourished and had suffered for an extended period of time from malnutrition. In his opinion, it was in the best interest of these animals to be moved to a facility that could take better care of them (CX-189; CX-193; Tr. 2 at 445-449).

35. On October 5, 2005, Inspector Coleman inspected Mr. Pearson's facility and found that his program of veterinary care only listed bears and did not include goats, dogs, skunk, coatimundi and hamsters at the facility. Also the program showed that should the need arise, the only means of euthanasia for the eight remaining black bears was a 22 caliber rifle that is obviously inadequate for that purpose and is found to be a

willful violation of 9 C.F. R. § 2.40. A dog at the facility was not properly documented as required by the regulations, and Mr. Pearson was given until October 18, 2005 to correct his records. This record deficiency; the fact that loose wires protruded into the enclosure for the bears; and that the perimeter fence had a loose post needing repair are not deficiencies that are found to be violations that require the imposition of a sanction. Mr. Pearson refused the inspector access to part of the facility that had housed lions and tigers that were no longer at the facility. This was a willful violation of 9 C.F. R. § 2.126(a)(4). The outside enclosure for a dog did not provide it adequate shade; the enclosures used to house dogs were not of proper construction; and the water receptacle for a dog was dirty and needed to be cleaned. Potable water was not available to a skunk and two pigmy goats. Two shoebox cages of hamsters were housed in an outdoor facility. These otherwise apparent violations of 9 C.F.R. §§ 3.4, 3.130 and 3.27(a) are excused by Mr. Pearson on the basis of the animals being pets and not covered by the Act and the regulations. In light of a statement in *Hodgins* to that effect (*see* discussion *infra*), these conditions are not being found to be violations of the Act. On the other hand, despite repeated prior written warnings, drainage of the bears' enclosure was again observed to be inadequate as evidenced by a large puddle of standing water with feces and dirt in the enclosure. This was willful violation of 9 C.F.R. § 3.127(c) (CX-190; Tr. 2 at 400-402).

36. On February 22, 2006, Inspector Coleman inspected Mr. Pearson's facility and found that the Program of Veterinary Care only provided for bears. It did not include a cougar, a leopard, a lion and tigers that were at the facility. One tiger was lame, the leopard had a wound on its tail and scarring on both hips, and there were no records of either animal being examined by a veterinarian or receiving veterinary care or treatment. There were no records showing where the tigers had been housed prior to February 22, 2006, and Mr. Pearson refused to provide any information other than that he had received them on April 26, 2005. The door of the primary enclosure housing the leopard needed repair to securely contain it. The perimeter fence for six tigers had holes in it and was not strong enough to be a secondary containment for them. Eight bears were being penned in forced hibernation in boxes that were not large enough for

them to stand up on their hind legs, and there was not an adequate supply of food available to them if they came out of their dens to eat. A cow carcass evidently intended as food for the big cats was contaminated with hay, dirt and feces attached to its hide, and Mr. Pearson's son stated the cause of the cow's death was unknown. There was no potable water accessible to any of the animals. The bears had no access to water and the water receptacles for the other animals were either frozen solid or completely dry. These were all willful violations of the regulations (CX-191; CX-192; CX-202; Tr. 2 at 200-214; Tr.2 at 393-395).

37. Conditions at Mr. Pearson's Exotic Animal Farm were also of concern to local health authorities. Based on a September 28, 2001 inspection of the facility made in response to complaints about its stench, the Summit County General Health District determined that the facility was "a public health nuisance" (CX-145 (copy of *Summit Co. Bd. of Health v. Lorenza and Barbara Pearson*, No. CV-2002-06-3473, slip opinion at 5)). The decision was affirmed upon appeal to the Court of Common Pleas, Summit County, Ohio (*Ibid.*), and to the Court of Appeals of Ohio (CX-200; 809 N.E.2d 80 (Ohio App. 2004)). Based on those decisions, the County Board of Health sought a court order to enter the property and remove the animals. The court order was granted but later vacated by the Ohio Appellate Court on jurisdictional grounds (CX-201; *Summit County Board of Health v. Pearson*, No. 22194, 2005 WL 1398847 (Ohio App. June 15, 2005)). The Health Department sought to have Mr. Pearson take the necessary steps to bring his property into compliance with applicable laws and regulations and issued orders to him to abate nuisance conditions in October and December of 2001, and in February and March of 2002, but little improvement was reported. Moreover, Mr. Pearson refused to permit inspections on April 8, 2002, May 6, 2002 and June 13, 2002 (CX- 198; CX-199; CX-200, slip opinion at 2).

Conclusions

Lorenza Pearson d/b/a L&L Exotic Animal Farm should be made subject to a cease and desist order and have his exhibitor's license revoked in that he willfully violated the regulations and standards issued under the Animal Welfare Act, and thereby the Animal Welfare Act itself, on the following dates and in the following respects:

1. On January 5, 2000, Mr. Pearson housed three tigers in an enclosure that was too small for each animal to have adequate freedom of movement, and did so after he had received a prior written warning on September 18, 1999 that using this enclosure to house the tigers was in violation of 9 C.F.R. § 3.128 that specifies the following space requirement for animal enclosures:

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement....

2. On June 12, 2000, Mr. Pearson provided maggot infested food to his lions and tigers in violation of 9 C.F.R. § 3.129 (a) that requires for feeding animals that:

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health...

3. On July 19, 2000, Mr. Pearson housed two adult lions, two adult tigers and one adult jaguar in enclosures that were too small for each animal to have adequate movement, and this violation was committed after he had received written warnings on September 18, 1999 and January 5, 2000, that using these enclosures violated the space requirements of 9 C.F.R. § 3.128.

4. On January 29, 2001, Mr. Pearson had one cougar and five lions at his facility that were in need of immediate veterinary care that was unavailable to the animals in violation of 9 C.F.R. § 2.40 that provides:

(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

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attending veterinarian or consulting 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 and 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.

5. On January 29, 2001, Mr. Pearson was again feeding his big cats and other carnivores food that was not wholesome and free from contamination as required by 9 C.F.R. § 3.129(a).

6. On January 29, 2001, Mr. Pearson did not make potable water accessible to his big cats, other carnivores and bears in violation of 9 C.F.R. § 3.130:

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

7. On January 29, 2001, Mr. Pearson failed to provide a lion cub and two cougars with adequate shelter from inclement weather as required by 9 C.F.R. § 3.127 (b):

Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all the animals kept outdoors to provide them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

8. On March 8, 2001, Mr. Pearson did not provide four tigers, one Canadian Lynx, and one Siberian Lynx potable water in violation of 9 C.F.R. § 3.130.

9. On March 8, 2001, Mr. Pearson's facility did not have an adequate method to drain excess water from the enclosures that then housed sixty-seven animals, despite having been given a written warning on January 31, 2001, that he was in violation of 9 C.F.R. § 3.127 that provides:

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

10. On April 23, 2001, and on September 16, 2003, Mr. Pearson's facility still did not have adequate drainage for the enclosures housing his animals in violation of 9 C.F.R. § 3.127.

11. On January 30, 2004, Mr. Pearson, without giving requisite no ice

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to APHIS, housed eighteen animals at three, off-site locations that were not specified in his exhibitor's license in violation of 9 C.F.R. § 2.8:

A licensee shall promptly notify the AC Regional Director by certified mail of any change in the name, address, management, or substantial control or ownership of his business or operation, or of any additional sites, within 10 days of any change.

12. On July 16, 2004, Mr. Pearson did not provide his bears potable water in violation of 9 C.F.R. § 3.130.

13. On May 12, 2005, Mr. Pearson was feeding his animals food that was not wholesome and free from contamination in violation of 9 C.F.R. § 3.129(a).

14. On May 12, 2005 and on May 17, 2005, Mr. Pearson was not providing accessible potable water to his animals in violation of 9 C.F.R. § 3.130.

15. Between May 13, 2005 and May 17, 2005, Mr. Pearson housed two young bears with older, aggressive bears that were interfering with the young bears health and causing them discomfort in violation of 9 C.F.R. § 3.133.

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

16. On May 12, 2005 and on May 17, 2005, Mr. Pearson did not maintain a program of veterinary care that was adequate for evaluating the care, condition and the nutritional sufficiency of the food he was providing to his bears, in violation of 9 C.F.R. § 2.40.

17. On October 5, 2005, Mr. Pearson failed to maintain a written program of veterinary care that had an appropriate method for euthanizing his bears in an emergency situation in violation of 9 C.F.R. § 2.40.

18. On October 5, 2005, Mr. Pearson failed to provide a suitable method to rapidly drain excess water from an enclosure housing eight bears in violation of 9 C.F.R. § 3.127(c).

19. On October 5, 2005, Mr. Pearson refused to allow APHIS inspectors to inspect and photograph his entire facility in violation of 9

C.F.R. § 2.126(a)(4).

20. On February 22, 2006, Mr. Pearson had not established and did not maintain a written program of veterinary care for six tigers, two lions, one leopard and one cougar housed at his facility in violation of 9 C.F.R. § 2.40 (a)(1). One tiger was lame, the leopard had a wound on its tail and scarring on both hips and there were no records of examination, or care and treatment of either animal by a veterinarian in violation of 9 C.F.R. § 2.40(b).

21. On February 22, 2006, Mr. Pearson did not have and had not maintained requisite records respecting his acquisition of six tigers in violation of 9 C.F.R. § 2.75 (b)(1):

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

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

22. On February 22, 2006, Mr. Pearson housed a leopard in an enclosure with a door that needed repairs in order to securely contain the leopard in violation of 9 C.F.R. § 3.125(a):

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

23. On February 22, 2006, Mr. Pearson housed six tigers in an enclosure that had a perimeter fence with holes in it and that was not strong enough to act as a secondary containment for the tigers in

violation of 9 C.F.R. § 3.127(d):

On or after May 17, 2000, all outdoor facilities (*i.e.*, facilities not entirely indoors) must be enclosed by a perimeter fence....The fence must be so constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility....

24. On February 22, 2006, Mr. Pearson was feeding six tigers, two lions, one leopard and one cougar food that was not wholesome and free from contamination in violation of 9 C.F.R. § 3.129(a).

25. On February 22, 2006, Mr. Pearson failed to provide access to food to eight bears that he was keeping denned in forced hibernation in violation of 9 C.F.R. § 3.129(a).

26. On February 22, 2006, Mr. Pearson was not providing accessible potable water, in clean, sanitary receptacles, to his animals, in violation of 9 C.F.R. § 3.130.

Discussion

Although Mr. Pearson sometimes followed instructions and corrected deficiencies at his facility, he often did not. The premises were filthy. Basic hygiene and sanitation was not practiced. Inadequate drainage of pens housing the animals was a chronic problem that was never fully remedied and the animals frequently had to endure the discomfort of staying wet. When water receptacles froze in the winter, the animals had no water to drink. In the summer when water was accessible, the water receptacles were dirty. If the hibernation of the bears that he denned in forced hibernation was interrupted, there was no food or water available to them. And some of those bears were kept, as were some lions and tigers, in enclosures that were too small for their comfort.

By way of defense, Mr. Pearson asserts that his problems with APHIS started after Dr. Harlan became part of the team assigned to the inspection of his Exotic Animal Farm and his traveling exhibit. He

claims that his refusal to cooperate with Dr. Harlan in her investigation of an unlicensed dealer whose animals he included with the traveling exhibit he took to a Heinz Corporation employee picnic in September of 1999, caused her and her colleagues at APHIS to seek revenge. He contends that when Dr. Harlan and Inspector Kovach subsequently inspected his facility, they were seeking ways to cite him for violations of the regulations. He points to the fact that inspections by a previously assigned APHIS inspector never resulted in more than two or three citations. In contrast, when Dr. Harlan first visited his facility on January 29, 2001, he was cited for 15 violations. However, his defense of selective prosecution is belied by the appalling conditions that confronted Dr. Harlan and Inspector Kovach when they made the January, 2001 inspection of Mr. Pearson's Exotic Animal Farm.

Two dead animals were found on the premises. The explanations given them were that one of the animals, a tiger, must have died suddenly during the night, and that the other, a badger, though obviously dead for some time, had been kept to be skinned and was inadvertently forgotten when it became covered with snow. Dr. Harlan and Inspector Kovach also found that female bears were being kept in boxes in forced hibernation with non-hibernating male bears roaming freely about the boxes. There was no practical way to observe the boxed bears to find out whether they needed food, water, or emergency care. The food preparation area for the big cats was dirty; had a dead cow with half its head missing hung up for butchering; and the band saw used for butchering the carcass was covered with dried blood. Animals were without drinking water and trying to quench their thirst by licking ice and eating snow. There was a mountain lion in a cage that provided it no protection from the wind and snow, and it was wet without any way to stay dry. Other animals were also wet and dirty. Some needed immediate veterinary care. This is only a partial list of the odious conditions that Dr. Harlan and Inspector Kovach found when they made that inspection, but it is sufficient to show that Mr. Pearson was cited, not out of vindictiveness, but because of the deplorable conditions that existed at his Animal Farm.

Dr. Harlan and Investigator Kovach have both impressed me as

highly credible witnesses. The full details of their investigations on January 29, 2001, are set forth in their investigative report and testimony, together with corroborating photographs (*see* finding 14 *supra*). Mr. Pearson has not met the burden of proving the requisite elements of a selective enforcement defense that are set forth in *Marilyn Shepard*, 57 Agric. Dec. 242, 278-80 (1998).

The fact that a prior assigned APHIS inspector did not often cite Mr. Pearson for violations may indicate that the inspector was distracted, or was lax in his enforcement of the Act and the regulations. Whatever the reason Mr. Pearson was not frequently cited prior to 1999, that fact does not absolve him from being held accountable for the violations that the inspections since 1999, show he has committed. *See, John D. Davenport, d/b/a King Royal Circus*, 57 Agric. Dec. 189, 209 (1998).

Mr. Pearson also argues that he should not be penalized for non-compliant items that he corrected. Even though *Hodgins*, 2000 U.S. App. Lexis 29892 at 7-8, states that a violation that is immediately corrected does not ordinarily justify a license suspension or revocation, it may if the violation was the product of a knowing disregard of the requirements of the law.

At any rate, I have disregarded every deficiency or non-compliant item cited by APHIS where Mr. Pearson has offered any explanation that appeared to be the least bit plausible or where his non-compliance was not truly egregious.

I have also not based any ordered sanction on allegations by APHIS respecting the treatment of animals Mr. Pearson or Ms. Brown identified as personal pets. Those allegations by APHIS have been set forth in the findings for the sake of factual completeness, but are excluded from the violations listed in the conclusions in light of a statement in *Hodgins, supra*, 2000 U.S. App. LEXIS 29892, slip opinion at 13, n 11, that the Animal Welfare Act has no requirements for the treatment of personal pets. For the reasons previously stated, I am treating the Sixth Circuit's decision in *Hodgins* as controlling precedent in this case.

The violations that I have nonetheless found and that are the basis for my order revoking Mr. Pearson's license, were in every sense egregious,

obvious violations of the Act and the regulations that substantially endangered the health and well-being of the animals Mr. Pearson kept at his facility for exhibition. The fact that many of these violations were often uncorrected and persistent requires, in addition to the issuance of a cease and desist order, the revocation of Mr. Pearson' exhibitor's license as the only effective way to prevent their future occurrence.

I am not assessing, however, the \$100,000.00 civil penalty APHIS has requested. Upon revocation of his license, there should be no further opportunity for Mr. Pearson to engage in conduct prohibited by the Act. As stated in *Chandler d/b/a Bill Chandler Cattle*, 64 Agric. Dec. 876, 894 (2005), citing *Spencer Livestock Commission v. Department of Agriculture*, 841 F.2d 1451, 1458 (9th Cir. 1988):

The purpose of an administrative sanction is not to punish one who may have violated governmental regulations; the purpose is instead to take such steps as are necessary to deter the Respondent from future conduct prohibited by the Act. *See Spencer, supra* at 1458.

Accordingly, the following Order is being issued.

ORDER

It is hereby ORDERED that Lorenza Pearson, d/b/a L & L Exotic Animal Farm, his 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 under the Animal Welfare Act.

It is further ORDERED that Animal Welfare Act license number 31-C-0034 issued to Lorenza Pearson, d/b/a L&L Exotic Animal Farm, is permanently revoked; and that Lorenza Pearson is permanently disqualified from obtaining a license under the Act and the regulations.

This decision and order shall become effective and final 35 days from its service upon the parties who have the right to file an appeal with the Judicial Officer within 30 days after receiving service of this decision and order by the Hearing Clerk as provided in the Rules of Practice (7 C.F.R. § 1.145).

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**In re: DANIEL J. HILL AND MONTROSE ORCHARDS, INC.
AWA Docket No. 06-0006.
Decision and Order.
Filed April 18, 2007.**

AWA – Farm exemption – Hobby farmers – Multi-purpose use – Exhibition – Food and fiber – Owners pet.

Sharlene A. Deskins for APHIS.

Respondent Pro se.

Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision I find that Respondents, Daniel J. Hill and Montrose Orchard, Inc., were required to obtain an exhibitor's license from the U. S. Department of Agriculture even though many of the animals being exhibited were ultimately used for food.

Procedural Background

On January 13, 2006, Kevin Shea, Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture, issued a Complaint against Respondents, Daniel J. Hill and Montrose Orchard, Inc., for operating as exhibitors under the Animal Welfare Act without obtaining the requisite license. Respondents filed a joint Answer contesting the allegations of the Complaint, principally stating that they were entitled to a "farm exemption" since all the animals they were charged with exhibiting were farm animals.

I conducted a prehearing conference via telephone on July 25, 2006, and scheduled a hearing in Flint, Michigan on December 6, 2006. At the hearing, Complainant was represented by Sharlene Deskins, Esq.,

and Respondent Daniel Hill represented himself and Montrose Orchards, Inc., pro se. Complainant called two witnesses and introduced seven exhibits, while Daniel Hill testified on behalf of Respondents, and introduced three exhibits. Briefs on behalf of Complainant and Respondents were filed on January 26, 2007.

Statutory and Regulatory Background

The Animal Welfare Act, 7 U.S.C. § 2131 et seq., (the “Act”) includes among its objectives “to insure that animals intended for use . . . for exhibition purposes . . . are provided real humane care and treatment.” 7 U.S.C. § 2131 (1). In order to be subject to the Act, the animals must be either in or substantially affect interstate commerce.

The Act defines “animal” for coverage purposes to include any “warmblooded animal.” However, that same definition, at § 2131(g), excludes “(3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber.” Meanwhile, an “exhibitor” is defined in the Act as a person who exhibits “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 . . .” § 2132(h). Section 2134 prohibits exhibition of animals without a valid license issued by the Secretary.

The regulations at 9 C.F.R. Parts 1-4 generally mirror the statute with respect to these definitions. However, APHIS has issued several documents and policies interpreting, to some degree, several of the concepts that are at issue in this hearing. Thus, Program Aid 1117, Licensing and Registration Under the Animal Welfare Act, Guidelines for Dealers, Exhibitors, Transporters, and Researchers (May 2002), RX 4¹, states at page 7 that “Normal farm-type operations that raise, or buy and sell, animals only for food and fiber . . . are exempt . . .” from the

¹ Throughout this decision, “Tr.” refers to the transcript, “CX” refers to Complainant’s exhibits, and “RX” refers to Respondents’ exhibits.

licensing requirement. Additionally, Policy # 26 issued by APHIS in November 1998 and found on their web site, states:

Farm animals, such as domestic cattle, horses, sheep, swine, and goats that are used for traditional, production agricultural purposes are exempt from coverage by the AWA. Traditional production agricultural purposes includes use as food and fiber, for improvement of animal nutrition, breeding, management, or production efficiency, or for improvement of the quality of food or fiber.

Facts

Montrose Orchards, Inc. is a closely-held family corporation whose president is Daniel J. Hill. Tr. 127-128. The main crops at Montrose Orchards, which is located in Montrose, Michigan, are blueberries and apples, as well as asparagus, pumpkins and Christmas trees. Tr. 131. Several crops are offered to the public on a pick-your-own basis, while everything grown on the premises is also offered for sale at a “gift shop” on the premises. Tr. 131. Respondents operate a cider press where apples are processed into cider. Tr. 137-138. Everything grown on the premises is sold directly to the public. Tr. 131.

There are several pens located prominently at Montrose Orchards, which have displayed, at varying times, a pig, a cow, several English fallow deer, Barbados sheep and goats. E.g., Tr. 12-13, CX 3. At various times, there have been signs at the entrance to the property directing the public to the animals, and there have been signs on the pens identifying the animals. CX 3, p. 1. The pens are fairly large and are not typical of the pens used for animals being raised for slaughter. Tr. 53-56. There are machines on the premises that are designed to allow visitors to the premises to purchase food to feed the animals in the pens. Tr. 31, 148. There is also a hand washing station so that people can wash up after contacting the animals. Tr. 31. Montrose Orchards is listed in the Michigan Directory of Farm Markets as having animals on the premises. Tr. 14-15.

Respondents do not charge an admission fee to enter on their

premises or to view the animals that are displayed. However, school groups are occasionally given tours of the facility, particularly the cider press, and they do pay a fee. Tr. 138.

Respondents raise most of the animals contained in their pens for food. Mr. Hill testified that the pig, the cow, the goats, and even the fallow deer are destined for the slaughterhouse, the freezer and the dinner table. Tr. 118-119. He brought to the hearing, but fortunately did not offer as an exhibit, what he stated was deer sausage and even identified which of the English fallow deer was the source of the sausage. Tr. 99-100.

Employees of APHIS first inspected Montrose Orchards in September, 2003, after observing Montrose's listing in the aforementioned Michigan Directory of Farm Markets. Tr. 11. The first inspection was conducted by Dr. Kurt Hammel, a veterinary medical officer. He observed the farm animals on display and asked to speak to the person in charge. Tr. 12-14. Upon meeting Mr. Hill, he advised him that the animals were on display and that therefore he needed an exhibitor's license under the Act. Tr. 14. The following month, Dr. Hammel returned to Montrose Orchard, observed much the same situation, and again advised a representative of the facility (not Mr. Hill) that they needed a license. Tr. 15-17.

On December 1, 2003, Dr. Hammel again returned to Montrose Orchard, this time accompanied by his supervisor Dr. Kirsten and Thomas Rippy, a senior investigator for APHIS. Tr. 17-18, 61. They presented Mr. Hill with what Dr. Hammel described as "an official notice of violation," Tr. 20, and Dr. Kirsten advised him of the need to come into compliance.

Another inspection occurred on June 16, 2004. Tr. 20. Dr. Hammel completed a search form, CX 2, which was also signed by Mr. Hill. During this inspection, Dr. Hammel took a number of photographs, CX 3, documenting that a clearly marked sign pointed the way to the animals (CX 3, p. 1), that the animal pens were visible from the parking lot (CX 3, p. 2), that there was a hand washing station proximate to the animal pens (CX 3, p. 4), and that the animals on display on the date of that inspection included at least four Barbados sheep (CX 3, p. 5), a pig (CX 3, p. 6), a cow (CX 3, p. 8), at least three goats (CX 3, pp. 7 and 9), and

at least three English fallow deer (CX 3, p. 10). Once again, he advised Mr. Hill of the need to have an exhibitor's license issued by APHIS. Tr. 29-30.

Dr. Hammel and Mr. Rippey revisited Montrose Orchards on May 16, 2005. Tr. 30-31, 62-63. Animals were still on display to the public. Tr. 31. Dr. Hammel observed an animal feeding station where the public could deposit coins and buy food to feed to the animals. Tr. 31. Subsequent inspections occurred in September 2005, May 2006 and August 2006, with the only change being that at the last visit the sign directing visitors to the animals was no longer evident. Tr. 33-38. APHIS also visited the Montrose Orchards in March and April 2006, but the facility was not open to the public at that time. Tr. 34-35.

Throughout the course of these inspections, Mr. Hill consistently maintained that it was lawful for Montrose Orchards to display the animals without an exhibitor's license because he fell under several exemptions under the Animal Welfare Act. Tr. 76-77, 114-117, CX 4, CX 5. He persistently inquired of the APHIS personnel who inspected Montrose Orchards as to whether there was an official interpretation of the Act or the regulations which supported their contention that he needed an exhibitor's license. He went so far as to inquire of the Office of Administrative Law Judges (OALJ) as to whether there was any case law in which there was a ruling which would indicate whether he and Montrose Orchards were entitled to an exemption from the exhibitor's license requirement. RX 1, RX 2. He was told by OALJ Attorney James Hurt (who he refers to as Judge Hurt) that OALJ decides live cases and does not give advisory opinions. Mr. Hurt referred Mr. Hill to the APHIS web site which apparently did not have a written interpretation that suited his situation. Mr. Hill maintained at the hearing, and again in his brief, that if there is an official written interpretation of the Act and regulations that indicates he is not entitled to an exemption, he would seek an exhibitor's license.

Prior to and throughout the hearing, Mr. Hill contended that the exemption he was covered under was the exemption at 9 C.F.R. § 2.1 (ii), which excludes from the licensing provisions

Any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than \$500 gross income from the sale of such animals to a research facility, an exhibitor, a dealer, or a pet store during any calendar year and is not otherwise required to obtain a license.

In their Answer and at the hearing, Respondents also contended they were entitled to a “farm animal” exemption, i.e., all the animals that were displayed in pens at Montrose Orchard were being raised for food. Respondents contend that they were “hobby farmers” in that they raised very limited numbers of animals for their own consumption.

Discussion

After careful review of the facts and the applicable law, I conclude that Respondents did operate as an exhibitor under the Animal Welfare Act. I find that Respondents’ operations were in interstate commerce or at least affected commerce, and that the display of animals as part of an inducement to visit a commercial operation constituted the charging of compensation. I find that the exemption for those who make less than \$500 from animal operations applies to dealers, and is inapplicable to Respondents. I find that while the animals on display at Montrose Orchards were ultimately raised for food, the fact that they were on display for extended periods of time still requires an exhibitor’s license. Finally, I impose a civil penalty of \$1,000 against Respondents jointly.

The commerce requirements of the Animal Welfare Act have always been liberally interpreted. Here, Respondents operate a business that they advertise locally. They accept credit cards as a form of payment for purchases. Tr. 132-133. While they often get animals for free, they occasionally buy and sell animals at auction. They are listed in the Michigan Directory of Farm Markets, are mentioned in numerous websites as a place to purchase a variety of products, and are in the process of developing their own website.

Congress indicated that it wanted to extend the application of the Act to broadly cover any activity that “affects” commerce, rather than require

the activity actually be in interstate commerce. While the use of credit cards, the internet, etc., arguably meets the “in commerce” test, the Office of Legal Counsel has concluded “that the Animal Welfare Act applies to activities that take place entirely within one State, as well as to those that involve traffic across State lines.” 3 U.S. Op. Off. Legal Counsel 326 (1979). See, *In re Marilyn Shepherd*, Agric. Dec. , slip op. p. 6 (August 31, 2006).

Respondents also contend that since they charge no admission to view the animals on display, they do not meet the prerequisite for being an exhibitor that compensation be charged. Even where no compensation is charged to view animals displayed at a commercial facility, the Judicial Officer has held that the use of displayed animals to attract customers to a facility is sufficient to meet the compensation requirement, even though no money changes hands in exchange for the right to view the animals. Thus, in *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, the Judicial Officer affirmed the administrative law judge’s finding that the display of a dolphin at a resort was for the purpose of attracting visitors to the resort. “Although it is true that no fee, as such, is charged for viewing the dolphin’s performance, the exhibition is maintained with the expectation of economic benefit to the resort. The dolphin act is an unitemized service which the resort provides to its patrons as well as an advertised attraction to draw patrons to the resort’s premises.” *Id.*, at 163. Moreover, by providing food dispensing machines for the purpose of selling food to patrons to feed to the animals, and by receiving admission fees for student tours of his facilities (although the fees seem to be more associated with the overall operation of the facility, particularly the cider press), some indirect compensation from the display of the animals is generated. It is not unreasonable to assume that the business model of Montrose Orchards is such that the viewing of the animals on display is indeed an attempt to differentiate Montrose from other similar operations, and as such the analysis in *Good*, that the animals are displayed in this manner with the intention of providing an economic benefit to Montrose Orchards, is applicable.

Respondents have contended that they fall into the exemption for

those who make less than \$500 annually from the sale of their animals. However, this exemption, found at 7 U.S.C. § 2132 (f) does not on its face seem to apply to Respondents' operations. Mr. Hill was told by APHIS personnel that this exemption applied to "hobby breeders"—"small-scale breeders with gross sales under \$500 per year." RX 4, p. 11. However, there was no evidence that Respondents were breeders who sold their animals' offspring to others. With the exception of the English fallow deer, which he apparently bred for his own use, there is no evidence of any breeding going on at Montrose Orchards whatsoever. Respondents' reliance on this exemption is misplaced.

Respondents also rely on the exemption for animals that are raised for food and fiber. There is no dispute that Respondents do, in fact, raise many or most of the animals they display for eventual use as food. The Act does seem to exempt on its face "farm animals . . . used or intended for use as food." Complainant contends that the primary intention with respect to these animals was not for use as food, but as animals to be exhibited. If the animals were raised only for use as food, it is reasonable to assume that large pens, openly visible to the public, signs directing the public to the animals and identifying the animals, machines that sell food for the public to purchase and feed the animals, hand washing stations for the use of the public after visiting the animals, and the listing in the Michigan Directory of Montrose Orchards as a facility where animals are displayed, would not be evident.

It appears that the Respondents' animals serve two purposes—they are being exhibited first and used for food later. Indeed, APHIS seems to recognize this multi-purpose possibility in its introduction to RX 4², where it states that this exemption applies to "Normal farm-type operations that raise, or buy and sell, animals **only** for food and fiber." *Id.*, at p. 7, (emphasis added). The fact that the animals are being utilized for multiple purposes, one of which is exempt, and one of which requires a license, does not negate the requirement that a license be obtained for

² Program Aid 1117, Licensing and Registration Under the Animal Welfare Act, Guidelines for Dealers, Exhibitors, Transporters, and Researchers.

the use that requires a license. This is not a new concept. Two cases cited by Complainant *In re Ronnie Faircloth et al*, 52 Agric. Dec. 171 (1993), and *In re. Terry and Lee Harrison*, 51 Agric. Dec. 234 (1992), in essence hold that the fact that an animal is used for an exempted purpose, such as a pet, does not mean that its owner is excused from the exhibitor's license requirement for its other purpose. Otherwise, any owner of a wild animal that it exhibits, even where admission is charged, could contend that the majority of the time the wild animal acts as the owner's pet, and is thus exempt from the license requirement. Such a result would be manifestly inconsistent with the Act. Here, the displayed animals are unquestionably one of the means that Respondents use to draw customers to Montrose Orchards and for that type of usage an exhibitor's license is required.

Complainant has asked that a civil penalty of \$4,000 be imposed against Respondents. After reviewing all the evidence, including Respondents' repeated efforts to obtain a written interpretation of their status under the Act, I conclude that a penalty of \$1,000 is warranted. While Respondents were repeatedly advised that they were in violation of the Act by their failure to obtain an exhibitor's license, the fact is that Mr. Hill repeatedly contended that he was exempted from the Act, and repeatedly requested APHIS to show him something in writing that would back up their interpretation. While there is no requirement that APHIS provide a written interpretation to anyone who asks for one, it is easy to see how the language of the Act and regulations could cause someone in Respondents' position to question the oral interpretation offered by the APHIS inspectors. The Agency frequently responds to such inquiries in writing.³ Neither the statute nor the regulations make it clear that when an animal is being used for both an exempt purpose and a covered purpose, the covered purpose must be complied with. The

³ See, e.g., Administrative Law Judge Palmer's decision in *In re Marvin D. Horne*, Agric. Dec. (Dec. 8, 2006).

“clarification” provided in Policy #26 sheds no light on the situation, and even muddies the waters. Upon viewing Mr. Hill’s demeanor at the hearing, I am convinced that he was not a scofflaw or an individual who was trying to squirm out of a statutory requirement, but simply wanted the Agency to show him in writing why he was not subject to one of the Act’s exemptions. I am obviously not finding that the Agency has a duty to respond to such an inquiry, but I am treating it as a factor in terms of evaluating the good faith of the Respondents in trying to comply with the law. The Act requires, 7 U.S.C. § 2149 (b), that I consider the violator’s size of business, the gravity of the violation, good faith and history of previous violations. In so doing, I conclude that \$1000 is an appropriate penalty.

Findings of Fact

1. Respondent Montrose Orchards, Inc. is a family owned Michigan corporation located in Montrose, Michigan. Respondent Daniel J. Hill is the president of Montrose Orchards.

2. Respondents operate a business which offers the public an opportunity to purchase apples, blueberries, Christmas trees, asparagus, pumpkins and other products. Most products are sold in the Orchard’s gift shop, and some products are also offered to the public on a self-pick basis.

3. Respondents display to the public a number of animals including, at various times, a pig, a cow, English fallow deer, Barbados sheep and goats. These animals were displayed in large pens. There were signs directing the public to these pens. There were signs on some of the pens identifying the animal(s) inside. There were food dispensing machines where members of the public could insert some money and buy food to feed the animals, and a hand washing station near the pens available for public use.

4. In a series of inspections occurring between September 2003 and August 2006, APHIS inspectors consistently indicated to Respondents that an exhibitor’s license was required to display the above-mentioned animals. Just as consistently, Respondent Hill insisted that the display of animals was exempt from the exhibitor’s license requirement.

5. Respondent Hill made numerous inquiries to USDA requesting a written statement that his display of animals required an exhibitor's license. He did not receive the requested statement.

6. Most of the animals displayed by Respondents are used for food.

Conclusions of Law

1. Between September 2003 and August 2006, Respondents were exhibitors under the Animal Welfare Act. As such, Respondents were required to obtain an exhibitor's license to display the animals on their premises to the public.

2. Upon consideration of the factors enumerated in the Animal Welfare Act, I assess a civil penalty of \$1,000 jointly and severally against Respondents.

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act including but not limited to the exhibition of animals.

2. Respondents are jointly and severally assessed a civil penalty of \$1,000, which

shall be paid by a certified check or money order with the notation "AWA Dkt. No. 06-0006" on the front of the check or money order made payable to the Treasurer of United States and shall be sent to:

Sharlene Deskins

Office of the General Counsel Marketing Division

United States Department of Agriculture, Mail Stop 1417

1400 Independence Ave., S.W.

Washington, D.C. 20250-1417

The Respondents cannot apply for or obtain a license under the Act until the civil penalty imposed in this order is paid in full.

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: DAVID McCauley, d/b/a DAVE'S ANIMAL FARM.
AWA Docket No. 06-0009.
Decision and Order.
Filed May 14, 2007.**

AWA – Justifiable reliance, unavailable –Regulations, when clearly contra to.

Brian T. Hill for APHIS.

Respondent Pro se.

Decision and Order by Chief Administrative Law Judge Marc R. Hillson

Decision

In this decision I find that Respondent David McCauley violated the Animal Welfare Act by acting as a dealer of regulated animals with respect to at least one transaction even though his license had been revoked in a prior decision. I find that Complainant did not show by a preponderance of the evidence that Respondent acted as a dealer with respect to two wallabies he transported to Germany. I impose a civil penalty of \$2,000 against Respondent.

Procedural Background

A Complaint was filed by Kevin Shea, Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of

DAVID McCAULEY
d/b/a/ DAVE'S ANIMAL FARM
66 Agric. Dec. 278

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Agriculture, on January 27, 2006, alleging that Respondent David McCauley had committed a number of violations of the Animal Welfare Act ("the Act") and regulations thereunder between May 4, 2005 and December 15, 2005. In particular the Complaint alleged that Respondent operated as a "dealer" under the Act, even though his license had previously been revoked, and that he offered animals for sale and exhibition, and sold and transported animals to Guatemala and Germany, during the violative period.

Respondent filed a timely Answer denying that he had violated the Act. He stated that he had been told by USDA personnel that it was not unlawful to ship animals from the U.S. to another country without a dealer's license, and that, in any event, the Complaint's allegations concerning the nature of his business in Germany were incorrect. He further contended that he had not acted as a dealer of regulated animals once his license was revoked.

On March 9, 2006, Complainant moved that a date be set for a hearing. I conducted a conference call on July 28, 2006 at which Complainant was represented by Colleen A. Carroll, Esq. and Respondent represented himself. At the conference call the parties agreed to a hearing date of December 12, 2006. Complainant agreed to deliver to Respondent, to be received no later than September 15, 2006, a list of anticipated witnesses, a brief summary of anticipated witness testimony, and copies of exhibits intended to be introduced at the hearing. Similarly, Respondent agreed to deliver his list, summaries and copies by October 20, 2006. On November 15, 2006, Brian T. Hill, Esq., submitted a Notice of Appearance on behalf of Complainant, replacing Ms. Carroll.

I conducted a hearing on this matter in San Antonio, Texas on December 12, 2006. At the outset of the hearing, Respondent notified me that he had never received the initial exchange from Complainant, nor had he submitted his exchange to Complainant. Mr. Hill, who had

not been involved in the case until two months after Complainant's submission was due, could not document that Complainant had mailed its exchange to Respondent, nor was he able to reach Ms. Carroll¹. Respondent indicated that he was thus unable to fully prepare for the hearing. Tr. 16. I stated that I would go on with the hearing, and would "reserve the right to continue the hearing" if Respondent needed additional time to prepare his cross-examination of witnesses. Tr. 20.

At the hearing Complainant called five witnesses and introduced 25 exhibits. Respondent testified on his own behalf, and introduced no exhibits. At the conclusion of the hearing, the parties and I agreed that there was no need to continue the hearing, as Respondent had "put on all his evidence and said everything he wanted to say." Tr. 206. Both parties submitted briefs in early February, 2007.

Statutory and Regulatory Background

The Animal Welfare Act, 7 U.S.C. § 2131 et seq., broadly regulates "animals and activities . . . in interstate or foreign commerce or [which] substantially affect such commerce or the free flow thereof . . . in order— (1) to insure that animals intended for . . . exhibition purposes or for use as pets are provided humane care and treatment." The Act authorizes the Secretary of Agriculture to issue licenses to dealers, 7 U.S.C. § 2133, and forbids any dealer from selling or offering to sell regulated animals without a license, 7 U.S.C. § 2134. The Act defines "dealer" as "any person who, in commerce, for compensation or profit, deliver for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of" any animal. 7 U.S.C. § 2132 (f).

The Secretary has promulgated regulations pursuant to the Act. The regulations define "commerce" as "trade, traffic, transportation, or other commerce: (1) Between a place in a State and any place outside of such State, including any foreign country, or between points within the same

¹ The exchange is normally not filed with the Hearing Clerk, so there was no evidence in the file indicating that my order regarding the exchange was complied with.

State but through any place outside thereof, or within any territory, possession, or the District of Columbia; or (2) Which affects the commerce described in this part.” 9 C.F.R. § 1.1. The regulations also provide that a person whose license has been revoked “shall not be licensed in his or her own name or in any other manner,” 9 C.F.R. § 2.10(b), and that any person whose license has been revoked “shall not buy, sell, transport, exhibit, or deliver for transportation” any animal. 9 C.F.R. § 2.10(c).

Facts

Respondent David McCauley is an individual doing business as Dave's Animal Farm, whose current mailing address is Post Office Box 358, McQueeney, Texas 78123. Respondent was licensed as a dealer under the Act and was in the business of selling Bennetts wallabies, and other macropods and exotic pets. He is also a published author whose book “Macropods: Their Care, Breeding, and the Rearing of Their Young” is sold through his website.² He is an expert in macropod health, and has for years consulted and published in that field.

Respondent's dealer's license was revoked by my decision of January 30, 2004, *In re: David McCauley*, 63 Agric. Dec. 79 (2004), CX 8.³ That

² The USDA library lists this book in its catalog.

³ At the hearing and again in his brief Respondent continues to urge that this decision be reversed, even though he did not show up at the hearing, did not file a motion to reconsider or for rehearing, and did not timely appeal the decision. While he stated that he did not receive notice of the exact date of the hearing, and the file contains no evidence as to whether he received the exact time and location of the hearing, he knew what day the hearing was scheduled to occur and elected to not show up rather than call my office or the Hearing Clerk's office to inquire why he had not been notified. Further, he signed a receipt for the decision at his usual place of business on February 11, 2004. CX 8, p. 1. The decision explicitly stated that it would become final within 35 days unless appealed, and the rules of procedure provide that an appeal must be filed within 30 days of receiving service of the decision. It was not until May 13, 2004, two months

decision became final on March 8, 2004. Respondent has not held a USDA dealer's license since that time. The Complaint charges Respondent with two specific transactions that it believes constitutes acting as a dealer without a license, as well as a general violation for advertising sales of regulated animals through his website.

The Guatemala transaction—Complainant presented evidence that Respondent shipped a wallaby to the Guatemalan National Zoo in January 2005. The wallaby was shipped out of San Antonio on Continental Airlines, CX 3, with the requisite health certificates, CX 4, 5. Respondent does not deny this transaction, but consistently has maintained that he was specifically and clearly told, by an unnamed USDA veterinarian, that he was allowed to ship animals outside the United States even though his dealer's license was revoked. He testified that he called USDA's regional office, was transferred to a staff veterinarian, and asked him a great many questions so that it was clear that the person knew what Respondent was asking. He stated that he was told "what you do outside of this country is your business." Tr. 162. Unfortunately, Respondent has no recollection as to the name of the individual who gave him this advice. Even if this advice was actually given, the fact is that the activity complained of did not take place entirely out of the United States or its territories, since Respondent shipped the wallaby from Texas. CX 3.

Respondent also testified that after he received the Complaint in this case, he spoke to his custom broker, who referred him to a Dr. Okino, another USDA veterinarian, who also told him that USDA did not require a license for exporting wallabies outside of the United States. Tr. 163-166. Respondent did not attempt to subpoena Dr. Okino.

Thus, it is undisputed that Respondent sold and shipped a wallaby to the Guatemalan National Zoo in January 2005.

The Germany transaction—Complainant alleges that Respondent acted as a dealer with respect to two joey⁴ wallabies he transported to

after the appeal was required to have been filed, that Respondent filed his appeal to the Judicial Officer who denied the late appeal for lack of jurisdiction.

⁴ A joey is a juvenile wallaby.

Germany in May 2005. Respondent states that he did not act as a dealer, but rather instead brought the wallabies over to Germany in furtherance of his business as an expert animal consultant, and to participate in the taping of a television program/video on wallabies. Respondent testified that he was paid only his expenses for his trip to Germany, Tr. 181-182, with the hope that the marketing of the video that was produced would net him a profit. Tr. 203. While Complainant proposes a finding of fact that Respondent received two air tickets to Germany, Respondent testified that he received only one such ticket, as part of his expenses, and that he used accumulated airline miles to purchase a ticket for his daughter, who accompanied him on the trip. Tr. 150-151. There is absolutely no testimony to support Complainant's proposed conclusion of law that the funds advanced by Dagmar Grubnau were used to purchase Respondent's daughter's airplane ticket. However, it is undisputed that Respondent received approximately \$1,150 to cover his airline ticket and fees such as the international health certificate and other inspection costs.

Respondent has testified that he did not sell the wallabies to Dagmar Grabnau. He stated that he gave them away because Grabnau's wife had bonded with them, and because he had had an arduous and messy trip to Germany. Tr. 165-168. However, the health certificate related to the portion of the trip from the United States lists Dagmar Grabnau as the consignee. CX 17. In addition, describing the transaction on his website, Respondent states that he had traveled to Germany and had "delivered a pair of bennetts joeys to a customer for use in a TV documentary" and that the documentary would follow "the joey's lives until they are parents themselves." CX 2, p. 1. While there is evidence that the price for wallabies can run well over \$1,000 apiece, there is no evidence of any transaction between Respondent and Grabnau that would indicate an actual sale of the two wallabies.

Complainant also contends⁵ that with respect to securing the

⁵ Although it is not specifically mentioned in the Complaint.

possession of a female wallaby to take to Germany, that Respondent acted as a dealer in regards to a complicated three way transaction. In essence, Respondent arranged for Arnold Sorenson to trade a male wallaby to Mike Smith, with the understanding that Mike Smith would give Respondent a female wallaby to take to Germany. Mr. Sorenson understood that Respondent would eventually provide him a male wallaby and \$300 to complete the deal, but apparently that has not happened thusfar.

Complainant also contends that Respondent has acted as a dealer by maintaining a website which until at least early May, 2005, indicated that Respondent was selling wallabies and other macropods, and even posted the price for some wallabies. CX 1, p. 3. Respondent's homepage indicates that he "is available for future consulting and presentations and still owns his large mob of Bennetts wallabies in Texas, which he supplies to zoos, exotic animal breeders, and the bottle-fed joeys to the public as pets." Sometime subsequent to May 2005 and before August, 2005, the price listings were left blank on Respondent's website. Respondent contented at the hearing that he was not in the business of selling wallabies and essentially blamed all his difficulties with the website on his webmaster, Mike Clayton, who he stated was constantly delinquent in complying with his requests to update his website. Tr. 197-202. He stated that he was paying him too much money to switch to someone else. He did not attempt to subpoena Mr. Clayton, even though Clayton's whereabouts is known to Respondent since he is apparently an assistant professor at a local university. Tr. 197. He also offered no explanation as to why Clayton was able to update his website to include details of his Germany trip, but did not eliminate the page "Pricing for Wallabies" on the website.

Discussion

I find that Respondent has violated the Animal Welfare Act by acting as a dealer without a dealer's license. However, I am only finding that he violated the Act with regard to the transaction with the Guatemala National Zoo. Although it is a close question, I find that he did not act as a dealer with regard to the transaction involving the shipment of wallabies to Germany. In addition, although I find he was clearly

holding himself out as a dealer on his website, and continues to do so, that in itself is not a violation of the Act—there has to be a transaction in order for their to be a violation, and only the Guatemalan transaction was proven by a preponderance of the evidence. Accordingly, I am issuing a cease and desist order and imposing a civil penalty of \$2,000, rather than the \$6,600 requested by Complainant.

At the outset, it is unequivocally clear that “commerce” as used in the Act and regulations, covers the sale and shipment of animals from within the United States to a point outside of the United States. There is no dispute that such a transaction took place with respect to the sale of wallabies to the Guatemalan National Zoo. The principal area of dispute centers on Respondent’s claim that he was told by an unidentified veterinarian that it was permissible for him to ship the wallabies outside the United States without a dealer’s license, and was told after-the-fact by another USDA veterinarian that his shipping of animals outside the country without a dealer’s license was legal. The problem with Respondent’s claim of “justifiable reliance” is that the regulations clearly define commerce as including transactions between a place in a state and any foreign country. There is nothing ambiguous about this language, and it was easily discernable to Respondent, who had a copy of the regulations. Tr. 137-138. Even if Respondent could produce USDA witnesses who gave him incorrect advice, he still would not prevail on this issue. The clear language of the regulation prevails over the incorrect interpretation of an employee. While clear proof of bad Agency advice might go to the issue of Respondent’s good faith on this issue, and have an impact of the penalty, the failure to name the person who allegedly gave him the bad advice before the transaction, and the failure to subpoena the person who allegedly confirmed this bad advice after-the-fact, leads me to reject this defense. Further, the alleged advice does not appear to cover Respondent’s transaction anyway, since the undisputed evidence clearly demonstrates that the wallaby was shipped from within the United States.

The German transaction presents a closer question. Bearing in mind that Complainant bears the burden of proof, by the preponderance of the

evidence, I must rule in favor of Respondent on this issue. If Respondent had shipped the two wallaby joeys from San Antonio to Germany without accompanying them, there is no question that he would have acted as a dealer. However, the fact that he lost his dealer's license does not require him to abandon all activities involving macropods. The loss of his license does not act as a ban on his utilizing his expertise in other manners, including writing, lecturing, consulting, etc. Lack of a license does not preclude him from taking wallabies with him on a lecture tour, or from making a television or movie documentary about macropods. There is not much in the way of evidence that contradicts Respondent's account of his trip to Germany. He stated he was being paid his expenses for a documentary on wallabies, and there is no evidence in this record to the contrary. The approximately \$1,100 he states that he was paid for his airline tickets and other expenses does not seem excessive, particularly when the length of the trip—less than two weeks—is factored in. There is no evidence that he was paid any amount that would approach the amount he normally charged for joey wallabies. There is no evidence to support the government contention that the costs of Respondent's daughter's ticket to Germany was borne by anyone in Germany, rather than Respondent's un rebutted statement that he used his accumulated airline miles to finance her ticket, and paid her taxes with his own money. Basically, Respondent's account—that he took the trip to help create a documentary film/video with the hope that he would receive a share of the profits, if any, as well as an increase in profits from the sales of his book, has not been countered by Complainant. Even though I find Respondent's account that he decided to donate the wallabies to be less than convincing,⁶ Complainant needs more than surmise to meet its burden of proof.

Similarly, Respondent's role in the three-way transaction Respondent participated in to obtain a female joey wallaby to take with him to

⁶ His website narrative of the trip, where he indicates that the documentary would follow the joeys "until they are parents themselves," is flatly inconsistent with his testimony that he had intended to bring them back to the United States. CX 2, p. 1.

Germany does not appear to be that of a dealer as defined in the Act. The net impact of the transaction is that Respondent arranged for a trade to allow him to obtain a female joey for his own benefit to take with him to Germany to utilize in the preparation of a documentary on wallabies. That he generated a debt with other dealers as part of this transaction does not make him a dealer.

I also find that even if Respondent advertised that he had wallabies for sale, that does not make him a dealer. Complainant has consistently proven its unlicensed dealer cases, against Respondent and others, by demonstrating sales of animals at a time when the seller did not have a license. E.g., *In re Marilyn Shepherd*, 65 Agric. Dec 1019 (2006). Each time a person without a dealer's license acts as a dealer—generally by buying or selling a regulated animal—that person commits a violation of the Act. Advertising prices for regulated animals does not in itself constitute a violation, as advertising is not listed as one of the regulated acts for which a dealer's license is required. Complainant's brief is devoid of case citations on this issue, and I have found nothing to indicate that the mere act of advertising constitutes violative conduct.⁷

I am imposing a penalty of \$2,000 for the violation committed by shipping a wallaby to the Guatemalan National Zoo. Dealing animals without a license is among the most serious violations of the Animal Welfare Act. Respondent was fully aware that his license had been revoked. His refusal to pay the civil penalty assessed in the earlier decision, the fact that he has a history of prior violations, and the unambiguous language in the regulations support a finding that his violation here was willful and that his conduct can be characterized as lacking good faith.

Findings of Fact

⁷ This is not to say I give any credibility to Respondent's rather lame defense that he had been trying to get his webmaster to remove any references to sales, but has been unable to get him to do so.

1. Respondent David McCauley is an individual doing business as Dave's Animal Farm and whose current mailing address is Post Office Box 358, McQueeney, Texas 78123.

2. Respondent at one time held Animal Welfare dealer's license # 74-B-0439. This license was revoked (and a civil penalty of \$10,000 was imposed) on January 30, 2004, in *In re: David McCauley*, 63 Agric. Dec. 79 (2004). The revocation became a final decision of the Secretary of Agriculture on March 8, 2004.

3. On or about January 18, 2005, Respondent sold and transported a wallaby to the Guatemala National Zoo.

4. On or about May 11, 2005, Respondent transported two wallabies to Dagmar Grubnau in Germany. These wallabies were transported in order to allow Respondent to assist in the preparation of a documentary. Respondent received some expenses and a promise of a percentage of profits that would be generated from the documentary. Although the wallabies remained in Germany after Respondent returned to the United States, there is no evidence that the wallabies were sold.

5. From on or about the time Respondent's license was revoked through at least August 22, 2005, Respondent advertised the sale of wallabies on his website.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent's sale and transportation of a wallaby to the Guatemala Zoo in January 2005, when he did not possess a dealer's license issued pursuant to the Act, was a willful violation of section 2134 of the Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. Respondent's transporting of two wallabies to Germany in conjunction with the preparation of a documentary did not constitute a violation of the Act or the Regulations.

4. The act of advertising wallabies for sale on his website did not in itself constitute a violation of the Act.

5. Upon consideration of the factors enumerated in the Act, I impose

DAVID McCAULEY
d/b/a/ DAVE'S ANIMAL FARM
66 Agric. Dec. 278

289

a civil penalty of \$2,000 against Respondent.

Order

1. Respondent, his agents and employees, successors and assigns, directly or

through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of \$2,000, which shall be paid by a certified check or money order with the notation "AWA Dkt. No. 06-0009" on the front of the check or money order made payable to the Treasurer of United States and shall be sent to:

Brian T. Hill
Office of the General Counsel
Room 2343 South Building
United States Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250-1417

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.

DEBARMENT NON-PROCUREMENT**DEPARTMENTAL DECISIONS**

In re: JOHN GRAHAM, III.
DNS-RMA Docket No. 07-0046.
Decision and Order.
Filed February 27, 2007.

DNS-RMA – FCIC – False and Inaccurate.

Donald A. Brittenham, Jr. for FCIC.

Dennis Chase for Respondent.

Decision and Order by Administrative Law Judge Peter M. Davenport

DECISION AND ORDER

This decision involves the appeal of the decision of Eldon Gould, the Debarring Official, Risk Management Agency (hereinafter “RMA”), Federal Crop Insurance Corporation, (hereinafter “FCIC”), United States Department of Agriculture to debar the Respondent John Graham III for a period of one year. Prior to the decision, the Respondent, through his representative, submitted written material to the Debarring Official, generally indicating that debarment would not be appropriate as he felt that no wrongdoing had occurred and providing mitigating factors which he wished to be considered. The letter imposing the debarment was dated October 26, 2006 and the appeal was initiated by a letter under the signature of the Respondent’s representative, Dennis Chase, C.E.O. of ChaseMaster Corporation of Bastrop, Louisiana dated December 15, 2006.¹

¹ The Administrative Record is silent as to the date of actual receipt of the Notice of Debarment by the Respondent. The Respondent’s representative indicates in his letter of December 15, 2006 that the Respondent received the notice on November 16, 2006 which would make the receipt of the appeal letter from the Respondent’s representative by the Hearing Clerk on Monday, December 18, 2006 timely filed.

The Respondent, John Graham III, is an individual whose mailing address is 36 Pony Greer Road, Rayville, Louisiana 71269. In May of 2003, while working as a loss adjuster within the Federal crop insurance program², he was assigned to review corn claims for three policies. A review of the production worksheets prepared and submitted by the Respondent indicated that false and inaccurate information was included on three separate worksheets which had been previously submitted to Heartland Crop Insurance, Inc. (hereinafter "Heartland"), an insurance provider. As a result of the false and inaccurate information contained on the production worksheet, an indemnity payment of \$129,463 was paid to Lonestar Planting, Inc. to which it was not entitled.

The appeal which has been advanced by the Respondent is somewhat short on specifics, but asserts that the debarment should not be imposed because of:

1. Agency misconduct
2. The lack of serious regulatory cause
3. The application of *Darby v. Cisneros*³
4. Debarment would be unduly harsh as the Respondent derives his livelihood entirely from government contracts or programs
5. The absence of substantial evidence supporting the agency decision
6. A violation of due process rights
7. Arbitrariness of the decision
8. Imposition of debarment for an unlawful purpose

None of the above assertions has merit. With respect to the allegation of agency misconduct, it is initially noted that the language contained in the decision concerning finality of the decision is not inconsistent with other provisions allowing the appeal of the decision to an Administrative Law Judge. Even had RMA provided Heartland with a copy of the debarment decision, which the Complainant denies was done, such notification would be within the scope of the regulations and would

² 7 CFR 457, *et seq.*

³ *Darby v. Cisneros*, 509 U.S. 137 (1993).

merely duplicate the information placed upon Excluded Parties List System (EPLS) publicly accessible on the internet at <http://www.epls.gov/>. Given Heartland's contractual obligations prohibiting the use of any person that has been debarred, Heartland's actions were both appropriate and predictable.

The Respondent's implicit argument that there is a lack of serious regulatory cause and his arguments that the decision is arbitrary and not supported by substantial evidence is manifestly inconsistent with the Respondent's admissions that he not only failed to follow required procedures and to perform acts required of a loss adjuster with FCIC, but also submitted false and inaccurate information on the production worksheets submitted to insurance providers.

As noted in the Complainant's Response to Respondent's Appeal, the Respondent's reliance on *Darby* is misplaced⁴ as the action taken and procedures followed in the debarment action and the appeal process are governed by 7 C.F.R. Part 3017, rather than the Administrative Procedures Act, 5 U.S.C. § 556 and 557.

Respondent's 4th argument is made that debarment would be unduly harsh as the Respondent has derived his livelihood entirely from government contracts or programs. While it is true that debarment might affect some individuals or entities to a greater extent than others, the Respondent remains free to continue to work in the insurance industry for insurance companies and adjust losses, provided however, that it is not in connection with Federal crop insurance policies. The contractual obligations of the Federal crop insurance program are straight forward. One who fails to meet those obligations, *a fortiori*, one who makes false and inaccurate statements while participating in the Federal crop insurance program, runs the risk of being debarred as has been done in this case. The proceedings leading to the debarment decision provided the Respondent with ample due process protections, including notice of the intended action and the possible consequences, an opportunity to

⁴ *Darby*, "We have recognized that the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality."

present any matters which he wished the debarring official to consider (as was done through his Representative), and further allowed him an appeal of the decision. As such, there is no violation of the Respondent's due process rights.

Last, the Respondent asserts that the imposition of debarment was done for an unlawful purpose. The debarring official set forth well supported reasons for the debarment and why he believed debarment was necessary to protect the public interest. Accordingly, his decision is in accordance with law and will be affirmed.

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 action taken by Federal Crop Insurance Corporation against the Respondent was prompted by a Southern Regional Compliance Office (SRCO) review (Exhibit 11) which concluded that the indemnity paid to Lonestar Planting, Inc. was not in accordance with Federal Crop Insurance Corporation (FCIC) approved policy and procedures and that, in particular, the actions of John Graham III were negligent in failing to recognize the late notice of crop loss; falsely

reporting that the loss was consistent with that of other farmers in the area; and failing to recognize that it was practical for the insured to have attempted replanting⁵. The Respondent was interviewed on at least two occasions,⁶ and admitted that certain elements of the information provided to the insurer were incorrect.

After careful consideration of both of the administrative records and the pleadings, the following Findings of Fact and Conclusions of Law are made.

FINDINGS OF FACT

1. The Respondent, John Graham III, is an individual having a mailing address of 36 Pony Greer Road, Rayville, Louisiana 71269 and who at all times material to this action functioned as a loss adjuster within the Federal crop insurance program..

2. In May of 2003, the Respondent was assigned to review corn claims for three Federal crop insurance policies #110721, #110878, and #110744.

3. On May 8, 2003, the Respondent completed a Production Worksheet for Policy #110721 in the name of Lonestar Planting, Inc., falsely certifying that “578 & maps were used to verify acres and shares. Loss was due to excessive moisture in area. Loss is similar in the area.” AR, Exhibit 7.

4. On May 9, 2003, the Respondent completed a Production Worksheet for Policy #110878 in the name of Bobby Dale Kelly, falsely certifying that “578 & maps were used to verify acres and shares. Loss was due to excessive moisture in area. Loss is similar in the area.” AR, Exhibit 8.

5. On May 9, 2003, the Respondent completed a Production Worksheet for Policy #110744 in the name of Karen Morris Kelly,

⁵ AR, Exhibit 11 at 2.

⁶ Exhibit 11 makes note of two statements dated September 17, 2003. The Administrative Record contains a statement dated November 18, 2004. (AR, Exhibit 12).

falsely certifying that “578 & maps were used to verify acres and shares. Loss was due to excessive moisture in area. Loss is similar in the area.” AR, Exhibit 9.

6. The Respondent failed to follow approved FCIC procedures and policies concerning the lack of recognition of untimeliness of the notice of loss, the computation of a “replant window of opportunity”⁷ and in gathering information concerning other farms in the area and applicable weather conditions. In a written statement dated November 18, 2004, the Respondent admitted that he did not verify the conditions of surrounding farms as noted on the three Production Worksheets and that the statements in question were in fact false.

7. The records of the Louisiana Office of State Climatology, Southern Regional Climate Center (SRCC), reflect that in 2003, Richland Parrish, Louisiana (where each of the three crops were located) had only one significant rainfall event which happened on April 7, 2003 and that the rest of the month was relatively dry, with no continuous or heavy rainfall during the month of April of 2003. AR Exhibit 18 (Ex. 7, Page 3 of 3 and Ex 8).

8. Corn yields in Richland Parrish, Louisiana in 2003 were 21% higher on the average than the average for the previous 10 years. AR, Exhibit 19 at 4. Of the 34,000 acres of corn planted in the parrish, 32,600 acres were harvested. Lonestar Planting, Inc.’s unharvested 1,045.6 acres amounted to 75% of the 1400 unharvested acres in the parrish, rebutting the statement that the loss by Lonestar Planting, Inc. was similar to that of other farms in the area. *Supra*.

9. As a result of the false and inaccurate completion of the Production Worksheet for Policy #110721 by the Respondent, the policy holder, Lonestar Planting, Inc. received an indemnity payment of \$129,463 to which it was not entitled.

⁷ AR, Exhibit 11, page 2

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. The Respondent, John Graham III, failed to follow FCIC approved policy and procedures in connection with the adjustment of three Federal crop insurance loss claims, including his failure to recognize the untimeliness of the loss notification, his failure to compute a replant window of opportunity and his failure in collecting information concerning other farms in the area and applicable weather conditions.

3. The Respondent knowingly and willfully completed and falsely certified Production Worksheets for policy numbers 110721, 110878 and 110744 which contained inaccurate and false statements. The inaccurate and false statements resulted in an indemnity payment to Lonestar Planting, Inc. for policy #110721 in the amount of \$129,463 to which it was not entitled.

4. As I agree with so much of the decision of the Debarring Official that the Respondent 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 October 26, 2006, I conclude that his decision is in accordance with the law and regulations; is based upon the applicable standard of evidence; is not arbitrary or capricious; and does not constitute an abuse of the Debarring Official's discretion.

Accordingly, the following Order is entered.

ORDER

It is ORDERED that the decision of Eldon Gould, the Debarring Official, in his debarment letter of October 26, 2006 is AFFIRMED as to John Graham III.

Copies of this Decision shall be served upon the parties and the Debarring Official by the Hearing Clerk's Office.

**In re: BILLY G. ROLAND and BILLY GRAY ROLAND, LTD.
DNS-RD Docket No. 07-0089.
Decision and Order.**

Filed June 8, 2007.

DNS-RD – Debarment – Defects, failure to remedy – Subcontractors.

Decision and Order by Administrative Law Judge Victor W. Palmer

Decision

This Decision and Order is issued pursuant to 7 C.F. R. § 3017.890, in disposition of the appeal by Billy G. Roland and Billy Gray Roland, Ltd., an entity through which Billy G. Roland does business (“Respondents”), of the determinations by the U.S. Department of Agriculture Rural Development (“USDA RD”) debarring Mr. Roland and Billy Gray Roland, Ltd., for three years from participation in all “covered transactions” as that term is defined in 7 C.F.R. part 3017, subpart B. I am affirming the debarment determinations on the basis of my review of the administrative record upon which they are based that demonstrates ample, compelling and legally sufficient support for their issuance.

As explained at 7 C.F.R. § 3017.100, part 3017 was promulgated to satisfy requirements under Executive Orders for a government-wide system of debarment and suspension applicable to Department of Agriculture nonprocurement activities that has government-wide effect. Therefore, the debarments not only exclude Respondents from participating in covered transactions with USDA RD, they also exclude them from such participation with any other Federal Government entity.

On October 27, 2005, Mr. Roland was suspended from participating in Federal Government programs (Administrative Record, Tab T). Subsequently, on November 16, 2005, Mr. Roland was notified that USDA RD had initiated debarment proceedings against him and his associated entities (Administrative Record, Tab S). The notice provided Mr. Roland the opportunity to contest the proposed debarment. In accordance with his request to do so, a transcribed fact-finding proceeding was conducted on March 7, 2006 pursuant to 7 C.F.R. § 3017.840 (Administrative Record, Tab G). USDA RD, as the debarring official, was thereupon required by 7 C.F.R. § 3017.845 to base its

decision:

...on all information contained in the official record. The official record includes-

- (1) All information in support of the debarring official's proposed debarment;
- (2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and
- (3) Any transcribed record of fact-finding proceedings.

7 C.F.R. § 3017.845.

On March 7, 2007, USDA RD issued its determinations debarring Mr. Roland and his company from participating in covered transactions for three years, but gave him credit for the period of time he was previously suspended so that the debarments shall end on October 27, 2008 (Administrative Record, Tabs C and D).

Mr. Roland's appeal is pursuant to 7 C.F.R. § 3017.890, under which I am directed as the assigned appeals officer to:

...vacate the decision of the debarring official only if the officer determines that the decision is:

- (1) Not in accordance with law;
- (2) Not based on the applicable standard of evidence; or
- (3) Arbitrary and capricious and an abuse of discretion.

7 C.F.R. § 3017.890 (a).

As the appeals officer, I am also subject to the following constraint:

(b) The appeals officer will base his decision solely on the administrative record.

7 C.F.R. § 3017.890 (b).

As I have previously stated, review of the administrative record amply demonstrates legally sufficient and compelling support for the debarment determinations by USDA RD.

The debarments were in response to alleged failures by Mr. Roland and the construction firm he controlled to properly perform obligations incurred from 1999 to 2005, in respect to four homes he undertook to build as a general contractor participating in a government program for the rural development of low cost housing. Under the program, USDA

RD has the responsibility for assuring that the houses are properly built, and, when necessary for the homeowner's protection, to pay legitimate, unsatisfied liens filed by sub-contractors and suppliers of building materials.

The Administrative Record provides convincing and persuasive evidence that Mr. Roland routinely failed to meet his obligations to home owners, sub-contractors, suppliers of construction materials, and to USDA RD.

The Galvin home

As the general contractor for the construction of a single family dwelling for Ms. Beverly Galvin, under a contract that Mr. Roland signed on June 29, 1999, Mr. Roland failed to pay a sub-contractor and two suppliers of construction materials. They remained unpaid until USDA RD satisfied the liens they filed against the Galvin property. The existence of the liens was not disclosed by Mr. Roland when he filed a "Release by Claimants" on November 29, 1999. To the contrary, he falsely stated that the sub-contractor and the suppliers had been paid in full. Mr. Roland also failed to pay for construction plans he obtained and used for the dwelling until three years after its completion. Moreover, Mr. Roland failed to complete the Galvin home by September 30, 1999, as required by the construction contract and incurred liquidated damages under the contract for every day the home remained uncompleted beyond the completion date. Mr. Roland, despite Ms. Galvin's assertion of her right to the specified liquidated damages, paid her less than a third of the amount to which she was entitled.

Mr. Roland has asserted no convincing argument or evidence in defense of his actions. He argued that the sub-contractor and the suppliers were eventually paid and therefore the fact that liens were filed should not be used as a reason for his debarment. However, as the debarring official pointed out, the liens were satisfied by USDA RD and not by Mr. Roland's direct payment of them. Moreover, Mr. Roland made a false statement when he filed a "Release by Claimants" on November 29, 1999, and stated that he had by that date paid the sub-

contractor and the two suppliers in full. He next argues that the construction delay that led to his paying Ms. Galvin less than the liquidated damages to which she was entitled was due to her request for different carpet than the type originally ordered. However, the debarring official found no approval for such change by a USDA RD official as the construction contract required before her request could be treated as a legitimate reason for delay in the construction.

The Grant home

As the general contractor for the construction of a home for Clinton and Joyce Grant, under a contract that Mr. Roland signed on February 21, 2001, Mr. Roland failed to pay a supplier of insulation for the home that was purchased through a sub-contractor. The supplier filed a lien on the home and has advised USDA RD that it is still unpaid. Under the terms of the Grant Construction Contract, General Conditions, Part V (“Obligation to Discharge Liens”), Mr. Roland as the General Contractor was obligated to discharge all liens on the property associated with labor performed or materials furnished for the home’s construction. Although Mr. Roland submitted a “Release By Claimants”, the supplier advised USDA RD that it had never signed a release of its claim for the material and labor it supplied and states that it has never been paid.

Mr. Roland argued in his defense that the names of the homeowners on the lien were incorrect, that USDA RD had not notified him of the lien, and that the supplier had in fact been paid. In its debarment determination, USDA RD pointed out that even if the last name of the homeowners was inadvertently misstated, the lien attached to the property since the legal description of the property was correct, and that USDA RD had no obligation to notify Mr. Roland of the lien. Moreover, the record shows that his sub-contractor was aware of the lien’s existence and asked the supplier, five years after it had been filed, to remove the lien because the claim had been paid. The supplier refused on the basis that its records did not show ever receiving payment and the sub-contractor could furnish no proof of payment. USDA RD pointed out to Mr. Roland that the person who he stated signed a release on behalf of this supplier differed from the person actually assigned by the supplier to

this job, and USDA RD found the supplier's statements more credible than Mr. Roland's assertions. Finally, Mr. Roland asserted that he went to the courthouse and found no record of this lien. The supplier stated however, that the lien was never removed and it is still unpaid. USDA RD, as the debarring official, had the discretion to accept the word of the supplier over that of Mr. Roland who it found to be less credible.

The Calloway home

As the general contractor for the construction of a single family dwelling for the Calloway family, under a contract that Mr. Roland executed on February 3, 1999, Mr. Roland failed to pay a sub-contractor for work performed on the home. The sub-contractor remained unpaid until USDA RD paid \$10,271.21 to satisfy the balance owed to the sub-contractor that had filed a preliminary notice of lien rights for its unpaid work on the Calloway property. In addition, Mr. Roland failed to correct defective conditions in the construction of the home that his Builder's Warranty required him to correct within thirty days after receiving notice of the defects from the homeowner. In response to the homeowner's complaints, USDA RD staff visually inspected the property and confirmed that needed repairs had not been completed. At the end of the inspection, Mr. Roland assured USDA RD that the repairs would soon be made. However, more than five months after the inspection and almost ten months after the defects were first reported to Mr. Roland by the Calloway family, the needed repairs had still not been made despite repeated calls to Mr. Roland from the County caseworker assigned to assist the Calloway family.

Mr. Roland denied that an air conditioning unit he had installed needed to be replaced. But an air conditioning company that inspected the property explained that the unit he had installed was inadequate for the 4 people living in the house. Mr. Roland attempted to justify his failure to fix a broken window at the house on the basis of inclement weather, but he had known of the need to fix the window for almost a year before weather conditions interfered with repair efforts. He also tried to justify a fallen front porch column by blaming the tying of a dog

to it, but as USDA RD pointed out, a properly installed column should be able to resist being pulled out by a dog tied to it. In respect to a problem with the well he installed to serve the property, Mr. Roland claimed either more people were drawing water from it than it was designed to serve, or that it was the fault of his well contractor. USDA RD responded that as the general contractor, Mr. Roland had the overall responsibility for the way the well functioned and it should work properly even if more than the four residents were using it. USDA RD found on the basis of the evidence before it, that three of the defects were not repaired until more than a year after the time of required completion under the Builder's Warranty, and that there was no record of the well ever being properly repaired.

The Smith home

As the general contractor for the construction of a single family dwelling for Henry and Keshia Smith, under a contract executed on August 6, 2004, Mr. Roland failed to make timely repairs of various defects in the construction of this home as the contract required. Additionally, contrary to the terms of the construction contract, he sought approval for periodic payments before actual work had been performed and proper building permits had been obtained.

As was the case with the other homes, Mr. Roland has furnished a host of improbable excuses for his shoddy work and his failure to make necessary corrections in the manner and within the time required by the contract. He has asserted that various complaints by the Smiths arose from their moving into the home before its completion. However, Mr. Roland requested inspection of the home as being completed on a date before the Smiths moved in. Also Mr. Roland filed a "Release of Claimants" form before that date, which indicated that he had paid his sub-contractors for all of their work that was by then completed. He has also asserted that the homeowner requested some of the sub-contractors and he should not be held accountable for defects attributable to their work. Nor should he be held accountable, he asserts, for work by sub-contractors after he gave them notice of needed repairs. As the general contractor, Mr. Roland is responsible under the construction contract, for

shoddy work by his sub-contractors including that of those selected with his assent by the homeowner. Mr. Roland submitted various letters purportedly signed by Mr. Smith expressing satisfaction with the work. But Mr. Smith has not verified signing these letters and the debarment determination sent by USDA RD to Mr. Roland pointed out that the handwriting on them “appears very similar to your handwriting on documents you have acknowledged you wrote...” Moreover, in a letter by Keisha Smith dated February 14, 2005, she noted the many problems the Smiths had with Mr. Roland as their contractor and the continuing problems they were still having with their poorly built home.

In addition to his defenses respecting his practices in constructing these specific four homes, Mr. Roland sent USDA RD photographs of other homes he has constructed; a submission that he had always been satisfied in the past with the work of the principal sub-contractor he used to build these homes; and letters from suppliers and companies that have worked on other homes with Mr. Roland attesting to his acceptability as a contractor. However, as USDA RD pointed out in its determinations, none of these submissions refute the specific facts contained in the Notice of the Proposed Debarment.

Overall, the determinations to debar Mr. Roland and his company rest on an Administrative Record that demonstrates that he did not comply with the terms of the four construction contracts he entered into from 1999 to 2005. He failed to pay sub-contractors and suppliers. He placed USDA RD in the position of having to pay sub-contractors and suppliers in his place to keep these low cost homes free from liens. He failed to complete construction of one of the homes on time, and then failed to fully pay liquidated damages to the homeowner as the governing contract required. He failed to remedy in a timely manner defects in the construction of these homes. The defenses Mr. Roland asserted against being debarred were, for good reasons, found by the debarring official to be implausible, unpersuasive and less credible than contrary evidence.

The administrative record contains credible and persuasive evidence that Mr. Roland and his company should be debarred for three years from participation in all “covered transactions” as that term is defined in 7 C.F.R. part 3017, subpart B, in that, as the debarring official found, the

administrative record more than adequately demonstrated Respondents’:

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

And

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

7 C.F.R. § 3017.800. Accordingly, the following Order is being entered.

ORDER

It is this 8th day of June, 2007, ORDERED that the determinations by the U.S. Department of Agriculture Rural Development debarring Billy G. Roland and Billy Gray Roland, Ltd., for three years from participation in all “covered transactions” as that term is defined in 7 C.F.R. part 3017, subpart B, is hereby upheld and affirmed.

In re: RURAL UTILITIES SERVICE 7 C.F.R. § 3017.870 ACTION AGAINST BLUE MOON SOLUTIONS, INC., MARTY HALE, and CHRISTONYA HILL.

DNS-RUS Docket No. 07-0107.

Decision and Order.

Filed June 22, 2007.

DNS-RUS – Forensic audit – Disallowed costs – Adequate accounting practices, failure to maintain.

Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This is an appeal of an April 12, 2007 determination by James M. Andrew, the Administrator of the Rural Utilities Service, (hereafter “RUS”), to debar the Appellants/Petitioners Blue Moon Solutions, Inc., (hereafter “Blue Moon”), Marty Hale, and Christonya Hill (hereafter collectively the “Appellants”) for a period of five years, the five year period being reduced by a credit for a period of suspension, through November 8, 2010. The Petition for Review was timely filed with the Hearing Clerks Office on May 11, 2007 and the Brief of the Rural Utilities Service was filed on May 24, 2007.¹

As part of a pilot grant program to provide broadband rural transmission service in rural America, RUS established the Community Connect Program in 2002. This program made \$20 million in grants available through a national competition to applicants proposing to provide broadband transmission services on a “Community-Oriented Connectivity” basis to un-served areas targeting small, rural and economically challenged communities.² On July 8, 2002, RUS published

¹ The April 12, 2007 Determination indicates that it is based upon “all evidence in the record relating to Blue Moon and the Grants, including the Respondents’ Letter, the ALJ Decision, the NAD Appeal Determination, and the NAD Director Review Determination.” Determination, page 3. The Determination also makes reference to over 6,000 pages from the NAD and ALJ proceedings. While the full 6,000+ pages have not been filed in this action, the final decisions of those proceedings are included and provide sufficient basis for review of the debarment under the regulations.

² The program was intended to provide a way to connect broadband services to schools, libraries, education centers, health care providers, law enforcement agencies and public safety organizations and to make the services available to residents and businesses in communities where no broadband services exist. Under the concept, small rural communities would be given a chance to benefit from advanced technologies necessary to foster economic growth, provide quality education and health care opportunities, and

Cont.

a Notice of Funds Availability (NOFA) in the Federal Register.³ Blue Moon submitted grant applications to deploy broadband services in seven rural communities located along the Rio Grande in Texas, including Falcon lakes Estates, San Ygnacio, Batesville, La Pryor, Progreso, Zapata, and Crystal City, supplying RUS with a project narrative, which provided a general overview and budget for each of the proposed projects, including a description of each phase of the project, and the cost and type of services Blue Moon would be providing.⁴

Beginning on May 16, 2003 and continuing through September 24, 2003, the Administrator of RUS notified Blue Moon by separate award letter for each of the applications that the seven Community-Oriented Connectivity Grants had been approved in an aggregate amount of \$2,698,272.00. Between August 5, 2003 and September 24, 2003, RUS mailed to Blue Moon the Grant Agreements for each of the awards, together with instructions on how to execute the agreements, a supply of the forms used to request advances or reimbursements (Standard Form 270, hereafter SF270) and the instructions for completing those forms.

Between January and July of 2004, \$1,936,046.00 of Grant funds were advanced to Blue Moon based upon 14 SF270s submitted to RUS by Blue Moon. In October of 2004, the Office of the Inspector General (OIG) issued a Report entitled Summary of Survey Results - Rural Utilities Service Broadband Grant and Loan Programs. In the report, OIG identified Blue Moon as one of the companies having potential for misusing grant funds. Due to the OIG concerns, in November of 2004, RUS sent a Compliance Auditor to visit Blue Moon to perform a Grant

to increase and enhance public safety efforts by bridging the technological gap between large, metropolitan areas and rural America.

³ 67 Fed. Reg. 45079-45083.

⁴ The Appellant's proposals provided that Blue Moon would deploy basic broadband transmission services to each location in all critical community facilities located within the proposed area free-of-charge for at least two years and would further provide basic broadband transmission service to all residential and business users free-of-charge for at least two years.

Review Compliance Audit.⁵ The Compliance Auditor completed the compliance audit on March 18, 2005, finding \$910,829.79 (nearly half of the grant funds advanced) could not be supported with actual cost documentation.

On May 6, 2005, RUS sent Blue Moon seven letters informing it of the audit results and instructing Blue Moon to return the disallowed unsupported costs to the construction fund account. Blue Moon contested the disallowances, meeting with RUS representatives in Washington, D.C. and securing time to submit an independent audit. The independent audit, performed by Bollinger, Segars, Gilbert & Moss, LLP, was submitted to RUS on August 30, 2005 along with a letter from Blue Moon which admitted that it had difficulty in accounting for specific task assignments within each project location, but indicating that it had updated its accounting procedures.⁶

On September 30, 2005, based upon the RUS Compliance Audit, OIG issued its Audit report 09601-TE which recommended recovery of the full amounts advanced to Blue Moon and further recommended termination of the grants. On the same date, the Acting Administrator of RUS informed Blue Moon by letter that the grants were suspended, citing “serious discrepancies between the purposes for which grant funds were requisitioned and their actual expenditure by the Appellant.” FOF

⁵ The Compliance Auditor made five field visits to Blue Moon, beginning in November of 2004 and ending in March of 2005. Each field visit lasted five days and at times, the Compliance Auditor was accompanied by a RUS field accountant. FOF 11, Hearing Officer’s Appeal Determination.

⁶ On May 8, 2006, Blue Moon also submitted an additional audit characterized as a “Forensic Audit” prepared by Beakley and Associates, PC. RUS rejected the audit as the auditor was not properly licensed at the time of the audit and was not considered independent; however, even that audit which generally found Blue Moon to have adequate supporting data for all budgeted line items, did find that Blue Moon had submitted claims for payment which were inconsistent with and well in excess of actual costs.

23, Hearing Officer's Appeal Determination. The September 30, 2005 letter was followed by letters dated November 9, 2005, first informing Blue Moon that the seven grants were terminated for material failure to comply with the terms of the grant agreements and additional letters suspending Blue Moon and its CEO Marty Hale from further federal contracting.

The termination of the grants was appealed to the Secretary's National Appeals Division. Following a two week hearing, a partially favorable decision was issued by Hearing Officer Ilene J.K. Sloan on October 4, 2006, finding that RUS's adverse determination terminating the grants was erroneous as it had failed to meet its burden of proof by a preponderance of the evidence. RUS appealed the Hearing Officer's Decision, and on January 25, 2007, Roger Klurfeld issued a Director Review Determination which affirmed RUS's termination of the grants, but concluded that the record did not support the demand that Blue Moon refund \$910,829.79, noting that the grant closeout process had not been completed and that as part of that process Blue Moon would be entitled to recover any reimbursable cost properly incurred prior to the termination of the grants.

Blue Moon and Marty Hale also contested their suspensions, first at an agency hearing conducted on December 14, 2005, and upon receiving an adverse decision at the agency level, by an appeal to the Office of Administrative Law Judges, where the case was heard by Judge Victor W. Palmer. In upholding the suspensions in a decision dated June 20, 2006, Judge Palmer found that Blue Moon's failure to provide documentation could not be characterized as "mere carelessness or negligent bookkeeping errors," but rather it had filed false and unsubstantiated requests for grant funds to obtain more money than it was entitled to receive under the Grant award. *In re: Blue Moon Solutions, Inc. and Marty Hale*, 65 Agric. Dec. 126 (2006).

On November 8, 2006, RUS issued Debarment Letters to each of the Appellants, notifying them of RUS's intention to initiate debarment

proceedings against them and to debar them for a period of five years.⁷ By letter dated December 8, 2006, the Appellants contested the proposed debarments, relying upon the findings contained in the Hearing Officer's Decision in the termination appeal. Correspondence was exchanged between the Appellants and RUS concerning a debarment hearing, and following the issuance of the NAD Director Review Determination, a hearing date was set for February 28, 2007 and the Appellants were given until February 21, 2007 to inform RUS of any new facts or evidence that they would present at the hearing. No notification of any new facts or evidence was submitted by the Appellants⁸ and on February 27, 2007, RUS informed the Appellants that in absence of any new information, no genuine dispute existed as to the material facts upon which the proposed debarment was based, no hearing was required, and that RUS was canceling the hearing. On April 12, 2007, RUS issued the Debarment Determination of the three Appellants that gives rise to this appeal.

The causes for debarment are set forth in 7 C.F.R. § 3017.800:

- (a) Conviction of or civil judgment for--
 - (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
 - (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

⁷ Christonya Hill was added to the individuals to be debarred as she was identified as Blue Moon's Chief Operations Officer (COO), she signed each of the Grant Agreements and all of the SF 270s requesting disbursement of the grant funds.

⁸ Counsel for the Appellants did contact RUS to advise it that the Appellants were not available on February 28, 2007, but did not provide information as to any new facts or evidence that would be presented.

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as--

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under Sec. 3017.120;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under Sec. 3017.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it

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affects your present responsibility.

(e) Notwithstanding paragraph (c) (1) of this section, within the Department of Agriculture a nonprocurement debarment by any Federal agency taken before March 1, 1989.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66565, Nov. 26, 2003]

The Debarment Letters of November 8, 2006 and the Determination of the Administrator of the Rural Utilities Service Regarding the Debarment of Blue Moon Solutions, Inc., Ms. Christonya Hill and Mr. Marty Hale of April 12, 2007 cite 7 C.F.R. § 3017.800(b)(2) and 3017.800(d) as the basis for the debarments. Relying upon all evidence of record relating to Blue Moon and the grants, including the Appellants' letters, Judge Palmer's decision of June 20, 2006, the Hearing Officer Decision of October 4, 2006, and the Director Review Determination of January 25, 2007, RUS found that (i) Blue Moon and the other named Appellants violated the terms of the Grant Agreements by submitting false SF270 certifications to RUS, (ii) persistently violated the Uniform Regulations and (iii) failed to use all grant funds for the completion of the projects. Although the Petition on Appeal's flamboyant rhetoric characterizes the debarments as: (i) the epitome of arbitrary and capricious behavior, (ii) the "ham-handed misuse of debarment as a retaliatory mace" swung at the Appellants using proceedings plagued with pernicious problems, (iii) myopically focusing, through the use of wistful thinking, on dribs and drabs of self-serving evidence - even a cursory reading of the record amply supports all three bases for the debarment.

On the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Blue Moon Solutions, Inc. is a Delaware corporation, incorporated in April of 2002, with corporate offices located at 9924 Reese Boulevard, Lubbock, Texas 79416.

2. Marty Hale is the Chief Executive Officer of Blue Moon Solutions, Inc. and has a business mailing address identical to Blue Moon Solutions, Inc.

3. Christonya Hall is the Chief Operating Officer of Blue Moon Solutions, Inc., having a business mailing address identical to Blue Moon Solutions, Inc. Ms. Hall signed the seven of the Grant Agreements for grants awarded to Blue Moon Solutions, Inc. and also signed all of the SF270s submitted to RUS requesting payment of funds for advances and reimbursements under the grants.

4. In response to a NOFA published in the Federal Register in 2002⁹ announcing the availability of 20 million dollars in grant funds as part of the Community Connect Program, Blue Moon submitted grant applications to deploy broadband services in seven rural communities located along the Rio Grande in Texas: Falcon Lakes Estates, San Ygnacio, Batesville, La Pryor, Progreso, Zapata, and Crystal City. Each of the seven grant applications contained a general overview of and budget for the project, a description of each phase of the project, and the cost and type of service that Blue Moon would be providing.

5. In 2003, Blue Moon was notified by RUS that it had been awarded grants in the aggregate amount of \$2,698,272.00 for the seven locations and received for execution Grant Agreements for each of the projects as well as the appropriate forms used to request advances or reimbursements of grant funds. Blue Moon executed the Grant Agreements and returned them to RUS.

6. In correspondence sent to Blue Moon during 2003 and 2004, RUS advised Blue Moon that grant funds were available for release and

⁹ See, footnote 3.

instructed Blue Moon that consistent with the terms of the Grant agreements, funds could be requested by submitting SF270s with supporting documentation.

7. Between January and July of 2004, Blue Moon requested and received \$1,936,046.00 of grant funds based upon 14 SF270s submitted by Blue Moon to RUS.

8. In October of 2004, Blue Moon was identified by OIG as a company having potential for misusing grant funds in a report entitled Summary of Survey Results- Rural Utilities Service Broadband Grant and Loan Programs.

9. In response to the concerns expressed in the OIG report, in November of 2004, RUS sent a Compliance Auditor to visit Blue Moon to perform a Grant Review Compliance Audit. The Grant Review Compliance Audit continued for several months, involved five field visits to Blue Moon, and was completed in March of 2005. The Grant Review Compliance Audit found significant supporting documentation problems and concluded that nearly half of the funds advanced (\$910,829.79) were not supported with actual cost documentation.

10. In May of 2005, Blue Moon was informed of the results of the compliance audit, was provided a schedule of the disallowed items and was instructed to return the disallowed unsupported costs to the construction fund account. Blue Moon did not return the funds, but sought and received additional time to secure an independent audit of the projects. The independent audit was performed by Bollinger, Segars, Gilbert & Moss, LLP. The audit report included a scope limitation to the report based upon time and cost constraints. It indicated that the auditor was unable to obtain support for labor capitalized to plant, property and equipment in both 2003 and 2004,¹⁰ and identified unsupported costs, and concluded that “unearned” USDA Grant proceeds equaled

¹⁰ The amounts identified in the report were \$155,073 for 2003 and \$190,916 for 2004. FOF 92, Hearing Officer’s Appeal Determination.

\$254,310.¹¹ The independent auditor found no instances of noncompliance that he was required to report under the Government Auditing Standards, considered Blue Moon's financial statements to be free of material misstatement, but identified three material weaknesses in the accounting practices. The audit report was submitted to RUS with a letter from Blue Moon which admitted that it had difficulty in accounting for specific task assignments within each project location, but indicating that it had updated its accounting procedures. Notwithstanding the findings of the independent audit, no funds covering the unsupported costs were returned.

11. On May 8, 2006, sometime after the terminations and suspensions, Blue Moon submitted an audit (the "Forensic Audit") prepared by Beakley & Associates, PC. RUS rejected the results as the auditor was not licensed at the time of the audit and was not considered independent by RUS.¹² That audit found that by the end of 2004, Blue Moon had received Grant funds in excess of costs by \$486,000.00, but had expended out-of-pocket and unreimbursed amounts of \$297,000.00. In 2005, Blue Moon had received \$364,000.00 of Grant funds in excess of costs, but had out-of-pocket and unreimbursed expenses well in excess of the amounts received from RUS. Moreover, he opined that as of the end of 2005, Blue Moon did not owe RUS any amount and would be entitled to recover additional reimbursement for legitimate expenses incurred which had not yet been claimed. Although RUS rejected the audit results, the Forensic Audit was given significant weight by the NAD Hearing Officer and was considered by the NAD Director in his determination.¹³

¹¹ FOF 94, Hearing Officer's Appeal Determination.

¹² The auditor had failed to renew his license until some time afterwards. When his failure was discovered, the required fee was paid and he was reinstated "retroactively."

¹³ It should be noted that all three of the audits found unsupported advances and that while RUS might be required to reimburse Blue Moon additional sums, the SF270s submitted by Blue Moon overstated actual costs and supporting documentation was lacking in the earlier two audits.

11. On September 30, 2005, RUS suspended the grants “for serious discrepancies between the purposes for which the grant funds were requisitioned and their actual expenditure” by Blue Moon. The suspension was followed on November 9, 2005 by letters for each of the seven projects terminating the grants for failure to comply with the terms of the grant agreements. Letters sent the same date suspending Blue Moon and Marty Hale from further federal contracting. Blue Moon appealed the termination, securing a partially favorable decision before the Hearing Officer entered on October 4, 2006; however, on further appeal, that decision was partially reversed by the Director Review Determination dated January 25, 2007 which found the termination appropriate, but concluded that the record did not support the demand for return of \$910,828.79 in view of the fact that the grant closeout process had not been completed.

12. Blue Moon and Marty Hale also appealed their suspensions, first at an agency hearing and then to an Administrative Law Judge. In a decision dated June 20, 2006, Judge Victor W. Palmer upheld the suspensions, finding Blue Moon’s failure to provide supporting documentation could not be characterized as “mere careless or negligent bookkeeping errors,” but rather it had filed false and unsubstantiated requests for Grant funds to obtain more money than it was entitled to receive under the Grant award.

13. On November 8, 2006, RUS issued letters to each of the Appellants, notifying them of RUS’ intent to initiate debarment proceedings against them and to debar them for a period of five years. By letter dated December 8, 2006, the Appellants contested the proposed debarments, relying heavily on the Hearing Officer’s decision of October 4, 2006. By letter dated January 5, 2007, RUS asked the Appellants whether they desired a hearing. The Appellants responded in a letter dated January 19, 2007, contending that a hearing was required under the applicable regulations.

14. Correspondence was exchanged between the Appellants and RUS concerning a debarment hearing, and following the issuance of the NAD Director Review Determination, a hearing date was set for February 28,

2007 and the Appellants were given until February 21, 2007 to inform RUS of any new facts or evidence that they would present at the hearing. No notification of any new facts or evidence was submitted by the Appellants¹⁴ and on February 27, 2007, RUS informed the Appellants that in absence of any new information, no genuine dispute existed as to the material facts upon which the proposed debarment was based, no hearing was required and that RUS was canceling the hearing. On April 12, 2007, the Debarment Determination was issued, debarring each of the Appellants for a period of five years, but crediting them with a period of suspension, with the resulting debarment periods ending on November 8, 2010.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.
2. For the reasons set forth in the Findings of Fact, the Appellants submitted false and overstated requisitions to RUS requesting disbursement of Grant funds, failed to maintain adequate accounting records documenting costs, requested premature advances despite regulatory prohibition of the same, and failed to complete the projects despite their certification of the same.
3. The conduct of the Appellants constitutes violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program and constitutes a cause so serious or compelling a nature that it affects the Appellants' present responsibility. 7 C.F.R. § 3017.800(b)(2) and § 3017.800(d).
4. The April 12, 2007 Determination of Debarment to debar each of the Appellants is in accordance with law, was based upon the applicable standard of evidence, and was not arbitrary, capricious, or an abuse of discretion. 7 C.F.R. § 3017.890.

¹⁴ Counsel for the Appellants did contact RUS to advise it that the Appellants were not available on February 28, 2007, but did not provide information as to any new facts or evidence that would be presented.

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ORDER

For the foregoing reasons, it is **ORDERED** that the Determination of James M. Andrew, the Administrator of the Rural Utilities Service to debar Blue Moon Solutions, Inc., Marty Hale and Christonya Hill for a period of five years, less credit for a period of suspension, with the debarment through November 8, 2010 from participation in all “covered transactions” as that term is defined in 7 C.F.R., part 3017, subpart B, is **UPHELD** and **AFFIRMED**.

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

EQUAL OPPORTUNITY CREDIT ACT**COURT DECISION**

**JOHNNIE MAE ROWE, v. UNION PLANTERS BANK OF
SOUTHEAST MISSOURI, KEVIN CHAMBERS, PATRICIA
ROBBINS.**

No. 01-3080.

Filed: May 9, 2002.

(Cite as: 289 F.3d 533).

EOCA – Prima facie claim – Protected class – Similarly situated – Qualified to receive benefits.

Loan applicant sued bank, alleging racial discrimination in violation of Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA). Applicant failed to demonstrate with prima facie evidence that: (1) she was a member of a protected class; (2) she applied for and was qualified for a loan with a bank; (3) the loan was rejected despite her qualifications; and (4) the bank continued to approve loans for applicants with similar qualifications. She applied for either commercial loan or loan guaranteed by Farmers Home Administration (FmHA), and she failed to substantiate her assertions that loan denials were racially motivated and that similar loans were approved for individuals of different race with similar qualifications.

United States Court of Appeals

Eighth Circuit.

Before McMILLIAN, HEANEY and RILEY, Circuit Judges.
MCMILLIAN, Circuit Judge.

Johnnie Mae Rowe appeals from a final order entered in United States District Court in the Eastern District of Missouri¹ granting summary

¹ The Honorable Thomas C. Mummert, III, United States Magistrate Judge for the

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judgment in favor of Union Planter's Bank of Southeast Missouri ("the Bank") and its individually-named employees, Kevin Chambers and Patricia Robbins, on Rowe's allegations of racial discrimination in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601et seq., and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691et seq. *See Rowe v. Union Planter's Bank of Southeast Missouri*, No. 1:00CV0062TCM (E.D.Mo. July 17, 2001) (memorandum and order). For reversal, Rowe argues that the magistrate judge erred in finding no genuine issues of material fact to establish a prima facie violation of either the FHA or the ECOA. We affirm.

Background

In October 1997, Rowe and her husband applied for a loan from the Bank to finance the purchase of a new church and parsonage. On the basis of a loan application prepared by the Bank's loan officer Kevin Chambers, the Rowes were denied both a loan guaranteed by the Farmers Home Administration ("FmHA") and a commercial loan from the Bank. The Rowes then prepared a more detailed loan application with the assistance of a financial consultant and were successful in obtaining a smaller loan from another bank.

The Rowes, an African-American couple, believed that Chambers' advice during the loan application process, his mishandling of the loan application and the Bank's subsequent denial of the loan applications were motivated by racial discrimination. On April 21, 1998, Rowe filed a complaint with the Comptroller of the Currency, who referred the complaint to the Department of Housing and Urban Development

Eastern District of Missouri, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c)(1).

(“HUD”), Office of Fair Housing and Equal Opportunity. On June 7, 2000, HUD issued a determination of no probable cause and Rowe then filed a pro se complaint in district court on June 19, 2000.

The parties consented to transfer the case to a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). On July 17, 2001, following both parties' motions for summary judgment, the magistrate judge granted summary judgment in favor of appellees, reasoning that Rowe failed to establish the prima facie elements of either an FHA or an ECOA claim. On August 15, 2001, Rowe filed her pro se notice of appeal. On September 26, 2001, Rowe retained counsel. This appeal followed. Jurisdiction in the district court was proper based on 42 U.S.C. § 3601 and 15 U.S.C. § 1691. Jurisdiction in this court is proper based on 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R.App. P. 4(a).

Discussion

We review grants of summary judgment de novo, evaluating the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact. See Fed.R.Civ.P. 56(c); *Radecki v. Joura*, 114 F.3d 115 (8th Cir.1997). In addition, because Rowe was a pro se litigant until this appeal, we liberally construe the allegations in her prior complaints. See *Bracken v. Dormire*, 247 F.3d 699, 702-03 (8th Cir.2001).

In order to establish a prima facie FHA or ECOA claim, Rowe must demonstrate that (1) she was a member of a protected class, (2) she applied for and was qualified for a loan with the Bank, (3) the loan was rejected despite her qualifications, and (4) the Bank continued to approve loans for applicants with similar qualifications. See *Noland v. Commerce Mortgage Co.*, 122 F.3d 551, 553 (8th Cir.1997) (outlining prima facie elements of FHA claim) (*citing Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir.1993)); see also *Latimore v. Citibank*, 979 F.Supp. 662, 665 (N.D.Ill.1997) (applying the same prima facie requirements to ECOA claims as FHA claims).

Rowe argues that summary judgment was improper because the record contains controverted issues of material fact regarding these

elements which necessitate a trial. Specifically, Rowe asserts that (1) she is an African-American, and thus a member of a protected class; (2) she did produce evidence that she was qualified for the loan, because her subsequent verified loan application, which was prepared by a financial consultant with the same information available to Chambers, qualified her for a loan elsewhere; and (3) Chambers' discriminatory intent can be inferred from the Bank's rejection of her loan application.

We agree with the magistrate judge that Rowe did not satisfy each of the prima facie elements constituting an FHA or ECOA claim. The evidence presented by Rowe herself established that she was not qualified for either an FmHA-guaranteed loan or a commercial loan. Additionally, Rowe did not submit any evidence to substantiate her assertion that the loan denials were racially motivated or that similar loans were approved for individuals of a different race with similar qualifications. As a result, we affirm on the basis of the magistrate judge's well-reasoned opinion and hold that Rowe failed to establish a prima facie FHA or ECOA claim. See 8th Cir. Rule 47B.

Conclusion

Accordingly, the order of the district court is affirmed.

GUADALUPE L. GARCIA, et al. v. USDA
C.A.D.C.,2006. Nos. 04-5448, 05-5002.
File March 31, 2006.

(Cite as 444 F.3d 625).

ECOA – Class Action commonality, when not – National origin – Credit transaction, when not.

Hispanic farmers failed to establish an issue of law that was common to all in the alleged class. The claimant alleged violation of ECOA in that the USDA failed to investigate their claims of discrimination complaints.

**United States Court of Appeals
District of Columbia Circuit**

Before: SENTELLE and HENDERSON, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Opinion for the court filed by Circuit Judge HENDERSON.

KAREN LECRAFT HENDERSON, Circuit Judge.

This appeal arises from one of several actions brought against the United States Department of Agriculture (Department or USDA) alleging discrimination in the administration of various federally-funded loan and benefit programs for American farmers.¹ The appellants, individual Hispanic farmers, seek to represent a class of similarly situated Hispanic farmers throughout the nation who claim that the Department discriminated against them in denying them farm loans and other benefits because of their ethnicity and that it failed to investigate the discrimination complaints they subsequently filed with the Department. In the district court, the appellants sought class certification and the USDA moved to dismiss, *inter alia*, the failure-to-investigate claim. The district court granted the Department's motion to dismiss and denied class certification, concluding that the appellants had failed to meet the requirements of Federal Rule of Civil Procedure 23(a) and 23(b). For the reasons that follow, we affirm in part and remand in part.

I.

¹ See, e.g., *Pigford v. Johanns*, 416 F.3d 12, 14 (D.C.Cir.2005) (black farmers); *Keepseagle v. Glickman*, 194 F.R.D. 1 (D.D.C.2000) (Native American farmers). A related appeal challenging the district court's denial of class certification to women farmers was heard the same day as this appeal. See *Love v. Johanns*, 439 F.3d 723 (D.C.Cir.2006).

The Farm Service Administration (FSA)² administers the Department's various loan programs for American farmers through county committees, the members of which are selected locally and are located in over 2,700 counties nationwide. A farmer seeking a loan must first obtain an application from his county committee. 7 C.F.R. § 1910.4(b). He then submits the completed application to the committee which determines whether the farmer meets specific USDA loan criteria, including, inter alia, citizenship, legal capacity to incur debt, education and farming experience, farm size, inability to obtain sufficient credit elsewhere and character. *Id.* §§ 1941.12 (2006), 1943.12(a) (2006), 1943.12 (1988), 764.4 (2006). If an unsuccessful applicant believes the committee discriminated against him in denying his application, he may lodge a complaint with either the USDA Secretary or the USDA Office of Civil Rights. *Id.* § 15.6. USDA regulations provide that complaints “shall be investigated in the manner determined by the Assistant Secretary for Civil Rights and such further action taken by the Agency or the Secretary as may be warranted.” *Id.*

On October 13, 2000, ten Hispanic farmers filed this action in the district court. The complaint set forth three counts.³ Count I sought a declaratory judgment to determine “the rights of plaintiffs and the Class members under the defendant's farm programs including their right to equal credit, and equal participation in farm program, and their right to full and timely enforcement of racial discrimination complaints.” 2d Am.

² In 1994, the Farmers Home Administration (FmHA) was combined with other Department entities to form the FSA. *See United States v. Lewis County*, 175 F.3d 671, 673 n. 2 (9th Cir.1999) (citing 7 U.S.C. § 6932 (Supp.1998)). All references are to the FSA.

³ Although they subsequently amended their original complaint twice, *see infra*, n. 5, the substantive counts did not change.

Compl. at 56, *reprinted in* Joint Appendix (JA) 83. The second count alleged a violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691*et seq.*⁴ JA 84. Specifically, the appellants alleged that the “[d]efendant’s acts of denying plaintiffs and Class members credit and other benefits and systematically failing to properly process their discrimination complaints was racially discriminatory and contrary to the [ECOA].” JA 84. Finally, the appellants alleged a violation of the Administrative Procedure Act, 5 U.S.C. §§ 551*et seq.* JA 84. The appellants sought declaratory relief as well as \$20 billion in damages. JA 85. Their complaint also proposed a class of all Hispanic participants in FSA farm programs who *petitioned* or would have petitioned had they not been ... prevented from timely filing a complaint [against] USDA at any time between January 1, 1981, and the present for relief from ... racial discrimination ... and who, because of the failings in the USDA civil rights complaint processing system ... were denied equal protection ... and due process in the handling of their ... complaints.

⁴ ECOA creates a private right of action against a creditor, including the United States, 15 U.S.C. § 1691e(a), who “discriminate[s] against any applicant, with respect to any aspect of a credit transaction” “on the basis of race, color, religion, national origin, sex or marital status, or age” or “because the applicant has in good faith exercised any right under this chapter.” *Id.* § 1691(a). The regulations governing ECOA define a “credit transaction” as “every aspect of an applicant’s dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).” 12 C.F.R. § 202.2(m). Although ECOA claims are subject to a two-year statute of limitations, *see* 15 U.S.C. § 1691e(f), the Congress retroactively extended the limitations period for individuals who had filed administrative complaints with the USDA between January 1, 1981, and July 1, 1997 for alleged acts of discrimination occurring between January 1, 1981 and December 31, 1996. *See* Pub.L. No. 105-277, § 741, 112 Stat. 2681 (*reprinted in* 7 U.S.C.A. § 2279 notes).

JA 78 (emphasis in original)⁵

On December 22, 2000, the Department moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), contending that the court lacked jurisdiction over the ECOA claim because the appellants had not exhausted their administrative remedies and that, in any event, their claims were time-barred. In addition, the Department moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that the appellants had failed to state a claim under ECOA, the APA or the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.* On March 20, 2002, the district denied the motion in part and granted it in part, relying on its earlier-and similar-order in *Love v. Johanns*, No. 00-2502 (D.D.C. Dec. 13, 2001). *Garcia v. Veneman*, No. 00-2445, 2002 WL 33004124 (D.D.C. Mar. 20, 2002), *reprinted in* JA 95-99. Of relevance here, the court dismissed the failure-to-investigate claim, concluding that the appellants failed to state a claim under ECOA because the investigation of a discrimination complaint is not a “credit transaction” within the meaning of ECOA. JA 97-98. It further held that the claim was not cognizable under the APA because ECOA provides “an adequate remedy.” JA 97-98.

On December 2, 2002, the district court denied class certification. *Garcia v. Veneman*, 211 F.R.D. 15 (D.D.C.2002)(*Garcia I*). It concluded that the appellants failed to show the required “commonality” under Federal Rule of Civil Procedure 23(a)(2) and did not represent a certifiable class under Rule 23(b). They did not show commonality, the court concluded, because they did not demonstrate that the Department operated under a general policy of discrimination nor did they identify a common USDA policy or practice that disparately affected them. *Id.* at

⁵ All references are to the appellants' Second Amended Complaint. The appellants eventually moved to file a Third Amended Complaint, which the district court denied. *See Garcia v. Veneman*, 224 F.R.D. 8, 16 (D.D.C.2004); *see also infra* n. 13.

19-22. The court then considered whether the requested class could be certified under Rule 23(b) and concluded that Rule 23(b)(2) certification was inappropriate because the \$20 billion in damages they sought predominated over their request for equitable relief. *Id.* at 22-23. The court also found Rule 23(b)(3) certification inappropriate because they had not shown that common questions predominated. *Id.* at 23-24.

After additional discovery, the appellants submitted a supplemental brief on the issue of commonality, which the district court treated as a renewed motion for class certification. *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C.2004)(*Garcia II*). They had obtained in discovery 37 USDA loan and disaster benefit files as well as two USDA databases which, they alleged, showed the requisite commonality for both their disparate impact and their disparate treatment allegations of discrimination. *Id.* at 10. They argued that the files revealed that the USDA had denied Hispanic farmers' applications based on the subjective, rather than the objective, eligibility criteria set forth in 7 C.F.R. § 15.6 and that, as a result, the use of subjective criteria had a disparate impact on them. *Id.* at 13-15. They also claimed that the USDA as a "single actor" had treated them discriminatorily through a pattern and practice of discrimination. *Id.* at 10. They listed five sub-patterns of discrimination, including (i) refusal to provide Hispanic farmers with loan applications or assistance in completing applications; (ii) subjecting Hispanic farmers to protracted delays in processing and funding their loans; (iii) using subjective criteria to reject the applications of Hispanic farmers; (iv) unnecessarily subjecting Hispanic farmers to the inconvenience of supervised bank accounts; and (v) delaying or denying loan servicing for Hispanic farmers. *Id.* at 10. The court nevertheless concluded that, even with their supplementation, they failed to demonstrate commonality.

On September 24, 2004, the appellants moved the district court to certify the order dismissing their failure-to-investigate claim for interlocutory appeal under 28 U.S.C. § 1292(b), which motion the court granted. *Garcia v. Veneman*, No. 00-2445 (D.D.C. Sept. 27, 2004). In accordance with Federal Rule of Civil Procedure 23(f), the appellants petitioned this court on September 22, 2004 for leave to file an

interlocutory appeal of the class certification denial, which petition we granted. *In re Garcia*, No. 04-8008 (D.C.Cir. Dec. 16, 2004). Before us for review, then, are three orders, namely *Garcia*, No. 00-2445, 2002 WL 33004124 (D.D.C. Mar. 20, 2002) (granting motion to dismiss), *Garcia I*, 211 F.R.D. 15 (D.D.C.2004) (denying class certification), and *Garcia II*, 224 F.R.D. 8 (D.D.C.2004) (denying class certification again).

II.

As we have recognized, the district court is “uniquely well situated” to rule on class certification matters. *Wagner v. Taylor*, 836 F.2d 578, 586 (D.C.Cir.1987). Accordingly, we review a certification ruling “conservatively only to ensure against abuse of discretion or erroneous application of legal criteria,” *id.*, and we will affirm the district court even if we would have ruled differently in the first instance. *See McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C.Cir.1984).

Under Federal Rule of Civil Procedure 23(a), a plaintiff seeking class certification must show that:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Failure to adequately demonstrate any of the four is fatal to class certification. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 106 (D.C.Cir.2002). The district court found that the appellants failed to show “questions of law or fact common to the class” or “commonality” under Rule 23(a)(2). We affirm that ruling.⁶

⁶ If a plaintiff meets the requirements of Rule 23(a), he must then establish that class

To establish commonality under Rule 23(a)(2), a plaintiff must identify at least one question common to all members of the class. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir.2004). Not every common question, however, suffices under subsection (a)(2). As the United States Supreme Court declared of an alleged disparate treatment class in a Title VII action, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).⁷ Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to “make a

certification is appropriate under one of the three alternatives of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-16, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Although the district court found that certification was also inappropriate under subsections (b)(2) and (3), we do not reach that holding because of our affirmance of its subsection (a)(2) holding. *See Love v. Johanns*, 439 F.3d 723, 730 n. 3 (D.C.Cir.2006).

⁷ Other courts have used Title VII precedent in cases involving ECOA. *See, e.g., Mays v. Buckeye Rural Elec. Co-op., Inc.*, 277 F.3d 873, 876 (6th Cir.2002) (“Given the similar purposes of the ECOA and Title VII, the burden-allocation system of federal employment discrimination law provides an analytical framework for claims of credit discrimination.”); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir.2000) (“In interpreting the ECOA, this court looks to Title VII case law”); *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082, 1100 (5th Cir.1987) (“The language [of ECOA] is closely related to that of Title VII of the Equal Employment Opportunity Act (“EEOA”), 42 U.S.C. § 2000e-2, and was intended to be interpreted similarly.”).

significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions.” *Hartman v. Duffey*, 19 F.3d 1459, 1470 (D.C.Cir.1994). And in *Love v. Johanns*, we held that a showing of commonality for a disparate treatment class under ECOA requires the plaintiff to show “(i) discrimination (ii) against a particular group (iii) of which the plaintiff is a member, *plus* (iv) some additional factor that ‘permit [s] the court to infer that members of the class suffered from a common policy of discrimination.’ ” 439 F.3d at 728. (emphasis in original) (citation omitted) (alteration in original).

Regarding the appellants' challenge to Department action with an allegedly class-wide discriminatory *impact*, they must make a showing sufficient to permit the court to infer that members of the class experienced discrimination as a result of the disparate effect of a facially neutral policy. *See Cooper v. S. Co.*, 390 F.3d 695, 716 (11th Cir.2004). That is, similar to our formulation of the commonality showing necessary for a disparate treatment class set out in *Love v. Johanns*, the appellants must show for their disparate *impact* class (i) a discriminatory impact, (ii) affecting a particular group, (iii) of which the plaintiffs are members, (iv) resulting from a common facially neutral policy or practice.

A.

First, the appellants contend that the district court erred in denying class certification of their discriminatory treatment claim based on the geographic spread of the local decisionmakers, labeling it a “pattern and practice” claim, *see* Appellants' Br. at 40. *But see Garcia I*, 211 F.R.D. at 22 (“Commonality is defeated ... by the large numbers and geographic dispersion of the decision-makers ...”). As with a Title VII claim, to establish a charge of pattern and practice discrimination under ECOA, a putative class must prove that “discrimination was the company's standard operating procedure-the regular rather than the unusual practice.” *Bazemore v. Friday*, 478 U.S. 385, 398, 106 S.Ct. 3000, 92

L.Ed.2d 315 (1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). Similarly, to show commonality under Federal Rule of Civil Procedure 23(a)(2), the plaintiff must “make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the [defendant’s] challenged ... decisions.” *Hartman*, 19 F.3d at 1472.

“As is now well recognized, the class action commonality criteria are, in general, more easily met when a disparate impact rather than a disparate treatment theory underlies a class claim.” *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 274 n. 10 (4th Cir.1980). Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist. *Id.* at 278-80 (reversing class certification because of geographic separation of workforce and autonomy of local decisionmakers); *see also Cooper*, 390 F.3d at 715. The appellants failed to identify any centralized, uniform policy or practice of discrimination by the USDA that formed the basis for discrimination against Hispanic loan applicants with varied eligibility criteria in over 2,700 counties nationwide over a 20-year period. Rather, despite the appellants’ allegation that the USDA’s actions are those of a “single actor,” their claims arise from multiple individual decisions made by multiple individual committees. Moreover, they do not cite a single reversal of a district court’s denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers.⁸ *Cf. Stastny*, 628 F.2d at 278-79 (district

⁸ The appellants contend that we cannot rely on the geographic spread of defendant decisionmakers in deciding whether to certify a disparate treatment class. Appellants’ Br. at 40. They are wrong. *See, e.g., Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir.2004) (no abuse of discretion in denying certification of class of all black employees at four separate facilities of defendant over 20 year period); *Cooper*, 390 F.3d at 715 (no abuse of discretion in denying class certification to employees working for different defendants throughout wide geographic area and encompassing range of working environments); *Stastny*, 628 F.2d at 278-79 (no abuse of discretion in denying

court abused discretion in certifying class of employees spread through “great number of geographically dispersed facilities” with “almost complete local autonomy”). Our standard of review is deferential and the appellants have failed to convince us that the district court abused its discretion in denying class certification to the appellants' alleged disparate treatment class.

B.

We next consider the appellants' claim that the district court erred in failing to certify a class on whose members the Department's facially neutral action has had a discriminatorily disparate impact. Assuming without deciding that a disparate impact claim is cognizable under ECOA,⁹ the claim would require a plaintiff to “identify a specific policy or practice which the defendant has used to discriminate and must also demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group.” *Powell v. Am. Gen. Fin., Inc.*,

class certification to employees working in different plants with local decisionmakers throughout state); *Webb v. Merck & Co., Inc.*, 206 F.R.D. 399, 406 (E.D.Pa.2002) (denying class certification “cut[ting] across employment status, job categories, facilities and geographic regions”).

⁹ Both Title VII and the Age Discrimination in Employment Act (ADEA) prohibit actions that “otherwise adversely affect” a protected individual. *See* 42 U.S.C. § 2000e-2(a)(2); 29 U.S.C. § 623(a)(2). The Supreme Court has held that this language gives rise to a cause of action for disparate impact discrimination under Title VII and the ADEA. *See Smith v. City of Jackson*, 544 U.S. 228, 125 S.Ct. 1536, 1540, 161 L.Ed.2d 410 (2005) (ADEA); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) (Title VII). ECOA contains no such language. We express no opinion about whether a disparate impact claim can be pursued under ECOA. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (court should not examine whether “plaintiffs have stated a cause of action or will prevail on the merits” in determining class certification *vel non*).

310 F.Supp.2d 481, 487 (N.D.N.Y.2004) (recognizing disparate impact claim under ECOA).

The appellants press two alternative theories to support their contention that the district court erred in not certifying a disparate impact class. First, they argue that they do not need to specify a facially neutral practice if it is impossible to determine which of the USDA eligibility criteria have had the discriminatory effect, instead borrowing from Title VII's "one employment practice" notion.¹⁰ Alternately, they argue the USDA's subjective decisionmaking process constitutes the common facially neutral practice. We reject both theories and instead affirm the

¹⁰ The appellants cite the "one employment practice" language of Title VII, *see* 42 U.S.C. § 2000e-2(k)(1)(B)(I), and argue that it relieves them from having to tie a disparate impact to a facially neutral USDA policy. Appellants Br. at 34-38. The Congress added the "one employment policy" language following the Supreme Court's holding in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). It provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(I). Assuming-again, without deciding-the "one employment practice" notion applies to an ECOA disparate impact claim, it does not alter the required commonality showing under Federal Rule of Civil Procedure 23(a)(2). The appellants erroneously confuse the commonality showing with the prima facie case of disparate impact discrimination. *See Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir.2004) ("Plaintiffs cannot avoid the heavy lifting of showing eligibility for class certification by conflating two exceptions to separate rules for adjudicating discrimination cases."). Under Rule 23(a)(2), the appellants must show that the putative class members have something in common-they all suffered an adverse effect from the same facially neutral policy, *see id.*-and their showing must be "significant," *see Hartman*, 19 F.3d at 1470. On the other hand, courts have set a lower bar for establishing a prima facie discrimination case. *See, e.g., Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Bundy v. Jackson*, 641 F.2d 934, 950 (D.C.Cir.1981) (recognizing difficulty plaintiff faces in proving motive behind employer's actions).

district court's denial of class certification because the appellants failed to show a *common* facially neutral USDA farm loan policy, resulting in the disparate effect on them and the putative class of Hispanic farmers. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) ("Of course, class certification would not be warranted absent some showing that the challenged practice ... has a disparate impact on African-American employees at Metro-North."). As the Supreme Court noted in *Falcon*-where class certification was denied-"[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. 2364.

In *Garcia I*, 211 F.R.D. at 21-22, the district court rejected the appellants' disparate impact claim because they did not connect disparate impact with a common facially neutral USDA policy. They had submitted the declaration of Jerry Hausman, an expert in econometrics and microeconomics, in which declaration he concluded that Hispanic farmers received a lower percentage of USDA loans than white farmers received in 1997. JA 123. Hausman, however, analyzed *all* farmers (white and Hispanic) as opposed to only those farmers (white and Hispanic) who had applied for USDA loans. After further discovery produced USDA loan databases, two of which the appellants used to support their renewed class certification motion, they submitted the declaration of statistician Karl Pavlovic, who found that 72 per cent of white applications were approved in the period from October 1997 to January 2003 while 59 per cent of Hispanic applications were approved in the same period. JA 477. In *Garcia II*, the district court assumed a disparate impact without discussion of Pavlovic's declaration. *Garcia II*, 224 F.R.D. at 11. The court, however, again concluded that the appellants had failed to connect the disparate impact to a common facially neutral USDA policy. *Id.* (rejecting appellants' argument because "[n]ot only does it 'leapfrog to the merits,' ... but it also boils down to the proposition that unexplained discrepancies in the distribution of

government benefits satisfy the commonality requirement of Rule 23(a)(2) without more”).

The appellants attempted to connect the disparate impact to USDA's subjective loan decisionmaking criteria, relying in part on statistical evidence. But their statistical analyses were analytically flawed because they did not incorporate key relevant variables connecting disparate impact to loan decisionmaking criteria. *See Bazemore v. Friday*, 478 U.S. 385, 400 n. 10, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (“some regressions [are] so incomplete as to be inadmissible as irrelevant”). It does not suffice under Rule 23(a)(2) to show an ethnic imbalance in the USDA's award of loans to farmers; rather, the appellants must show that a common facially neutral policy caused the imbalance. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (“[A] Title VII plaintiff does not make a case of disparate impact simply by showing that, ‘at the bottom line,’ there is racial imbalance in the work force.”); *Caridad*, 191 F.3d at 292. The appellants could have done this, for instance, by employing multiple regression. *See Love v. Johanns*, 439 F.3d at 731 (“Instead of conducting a relatively simple statistical analysis (such as a multiple regression) to control for any or all of these variables, O'Brien simply reported a series of elementary cross-tabulations, from which it is impossible-as a statistical matter-to draw meaningful conclusions.”); *see also Segar v. Smith*, 738 F.2d 1249, 1261 (D.C.Cir.1984) (“Multiple regression is a form of statistical analysis used increasingly in Title VII actions that measures the discrete influence independent variables have on a dependent variable such as salary levels.”). The appellants' statistics failed to account for variables that affected the analyses such as whether fewer Hispanic farmers were U.S. citizens, whether Hispanic farmers had worse credit and whether Hispanic farmers had less experience. *Love*, 439 F.3d at 731-32.

The district court thus acted within its discretion in rejecting the appellants' statistical showing as insufficient to infer classwide discrimination arising from the Department's administration of the farmers' loan programs. Its decision to deny class certification “did not

constitute a clear error of judgment, nor [was it] otherwise outside the range of choices the district court was allowed to make.” *Cooper*, 390 F.3d at 715. We, of course, do not suggest that statistical evidence alone could never show commonality; we simply believe that the district court did not abuse its discretion in finding the appellants' statistical evidence inadequate. See *Hartman*, 19 F.3d at 1473 (“While statistics can generally be probative of the question of commonality, we would feel uncomfortable in resting on the trial statistics in the present record for a final determination of commonality.”).¹¹

The other evidence the appellants relied on—namely, the 37 USDA case files—arguably may have come closer to establishing commonality

¹¹ We think the class certification issue here is similar to that in *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir.2004), in which the Eleventh Circuit affirmed the denial of class certification in a Title VII action. Seven black employees of Southern Company and several of its subsidiaries sought to represent a class alleging disparate impact and disparate treatment claims in connection with promotion opportunities, performance evaluations and compensation. The court found that the “plaintiffs' statistical evidence was insufficient to establish a presumption of discrimination *common* to the claims of all members of the putative class.” *Id.* at 719 (emphasis in original). “[A]nalytical flaws in the statistical evidence” prevented the *Cooper* plaintiffs from making a showing sufficient to “ ‘raise a presumption of discrimination arising from the collective whole of Defendant's compensation and promotion policies. Thus, disparate impact analysis produce[d] no evidence *common* to the claims of all class members.’ ” *Id.* at 716 (quoting *Cooper v. S. Co.*, 205 F.R.D. 596, 613 (N.D.Ga.2001)) (alteration and emphases in original). The statistical evidence there did not account for variables such as an employee's type or level of acquired skills and field of study, the quality, type and relevance of an employee's experience, an employee's job performance, etc., to ensure that black and white employees were similarly situated. Compare *id.* at 717 with *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir.1999) (reversing denial of class certification because expert “controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion”). In addition, the statistical evidence did not reference the named plaintiffs or their specific similarly-situated comparators and, accordingly, the court found that they had not established “*commonality* among these named plaintiffs' claims and the overall affected class.” *Cooper*, 390 F.3d at 718 (emphasis in original).

because it showed that the USDA often used the infeasibility of an applicant's farm plan as one reason for denying a loan. *See Garcia II*, 224 F.R.D. at 14 (farm plan infeasibility given as one reason for almost half of loan rejections). Nonetheless, mindful of our limited scope of review, *see supra* at 632, we do not believe that the district court abused its discretion in denying class certification. The USDA denied loans for a variety of reasons, including inadequate farm plans and lack of funds.¹² Mem. in Response to the Court's July 15, 2003 Order with Respect to Commonality at app. 7, *Garcia v. Veneman*, No. 02-2445 (D.D.C. filed Dec. 5, 2003). The case files as well as the anecdotal evidence upon which the appellants relied showed that often the appellants were denied loans based on objective financial data. *See id.* In sum, the Department used an array of objective-and individual-justifications in denying the appellants loans.¹³ Accordingly, we affirm the district court's denial of class certification of the appellants' disparate impact claim.

III.

We have jurisdiction to review, in our discretion, the district court's dismissal of the appellants' failure-to-investigate claim under ECOA and

¹² For instance, Roberto Salinas and his son jointly applied for an ownership loan in 2000 and Roberto Salinas solely applied for an operating loan in the same year. The USDA denied both loans because of the infeasibility of the farm plan as well as inadequate verification of Roberto Salinas's debt. Mem. in Response to the Court's July 15, 2003 Order with Respect to Commonality at app. 7, *Garcia v. Veneman*, No. 02-2445 (D.D.C. Dec. 5, 2003).

¹³ In addition to the disparate impact and treatment classes already discussed, the appellants sought certification of five subclasses. *Garcia II*, 224 F.R.D. at 15-16. The five subclasses were set forth in their proposed Third Amended Complaint, *see* JA 512-13, which the district court denied without prejudice. *Garcia II*, 224 F.R.D. at 16. Their challenge to the district court's denial of their motion to amend is supported by conclusionary assertions only, *see* Appellants' Br. at 44, and they have therefore waived the issue. *See United States v. Yeh*, 278 F.3d 9, 16 n. 4(D.C.Cir.2002).

the APA pursuant to 28 U.S.C. § 1292(b). The appellants must persuade us that exceptional circumstances justify a departure from the ordinary policy of postponing appellate review until after entry of final judgment.

See United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1209 (D.C.Cir.2005).

We exercise our jurisdiction over the dismissal of the ECOA failure-to-investigate claim, as we did in *Love v. Johanns*, and affirm the district court's dismissal for the same reason—the failure to investigate a discrimination complaint is not a “credit transaction” within the meaning of ECOA. *Love v. Johanns*, 439 F.3d at 732-33. We decline, however, to exercise our jurisdiction regarding the appeal of the denial of the appellants' failure-to-investigate claim made under the APA. As in *Love*, the class certification issues took most of the trial court's and the parties' attention and unlike the straightforward statutory construction issue the appellants' ECOA failure-to-investigate claim presents, we think this claim will benefit from further development in the district court.¹⁴ *Id.* at 732-33.

For the foregoing reasons, we affirm the district court's denial of class certification as well as its dismissal of the failure-to-investigate claim asserted under ECOA. We dismiss the appeal of the APA failure-to-investigate claim and remand to the district court for further proceedings consistent with this opinion.

So ordered

¹⁴ Before us, the appellants used slightly more than four pages of their 59-page brief and no time at oral argument addressing the APA failure-to-investigate claim.

MARY ORDILLE; RICHARD ORDILLE v. USDA.

No. 05-5062.

Filed: Jan. 24, 2007.

(Cite as 216 Fed. Appx. 160).

EOCA – Untimely claim – Relating claim back, when not – Discrimination, failure to allege specific, illegal.

Blueberry farmers' 1997 complaint was not an eligible complaint, under statute retroactively extending two-year limitations period for eligible nonemployment related discrimination complaints filed before July 1, 1997; and even if 1998 complaint was intended as an amendment, or perfection, of their 1997 complaint, the 1998 complaint did not relate back to the filing of 1997 complaint. Department could not have waived the requirement that, to be eligible for a waiver of the ECOA statute of limitations, farmers' discrimination complaint had to have been administratively filed prior to July 1, 1997.

**United States Court of Appeals
Third Circuit.**

Before: FUENTES and VAN ANTWERPEN*, Circuit Judges, and PADOVA, **District Judge.

* Judge Van Antwerpen participated via audio conference.

** The Honorable John R. Padova, District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

PADOVA, District Judge.

Mary and Richard Ordille appeal the order of the United States District Court for the District of New Jersey granting summary judgment in favor of the Department of Agriculture. At issue is whether the Ordilles' claims of discrimination in violation of the Equal Credit Opportunity Act are barred by the Act's statute of limitations, as that statute was modified by Public Law 105-277, Title VII § 741. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I.

Because we write solely for the parties, we set forth only those facts necessary to our analysis.

Mary and Richard Ordille are married blueberry farmers with a long history of difficulties with the Farm Service Agency (“FSA”), a bureau of the United States Department of Agriculture (the “USDA”), and its predecessor, the Farm Home Administration. They claim that the FSA discriminated against them in connection with applications for and existing extensions of credit, on the basis of their national origin, marital status and gender, in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691, et seq. (the “ECOA”).

The Ordilles sent a letter to Dan Glickman, Secretary of the Department of Agriculture, dated January 3, 1997, complaining about their treatment by the FSA and requesting an investigation. The Ordilles enclosed with their letter a lengthy affidavit dated January 6, 1997, recounting their mistreatment by various officials of the FSA between 1982 and October 1996 (the letter and affidavit are referred to collectively as the “January 1997 complaint”). The January 1997 complaint referred to unethical treatment of the Ordilles' original loan application; the failure of FSA officials to inform the Ordilles about grant and loan opportunities made available to other farmers; the failure of FSA officials to provide assistance when the Ordilles suffered weather related crop failures; the failure of the FSA to refinance the Ordilles' loan

at an agreed upon interest rate; the failure of the FSA to assist the Ordilles in the sale or conveyance of the farm to another farmer; and the refusal of the FSA to accept a conveyance of the farm to the FSA in satisfaction of the Ordilles' debt. Importantly, the January 1997 complaint does not allege that the mistreatment of the Ordilles was a result of unlawful discrimination.

On February 20, 1997, the USDA responded to the Ordilles' complaint, rejecting their claims of mistreatment. On October 1997, in response to a request for information about the Ordilles' complaint made by Mary Ordille, Dr. Jeremy S. Wu, Deputy Director of the USDA's Office of Civil Rights (the "OCR"), wrote to Mary Ordille stating that the Program Investigations Division, which processes discrimination complaints by participants in the USDA's financial assistance programs, did not have an active complaint from her and sent her a complaint form. On January 1, 1998, the Ordilles filed another complaint, this one directed to the OCR, complaining of discrimination based on their national origin, sex and marital status and attaching a letter, dated January 1, 1998, setting out their history of problems with the FSA. The letter substantially repeated the history of the Ordilles' FSA transactions contained in the January 1997 complaint, but added that Mary Ordille had been discriminated against based on her sex and national origin (Italian American) because she had not been allowed to apply for the original FSA loan without her husband. The January 1, 1998 letter also contains the following statement which alleges discrimination based on Mary Ordille's sex, national origin and marital status: "We should not have been discriminated [sic] because my husband had a job, because I was an Italian American female working a farm, married or denied our rights, while other farmers were given equal opportunities and protected." App. at A61.

On September 17, 1999, Rhonda Davis, Chief of the Statute of Limitation division at the OCR, sent a form letter to the Ordilles which

stated that the OCR had recently reviewed their discrimination complaint in accordance with Section 741 of Public Law 105-277¹ and determined that their pre-July 1, 1997 complaint met the requirements for a waiver of the statute of limitations. The letter also explained how the Ordilles could seek administrative review of their ECOA claim, referred to as the Section 741 process. On October 28, 1999, Rosalind Gray, Director, OCR, sent a letter to the Ordilles enclosing a final decision of the USDA determining that there had been no discrimination in their case. On December 6, 1999, the Ordilles received a second form letter from Rhonda Davis, nearly identical to the September 17, 1999 letter and with the same docket number. The December 6, 1999 letter again informed the Ordilles that their pre-July 1, 1997 complaint met the requirements for a Section 741 waiver of the statute of limitations.

Sometime in 2000, the Ordilles received an undated letter from Rhonda Davis informing them that they were not eligible for the Section 741 waiver:

This is to advise you that you are not eligible to participate under the Section 741 process. Your case was determined ineligible for Section 741 processing because your complaint was not filed with USDA prior to July 1, 1997. Our records show that your complaint was filed on January 1, 1998. This eligibility review is a final determination denying your complaint as eligible to be processed under the provisions of Section 741.

App. at A68.

¹ Public Law 105-277, Title VII § 741, waived the ECOA's statute of limitations for certain claims brought against the USDA which were filed administratively with the USDA prior to July 1, 1997 ("eligible claims"), and substituted a new statute of limitations for those claims. This extension is referred to as the "Section 741 waiver."

On October 18, 2000, the Ordilles asked that this determination be reviewed by an Administrative Law Judge (“ALJ”) under the Section 741 process. On December 8, 2000, the ALJ issued his Proposed Determination, denying the Ordilles' complaint as time-barred. The ALJ concluded that the Ordilles' complaint was untimely, and not eligible for a Section 741 waiver, despite the September 17 and December 6, 1999 letters which stated that the Ordilles' pre-July 1, 1997 complaint met the requirements for waiver of the statute of limitations. The ALJ stated that those letters' “erroneous reference to a ‘pre-July 1, 1997, complaint’ cannot transform the ineligible Complaint in this case, filed on January 1, 1998, into an eligible Complaint which must have been filed prior to July 1, 1997.” App. at A339. The Ordilles appealed the ALJ's Proposed Determination, arguing that the ALJ erroneously considered January 1, 1998 the date of their complaint, ignoring their January 1997 complaint, and that their January 1, 1998 complaint related back to the timely filing of the January 1997 complaint.

On February 1, 2001, the USDA adopted the Proposed Determination as its Final Determination. The Final Determination found that the Ordilles' complaint was time-barred and rejected the Ordilles' argument regarding relation back of the January 1, 1998 complaint on the grounds that the January 1997 complaint did not specifically assert discrimination based on sex, marital status or national origin. The Ordilles appealed the Final Decision to the United States District Court for the District of New Jersey on July 26, 2001. On September 26, 2005, in a thorough and well-reasoned opinion, the District Court granted summary judgment to USDA, finding that the Ordilles had not filed a complaint that met the eligibility requirements of Section 741 and rejected the Ordilles' appeal. App. at 44.

II.

The Ordilles ask us to find that the District Court erred in determining

that their ECOA claim was not eligible for a Section 741 waiver and was, therefore, time-barred. Our standard of review of a grant of summary judgment is plenary. *See Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 443 (3d Cir.2003). In reviewing the decision of the District Court, we assess the record using the same summary judgment standard that guides the district courts. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir.2000). To prevail on a motion for summary judgment, the moving party must demonstrate “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). The parties agree that there are no disputed issues of material fact and that the issues before us are purely legal.

III.

The Ordilles contend that the District Court erred in granting summary judgment to the USDA, arguing that the USDA waived the Section 741 requirement that an eligible claim be filed prior to July 1, 1997 through the letters Rhonda Davis sent to the Ordilles on September 17, 1999 and December 6, 1999, and by reaching a decision on the merits of the Ordilles' discrimination claims on October 28, 1999. In the event that we find that the eligible complaint requirement was not waived, the Ordilles argue that their January 1997 complaint is an eligible complaint pursuant to Section 741. They also contend that the January 1, 1998 complaint amended or perfected the January 1997 complaint and, therefore, relates back to the filing of the January 1997 complaint, which was filed prior to the expiration of the time period for eligible claims.

A. The Relevant Statutes

The ECOA “creates a private right of action against a creditor, including the United States, 15 U.S.C. § 1691e(a), who ‘discriminates

against any applicant, with respect to any aspect of a credit transaction' 'on the basis of race, color, religion, national origin, sex or marital status, or age' or 'because the applicant has in good faith exercised any right under this chapter.' ” *Garcia v. Johanns*, 444 F.3d 625, 629 n. 4 (D.C.Cir.2006) (quoting 15 U.S.C. § 1691(a)). “Credit transactions” are defined by the regulations governing the ECOA to include “ ‘every aspect of an applicant's dealings with a creditor regarding an application for credit or an existing extension of credit (including, but not limited to, information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing of credit information; revocation, alteration, or termination of credit; and collection procedures).’ ” *Id.*(quoting 12 C.F.R. § 202.2(m)). The ECOA thus waived the sovereign immunity of the United States, permitting suits against the Government for discrimination in the provision of credit. The ECOA provides a two-year statute of limitations for claims made pursuant to that statute. 15 U.S.C. § 1691e(f) (“[N]o such action shall be brought later than two years from the date of the occurrence of the violation”). However, in 1998, Congress passed, and the President signed, an extension to the statute of limitations for certain eligible claims, thereby further expanding the ECOA's waiver of sovereign immunity by allowing certain suits to be brought against the Government beyond the two-year statute of limitations.

The extension, Section 741, Pub.L.105-277, Title VII § 741; 112 Stat. 2681-30 (1998) (reprinted in 7 U.S.C. § 2279 notes), was enacted in response to the pleas of African-American farmers who had suffered years of racial discrimination in USDA programs, but, because of a history of inefficiency in the handling of discrimination complaints by the USDA, were unable to assert their discrimination claims in court pursuant to the ECOA. *See Pigford v. Glickman*, 206 F.3d 1212, 1215 (D.C.Cir.2000). The USDA has explained that, during the 1980s and 1990s, inefficiencies in its review of civil rights complaints led to the expiration of the statute of limitations on claims which had been brought administratively within the USDA before the USDA made a determination of those claims. See 63 F.R. 67392 (codified at 7 C.F.R. Part 15f). The Secretary of the USDA, therefore, “sought the enactment

of legislation to waive the applicable statutes of limitations for those individuals who had filed nonemployment related discrimination complaints with USDA alleging discrimination during that time period.” Id. Section 741 retroactively extended “the limitations period for individuals who had filed administrative complaints with the USDA between January 1, 1981, and July 1, 1997 for alleged acts of discrimination occurring between January 1, 1981 and December 31, 1996.” *Garcia*, 444 F.3d at 629 n. 4 (citing Pub.L. No. 105-277, Title VII § 741, 112 Stat. 2681).

Section 741 states, in relevant part, that:

(a) To the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than 2 years after the date of the enactment of this Act [Oct. 21, 1998], shall not be barred by the statute of limitations.

(b) The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act [Oct. 21, 1998].

Pub.L. 105-277, Title VII § 741(a), 112 Stat. 2681-30 (reprinted in 7 U.S.C. § 2279 notes). An eligible complaint is defined by Section 741 as: a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996-

“(1) in violation of the Equal Credit Opportunity Act (15 U.S.C.1961 et seq.) in administering-

(A) a farm ownership, farm operating or emergency loan funded from the Agricultural Credit Insurance Program Account;

Pub.L. 105-277, Title VII § 741(e), 112 Stat. 2681-31.

B. Waiver of the Section 741 Limitations Period

The District Court rejected the Ordilles' argument that the USDA waived the eligible complaint requirement of Section 741(e) because Section 741 is a waiver of sovereign immunity that must be strictly construed in favor of the Government and that cannot, therefore, be waived. See *Ordille v. United States*, Civ. A. No. 01-3503(JBS), 2005 WL 2372963, at *11-12 (D.N.J. Sept. 26, 2005). “Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed.” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (internal quotations omitted). Such waivers are strictly construed in favor of the sovereign. *Id.* at 34, 112 S.Ct. 1011 (citation omitted).

The Ordilles contend that the District Court erred because Section 741 is not intended to be a distinct waiver of sovereign immunity, but merely an amendment to the two-year statute of limitations provided by the ECOA, which statute itself waived sovereign immunity for suits alleging discrimination in extensions of credit by the Government. The Ordilles argue that the eligibility requirements of Section 741 may thus be waived by the Government because, once the Government has waived its sovereign immunity, there is a rebuttable presumption that the limitations principles applicable in suits against private parties, such as waiver and equitable tolling, apply to suits against the Government. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (recognizing that once Congress has waived sovereign immunity, “making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver” and holding that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to

suits against the United States”); *see also Scarborough v. Principi*, 541 U.S. 401, 421, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (rejecting the Government's argument that the waiver of sovereign immunity from the payment of counsel fees to prevailing parties pursuant to 28 U.S.C. § 2412 must be strictly construed to prevent the relation back of an amendment to a fee petition because “ ‘limitations principles should generally apply to the Government in the same way that they apply to private parties’ ” (*quoting Franconia Assoc. v. United States*, 536 U.S. 129, 145, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002))).

Accordingly, the issue before us is whether the requirements of Section 741 are subject to the rebuttable presumption that the limitations principles applicable to suits against private parties should be applied to suits against the Government, or whether the eligibility requirements of Section 741 create a jurisdictional prerequisite to suit. *See Hedges v. United States*, 404 F.3d 744, 747 (3d Cir.2005) (citing *Miller v. New Jersey State Dep't. of Corrections*, 145 F.3d 616, 617-18 (3d Cir.1998); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir.1994); and *Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir.1997)). This Court has previously explained that the following factors should be used in determining whether the Irwin presumption has been rebutted: “1) whether equity is already incorporated into the statute; 2) the length of the limitations period; 3) the substantive area of law; 4) the statutory language of the limitations period; 5) the availability of other explicit exceptions; and 6) the potential administrative burden of equitable tolling.” *Hedges*, 404 F.3d at 748 (citing *United States v. Beggerly*, 524 U.S. 38, 48-49, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998) and *United States v. Brockamp*, 519 U.S. 347, 349-54, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997)).

In considering the first factor, whether equity is already incorporated into the statute, the court looks at whether Congress “pre-empted equitable tolling by incorporating equitable considerations” into the limitations period. *Hedges*, 404 F.3d at 748-49 (citing *Beggerly*, 524 U.S. at 48-49, 118 S.Ct. 1862); *see also Beggerly*, 524 U.S. at 48-49, 118

S.Ct. 1862 (noting that the twelve-year statute of limitations provided by the Quiet Title Act, which began to run when the plaintiff knew or should have known of the claim of the United States, incorporated equitable considerations). The legislative history of Section 741 makes it clear that the statute incorporates equitable principles, as it is, in essence, an equitable tolling of the statute of limitations provided by the ECOA for certain eligible cases brought before the USDA in order to redress problems with the USDA's handling of these cases in the 1982 to 1996 time period. *See Garcia*, 444 F.3d at 629 n. 4 (citing Pub.L. No. 105-277, Title VII § 741, 112 Stat. 2681); *see also Pigford*, 206 F.3d at 1215; and 63 F.R. 67392 (codified at 7 C.F.R. Part 15f).

The second factor clearly favors a finding that the eligibility requirements of Section 741 create a jurisdictional mandate, since Section 741 extends the limitations period for eligible complaints from two years to as many as nineteen years (for an eligible complaint filed by October 21, 2000 based upon discrimination occurring as early as January 1, 1981). *See* Pub.L. 105-277, Title VII § 741, 112 Stat. 2681-30; *see also Beggerly*, 524 U.S. at 48, 118 S.Ct. 1862 (finding that extension of the statute of limitations by equitable tolling would be unwarranted where the statute incorporated equitable principles and had a twelve-year limitations period); and *Hedges*, 404 F.3d at 749 (“The presumption favoring equitable tolling is stronger when the limitations period is short.”) (citing *Beggerly*, 524 U.S. at 48, 118 S.Ct. 1862 and *Hughes v. United States*, 263 F.3d 272, 278 (3d Cir.2001)). In considering the third factor, the substantive area of law, we consider whether suits may be brought under the statute against private parties or only against the Government. *Hedges*, 404 F.3d at 749. This factor also favors a finding that the eligibility requirements of Section 741 may not be waived, since Section 741 is a unique statute, applying only to certain suits brought against the Government pursuant to the Equal Credit Opportunity Act. We also find that the remaining factors disfavor the application of the limitations principles available to private parties against the United States because Section 741 is a unique statute that only waives the statute of limitations for a limited class of complaints that were initially brought administratively against the USDA during a

limited time period and that, because of administrative problems within the USDA during that time period, were otherwise lost because the statute of limitations expired on those claims before the USDA had made an administrative determination.

We find, therefore, that the Irwin presumption that the limitations principles applicable to private parties may be applied against the Government has been rebutted in this case, and that the eligibility requirements of Section 741 create a jurisdictional prerequisite to the waiver of sovereign immunity contained in the ECOA that must be strictly construed in favor of the Government. *See Nordic Village*, 503 U.S. at 33, 112 S.Ct. 1011. The USDA could not, therefore, have waived the requirement of Section 741(e) that, to be eligible for a waiver of the ECOA statute of limitations, the Ordilles' discrimination complaint must have been administratively filed with the USDA prior to July 1, 1997. The form letters sent by Rhonda Davis to the Ordilles on September 17 and December 6, 1999, and the October 28, 1999 decision of Rosalind Gray, although confounding to the Ordilles, could not waive the eligible complaint requirements of Section 741(e). Consequently, we find that the Ordilles' January 1, 1998 discrimination complaint was not an eligible complaint pursuant to Section 741(e) and that it was, accordingly, time-barred by the ECOA's two-year statute of limitations.

C. The January 1997 Complaint

The Ordilles also contend, in the alternative, that their claim should not be time-barred because their January 1997 complaint was an eligible complaint pursuant to Section 741. The Ordilles' January 1997 complaint was filed within the allowable Section 741 time frame. It asserts that the FSA committed ethical lapses with respect to the Ordilles' loan, failed to communicate with them about loan programs, made mistakes with

respect to the interest rate on the loan, and improperly refused to assist the Ordilles in conveying their farm to another farmer, or to accept conveyance of the farm to the FSA in satisfaction of the Ordilles' debt. The January 1997 complaint does not specifically assert, or even hint, that the FSA's actions were motivated by illegal discrimination. Pursuant to Section 741, an eligible complaint must allege discrimination during the period "beginning on January 1, 1981 and ending December 31, 1996-(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.)." Pub.L. 105-277, Title VII § 741(e), 112 Stat. 2681-31. The January 1997 complaint does not allege discrimination in violation of the ECOA and, therefore, is not an eligible complaint.

D. Relation Back

The Ordilles also ask the Court to view their January 1, 1998 discrimination complaint as perfecting, or amending, their January 1997 complaint. They assert that their January 1, 1998 complaint is an amendment of their January 1997 complaint and, thus, relates back to the filing of the January 1997 complaint and is, therefore, an eligible complaint pursuant to Section 741(e). The Ordilles have not, however, submitted any authority supporting their contention.

The Ordilles contend that Dr. Wu's October 1997 letter was an acknowledgment of their January 1997 complaint and a request that they supplement that complaint with additional allegations which set forth their specific claims of discrimination. The Ordilles' contention is not supported by the evidence of record. The Ordilles' January 1997 complaint was rejected by the USDA on February 20, 1997 and there is no evidence that the Ordilles sought any review of that decision. Dr. Wu's October 1997 letter does not ask the Ordilles to supplement their January 1997 complaint by specifically stating their claims of discrimination, but does state:

The Program Investigation Division (PID) is responsible for

processing discrimination complaints by participants for [sic] USDA's federal financially assisted or conducted programs. PID has searched their records and they do not show any active complaint from you.

To register your complaint, please complete the enclosed form and return it to my office within 20 days of receipt of this letter in the enclosed envelope. Clearly indicate your legal representative, if you have one.

If we do not hear from you within 20 days, we will assume that you do not wish to pursue a complaint and close our files on this matter.

App. at A55. The January 1, 1998 complaint, which was filed significantly more than twenty days later, does not purport to amend or add claims to the January 1997 complaint. Indeed, the January 1, 1998 complaint does not even mention the existence of an earlier complaint. Under these circumstances, we cannot view the January 1998 complaint as an amendment of the January 1997 complaint that was requested by the USDA.

Even if the January 1, 1998 complaint was intended by the Ordilles as an amendment, or perfection, of the January 1997 complaint, there is no authority which would support relation back of the latter complaint to the date of filing of the earlier complaint. The purpose of Section 741 is to revive certain pre-existing complaints which would otherwise be time-barred. The regulations which implement the adjudication process for discrimination complaints filed administratively within the USDA pursuant to Section 741 do not provide for the amendment or relation back of amendments to those complaints. See 7 C.F.R. Part 15f. To the contrary, the implementing regulations contemplate consideration only of the pre-existing complaint. See 63 F.R. 67393 (stating that "proceedings under these regulations will be at the request of, or with the consent of, the complainant to consider his or her pre-existing complaint under these

procedures”) (codified at 7 C.F.R. Part 15f). As there is no statute or regulation that provides for the relation back of amendments to complaints made pursuant to Section 741, we look to the doctrine of relation back as it exists in the common law.² Under the common law, relation back of amendments is not permitted when the amendment alters the cause of action. See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1471 (2d ed.1990). Since the January 1997 complaint did not assert a claim for discrimination in violation of the ECOA, we conclude that the January 1998 complaint does not relate back to the filing of the January 1997 complaint and is, therefore, not an eligible complaint pursuant to Section 741(e).

IV.

For the foregoing reasons, we will affirm the decision of the District Court in all respects.

² The Ordilles do not contend that Federal Rule of Civil Procedure 15(c) applies to administrative claims brought before the USDA pursuant to Section 741 and we have found no authority for such application.

FEDERAL MEAT INSPECTION ACT

DEPARTMENTAL DECISION

**In re: FRANK CRAIG AND JEAN CRAIG, d/b/a FRANK'S
WHOLESALE MEATS.
FMIA Docket No. 05-0002.
PPIA Docket No. 05-0003.
Decision and Order.
Filed February 21, 2007.**

**FMIA – Federal Meat Inspection Act – PPIA – Poultry Products Inspection Act –
Intimidation of and interference with Food Safety and Inspection Service employees
– Indefinite suspension of inspection services.**

The Judicial Officer affirmed the decision of Chief Administrative Law Judge Marc R. Hillson (Chief ALJ) indefinitely suspending inspection services under title I of the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) from Respondents and Frank's Wholesale Meats based upon Respondent Frank Craig's intimidation of and interference with Food Safety and Inspection Service employees while they were performing duties under the FMIA and the PPIA. The Judicial Officer held, under 7 C.F.R. § 1.141(e), Respondents' failure to appear at the hearing constituted a waiver of the right to an oral hearing, an admission of the allegations of fact contained in the Complaint, and an admission of the facts presented at the hearing. The Judicial Officer rejected: (1) Respondents' request that the Judicial Officer convene a grand jury stating the Judicial Officer has no authority to convene a grand jury; (2) Respondents' request that the United States Department of Agriculture provide an attorney to represent them stating a respondent who desires assistance of counsel in an administrative proceeding bears the responsibility of obtaining counsel and there is no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided in an administrative proceeding; and (3) Respondents' request for \$33,000,000 in monetary damages stating the proceeding was an administrative proceeding to determine whether an order should be issued indefinitely suspending inspection services under the FMIA and the PPIA and the proceeding was not the proper proceeding in which to seek money damages. The Judicial Officer concluded Respondents had adequate time to prepare an appeal petition as evidenced by their timely-filed appeal petition. The Judicial Officer also rejected Respondents' contentions that Complainant instituted the proceeding to cover up slander, sexual harassment, bribery, and witness intimidation and that the Chief ALJ ignored Respondents' witnesses and Respondents' filings. The Judicial Officer stated, in the absence of clear evidence to

the contrary, public officers are presumed to have properly discharged their official duties; therefore, barring clear evidence to the contrary, which Respondents did not introduce, Complainant is presumed to have instituted the proceeding in order to carry out the purposes of the FMIA and the PPIA and the Chief ALJ is presumed to have considered the record prior to the issuance of his decision. The Judicial Officer further stated no witnesses appeared on behalf of Respondents; therefore, Respondents' contention that the Chief ALJ erroneously ignored Respondents' witnesses must be rejected.

Carlyne S. Cockrum and Rick D. Herndon, for Complainant.
Frank Craig and Jean Craig, San Bernardino, CA, Pro se.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Barbara Masters, Acting Administrator, Food Safety and Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint for Suspension of Federal Meat and Poultry Inspection Service [hereinafter the Complaint] on April 12, 2005. Complainant instituted the proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695) [hereinafter the Federal Meat Inspection Act]; the Poultry Products Inspection Act, as amended (21 U.S.C. §§ 451-471) [hereinafter the Poultry Products Inspection Act]; 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 (9 C.F.R. pt. 500) [hereinafter the Rules of Practice].

Complainant alleges that on March 23, 2005, April 4, 2005, and April 5, 2005, Respondent Frank Craig intimidated and interfered with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act.¹ Complainant seeks an order indefinitely suspending inspection services under the Federal Meat Inspection Act and the Poultry Products

¹Compl. ¶ III.

Inspection Act from Frank Craig and Jean Craig, d/b/a Frank's Wholesale Meats [hereinafter Respondents], and Frank's Wholesale Meats, its owners, officers, operators, partners, affiliates, successors, and assigns.² On April 29, 2005, Respondents filed a response to the Complaint denying the material allegations of the Complaint.³

On June 23, 2006, Complainant filed a motion requesting a date for oral hearing.⁴ On July 26, 2006, Chief Administrative Law Judge Marc R. Hillson [the Chief ALJ] held a telephone conference during which the Chief ALJ scheduled an oral hearing to be commenced October 24, 2006, in San Bernardino, California.⁵ Complainant's counsel participated in the July 26, 2006, telephone conference, but Respondents refused to participate in the telephone conference.⁶ On September 28, 2006, Complainant filed a motion to conduct the hearing by audio-visual means in Washington, DC, and Diamond Bar, California.⁷ On October 6, 2006, the Chief ALJ held a second telephone conference during which the Chief ALJ granted Complainant's motion to conduct the hearing by audio-visual means at two locations, one in Washington, DC, and the other in Diamond Bar, California.⁸ Complainant's counsel participated in the October 6, 2006, telephone conference, but Respondents refused to participate in the telephone

²Compl. at 5.

³Answers to Complaint for Suspension of Federal Meat & Poultry Inspection Service [hereinafter the Answer].

⁴Motion To Set Oral Hearing.

⁵Summary of Telephone Conference; Scheduling of Oral Hearing and Scheduling Exchange Dates.

⁶Summary of Telephone Conference; Scheduling of Oral Hearing and Scheduling Exchange Dates at 1 n.1.

⁷Motion to Conduct Hearing by Audio-Visual Means.

⁸Summary of Telephone Conference; and Scheduling of Audio-Visual Hearing.

conference.⁹

On October 24-26, 2006, the Chief ALJ presided at a hearing conducted in Washington, DC, and Diamond Bar, California. Carlyne S. Cockrum and Rick D. Herndon, Office of the General Counsel, United States Department of Agriculture, represented Complainant.¹⁰ Respondents refused to participate in the hearing.¹¹ The Chief ALJ issued a decision orally at the close of the hearing in which the Chief ALJ concluded Frank's Wholesale Meats harassed, intimidated, threatened, and interfered with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act and ordered the indefinite suspension of inspection services under title I of the Federal Meat Inspection Act and under the Poultry Products Inspection Act from Respondents and Frank's Wholesale Meats, its owners, officers, directors, partners, successors, and assigns.¹²

The Chief ALJ excerpted from the transcript the decision orally announced at the close of the October 24-26, 2006, hearing, and on November 15, 2006, filed the written excerpt. On November 22, 2006, Respondents appealed to the Judicial Officer.¹³ On December 8, 2006, Complainant filed a response to Respondents' Appeal Petition.¹⁴ On December 11, 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 October 26, 2006, oral decision; therefore, I affirm the Chief ALJ's October 26, 2006, oral decision.

⁹Summary of Telephone Conference; and Scheduling of Audio-Visual Hearing at 1.

¹⁰Tr. I at 7.

¹¹Tr. I at 7-10; Tr. II at 104-06; Tr. III at 4-6.

¹²Tr. III at 24-25.

¹³Letter dated November 21, 2006, from Respondent Frank Craig to the Chief ALJ [hereinafter Respondents' Appeal Petition].

¹⁴Response in Opposition to Appeal Petition.

Complainant's exhibits are designated by "CX." The transcript is divided into three volumes, one volume for each day of the 3-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the October 24, 2006, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the October 25, 2006, segment of the hearing; and references to "Tr. III" are to the volume of the transcript that relates to the October 26, 2006, segment of the hearing.

DECISION

Statement of the Case

Respondents, after being duly notified, failed to appear at the October 24-26, 2006, hearing without good cause.¹⁵ Section 1.141(e) of the Rules of Practice (7 C.F.R. § 1.141(e)) provides that a respondent who, after being duly notified, fails to appear at a hearing, without good cause, shall be deemed to have waived the right to an oral hearing and to have admitted any facts which may be presented at the hearing. Section 1.141(e) of the Rules of Practice (7 C.F.R. § 1.141(e)) also provides that a respondent's failure to appear at the hearing, without good cause, constitutes an admission of all the material allegations of fact contained in the complaint. Accordingly, the material allegations of fact contained in the Complaint and the facts presented at the October 24-26, 2006, hearing are adopted as findings of fact.

Findings of Fact

1. Respondents, at all times material to this proceeding, were engaged in meat and poultry processing operations at an establishment

¹⁵Tr. I at 7-10; Tr. II at 104-06; Tr. III at 4-6.

identified as Frank's Wholesale Meats and located at 651 North Waterman Avenue, San Bernardino, California 92410.¹⁶

2. Respondents' establishment is a small processing facility. Respondents' establishment has a retail area on the first floor and a small meeting room and United States Department of Agriculture inspection office on the second floor.¹⁷

3. On January 28, 1985, the Food Safety and Inspection Service issued a grant of federal inspection pursuant to the Federal Meat Inspection Act and the Poultry Products Inspection Act to Frank's Wholesale Meats located at 651 North Waterman Avenue, San Bernardino, California 92410.¹⁸

4. Respondents' establishment has been designated as Official Establishment number 7741/P-7741.¹⁹

5. On April 18, 1991, Respondent Frank Craig interfered with and attempted to intimidate Joyce Mize, a Food Safety and Inspection Service inspector, when she was performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act. Specifically, Respondent Frank Craig screamed at Joyce Mize and told Joyce Mize that she did not know what she was doing.²⁰

6. On January 23, 1995, Respondent Frank Craig interfered with and attempted to intimidate Joyce Mize, a Food Safety and Inspection Service inspector. Specifically, Respondent Frank Craig charged Joyce Mize in a hostile manner, criticized Joyce Mize's performance, and continually interrupted Joyce Mize.²¹

7. On June 21, 2000, Stuart Alexander, the owner of Santos Linguisa Factory, a sausage processor in San Leandro, California, murdered two Food Safety and Inspection Service employees and a California state

¹⁶Compl. ¶ I(a)-(b); Answer ¶ I(a)-(b).

¹⁷Tr. I at 34-35, 74-76, 99, 118; Tr. II at 15.

¹⁸Compl. ¶ I(b); Answer ¶ I(b); CX 4; Tr. I at 33.

¹⁹Compl. ¶ I(b); Answer ¶ I(b); CX 4.

²⁰CX 18; Tr. I at 78-81.

²¹CX 19; Tr. I at 82-87.

employee while they were performing duties at the Santos Linguisa Factory.²²

8. On November 30, 2000, Respondent Frank Craig interfered with and attempted to intimidate Joyce Mize, a Food Safety and Inspection Service inspector, when she was performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act. Specifically, Respondent Frank Craig screamed at Joyce Mize and threatened Joyce Mize.²³

9. On December 4, 2000, Joyce Mize and Dr. Syed Ali, Food Safety and Inspection Service circuit supervisor for the Riverside, California, circuit, met with Respondent Frank Craig to discuss Respondent Frank Craig's November 30, 2000, interference with and attempted intimidation of Joyce Mize. During the meeting, Respondent Frank Craig threatened Joyce Mize.²⁴

10. On December 4, 2000, in accordance with the Federal Meat Inspection Act and the Poultry Products Inspection Act, the Food Safety and Inspection Service suspended federal inspection services at Respondents' establishment because of statements by Respondent Frank Craig to Joyce Mize, a Food Safety and Inspection Service inspector, on November 30, 2000, and December 4, 2000, and to Dr. Syed Ali, a Food Safety and Inspection Service circuit supervisor, on December 4, 2000.²⁵

11. On December 18, 2000, Respondent Frank Craig provided written assurance to the Food Safety and Inspection Service that Respondents and Respondents' employees would not intimidate, threaten, or interfere with Food Safety and Inspection Service employees in the future.²⁶

12. On December 19, 2000, the Food Safety and Inspection Service

²²CX 1; Tr. I at 22-26.

²³CX 20-CX 22; Tr. I at 87-99; Tr. II at 40-49.

²⁴CX 22, CX 35, CX 48-CX 50; Tr. I at 94-95; Tr. II at 40-49.

²⁵Compl. ¶ II(a); CX 35, CX 48, CX 50; Tr. I at 226-28; Tr. II at 40-49.

²⁶CX 9.

resumed federal inspection services at Respondents' establishment based on Respondent Frank Craig's December 18, 2000, written assurance to the Food Safety and Inspection Service that Respondents and Respondents' employees would not intimidate, threaten, or interfere with Food Safety and Inspection Service employees in the future.²⁷

13. On or about February 28, 2001, in accordance with the Federal Meat Inspection Act and the Poultry Products Inspection Act, the Food Safety and Inspection Service suspended federal inspection services at Respondents' establishment because of statements by Respondent Frank Craig to Food Safety and Inspection Service employees during a program assessment meeting at Respondents' establishment. During this meeting, Respondent Frank Craig made derogatory remarks about Food Safety and Inspection Service inspector Joyce Mize and made comparisons between his inspection situation and that of Stuart Alexander, the owner of the Santos Linguisa Factory, who murdered two Food Safety and Inspection Service employees and a California state employee.²⁸

14. On March 6, 2001, Respondent Frank Craig met with Food Safety and Inspection Service employees in a mediation session conducted by a mediator from the Federal Mediation & Conciliation Service. During the mediation, Respondent Frank Craig drafted a written proposal in which he offered to refrain from any association with United States Department of Agriculture inspectors and to direct Mike Craig, the manager of Frank's Wholesale Meats, who was also Respondents' son, to handle all inspection activities in Respondents' establishment.²⁹

15. Based on Respondent Frank Craig's March 6, 2001, proposal, Respondents, on April 2, 2001, entered into a written agreement with the Food Safety and Inspection Service in which Respondents agreed that no one associated with Respondents' establishment would intimidate or interfere with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products

²⁷ Compl. ¶ II(a); CX 10; Tr. I at 44-46.

²⁸ CX 11, CX 23, CX 27, CX 51-CX 52; Tr. I at 109-25, 154-56; Tr. II at 49-55.

²⁹ CX 12, CX 25-26; Tr. I at 55-57, 134-46.

Inspection Act. Respondents also agreed that Respondent Frank Craig would not communicate with Food Safety and Inspection Service in-plant employees or circuit supervisors. The written agreement allowed Respondents to continue federally-inspected operations at Respondents' establishment.³⁰

16. After the April 2001 reinstatement of federal inspection services, Food Safety and Inspection Service employees continued to document incidents of intimidation and interference by Respondent Frank Craig. On August 16, 2001, Dr. Murli M. Prasad, Food Safety and Inspection Service district manager, met with Respondent Frank Craig to discuss these incidents of intimidation and interference and to remind Respondent Frank Craig of the April 2, 2001, agreement. This meeting was followed by a letter from Dr. Prasad to Respondent Frank Craig on October 5, 2001, reminding Respondent Frank Craig of his obligations under the April 2, 2001, agreement and the regulations prohibiting intimidation of and interference with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act.³¹

17. In a letter dated September 26, 2004, Respondent Jean Craig requested that the Food Safety and Inspection Service allow Respondent Frank Craig to resume a more responsible role in Respondents' establishment and to communicate with Food Safety and Inspection Service in-plant employees.³²

18. In September or October 2004, Respondent Frank Craig interfered with Charles Alcorn, a Food Safety and Inspection Service consumer safety inspector. Specifically, Respondent Frank Craig, in an angry and loud voice, instructed one of Respondents' employees to tell Charles

³⁰ Compl. ¶ II(a); Answer ¶ II(a); CX 12; Tr. I at 57-60.

³¹ CX 37-CX 38; Tr. I at 230-38.

³² Compl. ¶ II(b); Answer ¶ II(b); CX 13; Tr. I at 60-62.

Alcorn that he was not taking samples of ground beef correctly.³³

19. On or about December 1, 2004, the Food Safety and Inspection Service approved Respondent Jean Craig's request to allow Respondent Frank Craig to resume a more responsible role in Respondents' establishment and to communicate with Food Safety and Inspection Service in-plant employees. The Food Safety and Inspection Service informed Respondent Jean Craig that any intimidation of, or interference with, Food Safety and Inspection Service employees would result in an enforcement action in accordance with the Rules of Practice.³⁴

20. On December 6, 2004, Dr. Neal Westgerdes, Food Safety and Inspection Service district manager for the Alameda, California, district; Dr. Yudhbir Sharma, Food Safety and Inspection Service deputy district manager for the Alameda, California, district; and Dr. Syed Ali, Food Safety and Inspection Service circuit supervisor for the Riverside, California, circuit, met with Respondents to discuss the Food Safety and Inspection Service acceptance of Respondent Frank Craig as a contact person for Frank's Wholesale Meats.³⁵

21. On March 23, 2005, Respondent Frank Craig intimidated and interfered with Charles Wheatley, a Food Safety and Inspection Service consumer safety inspector, while Charles Wheatley was performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act. Respondent Frank Craig's statements included references to Stuart Alexander's June 21, 2000, murder of two Food Safety and Inspection Service employees and a California state employee and comparisons between Respondent Frank Craig's inspection situation and that of Stuart Alexander.³⁶

22. On April 4, 2005, Respondent Frank Craig intimidated and interfered with Charles Wheatley, a Food Safety and Inspection Service

³³CX 42-CX 43; Tr. II at 9-12.

³⁴Compl. ¶ II(b); Answer ¶ II(b); CX 14; Tr. I at 62-63.

³⁵Compl. ¶ II(c); Answer ¶ II(c); CX 57 at 1, CX 58, CX 61 at 3; Tr. II at 81-88, 91-94.

³⁶Compl. ¶ III(a); CX 45, CX 47 at 2; Tr. II at 25-28.

consumer safety inspector, while Charles Wheatley was performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act. Respondent Frank Craig engaged in unprofessional, argumentative, and confrontational behavior when Charles Wheatley attempted to speak with Respondent Frank Craig about food safety regulatory verification filings that showed insanitary conditions and practices at Respondents' establishment. Charles Wheatley was unable to complete his duties, and he left Respondents' establishment feeling harassed and intimidated. Dr. Syed Ali, the Food Safety and Inspection Service circuit supervisor for the Riverside, California, circuit, subsequently described Charles Wheatley as disturbed, distressed, upset, and shaken by the incident.³⁷

23. On April 5, 2005, Respondent Frank Craig intimidated and interfered with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act. Specifically, during a meeting with Dr. Neal Westgerdes, Food Safety and Inspection Service district manager for the Alameda, California, district; Dr. Yudhbir Sharma, Food Safety and Inspection Service deputy district manager for the Alameda, California, district; and Dr. Syed Ali, Food Safety and Inspection Service circuit supervisor for the Riverside, California, circuit, Respondent Frank Craig demonstrated hostility toward Food Safety and Inspection Service employees and became argumentative and confrontational. Respondent Frank Craig's statements included references to Stuart Alexander's June 21, 2000, murder of two Food Safety and Inspection Service employees and a California state employee.³⁸

24. On April 6, 2005, the Food Safety and Inspection Service issued Respondents a Notice of Suspension in accordance with section 500.3 of the Rules of Practice (9 C.F.R. § 500.3) based on Respondent Frank

³⁷ Compl. ¶ III(b); CX 46-CX 47, CX 53-CX 54; Tr. II at 30-35, 61-63.

³⁸ Compl. ¶ III(c); CX 57, CX 61; Tr. II at 84-88.

Craig's repetitive intimidation of and interference with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act.³⁹

25. Respondent Frank Craig has a permit for a gun and, at times material to this proceeding, kept a gun at Respondents' establishment.⁴⁰

26. Respondent Frank Craig has made numerous references to Stuart Alexander's June 21, 2000, murder of two Food Safety and Inspection Service employees and a California state employee while they were performing duties at the Santos Linguisa Factory, in San Leandro, California. Many of Respondent Frank Craig's references to the June 21, 2000, murders include comparisons between Respondent Frank Craig's inspection situation and that of Stuart Alexander.⁴¹

27. At times material to this proceeding, Respondent Frank Craig drank alcohol at Respondents' establishment and appeared under the influence while Food Safety and Inspection Service employees were present.⁴²

28. During the period April 18, 1991, through April 5, 2005, Respondent Frank Craig frequently argued with and confronted Food Safety and Inspection Service employees in a manner that intimidated and interfered with those Food Safety and Inspection Service employees, while those employees were performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act.

29. Respondent Frank Craig has previously been placed on probation for the crime of assault with a deadly weapon.⁴³

³⁹ Compl. ¶ IV(a); Answer ¶ IV(a); CX 60.

⁴⁰ Compl. ¶ IV(b); Answer ¶ IV(b)(1); CX 22, CX 29, CX 32, CX 45 at 1-2, CX 46 at 2, CX 47 at 2, CX 53 at 1, CX 55, CX 61 at 2; Tr. I at 99-101, 137, 150-52, 168-71, 179-80, 220-21; Tr. II at 24-25, 69.

⁴¹ Compl. ¶ IV(b); Answer ¶ IV(b)(2); CX 1, CX 5-CX 6, CX 11 at 1, CX 45 at 1, CX 51 at 4, CX 55, CX 57 at 2, CX 61 at 2; Tr. I at 22-26, 121-22, 219; Tr. II at 26, 60-65.

⁴² Tr. I at 101, 105, 159-60; Tr. II at 15, 98.

⁴³ Compl. ¶ IV(b).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondents intimidated and interfered with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act.
3. Respondents' repeated intimidation of and interference with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act warrants the indefinite suspension of inspection services under the Federal Meat Inspection Act and the Poultry Products Inspection Act from Respondents and Frank's Wholesale Meats.

Respondents' Appeal Petition

Respondents raise seven issues in Respondents' Appeal Petition. First, Respondents "appeal all the false allegations" (Respondents' Appeal Pet. at 1-3).

Respondents' denial of the allegations of the Complaint comes far too late to be considered. Respondents, after being duly notified, failed to appear at the October 24-26, 2006, hearing without good cause. Section 1.141(e) of the Rules of Practice (7 C.F.R. § 1.141(e)) provides that a respondent who, after being duly notified, fails to appear at a hearing, without good cause, shall be deemed to have waived the right to an oral hearing and to have admitted any facts which may be presented at the hearing. Section 1.141(e) of the Rules of Practice (7 C.F.R. § 1.141(e)) also provides that a respondent's failure to appear at the hearing, without good cause, constitutes an admission of all the material allegations of fact contained in the complaint. Respondents have not offered any reason for their failure to attend the October 24-26, 2006, hearing. Accordingly, the material allegations contained in the Complaint and the facts presented at the October 24-26, 2006, hearing are adopted as findings of fact.

Second, Respondents request I convene a grand jury (Respondents' Appeal Pet. at 1).

Authority to convene a grand jury is vested in the United States district courts;⁴⁴ I have no authority to convene a grand jury. Moreover, the function of a grand jury is to determine whether there is probable cause to believe a crime has been committed and to protect persons against unfounded criminal prosecution.⁴⁵ This proceeding is a civil administrative disciplinary proceeding. The results of a grand jury investigation would not be relevant to this proceeding.

Third, Respondents request that the United States Department of Agriculture provide an attorney to represent them (Respondents' Appeal Pet. at 1).

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

§ 555. Ancillary matters

....

(b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. 5 U.S.C. § 555(b).

However, a respondent who desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel. Moreover, a respondent who is unable to obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in a disciplinary administrative proceeding, such as one conducted under the Federal Meat Inspection Act and the Poultry Products Inspection

⁴⁴Fed. R. Crim. P. 6. See also *Switzer v. Coan*, 261 F.3d 985, 992 n.13 (10th Cir. 2001); *Korman v. United States*, 486 F.2d 926, 933 (7th Cir. 1973); *In re A & H Transp., Inc.*, 319 F.2d 69, 71 (4th Cir.), cert. denied, 375 U.S. 924 (1963).

⁴⁵*United States v. Calandra*, 414 U.S. 338, 343 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972).

Act.46 Therefore, I reject Respondents' request to have counsel

⁴⁶See generally *Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating it is well-settled that deportation hearings are in the nature of civil proceedings and aliens, therefore, have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating a deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), cert. denied, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2d Cir.) (stating in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), cert. denied, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating the Secretary of Health and Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 50-51 (2002) (stating a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in an administrative disciplinary proceeding conducted under the Animal Welfare Act); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 911 (1998) (stating a respondent who is unable

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provided to represent them.

Fourth, Respondents request “a starting point of” \$33,000,000 in monetary damages (Respondents’ Appeal Pet. at 1).

I reject Respondents’ request for monetary damages. This proceeding is an administrative disciplinary proceeding to determine whether an order should be issued indefinitely suspending inspection services under the Federal Meat Inspection Act and the Poultry Products Inspection Act. This proceeding is not the proper proceeding in which to seek money damages.

Fifth, Respondents contend they did not have sufficient time to prepare an appeal petition (Respondents’ Appeal Pet. at 1-3).

As an initial matter, Respondents’ timely-filed appeal petition belies Respondents’ contention that they did not have adequate time within which to prepare an appeal petition. Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that parties have 30 days after issuance of an oral decision within which to appeal to the Judicial Officer. The Chief ALJ issued an oral decision on October 26, 2006; therefore, Respondents had until November 27, 2006, to file an appeal petition with the Hearing Clerk.⁴⁷ The issues in this proceeding are not

to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in an administrative disciplinary proceeding conducted under the Swine Health Protection Act); *In re Steven M. Samek*, 57 Agric. Dec. 185, 188 (1998) (Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek) (stating a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in an administrative disciplinary proceeding conducted under the Animal Welfare Act); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and the respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), appeal dismissed, No. 84-4316 (5th Cir. July 25, 1984).

⁴⁷Thirty days after October 26, 2006, was Saturday, November 25, 2006. Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

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complex; therefore, I conclude Respondents had sufficient time within which to file an appeal petition.

Respondents assert they were not aware of the Chief ALJ's October 26, 2006, oral decision until November 20, 2006, when they received the written excerpt of the oral decision, and the time between their receipt of the written excerpt and the time that their appeal petition was required to be filed was not an adequate time within which to file an appeal petition (Respondents' Appeal Pet. at 1).

The Hearing Clerk served Respondents with the Rules of Practice on April 19, 2005.⁴⁸ Therefore, Respondents had actual notice that section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)) provides for the issuance of an oral decision at the close of a hearing or within a reasonable time after the close of the hearing and that, if the Chief ALJ issued an oral decision, Respondents would have 30 days after the issuance of the oral decision within which to file an appeal petition. Respondents failed to appear at the October 24-26, 2006, hearing without

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

....

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

7 C.F.R. § 1.147(h).

The next business day after Saturday, November 25, 2006, was Monday, November 27, 2006. Therefore, Respondents were required to file Respondents' Appeal Petition no later than November 27, 2006.

⁴⁸United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9223 1254.

good cause and the record contains no indication that Respondents attempted to discern the disposition of the proceeding after the close of the hearing. A respondent who refuses to attend a hearing without good cause does so at his or her peril. Respondents alone are responsible for their ignorance of the oral decision prior to November 20, 2006. Therefore, I reject Respondents' contention that they were not provided sufficient time to file an appeal petition.

Sixth, Respondents contend the instant proceeding is designed to cover up slander, sexual harassment, bribery, and witness intimidation (Respondents' Appeal Pet. at 1).

I reject Respondents' contention that Complainant instituted the instant proceeding to cover up slander, sexual harassment, bribery, and witness intimidation. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.⁴⁹ Complainant is presumed to have instituted the instant

⁴⁹See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating, although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating, without a showing that the action of the Secretary of Agriculture was arbitrary, the Secretary of Agriculture's action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a

presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand), 61 Agric. Dec. 389, 399 (2002) (stating an administrative law judge is presumed to have considered the record prior to the issuance of his or her decision); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 435 (2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); *In re Karl Mitchell* (Order Granting Complainant's Pet. for Recons.) 60 Agric. Dec. 647, 665-67 (2001) (holding, in the absence of clear evidence to the contrary, the Animal and Plant Health Inspection Service inspectors involved are presumed to be motivated only by the desire to properly discharge their official duties); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *aff'd*, 294 F.3d 1001 (8th Cir. 2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec.

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proceeding in order to carry out the purposes of the Federal Meat Inspection Act and the Poultry Products Inspection Act, and Respondents provide no basis for their contention that Complainant instituted the proceeding to cover up slander, sexual harassment, bribery, and witness intimidation.

Seventh, Respondents contend the Chief ALJ ignored all of Respondents' documents and all of Respondents' witnesses

1045, 1079 (1997) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, the Secretary of Agriculture's actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, the Secretary of Agriculture's actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, the Secretary of Agriculture's actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

(Respondents' Appeal Pet. at 1).

As an initial matter, Respondents failed to appear at the October 24-26, 2006, hearing and no witnesses appeared on Respondents' behalf. As Respondents had no witnesses, I must reject Respondents' contention that the Chief ALJ erroneously ignored Respondents' witnesses. Moreover, I reject Respondents' contention that the Chief ALJ erroneously ignored Respondents' filings. In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.⁵⁰ Administrative law judges must consider the record in a proceeding prior to the issuance of a decision in that proceeding.⁵¹ An administrative law judge is presumed to have considered the record prior to the issuance of his or her decision, and Respondents provide no basis for their contention that the Chief ALJ erroneously ignored their filings.

Indefinite Suspension of Inspection Services From Frank's Wholesale Meats

Complainant seeks an order indefinitely suspending inspection services under the Federal Meat Inspection Act and the Poultry Products Inspection Act from "Respondents and *its* owners, officers, operators, partners, affiliates, successors, or assigns"⁵² and the Chief ALJ ordered the indefinite suspension of "Frank Craig and Jean Craig doing business as Frank's Wholesale Meats, *its* owners, officers, directors, partners, successors and assigns, elected or incorporated."⁵³ The record indicates Respondents are individuals merely doing business as Frank's Wholesale

⁵⁰*Id.*

⁵¹*See* 5 U.S.C. § 556(d).

⁵²Compl. at 5 (emphasis added).

⁵³Tr. III at 24-25 (emphasis added).

Meats and Frank's Wholesale Meats has no legal existence. Nonetheless, I order the indefinite suspension of both Respondents and Frank's Wholesale Meats because Frank's Wholesale Meats applied for a grant of inspection and the Food Safety and Inspection Service issued a grant of inspection to Frank's Wholesale Meats.⁵⁴

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

ORDER

Inspection services under title I of the Federal Meat Inspection Act and under the Poultry Products Inspection Act are suspended indefinitely from Respondents and Frank's Wholesale Meats, its owners, officers, directors, operators, partners, affiliates, successors, and assigns, elected or incorporated. This Order shall become effective 30 days after service of the Order on Respondents.

⁵⁴CX 4.

YACOUB HANNA,
d/b/a FLEMING FOOD SHOPPE v. USDA
66 Agric. Dec. 375

375

FOOD STAMP PROGRAM

COURT DECISIONS

YACOUB HANNA, d/b/a FLEMING FOOD SHOPPE v. USDA
No. 04-74627.
Filed March 30, 2007.

(Cite as: 207 WL 1016988).

FSP – Electronic benefits transfer – Trafficking, food stamp.

Owner of a neighborhood store failed to explain the discrepancies discovered upon analysis of the electronic benefits transfer records showing inordinate number of exact-dollar transactions, multiple transactions within a relatively short time period, and over six times more food stamp sales than eligible food items sales.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

United States District Court, E.D. Michigan, Southern Division.

GERALD E. ROSEN, United States District Judge.

I. INTRODUCTION

Plaintiff Yacoub Hanna commenced this suit in this Court in November of 2004, challenging the decision of the United States Department of Agriculture's Food and Nutrition Service ("FNS") to disqualify his retail food store, the Fleming Food Shoppe in Flint, Michigan, from participating in the federal Food Stamp program. The Court's subject matter jurisdiction rests upon provisions in the federal Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, that authorize "de novo" judicial review of the validity of a decision to disqualify a store from

participation in the Food Stamp program. *See* 7 U.S.C. §§ 2023(a)(13), 2023(a)(15).

By motion filed on December 9, 2005, the Defendant United States of America now seeks an award of summary judgment in its favor on Plaintiff's challenge to the FNS's disqualification decision.¹ In support of this motion, Defendant contends that the FNS had a sufficient basis for concluding that Plaintiff's store was engaged in food stamp trafficking, and that Plaintiff's efforts to explain away or cast doubt on the evidence in the administrative record do not suffice to raise a genuine issue of material fact as to the validity of the challenged decision. In response, Plaintiff argues that the FNS's determination is open to question because of its reliance on data compiled through the agency's Electronic Benefit Transfer ("EBT") system, as opposed to local investigation or first-hand observation of illegal food stamp trafficking.

Having reviewed the parties' submissions, the accompanying exhibits, and the underlying administrative record, the Court finds that the relevant allegations, facts, and legal arguments are adequately presented in these written materials, and that oral argument would not aid the decisional process. Accordingly, the Court will decide Defendant's motion "on the briefs." *See* Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This opinion and order sets forth the Court's rulings.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Yacoub Hanna is the owner of the Fleming Food Shoppe in Flint, Michigan. On August 22, 2000, he secured the approval of the

¹ Although Plaintiff's complaint names a number of federal government officials and agencies as defendants, the United States is the only proper defendant in a suit challenging a disqualification decision. *See* 7 U.S.C. § 2023(a)(13). Accordingly, the Court will refer to the United States as the sole "Defendant" throughout the remainder of this opinion.

United States Department of Agriculture's Food and Nutrition Service ("FNS") to participate in the federal government's Food Stamp program.

As explained in Defendant's motion, the Food Stamp program no longer issues coupons, but instead provides recipients with an Electronic Benefit Transfer ("EBT") card that functions similarly to a bank-issued debit card. Each month, additional food stamp benefits are credited to a recipient's account, and these benefits are accessible through the recipient's EBT card. In particular, when a customer makes eligible purchases at a retail establishment that participates in the Food Stamp program, he swipes his EBT card through a card reader at the store, enters a PIN, and the amount of his transaction is electronically deducted from his food stamp benefit balance.

Because each such transaction now leaves an electronic "footprint," the FNS is able to compile these transaction records and examine the resulting data for indications that a retail food store might be violating the terms of the Food Stamp program. Based on such an analysis in this case, the agency notified Plaintiff in May of 2004 that he was suspected of such violations. Specifically, upon examining the records of EBT transactions at Plaintiff's store between October of 2003 and March of 2004, the FNS cited three categories of transactions that, in the agency's view, were suggestive of food stamp trafficking: (i) an "inordinate number" of EBT transactions in exact-dollar amounts; (ii) a number of instances of a single food stamp recipient engaging in multiple transactions within a relatively short time period; and (iii) a number of large purchases that exceeded the average purchase amount for a store the size of Plaintiff's establishment. (*See* Admin. Record at 15-21.)

Upon receiving this notice of suspected food stamp trafficking, Plaintiff retained counsel and requested a meeting to explain the transactions cited by the FNS. On June 1, 2004, Plaintiff's attorney and his store manager, Chester Coburn, met with Jennifer Renegar, an investigator in the FNS's Grand Rapids, Michigan field office. At this

meeting, Mr. Coburn explained that the even-dollar transactions cited by the FNS were attributable to Plaintiff's experimentation with a round-dollar pricing policy, which the store had abandoned in April of 2004 because "[i]t wasn't working." (*Id.* at 25.) With regard to the instances of multiple transactions from a single account within a short time period, Mr. Coburn speculated that customers might have been selling their food stamp benefits in the store's parking lot, but stated that he had no personal knowledge of this and could not "tell his customers what to buy." (*Id.*) Finally, Mr. Coburn sought to refute the suggestion that customers were making inordinately large purchases for a store the size of Plaintiff's, opining that the store sold more expensive food items that could account for these transactions.

Apart from these verbal responses from his store manager, Plaintiff also sought the opportunity to provide additional records to refute the charge of food stamp trafficking. In particular, Plaintiff produced a number of invoices from his suppliers, which evidently were intended to demonstrate that the store's inventory was sufficiently large to account for the food stamp transactions cited by the FNS. Despite these submissions, and despite a visit to Plaintiff's store by FNS investigator Renegar that failed to uncover any first-hand evidence of food stamp trafficking, the FNS notified Plaintiff on June 9, 2004 that his store had been permanently disqualified from further participation in the Food Stamp program.

On June 11, 2004, Plaintiff requested administrative review of this adverse decision. In October of 2004, an administrative review officer affirmed the FNS's decision to permanently disqualify Plaintiff from participating in the Food Stamp program. This lawsuit followed in November of 2004, with Plaintiff challenging the validity of this administrative determination.

The record compiled in the administrative proceedings has been supplemented to only a limited extent during the course of discovery in this action. Although Defendant requested that Plaintiff produce all of his store's financial records for the period from October of 2003 through

March of 2004, and although Plaintiff's store manager, Mr. Coburn, testified that the store's bookkeeper provides him with monthly statements of the store's sales, profits, and the like, (*see* Defendant's Motion, Ex. C, Coburn Dep. at 66-68), no such records have been forthcoming.² Instead, Plaintiff has produced essentially the same materials that he furnished during the administrative proceedings—namely, invoices reflecting the store's food purchases (as opposed to its sales) during the period at issue.

As discussed below, Defendant contends that these records confirm, rather than refute, the charge of food stamp trafficking, as they indicate that the food stamp redemptions at Plaintiff's store comprised an inordinate percentage of—and, in certain months, actually exceeded—the store's estimated overall sales of eligible food items during the relevant time period. Indeed, if this food stamp data is considered along with the information Defendant has obtained from the State of Michigan regarding the store's redemptions under the state-administered Women, Infants and Children ("WIC") program, it appears that the store's redemptions under the Food Stamp and WIC programs combined significantly exceeded its food sales each and every month from October of 2003 to March of 2004. As set forth in a summary provided by Defendant, Plaintiff's store sold less than \$10,000 in eligible food items during this period, yet it redeemed over \$63,000 in food stamps and WIC coupons. (*See* Defendant's Motion, Ex. A.)

III. ANALYSIS

A. The Standards Governing Defendant's Motion

²Indeed, as Defendant points out, Mr. Coburn was not even able to recall the name of the store's bookkeeper. (*See id.* at 27-28, 69.)

Through its present motion, Defendant seeks summary judgment in its favor on Plaintiff's challenge to the FNS's decision to disqualify Plaintiff's store from participating in the Food Stamp program. Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The familiar principles governing the resolution of summary judgment motions are affected somewhat by the statutory provision governing challenges to FNS disqualification decisions. As noted earlier, this Court must conduct a "trial de novo" on Plaintiff's challenge here, "in which the court shall determine the validity of the questioned administrative action in issue." 7 U.S.C. § 2023(a) (15). Unlike the more typical "substantial evidence" review of administrative determinations, this Food Stamp Act provision mandates that a district court "make its own findings based upon a preponderance of the evidence and not limit itself to matters considered in the administrative proceeding." *Warren v. United States*, 932 F.2d 582, 586 (6th Cir.1991); *see also Kahin v. United States*, 101 F.Supp.2d 1299, 1302 (S.D.Cal.2000).

Nonetheless, the courts have rejected the notion that "de novo" review under § 2023(a)(15) requires that a "district court proceed as if no agency action had been taken." *Redmond v. United States*, 507 F.2d 1007, 1011 (5th Cir.1975). Rather, while the district court is not "bound by the administrative record," the agency's decision is presumed to be valid, and must stand "unless the plaintiff proves that it should be set aside." *Redmond*, 507 F.2d at 1011-12; *see also McCray v. United States*, 511 F.Supp. 205, 209 (E.D.Mich.1981). Thus, "[t]he burden of proof in the judicial review proceeding is upon the aggrieved store to establish the invalidity of the administrative action by a preponderance of the evidence." *Warren*, 932 F.2d at 586.

Juxtaposing this substantive standard with ordinary summary judgment principles, Plaintiff may withstand Defendant's motion by

"rais[ing] material issues of fact as to each of the violations charged against" the Fleming Food Shoppe. *Kahin*, 101 F.Supp.2d at 1303. With these standards in mind, the Court turns to the record in this case.

B. Plaintiff Has Failed to Raise a Genuine Issue of Fact as to the Validity of the FNS's Decision to Disqualify His Store from Participation in the Food Stamp Program.

Under the Food Stamp Act, a retail food store is subject to permanent disqualification from further participation in the Food Stamp program upon a determination that the store has engaged in "the purchase of coupons or trafficking in coupons or authorization cards." 7 U.S.C. § 2021(b)(3)(B). In the administrative decision now under review, the FNS determined that Plaintiff's store had engaged in food stamp trafficking by exchanging benefits for cash, and that Plaintiff had failed to establish a basis for the imposition of a fine in lieu of permanent disqualification. Through its present motion, Defendant argues that Plaintiff has failed to raise a genuine issue of material fact as to the validity of the grounds cited by the FNS in support of its decision. The Court agrees.

As discussed earlier, the FNS's finding of food stamp trafficking rested upon three grounds. First, the agency cited a suspicious number of transactions in exact-dollar amounts. Next, the FNS pointed to a number of instances in which a single food stamp recipient engaged in multiple food stamp transactions within a brief period of time. Finally, the FNS opined that there were more large transactions at Plaintiff's establishment than would be expected for a store of its size. The Court addresses each of these grounds in turn.

In its initial May 19, 2004 notice to Plaintiff of suspected violations of the Food Stamp program, the FNS identified 39 exact-dollar transactions at Plaintiff's store between October 2, 2003 and February 13, 2004. (*See Admin. Record at 17.*) In response, Plaintiff's store manager, Chester Coburn, stated at a meeting with an FNS investigator that the

store had been experimenting during this time period with an exact-dollar pricing scheme "like a Dollar Store," but that this pricing method was abandoned in April of 2004 because "[i]t wasn't working." (*Id.* at 25.) Similarly, in his response to Defendant's summary judgment motion, Plaintiff asserts, without citation to the record, that he informed the FNS during its investigation "that [his store] had implemented an even dollar pricing [scheme], which did not prove to be profitable for the store." (Plaintiff's Response Br. at 4.)³

As noted by Defendant, Plaintiff's explanation on this point is somewhat wanting, to say the least. First, out of the 39 exact-dollar transactions identified by the FNS, 26 were multiple-of-five transactions—*i.e.*, for amounts of \$10.00, \$15.00, \$20.00, \$25.00, or \$30.00. (*See* Admin. Record at 17.) An even-dollar pricing scheme alone would not account for this disproportionate number of multiple-of-five transactions. In addition, Defendant points to the evidence that the same customers were responsible for a significant portion of these exact-dollar transactions. A single food stamp recipient, for example, redeemed (i) \$30.00 in food stamps three times, on October 7, October 9, and December 5, 2003, (ii) \$25.00 in benefits on October 13 and 17, 2003, and then again on February 5, 2004; and (iii) exact-dollar amounts of food stamps on six other occasions during the relevant period. (*See id.*) Plaintiff's appeal to a purported round-dollar pricing scheme simply does not account for these additional indicia of food stamp trafficking—particularly where, as discussed below, a *second* category of suspicious transactions tends to belie Plaintiff's claim of exact-dollar

³Notably, Plaintiff's response to Defendant's motion is replete with statements which, like this one, are utterly unsupported by any citation to the record. Indeed, the *only* such citations that appear *anywhere* in Plaintiff's brief are references to the deposition testimony of FNS investigator Jennifer Renegar. Unfortunately, Plaintiff did not attach a transcript of this deposition (or any other exhibits) to his response brief, and this transcript has not otherwise been made a part of the record provided to the Court. It is a difficult task, to say the least, for Plaintiff to identify genuine issues of material fact without citing *any* record evidence that might give rise to such issues.

pricing during the relevant time period.

The FNS's disqualification decision also was based on a number of instances of three or more transactions by the same food stamp recipient within a very short time frame-48 hours at most, and sometimes all within a single day. One recipient, for example, engaged in ten (10) transactions in less than 48 hours between March 18 and March 20, 2004, with the last two of these transactions occurring within 10 minutes of each other and involving *precisely the same amount, \$29.99.* (See *id.* at 18.) As Defendant points out, apart from the threshold implausibility of a single customer making several separate purchases within a brief time span-which, according to the record, occurred with ten different customers between October of 2003 and March of 2004, (*see id.* at 18-19)-there are multiple instances in the record of a single recipient making two purchases within a few minutes *in exactly the same amount.* In one instance, this was an exact-dollar amount (\$25.00), but the remaining duplicate transactions were in amounts ending in 99 cents-figures which, of course, are flatly inconsistent with Plaintiff's claim of an exact-dollar pricing scheme during this same period.

Plaintiff's explanation for this category of suspicious transactions-supplied by his store manager during a meeting with FNS investigator Jennifer Renegar, but not otherwise supported by any affidavit or sworn testimony from Plaintiff himself-is that his customers likely were selling their food stamp benefits in the store's parking lot, resulting in a single EBT card being used by multiple customers in a short time frame. Indeed, Plaintiff views Ms. Renegar's deposition testimony as lending support to this theory, as she evidently stated that, upon her arrival at Plaintiff's store to investigate possible food stamp trafficking, she observed a number of people in the store's parking lot

immediately begin to disperse.⁴ As Defendant points out, however, Plaintiff's explanation for the documented instances of multiple transactions on a single EBT card within a short time frame does not account for the occasions where two successive purchases under the same account involved the same amount *to the penny*. Once again, then, Plaintiff's proffered explanation appears implausible.

Yet, even if Plaintiff could be said to have identified genuine issues of fact with regard to the first two categories of suspicious transactions cited by the FNS—a task which, as noted, has been made considerably more difficult through Plaintiff's utter failure to cite any supporting evidence in the record—he has not mounted any sort of tenable challenge whatsoever to the agency's finding that his store's food stamp redemptions comprised a disproportionate share of the store's overall sales of eligible food items during the relevant period. In particular, using Plaintiff's own records (such as they are), Defendant has shown that the store's total food stamp redemptions for the period from October of 2003 to March of 2004 (\$11,453.72) actually *exceeded* the store's total sales of eligible food items (\$9,356.93). (*See* Defendant's Motion, Ex. A.)⁵ Similarly, Defendant's computations have revealed that the store's monthly food stamp redemptions exceeded its sales of eligible food items in three of the six months during this period. (*See id.*) Moreover, if one were to combine the store's redemptions under the federal Food Stamp program and Michigan's WIC program, these redemptions (\$63,676.32)

⁴ As noted earlier, the Court is forced to rely on the representations of Plaintiff's counsel regarding Ms. Renegar's deposition testimony, as a transcript of this testimony has not been provided for the Court's review.

⁵ Because Plaintiff failed to produce any sales records for this period, but instead produced only invoices for purchases of stock from the store's suppliers, Defendant has been forced to estimate the relevant sales figures. Defendant did so by totaling up the amounts in the invoices and then applying a 40-percent mark-up, as opposed to the 32-percent mark-up to which store manager Chester Coburn testified at his deposition. Presumably, then, Defendant's estimates have slightly overstated the store's actual sales, and Plaintiff does not suggest otherwise in his response to Defendant's motion.

exceeded the store's total sales of eligible food items (\$9,356.93) by *more than a factor of six* during the period from October of 2003 to March of 2004. (*See id.*)

Plaintiff has failed to raise any issue of material fact as to the validity of these findings. Beyond his vague, unsupported, and largely immaterial assertions about the sorts of customers who frequent his store, (*see, e.g.*, Plaintiff's Response Br. at 4-5 (characterizing the area around Plaintiff's store as "low income and made up of predominantly single households")), Plaintiff suggests only that Defendant's computations are flawed because its estimated sales figures for Plaintiff's store do not include certain "meat bundles" that it occasionally sells to its customers. Yet, leaving aside the fact that Plaintiff evidently did not produce any documentation concerning these "meat bundles" until well after the close of discovery⁶ -an untimely production that presumably was motivated by Plaintiff's discovery that the invoices he had previously furnished could not possibly support his store's food stamp and WIC redemptions-Defendant correctly points out that these meat sales do not begin to close the sizable gap between Plaintiff's food stamp and WIC redemptions and his store's total sales of eligible items during the relevant six-month period.

The first clue that these invoices for meat purchases might not do much to undermine the FNS's findings is that Plaintiff himself makes no effort in his response to Defendant's motion to actually *show* how they would do so-nor, indeed, to even *provide* any such invoices as exhibits to his response. Rather, true to form, Plaintiff merely asserts, without citation to the record or any supporting figures, that these invoices "support that [his store's] inventory is large enough to support the large

⁶The discovery cut-off date in this case was June 30, 2005, but Plaintiff apparently did not provide invoices for these meat purchases until September 22, 2005. (*See* Defendant's Reply Br., Ex. B.)

food stamp transactions."(Plaintiff's Response Br. at 3.) In any event, upon undertaking the task that Plaintiff should have performed, the Court has determined that these meat purchases add roughly \$1,000 per month to the amount Plaintiff spent during the relevant period to stock his store with eligible food items. Applying the same 40-percent mark-up that Defendant used to derive its estimate of Plaintiff's sales, these meat purchases would increase Plaintiff's total estimated sales for the relevant period to roughly \$17,600, rather than roughly \$9,356.93. Even so, the food stamp redemptions of over \$11,400 during this period would still reflect nearly 65 percent of Plaintiff's overall sales-and, of course, these sales of approximately \$17,600 still would not even come close to accounting for the \$63,676.32 in combined food stamp and WIC redemptions during this period. Accordingly, Plaintiff's eleventh-hour attempt to boost his sales figures does not cast any genuine doubt upon Defendant's compelling evidence of food stamp trafficking.

Finally, beyond his various "explanations"-which, as noted, are based largely upon rank speculation and his counsel's bare assertions, and which generally fail to account for the anomalies revealed in the FNS's investigation-Plaintiff advances a more general objection that the FNS impermissibly based its decision on an analysis of EBT transaction records rather than first-hand observation of wrongdoing. As Defendant points out, however, the Food Stamp Act expressly allows disqualification decisions to be based upon "evidence obtained through a transaction report under an electronic benefit transfer system."7 U.S.C. § 2021(a); *see also* 7 C.F.R. § 278.6(a). Accordingly, the courts have upheld disqualification decisions based on analyses of EBT data comparable to that which the FNS performed in this case. *See, e.g., Idias v. United States*, 359 F.3d 695, 698 (4th Cir.2004); *McClain's Market v. United States*, 411 F.Supp.2d 772, 776-77 (N.D.Ohio 2005), *aff'd*, 2006 WL 3780304 (6th Cir. Dec.20, 2006); *Kahin, supra*, 101 F.Supp.2d at 1303-04. There simply is no requirement under the Food Stamp Act that a store be "caught red-handed engaging in food stamp or EBT card fraud" before it may be disqualified from participating in the Food Stamp program. *Kahin*, 101 F.Supp.2d at 1303. Rather, circumstantial evidence may suffice, and the evidence here strongly supports the FNS's

determination that Plaintiff's store had engaged in food stamp trafficking.

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's December 9, 2005 motion for summary judgment is GRANTED.

ISLAM CORP., d/b/a DERBY CITY PRODUCE v. USDA
Civil Action No. 3:05-CV-00801-S.
Filed May 21, 2007.

(Cite as: 2007 WL 1520930).

FSP – Disqualification – Civil money penalty –Hardship, two-part requirement for finding.

Court determined that it did not have jurisdiction to weigh the penalty imposed by the agency for a Grocery store found to have violated WIC program guidelines. The store contended that its disqualification of participation in Food Stamp Program instead of a CMP was not warranted because the regulation regarding finding of “hardship” by a two-step requirement was not followed.

United States District Court
W.D. Kentucky.

MEMORANDUM OPINION

CHARLES R. SIMPSON, III, United States District Judge.

This matter is before the court upon the appeal of the plaintiff, Islam Corp., d/b/a Derby City Produce ("Derby City"), of an administrative decision of the defendant, Michael Johanns ("Johanns"), in his official capacity as Secretary of the United States Department of Agriculture, to

exclude Derby City from participation in the federal Food Stamp Program. Derby City contends that Johanns' decision was based on an erroneous interpretation of the applicable statutes and regulations and was arbitrary and capricious.

BACKGROUND

Derby City is a grocery store located in the West End neighborhood of Louisville, Kentucky. Until recently, Derby City participated in two government-administered programs providing assistance to low income individuals: (1) the Special Supplemental Food Program for Women, Infants and Children ("WIC Program") and (2) the federal Food Stamp Program. The WIC Program is funded by the United States Department of Agriculture ("USDA") and administered by the Kentucky Cabinet for Health and Family Services ("CHFS"). The Food Stamp Program is administered by the USDA through the Food and Nutrition Service ("FNS").

In May 2002, CHFS notified Derby City that it would be disqualified from the WIC Program for three years. CHFS investigators had gone to Derby City on three separate occasions to purchase items under the WIC program. On each visit Derby City overcharged the CHFS investigator. Derby City appealed CHFS' decision to Jefferson Circuit Court, which in January 2005, upheld the disqualification.

In May 2005, the FNS field office in Lexington, Kentucky, notified Derby City that because it had received a WIC disqualification, the regulations promulgated under the Food Stamp Program required either a reciprocal period of disqualification from the Food Stamp Program or the imposition of a civil monetary penalty in lieu of disqualification. Derby City requested that the FNS grant it a hardship exemption from the suspension so that it could instead pay the civil monetary penalty.

FNS, however, responded that a civil monetary penalty in lieu of disqualification was not warranted "because there are 3 stores with comparable stock and 3 large groceries within a 1 mile radius of your

store."In other words, Derby City's disqualification would not pose a hardship to food stamp households because there are other authorized groceries in the area selling as large a variety of staple food items at comparable prices, as required by 7 C.F.R. § 278.6(f), the regulation governing the hardship exemption. Derby City appealed to FNS' Administrative Review Branch, which sustained the decision of the field office. Derby City now brings this appeal.

ANALYSIS

Johanns argues that the court lacks jurisdiction over this matter because 7 U.S.C. § 2021 precludes judicial review of the type of administrative decision in this case. We agree.

Generally, judicial review of a FNS decision to disqualify a grocery from the Food Stamp Program is limited to determining "whether the agency properly applied the regulations, *i.e.*, whether the sanction is unwarranted in law or without justification in fact." *Goldstein v. United States*, 9 F.3d 521, 523 (6th Cir.1993) (quoting *Woodward v. United States*, 725 F.2d 1072, 1077 (6th Cir.1984)); *see also* 7 U.S.C. § 2023. However, § 2021 clearly provides that a disqualification from the Food Stamp Program, which is based on a disqualification from the WIC Program, is not subject to judicial review, notwithstanding the appeals provisions of § 2023.^{1,2}

¹7 U.S.C. § 2021(g) states: (1) The Secretary shall issue regulations providing criteria for the disqualification under this chapter of an approved retail food store or a wholesale food concern that is disqualified from accepting benefits under the special supplemental nutritional program for women, infants, and children established under section 1786 of Title 42.(2) A disqualification under paragraph (1) ... (C) notwithstanding section 2023 of this title, shall not be subject to judicial or administrative review.

²With regard to disqualification from the Food Stamp Program, 7 U.S.C. § 2023(a)(13) provides: If the store, concern, or State agency feels aggrieved by such final

Cont.

The United States District Court for the Southern District of California addressed this very issue in *Salamo v. United States Dep't of Agric.*, 226 F.Supp.2d 1234 (S.D.Cal.2002). In *Salamo*, the government argued that the plaintiff store's disqualification under § 2021(g) was not reviewable. The court agreed, finding that § 2021(g)(2)(C) narrows the scope of judicial review otherwise available under § 2023, and that through § 2021(g)(2)(C) the United States had chosen to limit the scope of its waiver of its sovereign immunity. The same reasoning applies to the case at hand.

Meanwhile, Derby City's counter-argument is flawed. Derby City contends that case law permits the court to review whether the FNS properly applied the statutes and regulations in imposing a sanction. Because it does not seek to have this court assess or weigh the severity of the sanction, Derby City asserts that this court maintains the right to review the FNS decision.

According to Derby City, FNS misapplied the regulation governing the hardship exemption, which imposes a two-part legal requirement for the finding of hardship: (1) that in the "area" in which the store operates there is (2) no other comparable store, with "comparable store" explicitly defined as (a) another authorized retail food store (b) selling as large a variety of staples at (c) comparable prices. 7 C.F.R. § 278.6(f). Derby City's argument is that the FNS failed to assess comparable stores in the area, and as a result, the sanction it imposed is unwarranted in law and without justification in fact, the standard of review delineated by *Goldstein*.

Derby City misapplies *Goldstein*, as well as *R & K Inc. v. United States*, 2000 WL 32013 (6th Cir.2000) and *Prunty v. United States Dep't*

determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court...

of Agric., Food & Nutrition Serv., 573 F.Supp. 1015 (S.D.Ohio 1983), two other cases it cites for the same proposition. In each of these cases the plaintiff was "directly" disqualified from the Food Stamp Program, not "indirectly" or "reciprocally" for having first been disqualified from the WIC program. Thus, these courts never dealt with the issue presented by 7 U.S.C. § 2021, as the court in *Salamo* did.

Derby City, however, contends that *Salamo* has not been followed in this circuit or by any other court. They are correct. Nevertheless, the *Salamo* court's reasoning has also not been *rejected* by this circuit or any other court. Although Derby City asserts that *Salmo's* reasoning has been *implicitly* rejected by many courts, we have yet to find a case which does so. Those cases cited by Derby City in support of its assertion, *East Food & Liquor, Inc. v. United States*, 50 F.3d 1405 (7th Cir.1995), *Davis v. United States*, 847 F.Supp. 120 (E.D.Wis.1993), and *Kim v. United States*, 822 F.Supp. 107 (E.D.N.Y.1993), are inapplicable. These cases were decided before the 1996 amendments to 7 U.S.C. § 2021, which added subsection (g), the subsection proscribing judicial review of reciprocal disqualifications. *See* 7 U.S.C.A. § 2021 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, § 843, 110 Stat. 2105 (1996).

Moreover, even if judicial review was permitted, the language of 7 C.F.R. § 278.6(f) does not mandate a civil monetary penalty in lieu of disqualification when the criteria for assessing a civil monetary penalty are met. The language clearly states that the "FNS *may* impose a civil money penalty as a sanction in lieu of disqualification." *Id.* Thus, the decision t[o] impose a civil monetary penalty is left to the discretion of the FNS.

As such, we must dismiss this case for lack of subject matter jurisdiction. A separate order in accordance with this opinion will be entered.

DASMESH ENTERPRISES, INC. d/b/a QUICK WAY PARTY STORE v. USDA.

No. 1:07-CV-28.

May 30, 2007.

(Cite as: 501 F.Supp.2d 1033).

FSP – WIC – Intent to overcharge – Corrective actions – Disqualification – Penalty, choice of penalty.

Court found that “no intent to overcharge” and “post investigation corrective actions taken” are not relevant as to the innocence of the infraction. Court rejected the arguments of participating store implicated in WIC improprieties stating there was no duty to warn merchants of investigation. Court had no jurisdiction to require the enforcing Agency to utilize a Civil Money Penalty in lieu of disqualification.

**United States District Court
W.D. Michigan, Southern Division.**

OPINION

ROBERT HOLMES BELL, Chief Judge.

Plaintiff Dasmesh Enterprises, Inc., d/b/a Quick Way Party Store, filed this action against the United States of America and the United States Department of Agriculture to challenge an administrative order suspending Plaintiff from the Food Stamp and WIC program for three years. This matter is currently before the Court on the government Defendants' motion to dismiss Plaintiff's complaint. For the reasons that follow Defendants' motion will be granted.

I.

Plaintiff Dasmesh Enterprises, Inc., d/b/a Quick Way Party Store, is located in Benton Harbor, Michigan. For a number of years Plaintiff has been an approved vendor for the United States Department of

Agriculture ("USDA"), Food and Nutrition Service's ("FNS") Food Stamp Program and the Women, Infants and Children ("WIC") Program. In October 2005 Plaintiff received notice from the Michigan Department of Community Health ("MDCH"), the state agency that administers the WIC Program, that it was disqualified for three years as a WIC Program vendor based upon a pattern of overcharges. (Compl.Ex. B). The reason given for Plaintiff's disqualification was that on three separate occasions between April and August 2005 Plaintiff charged the WIC Program more than the shelf price of the items purchased by an investigator. (Compl.Ex. B). The notice further advised that Plaintiff's disqualification from the WIC Program might result in its disqualification from participation in the Food Stamp Program and that such a disqualification might not be subject to administrative or judicial review. (Compl.Ex. B).¹

An administrative hearing was held before the MDCH at Plaintiff's request. (Compl.Ex. C). At the hearing Plaintiff argued that there was no intent to overcharge the WIC Program, that there was really only one violation, and that it had taken corrective action. (Compl.Ex. F). On January 13, 2006, the MDCH administrative law judge affirmed the three year disqualification based upon a finding that Plaintiff had engaged in a pattern of overcharges. (Compl.Ex. D). Plaintiff did not seek judicial review of the adverse administrative decision in state court.

In March 2006 Plaintiff received notice from the USDA that as a

¹The federal WIC regulations provide:

Reciprocal Food Stamp Program disqualification for WIC Program disqualifications. Disqualification from the WIC Program may result in disqualification as a retailer in the Food Stamp Program. Such disqualification may not be subject to administrative or judicial review under the Food Stamp Program.

7 C.F.R. § 246.12(h)(3)(xxv).

result of its disqualification from the WIC Program, Plaintiff would also be disqualified from continuing to participate as a Food Stamp Program vendor. (Compl.Ex. E).² Plaintiff promptly responded to the notice, reiterating the arguments it raised before the MDCH. (Compl.Ex. F). On April 6, 2006, the USDA imposed a three year disqualification from the Food Stamp Program and denied a civil money penalty. (Compl.Ex. G). The notice stated:

On April 12, 2006, Plaintiff appealed the USDA's decision disqualifying Plaintiff from the Food Stamp Program for three years rather than imposing a civil money penalty. (Compl.Ex. H). On December 6, 2006, the USDA issued a final agency decision upholding the denial of Plaintiff's request for a civil money penalty in lieu of disqualification. (Compl.Ex. A).

Plaintiff filed this action seeking reversal of its disqualifications from the WIC and Food Stamp Programs based upon Plaintiff's contentions that the USDA acted contrary to law by 1) failing to give notice of the

²The Food Stamp regulations provide:

FNS shall disqualify from the Food Stamp Program any firm which is disqualified from the WIC Program ... (i) ... for any of the following specific program violations: ... (E) A pattern of charging WIC customers more for food than non-WIC customers or charging WIC customers more than the current shelf price.

7 C.F.R. § 278.6(e)(8)(i)(E).

The determination that your firm is subject to reciprocal administrative action on the basis of the disqualification from the WIC Program is final and is not subject to administrative review, in accordance with the Food Stamp Act of 1977, as amended, and § 278.6(e) of the FSP regulations. However, appeal rights are available regarding the FNS determination made with regard to your firm's eligibility for a hardship civil money penalty.

(Comp.Ex. G) (emphasis in original).

pricing error, 2) by treating a single pricing error as multiple violations, and 3) by failing to grant a monetary penalty in lieu of disqualification. In its amended complaint Plaintiff has added a count for mandamus, seeking an order directing the WIC Program to give the required notice. Plaintiff also filed a motion to stay the order of disqualification pending judicial review.

The government has moved to dismiss Plaintiff's complaint for lack of subject matter jurisdiction because the USDA's decision is not subject to judicial review.

II.

In Counts 1 and 2 Plaintiff seeks reversal of its disqualification from the Food Stamp and WIC programs based upon the USDA's (or its agent, the MDCH's) alleged violations of federal law by failing to give notice of the pricing error, and by treating a single pricing error as multiple violations. The government moves to dismiss Counts 1 and 2 on the basis that this Court does not have jurisdiction to consider these claims.

The United States, as sovereign, "is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)). "This principle extends to agencies of the United States as well, which are immune absent a showing of a waiver of sovereign immunity." *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir.1993). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Testan*, 424 U.S. at 399, 96 S.Ct. 948 (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)).

Congress has conditionally waived its sovereign immunity and

permitted retailers involved in the Food Stamp Program to obtain judicial review of disqualification decisions through 7 U.S.C. § 2023(a). *Shoulders v. U.S. Dep't of Agric.*, 878 F.2d 141, 143 (4th Cir.1989) (holding that § 2023(a) is a conditional waiver of sovereign immunity). However, the Food Stamp Act contains an exception to § 2023. When a retailer is disqualified from the WIC Program, the Food Stamp Act provides for a mandatory reciprocal disqualification from the Food Stamp Program:

(g) Disqualification of retailers who are disqualified under the WIC program

(1) In general

The Secretary shall issue regulations providing criteria for the disqualification under this chapter of an approved retail food store or a wholesale food concern that is disqualified from accepting benefits under the special supplemental nutrition program for women, infants, and children established under section 1786 of Title 42.

7 U.S.C. § 2021(g)(1). When a retailer is disqualified from the Food Stamp Program under this section, the statute provides that the disqualification is not subject to judicial review:

A disqualification under paragraph (1)-

(A) shall be for the same length of time as the disqualification from the program referred to in paragraph (1);

(B) may begin at a later date than the disqualification from the program referred to in paragraph (1); and

(C) notwithstanding section 2023 of this title, shall not be subject to judicial or administrative review.

7 U.S.C. § 2021(g)(2) (emphasis added).

The implementing regulations are consistent with the statute. The regulations provide that "FNS shall disqualify from the Food Stamp Program any firm which is disqualified from the WIC Program." 7 C.F.R. § 278.6(e)(8) (emphasis added). With respect to judicial review the regulations provide that "Except for firms disqualified from the program in accordance with § 278.6(e)(8)," (i.e., in accordance with a WIC disqualification), the firm may obtain judicial review of the determination. 7 C.F.R. § 279.7 (emphasis added). The Food Stamp Act and its implementing regulations expressly and unambiguously preclude judicial review of a store's mandatory reciprocal disqualification from the Food Stamp Program triggered by the store's disqualification from the WIC Program.

The parties have identified only one court that has considered § 2021(g). In *Salmo v. United States Dep't of Agric.*, 226 F.Supp.2d 1234 (S.D.Cal.2002), the court stated that in § 2021(g)(2)(C)"Congress has unambiguously stated that decisions by the FNS disqualifying a store from participating in the FSP as a result of a prior WIC disqualification are not subject to administrative or judicial review." *Id.* at 1237. "The explicit statement in § 2021(g)(2)(C), narrowing the scope of judicial review available under § 2023, thus serves to narrow the scope of the government's waiver of sovereign immunity and this Court's exercise of subject matter jurisdiction." *Id.* at 1237.

Plaintiff acknowledges that its 2005 disqualification from the WIC Program was the sole basis for its subsequent disqualification from the Food Stamp Program. (Compl._ 22). Notwithstanding the clear language of the statute and regulations barring judicial review in just such circumstances, Plaintiff contends that the prohibition against judicial review does not apply in this case because Plaintiff's disqualification from the WIC Program was not "in accordance with § 278.6(e)(8)." Specifically, Plaintiff contends that its disqualification was not based upon a proper application of applicable USDA regulations because the MDCH erroneously determined that Plaintiff had engaged in a "pattern"

of charging WIC more than the shelf price and failed to give Plaintiff proper notice of its pricing error.

Plaintiff cites *Goldstein v. United States*, 9 F.3d 521 (6th Cir.1993), and *Anton v. United States*, 225 F.Supp.2d 770 (E.D.Mich.2002), in support of its contention that this court has jurisdiction to inquire "whether the agency properly applied the regulations, i.e., whether the sanction is "unwarranted in law" or "without justification in fact." "*Goldstein*, 9 F.3d at 523. *See also Anton*, 225 F.Supp.2d at 773-74 (following *Goldstein*). Plaintiff contends that the MDCH's repeated failure to follow the government's own regulations in dealing with Plaintiff was the "but for" reason why Plaintiff was sanctioned, and that under *Goldstein* and *Anton* the Court has jurisdiction to determine the validity of the underlying WIC disqualification.

Neither *Goldstein* nor *Anton* authorizes the court to review the administrative liability decision. Neither of these cases involved a mandatory reciprocal disqualification from the Food Stamp Program based a disqualification from the WIC Program. Accordingly, unlike this case, the administrative liability findings in *Goldstein* and *Anton* were subject to judicial review under § 2023. Furthermore, the language from *Goldstein* on which Plaintiff relies comes from a discussion concerning the scope of the court's review of the sanction imposed. The quoted language does not suggest that the Court may review the basis for the underlying disqualification decision in the course of reviewing the propriety of the decision not to impose a civil monetary sanction.³ Neither *Goldstein* nor *Anton* suggests that this Court has jurisdiction to review the underlying WIC disqualification.

³ The full sentence from *Goldstein* reads as follows:

Once the trial court has confirmed that the store has violated the statutes and regulations, the court's only task is to examine the sanction imposed in light of the administrative record in order to judge whether the agency properly applied the regulations, i.e., whether the sanction is "unwarranted in law" or "without justification in fact."

Goldstein, 9 F.3d at 523.

Furthermore, Plaintiff's argument that it should be able to circumvent § 2021(g)(2)'s prohibition of judicial review simply because it disagrees with the basis for its disqualification from the WIC Program would render § 2021(g)(2) meaningless. An entity disqualified from the WIC Program could always argue that its disqualification from the WIC program was not proper or was not "in accordance with" the law in order to avoid the jurisdictional bar. This is not what Congress intended.

Plaintiff was disqualified from the Food Stamp Program based upon its disqualification from the WIC Program. Plaintiff had an opportunity to challenge its disqualification from the WIC Program at a state administrative hearing. Plaintiff also could have, but did not, appeal the adverse administrative determination to the state court. Congress has clearly stated that it will not permit a duplicate review of the WIC disqualification determination in federal court. 7 U.S.C. § 2021(g)(2). This is exactly the type of administrative decision that Plaintiff challenges in Counts 1 and 2 of its complaint. Plaintiff's disqualification from the Food Stamp Program is not subject to judicial review. Defendant's motion to dismiss Counts 1 and 2 must accordingly be granted, and Counts 1 and 2 of Plaintiff's complaint must be dismissed for lack of jurisdiction.

III.

In Count 3 of its complaint Plaintiff challenges the USDA's denial of a civil money penalty in lieu of disqualification.

The USDA's letter of April 6, 2006, advised that although the determination that Plaintiff was subject to reciprocal administrative action on the basis of its disqualification from the WIC Program was final and was not subject to administrative review, "appeal rights are

available regarding the FNS determination made with regard to your firm's eligibility for a hardship civil money penalty." (Compl.Ex. G).

Plaintiff challenges the USDA's failure to impose a money penalty because of the USDA's legal errors described in Counts 1 and 2. (Compl. 24). Plaintiff contends that because the disqualification was based upon a single inadvertent error and because the MDCH failed to notify Plaintiff before finding three violations, Plaintiff should only have been given a token penalty in lieu of disqualification. (Compl. 24-26).

Even though the Court has jurisdiction to review the agency's decision not to impose a money penalty in lieu of disqualification, the "[d]etermination of a sanction to be applied by an administrative agency, if within bounds of its lawful authority, is subject to very limited judicial review." *Woodard v. United States*, 725 F.2d 1072, 1077 (6th Cir.1984). "The reviewing court's function is only to "determine the validity of the questioned administrative action," not to review the sanctions." *Id.* (quoting *Martin v. United States*, 459 F.2d 300, 302 (6th Cir.1972)). The scope of the court's review is limited to determining "whether the agency properly applied the regulations." *Goldstein*, 9 F.3d at 523. "If the agency properly applied the regulations, then the court's job is done and the sanction must be enforced. The trial *de novo* is limited to determining the validity of the administrative action; the severity of the sanction is not open to review." *Id.*

The applicable regulations provide that the FNS may impose a civil money penalty as a sanction in lieu of disqualification when the following criteria are met:

when the firm subject to a disqualification is selling a substantial variety of staple food items, and the firm's disqualification would cause hardship to food stamp households because there is no other authorized retail food store in the area selling as large a variety of staple food items at comparable prices.

7 C.F.R. § 278.6(f)(1).

The December 6, 2006, Final Agency Decision indicates that the USDA did consider whether disqualification of Plaintiff would cause hardship to food stamp households. (Compl.Ex. A). The USDA concluded that disqualification of Plaintiff would not cause hardship to food stamp households because there were other comparable stores within one mile. *Id.*

Plaintiff has not alleged that the government failed to follow the regulations that govern the imposition of a civil money penalty as a sanction in lieu of disqualification. Instead, Plaintiff contests its liability for any sanction whatsoever, or the severity of the sanction imposed. Neither argument is within the narrow scope of review accorded to the USDA's decision not to impose a money penalty in lieu of disqualification. The Court's jurisdiction to review sanctions does not subject the underlying liability for sanctions or the severity of the sanctions imposed to judicial review. Accordingly, the Court does not have jurisdiction over Count 3 of Plaintiff's complaint which challenges the sanction imposed.

IV.

In Count IV of its First Amended Verified Complaint Plaintiff requests an order pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361, setting aside the USDA's December 6, 2006, final agency decision and the MDCH's October 6, 2005, notice of termination and disqualification and directing the USDA to provide the notice required by the WIC Program regulations, 7 C.F.R. § 246.12(h)(3)(ix).

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kelly v. Great Seneca Fin. Corp.*, 447 F.3d 944, 951 (6th Cir.2006) (quoting *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976)). "In order for the court to accept mandamus jurisdiction, [the plaintiff] must

show that (1) he has exhausted all available administrative remedies and (2) the Commissioner violated a clear, nondiscretionary duty owed to [the plaintiff]." *Buchanan v. Apfel*, 249 F.3d 485, 491 (6th Cir.2001). "While a district court may issue an order in the nature of mandamus under § 1361 only when the duty owed the plaintiff is clear, the district court may take jurisdiction to determine if a clear duty is owed to the plaintiff." *Coal Operators and Assoc., Inc. v. Babbitt*, 291 F.3d 912, 915 (6th Cir.2002).

This case does not present the kind of extraordinary circumstances that would merit a mandamus remedy. Congress has made it clear that when a vendor is disqualified from the Food Stamp Program based upon its disqualification from the WIC Program, the vendor will not be able to seek judicial review. 7 U.S.C. § 2021(g)(2). Plaintiff was on notice that its disqualification from the WIC Program could result in its disqualification from the Food Stamp Program and that the Food Stamp disqualification may not be subject to administrative or judicial review. (Compl.Ex. B).

Plaintiff's inability to challenge the basis for the WIC disqualification at this time and in this forum is not unreasonable. Plaintiff had an opportunity (which it took) to challenge its disqualification from the WIC Program at an administrative tribunal before the MDCH. Plaintiff then had the opportunity to appeal the adverse ruling from the MDCH to the state circuit court. Plaintiff did not take that opportunity notwithstanding its knowledge that the adverse ruling could affect its participation in the Food Stamp Program, and notwithstanding its knowledge that a disqualification from the Food Stamp Program would not be subject to judicial review.

In addition to the fact that Plaintiff has been afforded sufficient procedural protections, Plaintiff has also failed to identify the breach of any clear legal duty. Plaintiff claims that it was entitled to notification of

its overcharge and an "opportunity to justify or correct" the overcharge pursuant to 7 C.F.R. § 246.12(h)(3)(ix).⁴ This provision applies when there is a dispute as to the amount of a vendor's claim for reimbursement. This provision does not apply to investigations into whether a store is in compliance with program regulations. The federal WIC regulations provide for a mandatory three year disqualification for a pattern of overcharges. 7 C.F.R. § 246.12(l)(1)(iii). In connection with the mandatory sanctions identified in § 246.12(l)(1) the regulations provide:

The State agency does not have to provide the vendor with prior warning that violations were occurring before imposing any of the sanctions in paragraph (1) of this section. 7 C.F.R. § 246.12(l)(3) (emphasis added). Moreover, the WIC Vendor Sanction Policy, which is referenced in Plaintiff's contract with the MDCH states in capital letters:

⁴ The vendor claim provision Plaintiff relies on states as follows:

(ix) Vendor claims. When the State agency determines the vendor has committed a vendor violation that affects the payment to the vendor, the State agency will delay payment or establish a claim.... The State agency will provide the vendor with an opportunity to justify or correct a vendor overcharge or other error....

7 C.F.R. § 246.12(h)(3)(ix).

THE DEPARTMENT WILL NOT PROVIDE VENDORS WITH PRIOR WARNING (NO WARNING LETTERS) THAT VIOLATIONS WERE OCCURRING BEFORE IMPOSING THE MANDATORY SANCTIONS REQUIRED BY USDA FEDERAL REGULATIONS SET FORTH IN SECTION C OF THIS SANCTION POLICY.

(Compl. Ex. J, at 6).

There is no dispute that the overcharges in this case were discovered during a covert compliance investigation. Notice under such circumstances would defeat the purpose of the investigation. Because notice was not required under the circumstances of this case, Plaintiff has failed to show that Defendants violated any clear, nondiscretionary duty. Accordingly, the Court lacks jurisdiction over Plaintiff's request for mandamus relief in Count 4.

V.

For all the reasons stated herein the Court lacks subject matter jurisdiction over Plaintiff's complaint. Defendants' motion to dismiss for lack of jurisdiction will accordingly be granted. Because this action is being dismissed, there is no need for the Court to address Plaintiff's motion for a stay of the order of disqualification pending a review of the administrative decision on the merits.

An order of dismissal consistent with this opinion will be entered.

LESLIE BRYANT, d/b/a LESLIE'S MARKET v. USDA.
Civil Action No. 2:06-1031.
Filed June 4, 2007.

(Cite as: 2007 WL 1651846).

FSP – WIC – Forum removal – Reciprocal.

Court rejected FSP participant's objection to removal of the appeal to Federal Court.

**United States District Court
S.D. West Virginia.**

MEMORANDUM OPINION AND ORDER

JOHN T. COPENHAVER, JR., United States District Judge.
Pending before the court is plaintiff's motion, filed December 22, 2006,
seeking remand of this action to the Circuit Court of Logan County.

I.

Plaintiff owns and operates Leslie's Market, a retail food store located in Verdunville, West Virginia. (Compl. 3.) Leslie's Market participates in the federal Food Stamp Program which is administered by the Food and Nutrition Service ("FNS"), a component agency of the United States Department of Agriculture. (*Id.* 3-4; Not. of Rem. 4.)

Between August 2004 and January 2006, FNS conducted a regulatory investigation and concluded Leslie's Market violated the rules and regulations of the Food Stamp Program. (*Id.* 6.) On or about December 4, 2006, FNS issued a final agency decision which suspended Leslie Market's participation in the Food Stamp Program for three years beginning on December 13, 2006.¹ (*Id.* 11.) On December 6, 2006, plaintiff instituted this action requesting judicial review of this decision, and on December 8, 2006, the United States of America removed the action on behalf of the named agencies pursuant to 28 U.S.C. § 1442(a)(1).

¹ FNS has agreed to stay the suspension pending the outcome of this action.

II.

The Food Stamp Act provides that

If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction ...

7 U.S.C. § 2023(a)(13).

Plaintiff tersely contends that inasmuch as "venue in these types of cases has not been limited to the United States district courts" the defendants "should not be permitted to dictate the forum in which the judicial review takes place." Plaintiff cites no case authority in support of its position and fails to acknowledge the existence of 28 U.S.C. 1442(a)(1) which states

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States *or any agency thereof*, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(emphasis supplied).

The United States Supreme Court has observed that "the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). The United States Court of Appeals for the Fifth Circuit has also observed that "[t]he

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d/b/a LESLIE'S MARKET v. USDA
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only prerequisite to removal of a civil action under § 1442 is that it be brought against a federal officer or agency." *IMFC Professional v. Latin Am. Home Health*, 676 F.2d 152, 156 (5th Cir.1982). Accordingly, the court concludes removal of this action was proper under 28 U.S.C. 1442(a)(1).

III.

In view of the foregoing, it is ORDERED that plaintiff's motion to remand be, and it hereby is, denied.

The Clerk is directed to forward copies of this order to all counsel of record.

FOOD STAMP PROGRAM**DEPARTMENTAL DECISION**

**In re: IDAHO DEPARTMENT OF HEALTH AND WELFARE
STATEWIDE SELF RELIANCE PROGRAMS.**

FSP Docket No. 06-0001.

Decision and Order.

Filed January 23, 2007.

FSP – QC error – Appeal late filed – Notice of claim – Authority to extend time for filing – Request for hearing – Motion to dismiss.

Jeffrey Vale for FNS.

James Tucker, James I. Vasile, Jocelyn B. Somers, Sara Denniston Eddie for Appellants.

Decision and Order by Chief Administrative Law Judge Marc. R. Hillson.

Decision and Order Dismissing Appeal

Appellee Food and Nutrition Service's Motion to Dismiss is **GRANTED**. I conclude that, as a result of Appellant's late filing of its appeal petition, I have no jurisdiction to conduct a hearing in this matter. Accordingly, I must dismiss the appeal.

Procedural Background

On June 23, 2006, Roberto Salazar, Administrator of the United States Department of Agriculture's Food and Nutrition Service, sent a letter to Richard Armstrong, Director, Idaho Department of Health and Welfare, informing him that the Idaho Department of Health and Welfare was liable for penalties in the amount of \$240,951 for quality control (QC) errors resulting in excessive payments under the food stamp program pursuant to the Food Stamp Act of 1977 (the Act). The letter further informed Mr. Armstrong that "This letter serves as notice of your State's liability amount pursuant to Section 16(c)(I)(C) of the Act. Enclosed is a Notice of Claim/Bill for Collection in the amount of

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\$240,951.00.” The letter advised Mr. Armstrong that if the State of Idaho wished to appeal this assessment it must file a Notice of Appeal within 10 days of receipt of the Notice of Claim/Bill for Collection.

On July 6, 2006, Russell Barron, Administrator of Appellant, filed Idaho’s appeal with USDA’s Office of Administrative Law Judges.¹ The Notice of Appeal was received on July 13, 2006, at which point Joyce Dawson, USDA’s Hearing Clerk, sent a letter to Appellant assigning a docket number to the case. In her letter, the Hearing Clerk specifically informed appellant that “the State agency must file and serve its appeal petition, as set forth in § 283.22 not later than 60 days after receiving a notice of the claim. Failure to file a timely appeal petition may result in a waiver of further appeal rights.” (emphasis in original).

A Petition to Appeal Error Rate Liability Assessment, dated September 8, 2006 was submitted that day via fax to the Hearing Clerk.

On November 6, 2006, Appellee filed a Motion to Dismiss, pursuant to 7 C.F.R. § 283.5, contending that Appellant filed its Appeal Petition in an untimely manner. Appellee contended that Appellant received the Notice of Claim letter on June 26, 2006, but did not file its appeal petition until September 8, 2006, 74 days after receipt of the notice of claim and 14 days out of time.

On November 20, 2006 Appellant filed a response to the Motion to Dismiss and requested that the case be scheduled for hearing.

I conducted a conference call with the parties on January 12, 2007 to discuss the Motion to Dismiss. Willard Abbott, Esq., represented Appellant and Angela Gusky, Esq. represented Appellee.

Discussion

The Food Stamp Act of 1977 requires the Secretary of Agriculture to

¹ An appeal dated July 3, 2006 was mistakenly filed with the wrong USDA office, but the timeliness of the filing of the Notice of Appeal is not an issue.

notify states if their payment error rates give rise to a liability amount based on the difference between the state's error rate and the national average payment error rate. 7 U.S.C. § 2025(c). The Secretary must notify the state of the payment claims or liability amounts before June 30 after the end of the fiscal year in question. If the state disagrees with the Secretary's determination of the payment claim or liability amount, the state

. . . shall submit to an administrative law judge—

(i) a notice of appeal not later than 10 days after receiving a notice of the claim or liability amount; and

(ii) evidence in support of the appeal of the State agency, no later than 60 days after receiving a notice of the claim or liability amount.

7 U.S.C. § 2025 (c) (8) (D).

The Secretary promulgated regulations further detailing the procedures for appealing these claims. The procedures for appealing QC claims of over \$50,000 requires the Hearing Clerk, after receiving the Notice of Appeal, to assign the case a docket number and to instruct the state as to the requirements of the appeal petition. The Hearing Clerk is specifically required to notify the state of the necessity of filing the petition within 60 days of receipt of the notice of claim. 7 C.F.R. § 283.4(e)(iii).

It is undisputed that all the procedural niceties were complied with here. Appellant contends, however, that certain aspects of the regulations were ambiguous or confusing so that it can be excused for filing its petition late. I disagree.

First, Appellant contends that the word "claim" as defined in the regulations does not necessarily refer to the term "QC claim." Appellant cites to an obvious typographical error in that the definition section of the regulations defines "OC claim" as the claim made pursuant to 7 U. S. C. § 2025(c). However, the absence of any such term as "OC claim" in the regulations, coupled by the fact that by its own terms the definition is

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referring to the claim specified in the statute, renders this contention feckless.

Second, Appellant contends that the fact Appellee referred to its demand for payment as a “Notice of Claim/Bill for Collection” somehow entitled Appellant to believe that it was not the document that was referred to in either the regulations or statute. This argument is particularly puzzling given that the June 23, 2006 letter specifically stated that the Act required the Secretary “to notify State agencies of payment claims or liability amounts. This letter serves as notice of your State’s liability amount pursuant to Section 16(c)(1)(C) of the Act. Enclosed is a Notice of Claim/Bill for Collection in the amount of \$240,951.00.” If that somehow did not indicate to Appellant that the Secretary was submitting a Notice of Claim, the next page of the letter clearly spells out Appellant’s appeal rights, with the cite to the governing regulations. Further, Appellant did file an appeal and one must ask what Appellant thought it was appealing if not the Notice of Claim. Moreover, upon receipt of the appeal the Hearing Clerk specifically and unambiguously notified Appellant of the requirement that the appeal petition be filed within 60 days of receipt of the Notice of Claim. There is nothing in this record that would justify me to find that Idaho had “no concrete basis” for construing the Notice of Claim as anything other than a claim made pursuant to 7 U. S. C. § 2025(c).

Likewise, Appellant’s final contention that the 60 day period in the Hearing Clerk’s letter referred to Idaho’s “claim” for a hearing rather than the “Notice of Claim” is weak. The letter clearly states that the 60 days was calculated from Idaho’s receipt of the notice of claim. This can hardly be confused with Idaho’s “claim”² for a hearing, which would not have been “received” by Appellant. Indeed, Appellant had not even

² A hearing is normally requested or demanded or moved for rather than being claimed. Thus, the rules indicate that the appeal petition contain “A request for an oral hearing, if desired.” 7 C.F.R. § 283.4(g)(3).

requested a hearing in their appeal letter, but only indicated they would be submitting³ a “statement of the issues, our position and evidence supporting our position.” It was not until the untimely filed petition on September 8, 2006 that Idaho even requested a hearing, so the grounds for the State’s alleged confusion are basically nonexistent.

At the telephone conference, Counsel for Appellant suggested that I should find that the regulations, and perhaps the statute, were vague and obscure and that I should deny the Motion to Dismiss and schedule the matter for hearing. Unfortunately, the filing of evidence in support of the State’s appeal within 60 days is a statutory mandate, something which I have no authority to overturn. While the Act allows me to extend deadlines “for cause shown,” none of the reasons for late filing propounded by Appellant constitutes good cause. 7 U.S.C. 2025(c)(8)(i).

Order

Appellee’s Motion to Dismiss is **GRANTED**.

This decision shall become final and effective 30 days after service unless appealed to the Judicial Officer within that time.

³ Mr. Barron’s appeal letter stated “. . . evidence . . . will be sent within the next 30 days.”

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**In re: IDAHO DEPARTMENT OF HEALTH AND WELFARE
STATEWIDE SELF RELIANCE PROGRAMS.**

FSP Docket No. 06-0001.

Decision and Order.

Filed June 27, 2007.

FSP – Food stamp program – Late-filed appeal petition – Notice of the claim – Authority to extend time for filing – Request for hearing – Motion to dismiss.

The Judicial Officer granted the Administrator's Motion to Dismiss. The Judicial Officer concluded the Idaho Department of Health and Welfare (Idaho) filed its appeal petition with the Hearing Clerk 14 days after the time expired for filing the appeal petition. The Judicial Officer found Idaho had no reasonable basis for confusing the Hearing Clerk's informational letter with a notice of the claim which triggered the running of the 60-day time limit in 7 U.S.C. 2025(c)(8)(D)(ii) (2000 & Supp. IV 2004) and 7 C.F.R. § 283.4(e)(1)(iii) for filing an appeal petition. The Judicial Officer rejected Idaho's contention that an administrative law judge could extend the time for filing an appeal petition under the "good cause" provision in 7 U.S.C. § 2025(c)(9)(E) (2000). The Judicial Officer stated the only basis provided in the Food Stamp Act for not meeting the 60-day deadline for filing an appeal petition is an extension of time granted by an administrative law judge for cause shown (7 U.S.C. §2025(c)(8)(I) (2000)) and a request for an extension of time to file an appeal petition must be submitted to the administrative law judge prior to the expiration of the original time for filing the appeal petition (7 C.F.R. § 283.22(f)). The Judicial Officer further found Idaho's argument that its request for hearing constituted "a notice of the claim" without merit. The Judicial Officer stated the regulations detailing the procedures for state agency appeal of quality control claims provide no basis for Idaho's confusing its request for hearing with a notice of the claim. The regulations (7 C.F.R. § 283.4(g)(3)) explicitly state the appeal petition shall contain a request for oral hearing, if desired by the state agency. As the request for oral hearing is required to be included in the appeal petition, the Judicial Officer found the request for hearing could not also constitute the beginning of the 60-day period for filing the appeal petition. The Judicial Officer further stated 7 C.F.R. § 283.4(e)(1)(iii) provides that a state agency must file its appeal petition not later than 60 days after receiving a notice of the claim and Idaho cannot be said to have "received" its own request for hearing.

Angela M. Gusky and Jill R. Maze, for the Food and Nutrition Service.
Willard R. Abbott, Boise, ID, for the Idaho Department of Health and Welfare.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Roberto Salazar, the Administrator, Food and Nutrition Service, United States Department of Agriculture [hereinafter the Administrator], pursuant to the Food Stamp Act, as amended [hereinafter the Food Stamp Act],¹ sent a letter dated June 23, 2006, to the Idaho Department of Health and Welfare [hereinafter Idaho] notifying Idaho of its food stamp program quality control error rate for fiscal year 2005. The Administrator also informed Idaho that the letter served as notice of Idaho's \$240,951 liability amount for fiscal year 2005 and that, if Idaho wished to appeal the \$240,951 liability amount, it must file a notice of appeal with the Hearing Clerk, within 10 days of receipt of the liability amount and notice of claim/bill for collection. Attached to the June 23, 2006, letter was a bill for collection of the \$240,951 liability amount.² On June 26, 2006, Idaho received the June 23, 2006, letter and bill for collection. On July 13, 2006, Idaho filed a notice of appeal with the Hearing Clerk stating "[a] statement of the issues, our position, and evidence supporting our position will be sent within the next 30 days."

In mid-July 2006, the Hearing Clerk, by letter, informed Idaho that its notice of appeal had been received, that it must file and serve its appeal petition not later than 60 days after receiving a notice of the claim, and that failure to file a timely appeal petition may result in a waiver of further appeal rights.

On September 8, 2006, Idaho filed a Petition to Appeal Error Rate Liability Assessment. On November 6, 2006, the Administrator filed a Motion to Dismiss contending Idaho's Petition to Appeal Error Rate

¹7 U.S.C. §§ 2011-2036 (2000 & Supp. IV 2004).

²Pursuant to the Food Stamp Act, the Administrator placed 50 percent of the liability amount (\$120,475.50) at-risk for payment to the Secretary of Agriculture if an excessive payment error rate is established for fiscal year 2006 and designated 50 percent of the liability amount (\$120,475.50) to be used by Idaho for new investment to improve Idaho's administration of the food stamp program. (See 7 U.S.C. § 2025(c)(1)(D) (2000 & Supp. IV 2004).)

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Liability Assessment had not been timely filed. The Administrator asserted Idaho received a notice of the claim on June 26, 2006, but did not file its Petition to Appeal Error Rate Liability Assessment with the Hearing Clerk until September 8, 2006, 74 days after receipt of the notice of the claim and 14 days late. On November 20, 2006, Idaho filed a response to the Administrator's Motion to Dismiss and requested that the case be scheduled for hearing.

On January 23, 2007, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] filed a Decision and Order Dismissing Appeal in which he granted the Administrator's Motion to Dismiss. On February 20, 2007, Idaho filed an Appeal Petition for Review by Judicial Officer and Idaho's Brief in Support of Reversal by Judicial Officer. On March 23, 2007, the Administrator filed Appellee's Response in Opposition to the State of Idaho's Appeal Petition and Brief in Support Thereof. On March 29, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.³

DISCUSSION

The Food Stamp Act requires the Secretary of Agriculture to notify a state agency if its fiscal year payment error rate gives rise to a payment claim or liability amount based on the difference between the state agency's error rate and the national average payment error rate.⁴ The Food Stamp Act further provides, if a state agency disagrees with the Secretary of Agriculture's determination of the payment claim or liability amount, the state agency shall submit to an administrative law judge:

³I had some concern regarding my jurisdiction to issue a decision in the instant proceeding. Through Stephen M. Reilly, an attorney with the Office of the Judicial Officer, I requested that each party submit a brief regarding my jurisdiction, and, in June 2007, each party submitted a brief which supports the argument that I have jurisdiction to issue a decision in the instant proceeding.

⁴7 U.S.C. § 2025(c)(8)(C) (2000 & Supp. IV 2004).

(1) a notice of appeal not later than 10 days after receiving notice of the payment claim or liability amount; and (2) evidence in support of the appeal not later than 60 days after receiving notice of the payment claim or liability amount.⁵

The Secretary of Agriculture promulgated regulations further detailing the procedures for state agency appeal of these quality control claims.⁶ The regulations relating to state agency appeal of quality control claims of \$50,000 or more⁷ require the Hearing Clerk, after receiving a notice of appeal from a state agency, to inform the state agency, by letter, that the state agency must file and serve its appeal petition not later than 60 days after receiving a notice of the claim and that failure to file a timely appeal petition may result in a waiver of further appeal rights.⁸

The record establishes that Idaho received the Administrator's notice of claim and bill for collection on June 26, 2006.⁹ On July 13, 2006, Idaho filed a notice of appeal with the Hearing Clerk.¹⁰ After receiving Idaho's notice of appeal, the Hearing Clerk informed Idaho by letter that Idaho must file and serve its appeal petition, as set forth in 7 C.F.R. §283.22, "not later than 60 days after receiving a notice of the claim" and "[f]ailure to file a timely appeal petition may result in a waiver of further appeal rights." (Emphasis in original.) Idaho received the Hearing Clerk's informational letter on July 17, 2006.¹¹

⁵ 7 U.S.C. § 2025(c)(8)(D) (2000 & Supp. IV 2004).

⁶ 7 C.F.R. pt. 283.

⁷ 7 C.F.R. §283.4-.23.

⁸ 7 C.F.R. § 283.4(e)(1).

⁹ Motion to Dismiss, Exhibit B.

¹⁰ Idaho filed a notice of appeal, dated July 3, 2006, with the wrong United States Department of Agriculture office (Motion to Dismiss, Exhibit C). Idaho sent a second notice of appeal, dated July 6, 2006, to the Hearing Clerk (Motion to Dismiss, Exhibit D). Idaho filed this second notice of appeal with the Hearing Clerk on July 13, 2006. The timeliness of Idaho's filing its notice of appeal is not at issue in this proceeding.

¹¹ United States Postal Service Track and Confirm for Article Number 7000 1670 0003 5453 2515.

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Thus, in accordance with the Food Stamp Act, the regulations detailing the procedures for state agency appeal of quality control claims, and the Hearing Clerk's mid-July 2006 letter, Idaho was required to file its appeal petition with the Hearing Clerk no later than August 25, 2006. Idaho filed its appeal petition with the Hearing Clerk on September 8, 2006, 14 days after the time expired for Idaho's filing an appeal petition. Therefore, I affirm the Chief ALJ's Decision and Order Dismissing Appeal in which he granted the Administrator's Motion to Dismiss.

**IDAHO'S PETITION FOR REVIEW
BY THE JUDICIAL OFFICER**

Idaho raises four issues in its Appeal Petition for Review by Judicial Officer and Idaho's Brief in Support of Reversal by Judicial Officer. First, Idaho asserts it was not given adequate notice that it was required to file its appeal petition not later than 60 days after it received the Administrator's notice of claim and bill for collection on June 26, 2006. Idaho contends 7 C.F.R. §283.4(e)(1)(iii) is vague; it reasonably understood the Hearing Clerk's letter, which Idaho received on July 17, 2006, as the notice of claim; and it believed it had until September 17, 2006, to file its appeal petition. Idaho argues it should not be denied the opportunity to present its case on the merits because it reasonably misread 7 C.F.R. § 283.4(e)(1)(iii). (Idaho's Brief in Support of Reversal by Judicial Officer at 2-6.)

The regulations provide that the Hearing Clerk must send the state agency a letter which advises the state agency that it must file its appeal petition not later than 60 days after receiving a notice of the claim.¹² The regulations clearly distinguish between the Hearing Clerk's informational letter and a notice of the claim.¹³ I find no reasonable

¹²7 C.F.R. § 283.4(e)(1)(iii).

¹³See 7 C.F.R. § 283.4(e).

basis for Idaho's misreading 7 C.F.R. § 283.4(e)(1)(iii).

Moreover, the Administrator's letter dated June 23, 2006, and served on Idaho on June 26, 2006, plainly states it is the notice of claim and informs Idaho of its right to appeal the notice of claim, as follows:

USDA is required by Section 16(c)(8)(C) of the Act to notify State agencies of payment claims or liability amounts. This letter serves as notice of your State's liability amount pursuant to Section 16(c)(1)(C) of the Act. Enclosed is a Notice of Claim/Bill for Collection in the amount of \$240,951.00.

....
...

Section 16(c)(8)(D)(i) of the Act provides that if a State agency decides to pursue an appeal, it must file a notice of appeal, pursuant to 7 CFR § 283.4 within 10 days of receipt of the liability amount and Notice of Claim/Bill for Collection. However, the statute further provides that this time period may be extended as needed by the Department's Office of the Administrative Law Judges (OALJ). In accordance with 7 CFR § 283.22 of the FSP regulations, a request for an extension must be submitted to the OALJ prior to the original due date. The notice of appeal or a request for an extension shall be filed with the Hearing Clerk, U.S. Department of Agriculture, Office of Administrative Law Judges, Room 1081, South Agriculture Building, Washington, D.C. 20250 within 10 days of receipt of the liability amount and the Notice of Claim/Bill for Collection.

Letter dated June 23, 2006, from the Administrator to Idaho at 2-3.

Further, the Hearing Clerk's mid-July 2006, letter to Idaho does not indicate that it is a notice of the claim. Instead, the Hearing Clerk's letter clearly states that it is an informational letter. The Hearing Clerk's letter refers Idaho to the procedures applicable to state agency appeal of quality control claims and explicitly states that Idaho's appeal petition must be filed and served not later than 60 days after receiving a notice of the claim.

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Idaho cites two cases, *Laurson v. Massanari*, 164 F. Supp.2d 317 (E.D.N.Y. 2001), and *Hernandez v. Sullivan*, 1991 WL 243451 (S.D.N.Y. 1991), in support of its position that it did not receive adequate notice of the requirements for filing a timely appeal petition. I find both cases inapposite.

Laurson and *Hernandez* involve individuals seeking social security disability benefits. In *Laurson*, the Court held the Commissioner of Social Security failed to provide adequate notice that a claimant for disability benefits must request an extension of time to bringing suit for judicial review within 60 days after notice of the Appeals Council's denial is mailed to the claimant. The Court found that neither the Commissioner's regulations nor the Commissioner's notice to the *pro se* claimant explicitly notified the claimant that the request for an extension of time must be made within 60 days after notice of the Appeals Council's denial is mailed to the claimant. The Court further stated "[t]o be added to the mix is the realization that many claimants for social security benefits are not well educated or are not adept in the English language; moreover, they invariably are not represented by counsel." In *Hernandez*, the Court held that faulty legal advice provided to a claimant was sufficient to toll the 60-day period during which a claimant may seek judicial review of the Appeals Council's denial.

In contrast to the claimants in *Laurson* and *Hernandez*, Idaho is a state agency with significant resources and has been continually represented by counsel in this proceeding. Further, unlike the regulation at issue in *Laurson*, both the Food Stamp Act and the regulations detailing the procedures for state agency appeal of quality control claims explicitly provide that a state agency must file its appeal petition not later than 60 days after receiving a notice of the claim.¹⁴ Finally, unlike the faulty legal advice sent to the claimant in *Hernandez*, the Administrator and the Hearing Clerk fully and correctly advised Idaho of the

¹⁴7 U.S.C. § 2025(c)(8)(D)(ii) (2000 & Supp. IV 2004); 7 C.F.R. § 283.4(e)(1)(iii).

procedures applicable to appeal of the Administrator's notice of the liability amount.

Second, citing section 16(c)(9)(E) of the Food Stamp Act,¹⁵ Idaho contends the administrative law judge has authority to extend the deadline for filing a state Agency's appeal petition when there is a significant circumstance beyond the control of the state agency (Idaho's Brief in Support of Reversal by Judicial Officer at 3).

As an initial matter, the "good cause" provision cited by Idaho relates only to "the contention of a State agency that the claim or liability amount should be waived"[;]¹⁶ it does not relate to extensions of time for filing an appeal petition.

The only basis provided in the Food Stamp Act for not meeting the 60-day deadline for filing an appeal petition is an extension of time granted by an administrative law judge for cause shown.¹⁷ Any request for an extension of time to file an appeal petition must be submitted to the administrative law judge prior to the expiration of the original time for filing the appeal petition.¹⁸ Idaho did not request an extension of time to file its appeal petition by August 25, 2006, the date its appeal petition was due. Therefore, there is no basis under the Food Stamp Act or the regulations detailing the procedures for state agency appeal of quality control claims for Idaho's failure to meet the 60-day deadline for filing its appeal petition.

Third, Idaho contends the Chief ALJ erroneously concluded the phrase "a notice of the claim" found at 7 C.F.R. § 283.4(e)(1)(iii) is the semantic equivalent of "the Notice of Claim." Idaho argues that it "had good cause to misread the deadline language in the regulation" and asserts, if the term "QC claim," or the capitalized form, "Notice of Claim," had been used in 7 C.F.R. § 283.4(e)(1)(iii), instead of the term that was used, "a notice of the claim," Idaho would have been reasonably

¹⁵7 U.S.C. § 2025(c)(9)(E) (2000).

¹⁶7 U.S.C. § 2025(c)(8)(H) (2000 & Supp. IV 2004).

¹⁷7 U.S.C. § 2025(c)(8)(I) (2000). See also 7 C.F.R. § 283.22(f).

¹⁸7 C.F.R. § 283.22(f).

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notified that the term had special meaning. (Idaho's Brief in Support of Reversal by Judicial Officer at 6-8.)

Based on the record before me, I find no reasonable basis for Idaho's confusing the Hearing Clerk's mid-July 2006, informational letter with a notice of the claim. The Administrator's letter, dated June 23, 2006, explicitly states that the letter serves as notice of Idaho's liability amount pursuant to section 16(c)(1)(C) of the Food Stamp Act.¹⁹ Enclosed with the letter was a "Notice of Claim/Bill for Collection." In addition, the Administrator's June 23, 2006, letter states, if a state agency appeals, the state agency must, pursuant to section 16(c)(8)(D)(i) of the Food Stamp Act,²⁰ file a notice of appeal, pursuant to 7 C.F.R. § 283.4, with the Hearing Clerk "within 10 days of receipt of the liability amount and Notice of Claim/Bill for Collection." In accordance with the Food Stamp Act, the regulations detailing procedures for state agency appeal of quality control claims, and the Administrator's June 23, 2006, letter, Idaho filed a notice of appeal with the Hearing Clerk. I find Idaho's filing the notice of appeal indicates Idaho knew it was appealing a notice of the claim; I cannot find any other reason for Idaho's filing a notice of appeal pursuant to section 16(c)(8)(D)(i) of the Food Stamp Act²¹ and 7 C.F.R. § 283.4.

Moreover, the Hearing Clerk's mid-July 2006, letter to Idaho does not indicate that it is a notice of the claim. Instead, the Hearing Clerk's letter clearly states it is an informational letter. The Hearing Clerk's letter refers Idaho to the procedures applicable to state agency appeal of quality control claims and explicitly states that Idaho's appeal petition must be filed and served not later than 60 days after receiving a notice of the claim.

Further still, the Food Stamp Act explicitly states a state agency

¹⁹7 U.S.C. § 2025(c)(1)(C) (2000 & Supp. IV 2004).

²⁰7 U.S.C. § 2025(c)(8)(D)(i) (2000 & Supp. IV 2004).

²¹7 U.S.C. § 2025(c)(8)(D)(i) (2000 & Supp. IV 2004).

desiring to appeal a payment claim or a liability amount must submit a notice of appeal and an appeal petition within specified times after receiving a notice of the claim or liability amount, as follows:

§ 2025. Administrative cost-sharing and quality control

.....
(c) Quality control system

.....
(8) Criteria for payment by a State agency

.....
 (D) A State agency desiring to appeal a payment claim or liability amount . . . shall submit to an administrative law judge—

- (i) a notice of appeal, not later than 10 days after receiving a notice of the claim or liability amount; and
- (ii) evidence in support of the appeal of the State agency, not later than 60 days after receiving a notice of the claim or liability amount.

7 U.S.C. § 2025(c)(8)(D) (2000 & Supp. IV 2004). In light of the language in the Food Stamp Act, the regulations detailing the procedures for state agency appeal of quality control claims, the Administrator's letter dated June 23, 2006, and the Hearing Clerk's mid-July 2006 letter, I find no basis for Idaho's argument that it "had good cause to misread the deadline language in the regulation" and Idaho's assertion that it had a reasonable basis for confusing the Hearing Clerk's mid-July 2006, informational letter with a notice of the claim.

Fourth, Idaho contends the Chief ALJ gave inadequate weight to the fact that the term "claim" is commonly applied in the field of law to mean "claim for relief," exactly the sense in which Idaho construed it. Idaho states its request "for a hearing right based on operative facts that Idaho believed entitled it to be relieved of food stamp error penalties" constitutes a "claim." (Idaho's Brief in Support of Reversal by Judicial Officer at 8-9.)

According to Idaho's reasoning, the 60-day time period for Idaho's filing an appeal petition began on the date Idaho filed a request for

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hearing. Idaho first filed a request for hearing on September 8, 2006.²² I find Idaho's argument that its request for hearing constitutes "a notice of the claim" without merit. The regulations detailing the procedures for state agency appeal of quality control claims provide no basis for Idaho's confusing its request for hearing with a notice of the claim. The regulations explicitly state the appeal petition shall contain a request for oral hearing, if desired by the state agency.²³ As the request for oral hearing is required to be included in the appeal petition, I find that the request for hearing could not also constitute the beginning of the 60-day period for filing the appeal petition. Moreover, the regulations provide that a state agency must file its appeal petition not later than 60 days after receiving a notice of the claim.²⁴ Idaho cannot be said to have "received" its request for hearing; I find, instead, that Idaho issued and filed its request for hearing.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Administrator's Motion to Dismiss is granted.
2. Idaho's request for oral hearing is denied.

This Order shall become final and take effect 30 days after the date of delivery or service on Idaho.²⁵

²²Petition to Appeal Error Rate Liability Assessment at 11.

²³7 C.F.R. § 283.4(g)(3).

²⁴7 C.F.R. § 283.4(e)(1)(iii).

²⁵See 7 U.S.C. § 2023(a)(5) (2000).

JUDICIAL REVIEW

Idaho has the right to seek judicial review of the Order in this Decision and Order in the United States District Court for the District of Idaho in accordance with 7 U.S.C. § 2023(a) (2000 & Supp. IV 2004). Idaho must seek judicial review by filing a complaint against the United States within 30 days after the date of delivery or service of this Decision and Order upon Idaho.²⁶

²⁶See 7 U.S.C. § 2023(a)(13) (2000); 7 C.F.R. § 283.20(j)(4).

HORSE PROTECTION ACT

COURT DECISION

MIKE TURNER AND SUSIE HARMON v. USDA.

No. 05-4487.

Filed February 15, 2007.

(Cite as: 217 Fed.Appx. 462).

HPA – Independent recollection, no – recollection refreshed, no – Presumption of soreness – Abnormal soreness – Pre-show inspection – Inaccuracies in recorded forms – Substantial evidence.

Court affirmed the JO's decision to overturn the finding of the ALJ holding that although the ALJ's findings are part of the record to be weighed, if there was legally substantial and reliable evidence relied upon by the JO, the court will not overturn the JO's decision without a showing that it was arbitrary, capricious and not in accordance with the law.

United States Court of Appeals, Sixth Circuit.

Before: BATCHELDER and MOORE, Circuit Judges; COHN*, District Judge.

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

AVERN COHN, District Judge.

Petitioners Susie Harmon and Mike Turner seek review of the decision of the Secretary of Agriculture pursuant to the Horse Protection Act ("HPA"), 15 U.S.C. § 1821, *et seq.*, that they entered a Tennessee Walking Horse, "The Ultra Doc", at a horse show while the horse was "sore." The issues on appeal are (1) whether substantial evidence supports the finding of the Judicial Officer that The Ultra Doc was sore within the meaning of the HPA, and (2) whether petitioner Harmon

"entered" The Ultra Doc into the show under 15 U.S.C. § 1824(2)(B). For the reasons that follow, the petition for review will be denied.

I.

A. Statutory Framework

The HPA prohibits the "entering" of sore horses for, among other things, exhibition at horse shows. 15 U.S.C. § 1824(2).¹ 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). When a horse's front feet are deliberately made sore "the intense pain which the animal suffer[s] when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking Horse. H.R.Rep. No. 91-1597, 91st Cong.2d Sess. 2 (1970), reprinted in 1970 U.S.C.C.A.N. 4870, 4871. "[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. § 1825(d)(5). Before competing in a show, a horse is usually examined by Designated Qualified Persons (DQPs) and by two Veterinarian Medical Officers (VMOs) to determine whether the horse is "sore." DQPs are employed by the management of a horse show to inspect the horses for soreness and to prevent sore horses from competing. 15 U.S.C. § 1823(c). The DQPs work under the supervision of VMOs. 9 C.F.R. §§ 11.7, 11.21.

B. Factual Background & Procedural History

Petitioner Harmon was the owner of The Ultra Doc and petitioner Turner was his trainer. On May 26, 2000, Turner entered The Ultra Doc

¹15 U.S.C. § 1824(2) proscribes the following: "The ... entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore."

in the 30th Annual Spring Fun Show Preview (Fun Show Preview), in Shelbyville, Tennessee. Turner paid the entrance fee for The Ultra Doc. He stated that he had Harmon's permission to enter the horse and that he expected Harmon to reimburse him for the fee. Harmon stated that she planned to ride The Ultra Doc in the show.

Prior to the commencement of the show, The Ultra Doc underwent examination by a DQP and two VMOs. DQP Charles Thomas (DQP Thomas) performed a pre-show inspection of The Ultra Doc under the National Horse Show Commission (NHSC) guidelines, which utilizes a point system. DQP Thomas found that The Ultra Doc exhibited mild pain responses when palpated. In particular, DQP Thomas documented on a NHSC Examination Form that The Ultra Doc "[r]eacted left foot outside, right foot [i]nside/left foot lighter than right foot." He also noted that The Ultra Doc was "tossing [his] head for balance" and "flexing [his] abdominal muscles [and][a]lso stepped forward when checking R[igh]t Foot." Based on this evaluation DQP Thomas disqualified The Ultra Doc under the NHSC guidelines. However, the total points he assigned to The Ultra Doc did not rise to the level of an HPA violation. DQP Thomas documented his evaluation by completing a NHSC Examination Form, DQP Ticket², and by signing an affidavit.

Next, VMO John Guedron (VMO Guedron), and then VMO Clement Dussault (VMO Dussault), each examined The Ultra Doc separately. The two VMOs then discussed their findings and agreed that the Ultra Doc was "sore" under the HPA. VMO Guedron filled out a Summary of Alleged Violations Form ("Summary Form"), APHIS 7077. VMO Dussault signed the Summary Form to indicate that he agreed with its contents. The Summary Form includes a diagram of a horse's legs on which the VMO can mark where the subject horse is sore. On The Ultra

²The DQP Ticket requests statistical information such as the horse's name and sex, and the names and addresses of the horse's owner, trainer, and exhibitor.

Doc's Summary Form, VMO Guedron marked "X"s on the lateral side of the horse's lower left foot and on the medial side of the horse's right foot. He also explained that the 'Xs' = Areas of consistent, repeatable pain responses. " That night, VMO Dussault signed an affidavit relating to his evaluation, in which he concluded that in his "professional opinion this horse would feel pain while moving and this was caused by mechanical and/or chemical means."

On July 10, 2001, the Administrator, Animal and Plant Health Inspection Service (APHIS) issued a complaint charging petitioners with violating 15 U.S.C. § 1824(2)(B) by entering The Ultra Doc at the Fun Show Preview on May 26, 2000.³ A hearing was held before an Administrative Law Judge (ALJ) on March 29, 2005. The following witnesses testified at the hearing: VMO Dussault, DQP Thomas, Lonnie Messic (the Executive Vice President of the NHSC), petitioner Harmon, and petitioner Turner. The Administrator also introduced documentary evidence including VMO Dussault's affidavit, the Summary Form, DQP Thomas' NHSC forms, and video tapes of the inspections performed by DQP Thomas, VMO Guedron, and VMO Dussault.

On June 2, 2005, the ALJ dismissed the claims against the petitioners with prejudice after concluding that the Administrator "failed to offer sufficient proof to support a violation of the Act." Specifically the ALJ found that VMO Dussault's testimony at the hearing was not reliable or probative. First, he noted that Dussault had no independent recollection of his examination of The Ultra Doc, which had occurred nearly five years before his testimony. Second, the ALJ found that VMO Dussault had merely signed his name to the Summary Form, and that VMO Guedron and another investigator who actually filled out the form did not

³ The Complaint also alleged that Harmon was the owner of the horse and had "allowed" the entry of a sore horse into a show in violation of Section 1824(2)(D). Because the ALJ dismissed the charges against petitioners, he did not rule on this issue. The Administrator appealed did not appeal this issue to the JO.

testify. Third, the ALJ found that VMO Dussault failed to document or testify that his affidavit was created while the events were still fresh in his mind.

Fourth, the ALJ found that the documents upon which VMO Dussault relied, specifically the Summary Form and his affidavit, were "frought with sloppiness and inaccuracy." In particular, question 17 of the Summary Form requests the sex of the horse. The Ultra Doc is a stallion, however someone answered "G", indicating that The Ultra Doc is a gelding. Likewise, question 12 of the Summary Form requests the name of the owner of the horse. It is incorrectly answered "John Harmon" instead of "Susie Harmon."

Finally, the ALJ pointed out that VMO Dussault stated in his affidavit that The Ultra Doc's "responses to palpation were mild on the left foot and moderate to severe on the right foot." The ALJ ruled that a mild pain response does not demonstrate "abnormal sensitivity," triggering the presumption that The Ultra Doc was sore under section 1825(d)(5).

In reaching his decision in favor of petitioners, the ALJ relied on DQP Thomas' hearing testimony, which he found to be "forthright and credible, [and] his notes more detailed than those of the USDA veterinarians." The ALJ believed that in order to accept the opinion of VMO Dussault, he had to "totally discount the opinions and findings" of DQP Thomas, "whose memory of his examination was far superior to that of the VMO testifying at the trial."

The Administrator appealed the ALJ's decision to a Judicial Officer (JO). On October 26, 2005, the JO issued his Decision and Order finding that Turner and Harmon were in violation of 15 U.S.C. § 1824(2)(B). The JO imposed upon each petitioner a civil penalty of \$2,200.00 and disqualified each from "showing, exhibiting, or entering any horse, and from managing, judging or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction" for a period of one year.

In contrast to the ALJ, the JO found the Summary Form and VMO Dussault's affidavit to be reliable and probative. Although the JO accepted that VMO Dussault did not fill out the Summary Form, but only signed it, he found that the Summary Form "reflects the results of two independent pre-show physical examinations ... [and] tends to prove the allegation in the Complaint." In so finding, the JO relied upon VMO Dussault's testimony at the hearing where he explained that when two VMOs find reactions to palpation in the same place and agree that a horse is sore, the veterinarian who first examines the horse will fill out the Summary Form, and the second veterinarian who examined the horse will sign it.

Although the JO agreed with the ALJ that there were inaccuracies as to The Ultra Doc's sex and ownership on the Summary Form, he found that these errors were not significant with regard to the charges against the petitioners. In particular, he found that the issue of whether The Ultra Doc was sore did not depend on its sex; and he found that Harmon had admitted that she was the owner at all times material to the proceeding. Next, the JO found VMO Dussault's statement in his affidavit that The Ultra Doc's "responses to palpation were mild on the left foot and moderate to severe on the right foot" was a sufficient basis to demonstrate "abnormal sensitivity," triggering the presumption that the horse was sore under section 1825(d)(5). The JO stated that the standard for finding soreness is "abnormal sensitivity in both of [a horse's] forelimbs or hindlimbs," and that this is established where a horse experiences "bilateral reproducible pain responses to palpation" as VMOs Guedron and Dussault believed The Ultra Doc had experienced.

Finally, the JO disagreed with the ALJ's opinion that in order to accept VMO Dussault's affidavit statement and hearing testimony, one would have to totally disregard DQP Thomas' evaluation. The JO found that DQP Thomas' findings were consistent with VMO Dussault's. The JO pointed out that DQP Thomas stated on the NHSC Examination Form that The Ultra Doc "[r]eacted left foot outside, right foot [i]nside/left foot lighter than right foot." The JO found this statement to be consistent with VMO Dussault's statement that the Ultra Doc's "responses to palpation

were "mild on the left foot and moderate to severe on the right." "

C.

Turner and Harmon filed a timely petition for review with this Court on November 28, 2005.

II.

A. Standard of Review

We review an administrative decision of the United States Department of Agriculture (USDA) under the HPA to determine "whether the proper legal standards were employed and substantial evidence supports the decision." *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 188 (6th Cir.1983). Substantial evidence means "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, 83 L.Ed. 126 (1938). As we have previously explained:

Substantial evidence 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. Substantial evidence is not simply some evidence, or even a great deal of evidence. Rather, the substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Murphy v. Sec'y of Health & Human Serv., 801 F.2d 182, 184 (6th Cir.1986) (internal citations and quotations omitted). When a JO disagrees with a ALJ's conclusion and substitutes his judgment for that of the ALJ, this Court still utilizes the substantial evidence test to review the JO's decision. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, 71 S.Ct. 456, 95 L.Ed. 456 (1951). "[T]he ALJ's finding are simply part

of the record to be weighed against other evidence supporting the agency." *Stamper v. Sec'y of Agric.*, 722 F.2d 1483, 1486 (9th Cir.1984). Moreover, deference should be given to an agency's reasonable decision: "Even if we were to reach a different conclusion from the agency, the agency's reasonable choice, supported by substantial evidence, may not be overturned." *Elliott v. Adm'r, Animal & Plant Health Insp. Serv.*, 990 F.2d 140, 143-4 (4th Cir.1993).

B. Whether there was Substantial Evidence for the Judicial Officer to Conclude that The Ultra Doc was "Sore"

1.

Petitioners argue that the ALJ's decision was correct, and that the record as a whole cannot support the JO's decision that they violated 15 U.S.C. § 1824(2)(B). Petitioners compare the facts here to those in *Bobo v. United States Dep't. of Agric.*, 52 F.3d 1406 (6th Cir.1995). In *Bobo*, we found that the ALJ had substantial evidence to conclude that the petitioner's horse was "sore" based on documentary evidence, and the testimony of the VMO's who inspected the horse. 52 F.3d at 1413-15. Petitioners argue that the evidence here falls far short of the evidence presented in *Bobo*. Petitioners first point out that in *Bobo*, all of the VMOs who inspected the horse were present to testify and subject to cross-examination at the hearing; and while three of the four VMOs stated that they did not have independent recollections of their inspections, all of the VMO's testified that they had signed the evaluation forms and created their affidavits while inspection was still fresh in their minds. Petitioners argue that while VMO Dussault testified that he did not have an independent recollection of the inspection, he failed to state that his affidavit was created while the inspection was still fresh in his mind. Furthermore, petitioners point out that VMO Guedron did not testify or present an affidavit on his behalf.

Next, petitioners assert that in *Bobo* each VMO included in his affidavit a description of the method of palpation and the specific pain responses elicited from the horse. 52 F.3d at 1413-15. Petitioners argue

that here, VMO Dussault failed to denote a specific finding of The Ultra Doc's pain responses in his affidavit. Additionally, petitioners argue that VMO Dussault did not properly document a complete examination of The Ultra Doc because he failed to note whether he performed an evaluation of The Ultra Doc's appearance as required by the 2000 training manual published by the USDA for the training of DQPs and VMOs.

Finally, petitioners point out several mistakes on the Summary Form in addition to those that the ALJ discussed. For instance, while it is undisputed that DQP Thomas examined The Ultra Doc first, the Summary Form states that VMOs Guedron and Dussault inspected The Ultra Doc before DQP Thomas. Furthermore, question 27, which requests the "Name and address of person(s) responsible for transportation" was left unanswered. Likewise, question 28, which asks for the "Name and Address of Person(s) that entered horse" was also left unanswered. Finally, question 29 asks "Is the horse sore?" and requires the inspector to check either "yes" or "no", and further requests that the VMO "explain" his findings if he checks "yes." Although VMO Guedron checked "yes" for this question, he did not offer an explanation in the designated space.

2.

None of the petitioners' arguments are availing. There was substantial evidence in the record upon which the JO could conclude that The Ultra Doc was sore. First, this Court has previously held that the affidavits of VMOs and Summary of Alleged Violations Forms are reliable and probative. *Gray v. United States Dep't. of Agric.*, 39 F.3d 670, 676 (6th Cir.1994). This is so even where a VMO has no independent recollection of the inspection. *Id.* at 676 n. 5; *see also Bobo*, 52 F.3d at 1413. In *Gray* we explained that although affidavits and evaluation forms are technically hearsay, they are admissible if they are probative, and their use is fundamentally fair. 39 F.3d at 676. In *Gray* we held that the affidavits of the VMOs and a Summary of Alleged Violations Form

satisfied the admissibility criteria even where the VMOs in that case had no independent recollection because "[t]hey were signed and/or prepared by individuals who were experienced in their tasks and who had no reasons to record their findings in other than an impartial fashion. Moreover, the documents were created almost contemporaneously with the observations they relay." *Id.*

We find that VMO Dussault's affidavit meets this criteria. VMO Dussault is an experienced veterinarian; there is no evidence that he did not conduct his inspection of The Ultra Doc in an impartial fashion; and he created his affidavit the same night as the inspection. Likewise, we find that the Summary of Alleged Violations also meets this criteria. The Summary Form was filled out by VMO Guedron after VMOs Guedron and Dussault independently inspected The Ultra Doc and agreed that the horse was sore and was signed by VMO Dussault. Again, there is no evidence that either VMOs inspection was not conducted in an impartial fashion, and the Summary Form was filled out shortly after both inspections occurred.

The JO explained why he believed the inaccuracies as to The Ultra Doc's sex and ownership were irrelevant to the question of whether The Ultra Doc was sore. We similarly find that the incomplete answers highlighted by the petitioners in question 27, which requests the name of the person(s) who transported the horse to the show, and question 28, which requests the name and address of the person(s) who entered the horse into the show, are also irrelevant to the issue of whether the Ultra Doc was sore. Moreover, these answers have been provided for elsewhere in the record. As to question 29, which asks if the horse is sore, and if the inspector answers "yes," requests an explanation, VMO Guedron provided an explanation by marking "X"s on the diagram of the horse's legs where he and VMO Dussault found "[a]reas of consistent, repeatable pain responses."

Next, we find that VMO Dussault's affidavit is sufficiently detailed as to constitute substantial evidence that The Ultra Doc was sore on May 26, 2000. Contrary to petitioner's assertion, VMO Dussault does describe

the methods of palpation he used during his inspection, and he also notes The Ultra Doc's specific response to each palpation. In particular, he states in his affidavit that:

I approached the horse on the left side making contact with the horse and the horse presented its foot. I examined the posterior aspect and then moved the leg forward. When I palpated the anterior and lateral aspect as noted on the APHIS Form 7077, of the left front pastern, the horse withdrew its foot. I then placed the foot on the ground. I went to the right side of the horse and made contact with the horse and the horse presented its foot for inspection. I examined the posterior aspect of the right foot and moved the foot forward. When I palpated the area as noted on the [Summary of Alleged Violations Form], the anterior and medial aspects of the right foot the horse withdrew its foot. The responses to palpation were mild on the left foot and moderate to severe on the right.

Moreover, we find that VMO Dussault did evaluate the physical appearance of the Ultra Doc. He states in his affidavit that just before he performed the palpation, he "observed the horse move around the cone and noted it moved tightly."

Finally, we find that the JO reasonably concluded that DQP Thomas' findings are consistent with those of VMO Guedron and VMO Dussault. All three examiners noted that The Ultra Doc reacted to palpation on both the left and right forelegs in approximately the same area, and that this reaction could be interpreted to mean that the horse was experiencing pain. DQP Thomas noted that on the Ultra Doc's physical examination, the horse "[r]eacted left foot outside, right foot [i]nside/left foot lighter than right foot." He further noted, "[a]pppearance, some tossing of head, flexing of abdominal mussel [sic]. Horse stepped forward in rear when checking right foot." When DQP Thomas was asked at the hearing what does it mean "when a horse tosses its head during an examination?," he responded that The Ultra Doc "could be having a certain spot that he could have some pain, mild pain or whatever, and he might want to shift his leg or move over his head or

whatever." This is similar to the diagram on the Summary Form, on which VMO Guedron marked "X"s on The Ultra Doc's lower left and right legs to indicate where the horse appeared to experience "areas of consistent, repeatable pain responses." VMO Dussault concurred with these findings and signed the form. VMO Dussault similarly concluded in his affidavit that, "[t]he responses to palpation were mild on the left foot and moderate to severe on the right ... In my professional opinion this horse would feel pain while moving and this was caused by mechanical and/or chemical means."

Altogether, this evidence supports the JO's conclusion that The Ultra Doc exhibited abnormal sensitivity, triggering the statutory presumption of soreness. The JO correctly stated that the standard for finding soreness is "abnormal sensitivity in both of a [horse's] forelimbs or hindlimbs." This is established where the horse experiences "bilateral reproducible pain responses to palpation." *See, e.g., In re Eddie C. Tuck*, 53 Agric. Dec. 261, 294-95 (1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 204 (1994); *In re Billy Gray*, 52 Agric. Dec. 1044, 1077 (1993); *In re Lloyd R. Smith*, 51 Agric. Dec. 327, 330-31 (1992). The severity of The Ultra Doc's pain responses is not an issue. All three examiners noted that The Ultra Doc reacted to their palpation in a manner that could reasonably be interpreted to be pain responses in both limbs. Neither Turner nor Harmon have attempted to rebut this presumption nor have they presented case law that states that a "mild" response in one limb is insufficient to trigger a presumption of soreness.

We find that the JO conducted a careful and thorough review of the record, and provided an adequate explanation for why he reached a different conclusion than the ALJ, citing to probative and reliable evidence. Therefore, this Court finds that the JO did have substantial evidence on which to base his decision.

C. Whether Susie Harmon "Entered" The Ultra Doc Under 15 U.S.C. § 1824(2)(B)

An individual violates the HPA by "entering for the purpose of

showing ... in any horse show ... any horse which is sore." 15 U.S.C. § 1824(2)(B). The JO determined in his Findings of Facts that:

On or about May 26, 2000, Respondent Susie Harmon entered the Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, by participating in the decision to enter The Ultra Doc in the 30th Annual Spring Fun Show Preview and scheduling herself to ride The Ultra Doc in the 30th Annual Spring Fun Show Preview.

The JO also held in his Conclusions of Law that:

On or about May 26, 2000, Respondent Susie Harmon entered the Ultra Doc as entry number 185 in class number 21 at the 30th Annual Spring Fun Show Preview in Shelbyville, Tennessee, for the purpose of showing or exhibiting The Ultra Doc, while the horse was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Petitioner Harmon argues that although she owned The Ultra Doc on May 26, 2000, she did not enter him into the Fun Show Preview.

We find that Petitioner Harmon has forfeited any challenge to the JO's construction of 15 U.S.C. § 1824(2)(B). In their opening brief, the petitioners do not argue that the JO's factual findings do not support the conclusion that Harmon entered The Ultra Doc in the show. Instead, they merely state in passing that Harmon "did not enter said horse in the 30th Annual Spring Fun Show on said date." They do not further develop this argument, or even argue that the JO lacked substantial evidence to support this conclusion. Further, the petitioners did not file a reply brief disputing the USDA's contention that substantial evidence supports the JO's findings. Because the petitioners referred to this issue in only the most perfunctory manner, they forfeited the argument. *See United States v. Reed*, 167 F.3d 984, 993 (6th Cir.1999), *cert. denied*, 528 U.S. 897, 120 S.Ct. 229, 145 L.Ed.2d 192 (1999).

III.

For the foregoing reasons, the petition for review is DENIED, and the order of the Judicial Officer is AFFIRMED.

**CHRISTOPHER JEROME ZAHND v. USDA.
C.A.11,2007.
No. 06-11571.
Filed February 21, 2007.**

(Cite as 479 F.3d 767).

HPA – Substantial evidence standard – Presumption of soreness.

Although the ALJ found the statutory presumption of soreness had been overcome by the horse's trainer court and dismissed the case, the court allowed deference to the findings of the Judicial Officer. The court found that the JO was entitled to resolve conflicting evidence against the trainer on the issue of soreness since there was legally substantial evidence to derive a decision that was not arbitrary, capricious or against the law.

**United States Court of Appeals
Eleventh Circuit**

Petition for Review of a Decision of the Department of Agriculture.

Before BIRCH and PRYOR, Circuit Judges, and NANGLE,*
District Judge.

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

PRYOR, Circuit Judge:

This petition for review of an order of the Secretary of the United

States Department of Agriculture presents the following issue: whether substantial evidence supports the decision of a Judicial Officer for the Department of Agriculture that Lady Ebony's Ace, a four-year-old Tennessee Walking Horse, was sore within the meaning of the Horse Protection Act, 15 U.S.C. §§ 1821-1831, when she was entered in a horse show in Shelbyville, Tennessee, on May 25, 2000. After two veterinarians for the Department of Agriculture inspected Lady Ebony's Ace at the show, a ticket was issued charging Christopher Jerome Zahnd, the horse's trainer, and Ronald Beltz, the horse's owner, with violating the Horse Protection Act by entering a sore horse. Following a hearing, an Administrative Law Judge dismissed the complaint because he found that Zahnd had rebutted the statutory presumption of violation, but a Judicial Officer reversed. The Judicial Officer relied on the expert testimony of a veterinarian who examined the horse. After thorough review of the record, we deny the petition.

I. BACKGROUND

On the morning of May 25, 2000, Zahnd loaded Lady Ebony's Ace into a horse trailer at his stable in Trinity, Alabama. Zahnd then drove to the 30th Annual Spring Fun Show Preview "S.H.O.W. Your Horses" in Shelbyville, Tennessee. Lady Ebony's Ace spent the greater part of the day in the trailer because, in addition to driving time, Zahnd stopped for several hours at a horse sale and a stall had not been procured for the use of Lady Ebony's Ace before the show. When Lady Ebony's Ace was unloaded from the trailer, shortly before her pre-show inspection, she had been in the horse trailer for eleven to twelve hours. After she was unloaded, Lady Ebony's Ace was examined by Zahnd and Larry Joe Appleton Jr., who was acting as Zahnd's groom for the night. Neither Zahnd nor Appleton observed any abnormal responses from the mare.

Lady Ebony's Ace was then examined by Charles Thomas, the Designated Qualified Person hired by the Spring Fun Show to ensure compliance with the Horse Protection Act, and two veterinarians for the Department of Agriculture, Drs. Clement Dussault and John Guedron.

The purpose of that examination is to determine whether the horse is sore, that is, whether a horse has been abused with chemical or mechanical devices and will feel pain when moving. The typical examination takes a minute to a minute and 15 seconds and involves two stages. First, the horse is observed as it walks around a cone. Second, the feet and legs of the horse are palpated with thumb pressure.

Thomas examined Lady Ebony's Ace twice. After his examinations, Thomas disqualified her from showing that night. Thomas noted that Lady Ebony's Ace reacted to palpation on both front feet and walked slowly with a slight pull on the reins when led. Thomas noted a mild reaction on the left front foot outside and a stronger reaction on the right front foot outside. Thomas did not find a violation of the Horse Protection Act.

Lady Ebony's Ace was then examined by Dr. Dussault. Dr. Dussault observed that Lady Ebony's Ace moved "somewhat freely" as she moved around the cone. On palpation, Dr. Dussault observed that Lady Ebony's Ace withdrew her foot when he palpated the medial and lateral aspects of both the left and right front pasterns. Dr. Dussault described the reaction as moderate. Based on his observations, Dr. Dussault requested that Dr. Guedron examine Lady Ebony's Ace.

During his examination, Dr. Guedron observed that, as she walked around the cone, Lady Ebony's Ace walked slowly "with a shortened gait and was reluctant to lead." On physical examination, Dr. Guedron observed "strong, consistent and repeatable pain responses ... to digital palpation of both the medial and lateral heel bulbs" of the left foot. On the right foot, Dr. Guedron also observed "strong, consistent and repeatable pain responses to digital palpation of the same areas of the pastern as described for the left foot."

After their examinations, Dr. Dussault and Dr. Guedron conferred and agreed that Lady Ebony's Ace was sore as defined by the Horse Protection Act. In separate affidavits, both doctors gave their opinion that the horse had been sored by use of chemical or mechanical means.

Zahnd and Beltz were each issued tickets that alleged violations of the Horse Protection Act.

On October 25, 2001, the Acting Administrator of the Animal and Plant Health Inspection Service of the Department of Agriculture filed a complaint against Beltz and Zahnd and alleged that Lady Ebony's Ace had been entered in the show in Shelbyville for the purpose of showing while she was sore. A hearing was scheduled for June 3, 2004. Because Dr. Guedron was unavailable to testify on that date, the hearing was rescheduled to December 1, 2004. Before the rescheduled hearing, the complaint against Beltz was settled, which left Zahnd as the only respondent.

At the hearing, the Secretary offered the testimony of Dr. Dussault and eight exhibits, which consisted of the affidavits of Thomas, Dr. Dussault, Dr. Guedron, and Zahnd, the DQP ticket and examination sheet, the violation ticket issued by the Department, and a video of the examination proceedings. Zahnd and Appleton testified for Zahnd. Dr. Guedron did not testify.

Dr. Dussault testified that, during an examination, he looks for odors, scarring, or evidence of other artificial substances on a horse's leg. With regard to palpation, Dr. Dussault looks for a repeated response such as withdrawal of the foot as a sign of pain. Dr. Dussault testified that the pressure typically applied during palpation is enough to blanch the thumbnail. Dr. Dussault testified that palpation alone would not cause a horse to feel pain or move but jabbing a horse could make it move.

With regard to his examination of Lady Ebony's Ace, Dr. Dussault testified that, when he palpated the lateral part of the horse's pastern, she withdrew her foot, which is a sign of pain. Dr. Dussault did not observe any smells or scarring on Lady Ebony's Ace and did not recall any hair loss. On cross-examination, Dr. Dussault agreed that increased reactions to multiple palpations could be a sign either that the horse was feeling more pain or that the horse was irritated. Dr. Dussault also agreed that a

horse that had been in a trailer all day could be more aggravated than a horse that had been in a stall, but opined that he did not believe Lady Ebony's Ace was aggravated because she only responded when palpated on the lateral part of her pastern.

Appleton testified first for Zahnd. Appleton testified that Lady Ebony's Ace had spent eleven to twelve hours in a trailer on the day of the show and that the trailer was "pretty unstable" when moving. With regard to his examination of Lady Ebony's Ace before the inspection by the Designated Qualified Person, Appleton testified that he did not observe any reactions. Appleton testified that a horse will become more irritated with repeated mashing of its foot and that, depending on the manner of mashing, an examiner can obtain a different reaction from a horse. Appleton also observed that, at least once during the examinations of Lady Ebony's Ace, another horse walked directly behind her. According to Appleton, most of the time a horse will move if another horse walks behind it during inspection. Appleton admitted, on cross-examination, that he was not a veterinarian.

Zahnd then testified on his own behalf. Zahnd testified that his occupation was training Tennessee Walking Horses and that he had been in that field for fifteen years. Zahnd testified that he showed Lady Ebony's Ace eight to ten times a month from March to November 2000. The instant citation was the only one Zahnd had ever received. Zahnd testified that, on the night of the Spring Fun Show, both he and Appleton examined Lady Ebony's Ace before the official inspection and he did not observe any response to palpation during either examination. Zahnd testified that the kind of pressure used on a horse could affect the strength of the reaction. Zahnd also testified that Lady Ebony's Ace was a "little bit stubborn and hateful thing" and that if her routine was changed she could become irritated. Zahnd observed that, during one of the examinations, Lady Ebony's Ace was resting her back foot in a position that a horse will not take if it is sore. Zahnd testified that he did not know during which inspection the horse rested her back foot. In addition, Zahnd testified that if you poke on a horse's foot enough times eventually she will move. Zahnd testified that, in his experience, hair

loss or scarring is apparent on 90 percent of sored horses. On cross-examination, Zahnd admitted that he was not a veterinarian and a veterinarian should know more, "without a doubt," about whether a horse is sore.

After consideration of the evidence, the Administrative Law Judge dismissed the complaint. The Administrative Law Judge concluded that the Secretary had established the statutory presumption that Lady Ebony's Ace was sore, 15 U.S.C. § 1825(d)(5), but Zahnd had rebutted the statutory presumption. The Administrative Law Judge concluded that Zahnd had rebutted the presumption of soreness with evidence that the reactions of Lady Ebony's Ace could be attributed to multiple factors, including her temper and her long day spent in a trailer. The Administrative Law Judge was also influenced in his decision by the lack of any physical indicia of soring; the failure of Dr. Guedron to testify, specifically with regard to his manner of palpation; the lack of any rebuttal evidence to contradict Zahnd's explanations for the mare's behavior; and Zahnd's unblemished record of compliance with the Horse Protection Act.

On appeal, the Judicial Officer reversed the Administrative Law Judge. After making independent findings of fact, the Judicial Officer summarily concluded that Zahnd's evidence was not sufficient to rebut the statutory presumption and did not outweigh the evidence that Lady Ebony's Ace was sore. The Judicial Officer then addressed the conclusions of the Administrative Law Judge and his disagreements with those conclusions. The Judicial Officer found that the failure of Dr. Guedron to testify was not a detriment to the Secretary's case because the pressure used by Dr. Guedron in palpating Lady Ebony's Ace was irrelevant. With regard to the absence of scarring, chemical odor, and hair loss, the Judicial Officer found that, according to the policy of the Secretary of Agriculture, digital palpation alone is a highly reliable method of determining whether a horse is sore. Based on his "personal experience with Horse Protection Act cases," the Judicial Officer disagreed with the conclusion of the Administrative Law Judge that

“scarring, chemical odor, and hair loss are the three most common indicia of the use of mechanical or chemical soring devices” and noted that Dr. Dussault testified that soreness was possible without odor or hair loss. The Judicial Officer rejected Zahnd's explanations for the reactions of Lady Ebony's Ace because he concluded that Lady Ebony's Ace was not a “silly” horse, that is, a horse that moves no matter where it is touched. The Judicial Officer reviewed a videotape of the examinations by Thomas, Dussault, and Guedron to support his finding. Finally, the Judicial Officer found that Zahnd's record of compliance was irrelevant to the question whether Lady Ebony's Ace was sore. The Judicial Officer did not otherwise explain his conclusion that Lady Ebony's Ace was proven sore and that Zahnd did not rebut the presumption. The Judicial Officer imposed a fine of \$2200 and disqualified Zahnd from showing or exhibiting for one year.

II. STANDARD OF REVIEW

We review the findings of the Secretary to determine whether they are supported by substantial evidence. 15 U.S.C. § 1825(b)(2). “Substantial evidence is: ‘something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.’ ” *Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1510 (11th Cir.1983) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966)). To support the findings of the Secretary, substantial evidence must be found on the record as a whole. *See Giles Lowery Stockyards, Inc. v. Dep't of Agric.*, 565 F.2d 321, 326 (5th Cir.1977).

III. DISCUSSION

To resolve this petition, we address two matters. First, we address the nature of the alleged violation of the Horse Protection Act, 15 U.S.C. §§ 1821-1831, at issue in this proceeding. Second, we address whether substantial evidence supports the decision of the Judicial Officer that Zahnd did not rebut the statutory presumption.

A. The Alleged Violation of the Horse Protection Act

The Horse Protection Act makes it illegal for any individual to enter “for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore.” 15 U.S.C. § 1824(2)(B). As used by the statute, soring means the application of devices or chemicals to the forelimbs of a horse to achieve the distinctive high-stepping gait of the Tennessee Walking Horse. Soring causes intense pain to the horse and gives the horse trainer an unfair advantage in competition by artificially inducing the distinctive gait.

Under the Act, a horse is sore only if the soreness is the result of one of several artificial means:

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

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

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

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

Id. § 1821(3). A horse is presumed to be sore “if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.” *Id.* § 1825(d)(5).

With respect to Lady Ebony's Ace, there is no dispute that the statutory presumption of soreness was triggered. The Designated Qualified Person and two veterinarians for the Department of Agriculture palpated Lady Ebony's Ace and observed abnormal sensitivity in both of her forelimbs. “Nevertheless, it is well settled that the presumption of soreness is rebuttable. While it imposes on the party against whom it is directed the burden of producing evidence to me[e]t or rebut the presumption, the burden of proof remains with the [Complainant] and never shifts to the Respondent.” *In re Martin*, 53 Agric. Dec. 212, 223 (Mar. 16, 1994) (brackets in original).

B. The Decision of the Judicial Officer that Zahnd Did Not Rebut the Statutory Presumption of Soreness Is Supported by Substantial Evidence.

Whether we can meaningfully review the decision of the Judicial Officer that Zahnd failed to rebut the statutory presumption of soreness is a close question. The Administrative Law Judge found that Zahnd rebutted the presumption, but the Judicial Officer disagreed. Because the Judicial Officer is not bound by the decision of the Administrative Law Judge and can draw independent inferences, we review only the decision of the Judicial Officer for substantial evidence. *See Universal Camera*, 340 U.S. at 496, 71 S.Ct. at 469. Our decision is made difficult because, although the Judicial Officer expressed his disagreement with the decision of the Administrative Law Judge, the Judicial Officer did not offer any reasoning for his decision that Zahnd did not rebut the statutory presumption. The Judicial Officer failed to address at least some of Zahnd's evidence and explain why that evidence did not rebut the presumption.

At the hearing, Zahnd presented a few explanations to rebut the presumption that Lady Ebony's Ace was sore. Zahnd's evidence was that Lady Ebony's Ace was an irritable horse: she had been subject to the

irritation of a day in a horse trailer; she had been subject to multiple palpations; the manner of palpation can affect whether a horse moves; and an irritated horse could exhibit greater reactions than a non-irritated horse. Zahnd also presented two other possible causes for some of the movements of Lady Ebony's Ace: first, Appleton testified that the movement of another horse behind a horse being examined ordinarily will make the latter horse move; and second, Zahnd observed that Lady Ebony's Ace stood resting a back foot during an examination, which was, in Zahnd's lay experience, a position a horse does not take when it is sore. Both Appleton and Zahnd apparently were credible witnesses.

The only response of the Judicial Officer to this evidence was that the record did not support the finding that Lady Ebony's Ace was a "silly" horse. Although the record supports that finding, the suggestion that Lady Ebony's Ace was acting "silly" was not the sole explanation for her behavior offered by Zahnd. The term "silly" was used to refer to the horse's irritability. In an affidavit procured by an investigator for the Department of Agriculture, Zahnd stated that the horse "was stirred up, because she acted silly during the whole time she was being checked." The Administrative Law Judge described Zahnd's explanation for the horse's behavior as "due to the horse acting 'silly' as a result of spending most of the day in a horse trailer, and as a result of the extended examination process." Although both Appleton and Zahnd provided other testimony such that Lady Ebony's Ace moved when a horse walked behind her and that a horse will not rest a foot when it is sore, the Judicial Officer did not explain his rejection of these explanations.

Nevertheless, under our highly deferential standard of review, we conclude that the rejection by the Judicial Officer of the explanation that Lady Ebony's Ace was "silly" was intended to encompass Zahnd's explanation that the mare was aggravated or irritated, and substantial evidence supports that finding. As we have noted in our review of agency decisions under the "arbitrary, capricious, ... (or) unsupported by substantial evidence" standard, "[t]he agency must articulate a rational connection between the facts found and the choice made While we

may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' ” *Refrigerated Transp. Co., Inc. v. I.C.C.*, 663 F.2d 528, 531 (5th Cir. Unit B 1981) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974)). Although Zahnd and Appleton provided testimony that the reactions of Lady Ebony's Ace could be attributed to her irritable temper and multiple irritations, Dr. Dussault testified that Lady Ebony's Ace was not acting aggravated or irritated when she was palpated. The Judicial Officer was entitled to rely on Dussault's testimony and an independent review of the videotape of the examinations by Thomas, Dussault, and Guedron to reject the explanation given by Zahnd

The only remaining evidence offered by Zahnd to refute the presumption was Appleton's testimony that the movement of one horse behind another *could* cause the latter horse to move, and Zahnd's testimony that, in *his* experience, a horse would not rest its foot when it is sore. Neither statement is sufficient for us to conclude that the decision of the Judicial Officer is not supported by substantial evidence. The Judicial Officer was entitled to rely on both his review of the videotape of the examinations and the expert testimony of a veterinarian who performed a reliable examination of the horse rather than the vague and speculative testimony of two lay witnesses.

IV. CONCLUSION

The petition for review is DENIED.

KIM BENNETT v. USDA.

No. 06-3350.

Filed March 9, 2007.

(Cite as 219 Fed. Appx. 441).

HPA – Reasonableness of inspection – Right to refuse to allow inspection.

Horse trainer with prior good record and experience as a horse show event judge, refused to allow APHIS veterinarian to perform a pre-show inspection based upon his belief that the veterinarian was conducting examinations in an unreasonable manner. Court determined that neither the statute, nor the regulations, addressed the issue of what constitutes good grounds for refusal to allow inspection. A refusal to allow reasonable inspection is grounds for finding a violation of the act. Using the *Cheveron* standard, the court found that the agency's interpretation of the statute was reasonable in that the trainer was not entitled to rely on his own interpretation of what was a reasonable inspection under the statute.

**United States Court of Appeals
Sixth Circuit.**

BEFORE: KEITH and McKEAGUE, Circuit Judges; and CLELAND,
District Judge.*

* Honorable Robert H. Cleland, United States District Judge for the
Eastern District of Michigan, sitting by designation.

OPINION

McKEAGUE, Circuit Judge.

Appellant Kim Bennett ("Bennett") appeals a decision of the Secretary of Agriculture (the "Secretary") finding him in violation of the Horse Protection Act. For the reasons that follow, we affirm the decision of the Secretary.

I. BACKGROUND

Bennett has trained and bred Tennessee Walking Horses since 1980. He has a AAA judge's license with the National Horse Show Commission, and a trainer's license with the Walkers Training Association, both in good standing. Bennett and his wife, who is also a licensed trainer and judge, advised some acquaintances, not parties to this case, to purchase The Duck, and in 2002 the Bennetts began training The Duck. The Duck is a stallion and a previous world grand champion,

and Bennett's goal was to prepare The Duck to win another championship at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee in August of 2002.

On August 26, 2002, Bennett entered The Duck as a contender in the competition at the Celebration that day. As a breeding stallion, The Duck had a nervous temperament; he did not like strangers and was easily excited when around other horses. Therefore, Bennett, who was to ride The Duck in the competition, waited until the horse inspection area was empty of other horses before bringing The Duck to be inspected. Mark Thomas, a "designated qualified person" licensed to inspect horses for violation of the federal Horse Protection Act and employed by the privately-run National Horse Show Commission, conducted a pre-show inspection of The Duck to determine whether The Duck had been illegally "sored" to enhance his gait. Thomas gave The Duck the highest possible score for his general appearance, his locomotion, and his reaction to palpation. The Duck was approved for exhibition, and Bennett led him to the warm-up area.

On his way to the warm-up area, Bennett was stopped by Dr. Michael Guedron, a United States Department of Agriculture ("USDA") veterinarian authorized by the Secretary to inspect horses for violations of the Horse Protection Act. Dr. Guedron displayed appropriate credentials indicating this authority, of which Bennett was also previously aware. Dr. Guedron told Bennett to return The Duck to the inspection area for a second inspection; he did not volunteer an explanation for this instruction, nor provide one when Bennett asked. Bennett complied initially, but when he observed Dr. Guedron palpating The Duck's left front pastern in a manner Bennett believed to be intended to provoke a "sore" response from a horse that was not sore, he led The Duck away from Dr. Guedron. Dr. Guedron asked whether Bennett were refusing inspection; he responded, "No, I'm not. I'm just asking that you inspect the horse properly." Tr. at 216.

Also present was Dr. Lynn Bourgeois, another USDA veterinary medical officer. Dr. Bourgeois was also the "show veterinarian,"

meaning that he was the veterinarian in charge of the show, and was responsible to oversee Dr. Guedron, other federal inspectors, and the designated qualified persons. Dr. Bourgeois asked Bennett whether he would allow Dr. Guedron to finish the inspection. Bennett replied, "Not Dr. Guedron." Tr. at 160. Bennett requested that Dr. Bourgeois inspect the horse himself, but Dr. Bourgeois would not. Bennett never agreed to allow Dr. Guedron to complete the inspection, and eventually everyone left; The Duck did not compete.

The USDA took no further action regarding this incident until April 13, 2004, when an administrator for the Animal and Plant Health Inspection Service (the "APHIS") filed a complaint under the Horse Protection Act, 15 U.S.C. §§ 1821-1831, with the Secretary. The complaint alleged that Bennett had refused to allow a representative of the Secretary to inspect The Duck, in violation of 15 U.S.C. §§ 1824(9), 1823(e). The Administrative Law Judge ("ALJ") before whom the case was argued found that the USDA had not met its burden of proving a violation of the Horse Protection Act by a preponderance of the evidence because it had not shown that Dr. Guedron's inspection was performed "in a reasonable manner." ALJ Opinion at 10-11.

The USDA appealed the ALJ's decision to a Judicial Officer of the Secretary. The Judicial Officer reversed the ALJ, finding Bennett's belief that Dr. Guedron was performing his inspection unreasonably "not relevant" to the question of whether Bennett violated 15 U.S.C. § 1824(9). Opinion of Secretary at 17. The Judicial Officer found that Bennett had refused to allow Dr. Guedron to inspect The Duck, and therefore decided there had been a violation of the Horse Protection Act. Opinion of Secretary at 19-20. The Judicial Officer therefore ordered Bennett to pay a \$2,200 fine, and disqualified him for one year from "showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction." Opinion of Secretary at 23, 27. Bennett now appeals that decision.

II. REFUSAL OF AN UNREASONABLE INSPECTION

"[C]ourts are to give substantial deference to an agency's interpretation of its own regulations. " *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 943 (6th Cir.2000) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)).¹ The Secretary's² interpretation may be overturned "if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, " but "if it is a reasonable regulatory interpretation we must defer to it. " *Id.* at 944 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381; *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 94-95, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995)).

Regarding statutes, however, courts give less deference to an agency's interpretation. To "assess[] an agency's construction of a statute that it administers," courts perform the two-part analysis set forth in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Harris v. Olszewski*, 442 F.3d 456, 466 (6th Cir.2006). That analysis inquires: (1) "has Congress directly spoken to the precise question at issue?" and (2) "is the agency's answer [] based on a permissible construction of the statute?" *Id.* (alteration in original) (quoting *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778).

¹Both the USDA here and the Tenth Circuit in *McNamar v. Apfel*, 172 F.3d 764, 766 (10th Cir.1999), which the USDA quotes, inaccurately claim that the Supreme Court's opinion in *Thomas Jefferson University* holds that courts defer to agency interpretations of *both* the statutes *and* regulations they administer. *Thomas Jefferson University* refers only to the interpretations of regulations. A federal agency's interpretation of statutes is subject to a less deferential standard, as set forth below.

²The Judicial Officer "serves as the delegate for the Secretary of Agriculture for judicial matters, and has final administrative authority to decide the Department's [USDA's] cases...." *Rowland v. USDA*, 43 F.3d 1112, 1114 (6th Cir.1995) (citing 7 C.F.R. § 2.35).

The Horse Protection Act prohibits "[t]he failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by [15 U.S.C. § 1823]." 15 U.S.C. § 1824(9). This "inspection" is explained in § 1823:

[T]he Secretary [of Agriculture], or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction.... Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner.

Id. § 1823(e). The Department of Agriculture's regulations further provide:

Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate.... APHIS representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows, horse exhibitions, or horse sales or auctions for the purpose of examining horses, but they may do so in extraordinary situations....

9 C.F.R. § 11.4(a).

Both the statute and the regulation address the "reasonableness" of an inspection. The statute requires "*reasonable* promptness," "*reasonable* limits," and a "*reasonable* manner," and the regulation states that USDA officials will "*reasonably* inspect" at "*reasonable* times and places." However, neither expressly provides that a trainer or owner may refuse inspection due to a lack of such reasonableness. The Judicial Officer's opinion does not expressly address the regulation. It does explain his

interpretation of the statute's reasonableness requirements:

The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection or as a basis to require inspection by another representative of the Secretary of Agriculture.

Opinion of Secretary at 17-18.

At oral argument, the USDA conceded that there might exist extreme circumstances under which a trainer or exhibitor could refuse an inspection due to its unreasonableness without violating § 1824(9). Thus, the court is not presented with the question of whether it would ever be permissible for an exhibitor to refuse an inspection because it was unreasonable. The court need only decide whether, in this case, Bennett's refusal of an inspection he believed to be unreasonable was a violation of the Horse Protection Act.

Because the statute itself does not specify whether the "reasonableness" language provides a basis for owners and trainers to refuse inspection, Congress has not "directly spoken to the precise question at issue" in this case, the first question under the *Chevron* analysis. The second *Chevron* question is whether the USDA's interpretation is "based on a permissible construction of the statute." *Harris* explains that "[i]f so and if Congress has given the agency authority to interpret the statute, a federal court will defer to the agency's interpretation." 442 F.3d at 466 (citing *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778).

The Supreme Court explained in *Smiley v. Citibank*, 517 U.S. 735, 740-41, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996), that "[w]e accord deference to agencies under *Chevron*... because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and

foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Thus, even if the statutory "gap for the agency to fill," and the attendant "delegation of authority" for the agency to interpret the statute, are "implicit rather than explicit," "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778.

In this case, § 1823(e) makes clear that the inspection required by § 1824(9) is to be carried out by the Secretary of Agriculture or his representative. Thus, the inspection described in § 1824(9) is implemented by the USDA, and under *Chevron*, the USDA properly should resolve the ambiguity in § 1824(9). Thus, provided the Judicial Officer's interpretation of the statute is "permissible," the panel should defer to his interpretation. *Harris*, 442 F.3d at 466; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

The Judicial Officer determined that Bennett's "belief that Dr. Guedron was not conducting the inspection in a reasonable manner and [Bennett's] request for inspection by" Dr. Bourgeois "are not relevant to [Bennett's] violation of ... the Horse Protection Act," which position the USDA maintains on appeal. Opinion of Secretary at 17. This interpretation is reasonable. As the USDA points out in its brief, this interpretation furthers the purposes of the Horse Protection Act. Permitting a trainer or owner to refuse inspection based on his own assertion that an inspection is unreasonable, in the absence of

circumstances "well outside the norm of regularity in the inspection process" to which the USDA referred at oral argument,³ would potentially allow trainers to avoid discovery of "soring," the prevention of which is the purpose of the Horse Protection Act. 15 U.S.C. § 1822. Because § 1824(9) does not explicitly state the consequences of the requirement that an inspection be reasonable, and because the USDA's interpretation of the reasonableness language is permissible, this court must accept the USDA's determination that an exhibitor violates the Horse Protection Act if he refuses an inspection that is not egregious, based on his subjective belief that the inspection is unreasonable.

III. SUBSTANTIAL EVIDENCE

This court "review[s] an administrative decision of the [Secretary] under the [Horse Protection Act] to determine whether the proper legal standards were employed and substantial evidence supports the decision." *Bobo v. USDA*, 52 F.3d 1406, 1410 (6th Cir.1995) (internal quotations omitted) (second and third alterations in original) (quoting *Gray v. USDA*, 39 F.3d 670, 675 (6th Cir.1994)). "Substantial evidence means more than a scintilla but less than a preponderance of the evidence," and " must be based upon the record taken as a whole. " *Id.* (quoting *Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 144 (4th Cir.1993); *Gray*, 39 F.3d at 675).

Unlike a federal court, a Judicial Officer, "sitting in review of an ALJ's initial decision, is authorized by statute to substitute [his] judgment for that of the ALJ." *Parchman v. USDA*, 852 F.2d 858, 860 n. 1 (6th Cir.1988) (quoting *Farrow v. USDA*, 760 F.2d 211, 213 (8th Cir.1985)) (internal quotations omitted). However, where findings of fact are based on determinations of witness credibility, the ALJ's findings are given

³The USDA conceded at oral argument that if, for example, a USDA veterinarian "start[ed] towards the horse's hoof" with "a big knife," and the owner therefore led the horse away from the inspection, the owner would not have violated §1824(9).

greater weight. *Rowland v. USDA*, 43 F.3d 1112, 1114 (6th Cir.1995).

The Horse Protection Act, as noted above, prohibits the "refusal to permit ... inspection" of a horse in an exhibition. 15 U.S.C. § 1824(9). As § 1823(e) clarifies, this is an inspection by "the Secretary, or any representative of the Secretary duly designated by the Secretary," provided he "present[] appropriate credentials." It is not disputed here that Dr. Guedron possessed and presented the appropriate credentials, or that he was a duly designated representative of the Secretary of Agriculture. Bennett argues that he "never refused to allow Dr. Guedron to inspect the horse.... Bennett's only request was that the USDA conduct its inspection reasonably and properly under direction of the H[orse] P[rotection] A[ct]." Appellant's Brief at 19.

However, this contention reflects only some of what happened. As Bennett acknowledges in his own statement of facts, he was first asked by Dr. Guedron whether he was refusing an inspection; he responded, "No, I am not. I am only asking that you inspect the horse properly." Tr. at 316, *quoted in* Appellant's Brief at 10. When Dr. Bourgeois, the show vet, then "asked Bennett whether he would allow Dr. Guedron to complete his inspection of the horse[,] Bennett replied, Not Dr. Guedron." *Id.* Thus, Bennett himself admits that he expressly refused to allow Dr. Guedron to inspect The Duck. The true focus of his argument is that he "never refused Dr. Guedron the opportunity to *reasonably* inspect the horse." Appellant's Brief at 22.

As discussed above, the Judicial Officer permissibly concluded that the exhibitor's belief regarding the reasonableness of an inspection under such circumstances as existed here is not relevant to the question of whether a trainer has refused the inspection. Thus, by stating that Dr. Guedron was not permitted to inspect The Duck, even though he invited Dr. Bourgeois to inspect him, Bennett refused to allow a duly appointed representative of the Secretary to inspect a horse, in violation of the Horse Protection Act.

Even if Bennett had not conceded that he would not allow Dr. Guedron to inspect The Duck, "upon the record taken as a whole," there was substantial evidence that he refused inspection. Dr. Bourgeois, the show vet, testified that Bennett would not allow Dr. Guedron to inspect The Duck. Mark Thomas, the designated qualified person who initially inspected (and passed) The Duck, testified, "I just saw that Dr. Guedron started his inspection and things didn't go to suit Mr. Bennett." Tr. at 55. When asked whether Bennett allowed Dr. Guedron to inspect The Duck, Thomas responded, "Not while I was there." Tr. at 58. Lonnie Messick, an official of the National Horse Show Commission who was videotaping inspections on August 26, 2002, testified that Bennett would not allow Dr. Guedron to finish inspecting The Duck. Additionally, Leigh Bennett (Kim Bennett's wife) testified that Bennett told Dr. Guedron that "if he could not inspect him properly, that he [Bennett] didn't want him [Dr. Guedron] to inspect him [The Duck]." Tr. at 370. Similarly, Bennett testified that "I refused him [Dr. Guedron] to inspect him [The Duck] improperly." Tr. at 458.

Thus, the record indicates that substantial evidence supported the Judicial Officer's conclusion that Bennett refused to allow Dr. Guedron to complete his inspection of The Duck. Substantial evidence need not even be a "preponderance" of the evidence. *Bobo*, 52 F.3d at 1410. Here, five eyewitnesses agree that Bennett would not allow Dr. Guedron to inspect The Duck. Bennett and his wife were both careful to say that Bennett would not allow the inspection *unless* Dr. Guedron would conduct it "properly." Clearly, Bennett's position is that he objected to Dr. Guedron's inspection only because it was being conducted improperly. However, even Bennett and his wife do not claim that Bennett allowed Dr. Guedron to inspect the horse.

Bennett also argues that the ALJ's determinations should be given particular weight because they are based on credibility determinations. Bennett is correct that the factfindings of an ALJ are given greater weight when they are based on credibility determinations. In this case, the ALJ's opinion states in so many words that "I found Kim Bennett to be a credible witness." ALJ Opinion at 9.

However, the Judicial Officer's reversal was not based on his disagreement with the ALJ's findings of fact. Both the ALJ's and Judicial Officer's opinions found that Bennett was willing to have The Duck inspected as long as Dr. Guedron did not perform the inspection. ALJ Opinion at 8; Opinion of Secretary at 15. Thus, the fact that credibility-based factfindings of ALJs are given greater weight does not undermine the decision of the Judicial Officer in this case.

Bennett also argues that the USDA's decision not to offer evidence from Dr. Guedron himself leads to an adverse inference regarding what such evidence would have shown. This adverse inference arises in the Sixth Circuit under the so-called "missing witness rule" when a party fails to call a witness "peculiarly within [his] power to produce" and whose testimony would "elucidate the transaction." *United States v. Blakemore*, 489 F.2d 193, 195 (6th Cir.1973) (quoting *Wynn v. United States*, 397 F.2d 621, 625 (D.C.Cir.1967)) (internal quotations omitted) (alteration in original).⁴

At the time of the proceedings below, Dr. Guedron had left the USDA. Even assuming that he was a witness peculiarly within the USDA's power to produce, the adverse inference is not helpful to Bennett. Bennett's principal contention throughout has been that Dr. Guedron was inspecting The Duck in an unreasonable manner. The ALJ found that the inspection was unreasonable; the USDA maintains that reasonableness was irrelevant in this case. Thus, had Dr. Guedron

⁴The Secretary of Agriculture has also invoked this rule in proceedings under the Horse Protection Act. *In re David Tracy Bradshaw*, 59 Agric. Dec. 228, 2000 WL 799108, at * 16 (June 14, 2000) ("A party's failure to produce a witness, when it would be natural for that party to produce that witness, if the facts known by the witness had been favorable, serves to indicate, as a natural inference, that the party fears to produce the witness.... This principle has been followed in many proceedings before the United States Department of Agriculture....").

admitted on the stand that his inspection was unreasonable, the case would not be altered. Bennett's case does not fail for lack of evidence regarding Dr. Guedron's method of inspection, but because the USDA interprets § 1824(9) as requiring an exhibitor to permit inspection, even if he believes it to be unreasonable, under such circumstances as existed here. Even granting Bennett every inference in his favor, the Judicial Officer's determination that Bennett violated the inspection requirement of the Horse Protection Act is supported by substantial evidence.

IV. CONCLUSION

For these reasons, the Judicial Officer's decision that Bennett violated the Horse Protection Act is **AFFIRMED**.

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: DERWOOD STEWART, AN INDIVIDUAL d/b/a STEWART FARMS, A SOLE PROPRIETORSHIP.

HPA Docket No. 06-0001.

Decision and Order.

Filed February 6, 2007.

HPA – Horse protection – Failure to obey order of disqualification – Civil penalty – Extensions of time procedural – Ex parte communication.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's (ALJ) decision in which she concluded Respondent knowingly failed to obey an order of disqualification in violation of 15 U.S.C. § 1825(c). However, the Judicial Officer increased the amount of the civil penalty assessed by the ALJ against Respondent from \$500 to \$3,300. The Judicial Officer based the \$3,300 civil penalty on the factors required under the Horse Protection Act (15 U.S.C. § 1825(b)(1)) to be considered when determining the amount of the civil penalty and the United States Department of Agriculture's sanction policy. The Judicial Officer rejected Respondent's contention that Complainant's Appeal Petition was late-filed because an extension of time could not be granted ex parte. The Judicial Officer stated the Rules of Practice prohibits the Judicial Officer from discussing ex parte the merits of a proceeding with Complainant's counsel (7 C.F.R. § 1.151(a)), but that ex parte discussions as to procedural matters, such as extensions of time, fall outside the prohibition on ex parte discussions.

Colleen A. Carroll, for Complainant.

L. Thomas Austin, Dunlap, TN, for Respondent.

Initial decision issued by Jill S. Clifton, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on December 5, 2005. Complainant instituted the

proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on February 26, 2005, Derwood Stewart [hereinafter Respondent] knowingly failed to obey an order of disqualification issued by the Secretary of Agriculture by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction held at Respondent's farm.¹ On January 3, 2006, Respondent filed an Answer denying the material allegations of the Complaint.

On September 7, 2006, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Chattanooga, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. L. Thomas Austin, Austin, Davis & Mitchell, Dunlap, Tennessee, represented Respondent. The ALJ issued a decision orally at the close of the hearing in which the ALJ: (1) found that on February 26, 2005, Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition; (2) concluded that Respondent violated section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)); and (3) assessed Respondent a \$500 civil penalty.²

The ALJ excerpted from the transcript the decision orally announced at the close of the hearing, and on September 14, 2006, filed the written excerpt.³ On October 27, 2006, Complainant appealed to the Judicial Officer.⁴ On November 27, 2006, Respondent filed a response to

¹Compl. ¶ 9.

²Tr. 167-79.

³Confirmation of Oral Decision and Order.

⁴Complainant's Petition for Appeal of Oral Decision and Order [hereinafter Complainant's Appeal Petition].

Complainant's Appeal Petition.⁵ On November 29, 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 finding that Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition; however, I disagree with the amount of the civil penalty assessed against Respondent by the ALJ. Therefore, I affirm the ALJ's September 7, 2006, oral decision,⁶ except for the amount of the civil penalty assessed against Respondent.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

....

CHAPTER 44—PROTECTION OF HORSES

....

§ 1825. Violations and penalties

....

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

In addition to any fine, imprisonment, or civil penalty

⁵Response to Petition for Appeal of Oral Decision and Order [hereinafter Respondent's Response to Appeal Petition].

⁶Tr. 167-79.

authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation.

15 U.S.C. § 1825(c).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

.....

PART 3—DEBT MANAGEMENT

.....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties

Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—

. . . .

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

. . . .

(viii) Civil penalty for failure to obey Horse Protection Act disqualification, codified at 15 U.S.C. 1825(c), has a maximum of \$3,300 and exhibition of disqualified horse, codified at 15 U.S.C. 1825(c), has a maximum of \$3,300.

7 C.F.R. § 3.91(a), (b)(2)(viii) (2005).

DECISION

Decision Summary

Except for the amount of the civil penalty assessed against Respondent, I affirm the ALJ's September 7, 2006, oral decision in which the ALJ found that on February 26, 2005, Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition and the ALJ concluded that Respondent violated section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)).⁷ Neither Complainant nor Respondent appeals the ALJ's finding or conclusion. The only issue before me is the amount of the civil penalty to be assessed against Respondent for his failure to obey an order of disqualification. Complainant urges that I assess Respondent a \$3,300 civil penalty,⁸ the maximum civil penalty for Respondent's February 26, 2005, knowing

⁷Tr. 167-79.

⁸Complainant's Appeal Pet. at 2-8.

failure to obey the order of disqualification.⁹ Respondent urges that I sustain the ALJ and assess Respondent a \$500 civil penalty for Respondent's February 26, 2005, knowing failure to obey the order of disqualification.¹⁰ After reviewing the factors required under the Horse Protection Act to be considered when determining the amount of the civil penalty and in light of the United States Department of Agriculture's sanction policy, I assess Respondent a \$3,300 civil penalty for his February 26, 2005, knowing failure to obey an order of disqualification.

Findings of Fact

1. Respondent is an individual doing business as Stewart Farms (Answer Introductory Paragraph).

2. Respondent's mailing address is 674 Gath Lucky Road, McMinnville, Tennessee 37110 (CX 2, CX 4, CX 5 at 1).

3. On September 6, 2001, the Judicial Officer issued a decision concluding that, on October 28, 1998, Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) when Respondent entered a horse for the purpose of showing or exhibiting the horse in the 30th Anniversary National Walking Horse Trainers Show, while the horse was sore (CX 1 at 1-22; Answer ¶ II).¹¹

4. On September 6, 2001, the Judicial Officer issued an order disqualifying Respondent for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (CX 1 at 19-20).¹²

5. On February 22, 2002, Respondent filed a motion to stay the

⁹15 U.S.C. § 1825(c); 7 C.F.R. § 3.91(b)(2)(viii) (2005).

¹⁰Respondent's Response to Appeal Pet. at 2.

¹¹*In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

¹²*Id.* at 609.

September 6, 2001, order issued by the Judicial Officer pending appeal (CX 8 at 2-4).

6. On March 4, 2002, the Judicial Officer issued an order staying the September 6, 2001, order pending the outcome of proceedings for judicial review, as follows:

ORDER

The Order issued in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. [570] (. . . 2001), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Derwood Stewart shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

CX 8 at 7.¹³

7. On May 15, 2003, the United States Court of Appeals for the Sixth Circuit denied Respondent's petition for review of the Judicial Officer's September 6, 2001, decision (RX 1; Answer ¶ 4).¹⁴

8. On July 9, 2003, the United States Court of Appeals for the Sixth Circuit denied Respondent's petition for rehearing of the Court's May 15, 2003, decision (RX 2).

9. On May 21, 2004, the Judicial Officer issued an order lifting the March 4, 2002, stay order stating the disqualification of Respondent shall become effective on the 60th day after service of the order lifting stay on Respondent, as follows:

ORDER

¹³*In re Derwood Stewart* (Stay Order as to Derwood Stewart), 61 Agric. Dec. 291 (2002).

¹⁴*Stewart v. United States Dep't of Agric.*, 64 F. App'x 941 (6th Cir. 2003).

. . . .
2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. . . .

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

CX 1 at 23-24.¹⁵

10. The Hearing Clerk served Respondent with the Judicial Officer's May 21, 2004, Order Lifting Stay Order as to Derwood Stewart on May 26, 2004 (CX 1 at 25-26).

11. Respondent was disqualified for a period of 1 year beginning July 25, 2004, from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction (CX 1 at 23-26).

12. Respondent advertised that he would hold a horse review and barn party at his farm, Stewart Farms, 674 Gath Lucky Road, McMinnville, Tennessee, on February 26, 2005, and invited the public to participate. On the advertisement for the horse review and barn party, Respondent identified himself as the owner of the facility at which the horse review and barn party was to be held. (CX 2.)

13. Numerous individuals attended Respondent's February 26, 2005, horse review and barn party and displayed horses (CX 3-CX 6).

14. Some of the horses at Respondent's February 26, 2005, horse review and barn party were for sale (CX 6; Tr. 54-55, 58-61, 64-66, 103-09, 136-37).

¹⁵*In re Derwood Stewart* (Order Lifting Stay Order as to Derwood Stewart), 63 Agric. Dec. 268 (2004).

15. Respondent participated in the February 26, 2005, horse review and barn party (CX 3 at 3, CX 4 at 2, CX 5 at 2, CX 6; Tr. 73, 84-85, 96, 119, 136-37).

16. On February 26, 2005, Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition (CX 2-CX 6).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On February 26, 2005, Respondent knowingly failed to obey an order of disqualification in violation of section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)).

Complainant's Appeal Petition

Complainant raises one issue in Complainant's Appeal Petition. Complainant contends the ALJ erroneously failed to assess Respondent the maximum civil penalty of \$3,300 for Respondent's knowing failure to obey an order of disqualification.¹⁶

The ALJ declined to assess Respondent the maximum civil penalty for Respondent's knowing failure to obey an order of disqualification and, instead, assessed Respondent a \$500 civil penalty.¹⁷ The ALJ stated, prior to the commencement of the September 7, 2006, hearing, she had been prepared to assess Respondent the maximum civil penalty of \$3,300 if Complainant proved Respondent knowingly failed to obey an order of disqualification.¹⁸ While the ALJ concluded Respondent knowingly failed to obey an order of disqualification, she found the maximum civil penalty too harsh.¹⁹ The ALJ cited four reasons for

¹⁶Complainant's Appeal Pet. at 2-7.

¹⁷Tr. 177; Confirmation of Oral Decision and Order ¶ 10.

¹⁸Tr. 175-76.

¹⁹Tr. 176.

declining to assess the maximum civil penalty as requested by Complainant: (1) Respondent's knowing failure to obey an order of disqualification "was very small," was not "flagrant," and was not "intended to flaunt the authority of the United States Government"; (2) Respondent's knowing failure to obey an order of disqualification "was not the typical violation which we confront when horses have been intentionally soled"; (3) Respondent's knowing failure to obey an order of disqualification "happened in winter"; and (4) the event at which Respondent knowingly failed to obey an order of disqualification "was not what normally we would think of when we think of horse show, horse sale, horse auction, and horse exhibition[.]"²⁰

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) authorizes the assessment of a civil penalty of not more than \$3,000 for each knowing failure to obey an order of disqualification. In 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture increased the maximum civil penalty that may be assessed under section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) from \$3,000 to \$3,300.²¹ Complainant seeks an order assessing Respondent the maximum civil penalty of \$3,300.²²

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

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the

²⁰Tr. 176-77.

²¹7 C.F.R. § 3.91(b)(2)(viii) (2005).

²²Tr. 161; Complainant's Appeal Pet.

administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that the provisions of section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) respecting assessment of a civil penalty shall apply with respect to civil penalties under section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)). Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

I agree with the ALJ that Respondent's failure to obey an order of disqualification was not "intended to flaunt the authority of the United States Government." However, I disagree with the ALJ's finding that Respondent's knowing failure to obey an order of disqualification was "very small" and not "flagrant." Instead, I find the nature, extent, and gravity of Respondent's prohibited conduct are great. Respondent knew that he was subject to an order disqualifying him from managing a horse exhibition during the period July 25, 2004, through July 24, 2005. Nonetheless, Respondent advertised that he would hold a horse review and barn party at his farm, Stewart Farms, 674 Gath Lucky Road, McMinnville, Tennessee, on February 26, 2005, and invited the public to participate.²³ On the advertisement for the horse review and barn party, Respondent identified himself as the owner of the facility at which the horse review and barn party was to be held.²⁴ Numerous individuals attended Respondent's February 26, 2005, horse review and barn party

²³CX 2.

²⁴CX 2.

and displayed horses.²⁵ Some of the horses at Respondent's horse review and barn party were for sale.²⁶ Respondent participated in the horse review and barn party.²⁷ Weighing all the circumstances, I find Respondent highly culpable for his knowing failure to obey an order of disqualification.

Moreover, Respondent has a history of a prior violation of the Horse Protection Act.²⁸ Further still, Respondent presented no argument that he is unable to pay a \$3,300 civil penalty or that a \$3,300 civil penalty would affect his ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.²⁹ This policy of assessing the maximum

²⁵CX 3-CX 6.

²⁶CX 6; Tr. 54-55, 58-61, 64-66, 103-09, 136-37.

²⁷CX 3 at 3, CX 4 at 2, CX 5 at 2, CX 6; Tr. 73, 84-85, 96, 119, 136-37.

²⁸*In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

²⁹*In re Kim Bennett*, 65 Agric. Dec. 174, 189 (2006), *appeal docketed*, No. 06-3350 (6th Cir. Mar. 9, 2006); *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005), *appeal docketed sub nom. Zahnd v. Secretary of the Dep't of Agric.*, No. 06-11571-E (11th Cir. Mar. 8, 2006); *In re Mike Turner*, 64 Agric. Dec. 1456, 1475 (2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *aff'd*, 2006 WL 2430314 (6th Cir. Aug. 22, 2006) (unpublished); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Jack Stepp*, 57 Agric. Dec. 297 (1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E.

civil penalty in most Horse Protection Act cases applies to cases in which a respondent has knowingly failed to obey an order of disqualification.³⁰

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.³¹

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification is appropriate in almost every Horse Protection Act case.³²

Rizio), 52 Agric. Dec. 298 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

³⁰*See In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (assessing the respondent the then-maximum civil penalty of \$3,000 for the respondent's knowing failure to obey an order of disqualification), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

³¹*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

³²*In re Kim Bennett*, 65 Agric. Dec. 174, 191 (2006), *appeal docketed*, No. 06-3350 (6th Cir. Mar. 9, 2006); *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1505-06 (2005), *appeal docketed sub nom. Zahnd v. Secretary of the Dep't of Agric.*, No. 06-11571-E (11th Cir. Mar. 8, 2006); *In re Mike Turner*, 64 Agric. Dec. 1456, 1506 (2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (2005), *aff'd*, 2006 WL 2430314 (6th Cir. Aug. 22, 2006) (unpublished); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R.

Cont.

Assessing a \$500 civil penalty for a knowing failure to obey an order of disqualification would undermine the purpose for the issuance of disqualification orders and render them ineffective. Violators of the Horse Protection Act who are disqualified may choose to run the risk of the assessment of a \$500 civil penalty in order to continue to participate in horse shows, horse exhibitions, horse sales, and horse auctions during the disqualification period. Therefore, in most Horse Protection Act cases, the maximum civil penalty for each knowing failure to obey an order of disqualification is warranted; however, the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of assessing the maximum civil penalty for Respondent's knowing failure to obey an order of disqualification is warranted.

Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for Respondent's violation of the Horse Protection Act. Therefore, I assess Respondent a \$3,300 civil penalty for his February 26, 2005, knowing

Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 591 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 982 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

failure to obey an order of disqualification.

I have already addressed my reasons for my disagreement with the ALJ's findings that Respondent's knowing failure to obey an order of disqualification was "very small" and not "flagrant." In addition, when determining the amount of the civil penalty, the ALJ took into consideration the season of the year in which Respondent violated the Horse Protection Act. I find the season of the year in which a respondent violates the Horse Protection Act irrelevant when determining the amount of the civil penalty to be assessed. Further, I find irrelevant the ALJ's finding that the event at which Respondent knowingly failed to obey an order of disqualification "was not what normally we would think of when we think of horse show, horse sale, horse auction, and horse exhibition[.]"³³ The Horse Protection Regulations (9 C.F.R. pt. 11) defines the term *horse exhibition*, as follows:

§ 11.1 Definitions.

.....
Horse Exhibition means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

9 C.F.R. § 11.1.

The ALJ concluded, based on this definition, the event at Respondent's premises on February 26, 2005, "was indeed a horse exhibition."³⁴ Since the term *horse exhibition* is defined in the Horse Protection Regulations and the February 26, 2005, event at Respondent's premises falls within the definition of the term *horse exhibition*, I find irrelevant the ALJ's finding that the event at which Respondent

³³ Tr. 177.

³⁴ Tr. 172.

knowingly failed to obey an order of disqualification “was not what normally we would think of when we think of [a] . . . horse exhibition[.]”³⁵ Finally, I find no basis for the ALJ to compare Respondent’s knowing failure to obey an order of disqualification with “the typical violation which we confront when horses have been intentionally soiled.”³⁶ Congress provided for the assessment of a distinct civil penalty for the knowing failure to obey an order of disqualification.³⁷

Respondent’s Response to Appeal Petition

Respondent asserts counsel for Complainant, Colleen A. Carroll, discussed *ex parte* with the Judicial Officer an extension of time for filing Complainant’s Appeal Petition. Respondent contends: (1) Ms. Carroll’s *ex parte* discussion with the Judicial Officer violated Rule 3.5 of the Rules of the Supreme Court of the State of Tennessee; (2) Complainant’s Appeal Petition was not timely filed, as it was error for the Judicial Officer to grant an extension of time *ex parte*; and (3) the Judicial Officer should recuse himself because he granted Complainant’s

³⁵ Tr. 177.

³⁶ Tr. 176.

³⁷ Compare section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)), which provides for the assessment of a maximum civil penalty of \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824), with section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)), which provides for the assessment of a maximum civil penalty of \$3,000 for the knowing failure to obey an order of disqualification. (In 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200 (7 C.F.R. § 3.91(b)(2)(vii) (2005)) and adjusted the civil monetary penalty that may be assessed under section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) for each knowing failure to obey an order of disqualification by increasing the maximum civil penalty from \$3,000 to \$3,300 (7 C.F.R. § 3.91(b)(2)(viii) (2005)).

request for an extension of time ex parte.³⁸

The ALJ issued a decision orally at the close of the September 7, 2006, hearing. Pursuant to the Rules of Practice, the parties had 30 days after issuance of the ALJ's oral decision within which to appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.³⁹ Thus, Complainant's Appeal Petition was required to be filed with the Hearing Clerk no later than October 10, 2006.⁴⁰ On October 10, 2006, Complainant, by telephone, requested an extension of time within which to file Complainant's Appeal Petition, which I granted on October 11, 2006.⁴¹

As an initial matter, the Rules of the Supreme Court of the State of

³⁸ Respondent's Response to Appeal Pet. at 1-2.

³⁹ 7 C.F.R. § 1.145(a).

⁴⁰ Thirty days after September 7, 2006, was Saturday, October 7, 2006. Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

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

....

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

7 C.F.R. § 1.147(h).

The next business day after Saturday, October 7, 2006, was Tuesday, October 10, 2006. Therefore, Complainant was required to file Complainant's Appeal Petition no later than October 10, 2006.

⁴¹ Informal Order Extending Time For Filing Complainant's Appeal Petition.

Tennessee are not applicable to the instant proceeding;⁴² instead, the Rules of Practice governs the instant proceeding. Section 1.151(a) of the Rules of Practice prohibits only ex parte discussions that concern the merits of a proceeding, as follows:

§ 1.151 *Ex parte* communications.

(a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss *ex parte* the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided*, That procedural matters shall not be included within this limitation[.]

7 C.F.R. § 1.151(a). Thus, the Rules of Practice permits ex parte discussions as to procedural matters,⁴³ and a request for an extension of time is a procedural matter that falls outside the prohibition on ex parte discussions.⁴⁴ Moreover, the Rules of Practice only requires the Judicial Officer to provide a party with notice of a request for an extension of time and an opportunity to respond to that request, when time permits, as follows:

⁴² The Rules of the Supreme Court of the State of Tennessee govern all matters on appeal to the Supreme Court of the State of Tennessee (Rule 1).

⁴³ *In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988) (stating the Rules of Practice permits ex parte discussions as to procedural matters).

⁴⁴ *United States v. 47 West 644 Route 38*, 190 F.3d 781, 783 (7th Cir. 1999) (stating the term *substantive motion* means those that, if granted, would result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting an extension of time within which to file something), *cert. denied sub nom. Accardi v. United States*, 529 U.S. 1005 (2000); *Britton v. Swift Transportation Co.*, 127 F.3d 616, 618 (7th Cir. 1997) (stating the term *substantive motion* means those that, if granted, would result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting an extension of time within which to file something).

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

.....
(f) *Extensions of time.* The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in § 1.143 if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f). With respect to the extension of time at issue in this proceeding, Complainant made his request for an extension of time to file an appeal petition on October 10, 2006, the date the time for filing Complainant's Appeal Petition was to expire. Under the circumstances, I find time did not permit my providing Respondent notice of Complainant's request for an extension of time and an opportunity to submit views concerning Complainant's request. Therefore, I reject Respondent's contention that I erroneously granted Complainant's October 10, 2006, request for an extension of time within which to file Complainant's Appeal Petition, and I reject Respondent's request that I recuse myself based on my issuance of the October 11, 2006, Informal Order Extending Time For Filing Complainant's Appeal Petition.

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

ORDER

Respondent is assessed a \$3,300 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:

Colleen A. Carroll

HORSE PROTECTION ACT

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

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 06-0001.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.⁴⁵ The date of the Order in this Decision and Order is February 6, 2007.

⁴⁵15 U.S.C. § 1825(b)(2), (c).

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**In re: TIMOTHY WAYNE HOLLEY, d/b/a TIM HOLLEY
STABLES TIM HOLLEY AND SON STABLES.
HPA Docket No. 06-0005.
Confirmation of Oral Decision and Order.
Filed April 9, 2007.**

HPA – Oral Decision – Prior disqualification – Soring.

Bernadette R. Juarez for APHIS.
W. Mitchell Moran for Respondent.
Decision and Order by Administrative Law Judge Jill S. Clifton.

1. The Complainant, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (“APHIS”), is represented by Bernadette R. Juarez, Esq. The Respondent Timothy Wayne Holley, an individual, d/b/a Tim Holley Stables and Tim Holley and Son Stables (“Respondent Holley”) represents himself¹ (appears *pro se*).
2. The Complaint, filed on February 14, 2006, alleged violations of the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) (the "Act"). Respondent Holley’s Answer was filed on March 8, 2006. During the hearing in Jackson, Mississippi on April 3-4, 2007, the Complaint was amended to conform to proof.
3. On April 4, 2007, 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 transcript²

¹ Respondent Holley was represented by W. Mitchell Moran, Esq., until Mr. Moran moved to withdraw as Respondent Holley’s attorney, and I granted his motion, during the first day of the hearing, April 3, 2007.

² Anyone choosing to pay for an expedited copy of the transcript could order same from Neal R. Gross and Co., Inc., Court Reporters, 1323 Rhode Island Ave NW, Washington DC 20005-3701, telephone 202.234.4433; fax 202.387.7330.

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.

4. Ten witnesses testified: Ms. Carolyn S. Ballard, Mr. Stephen C. Fuller, Mr. Gary H. Pettway, Ms. Marcia M. Allison, Mr. James Lonnie Messick, Mr. Rhudy Ralph Ayers, Dr. Clement Dussault, Dr. Lynn P. Bourgeois, Ms. Colleen Carroll, Esq., and Dr. Robert A. Willems. Numerous exhibits were admitted into evidence.

Abbreviated Findings of Fact and Conclusions (*See Transcript*)

5. The Secretary of Agriculture has jurisdiction.

6. Respondent Holley is an individual whose address was and is 63 Tamin Cove, Byhalia, Mississippi 38611.

7. Respondent Holley knowingly violated section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B) on March 21, 2002, by entering the horse Ultimate Game, while Ultimate Game was sore, for the purpose of showing or exhibiting Ultimate Game, as entry number 422 in class 27 at the 34th Annual National Walking Horse Trainers Show in Shelbyville, Tennessee.

8. While Respondent Holley was under an order of disqualification,³ Respondent Holley knowingly violated the Horse Protection Act, specifically 15 U.S.C. § 1825(c), **35** times.

9. The following order is authorized by the Act and warranted under the circumstances.

Abbreviated Order (*See Transcript*)

10. Respondent Holley is assessed a civil penalty of **\$2,200** for his violation of 15 U.S.C. § 1824(2)(B); plus a civil penalty of **\$115,500** for his 35 violations of 15 U.S.C. § 1825(c); both of which shall be paid by certified checks or money orders or cashier's checks, made payable to the order of the **Treasurer of the United States**. Payments of the civil

³ Respondent Holley was under a one-year period of disqualification from March 15, 2002 through March 14, 2003.

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penalties **shall be sent by a commercial delivery service, such as FedEx or UPS**, to, and received by, Bernadette R. Juarez, Esq., at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Bernadette R. Juarez, Esq.
South Building, Room 2343, Stop 1417
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1417.

11. Respondent Holley is **disqualified for 10 years**⁴ from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, corporation, partnership, 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, corporation, partnership, or other device.⁵

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

13. My oral Decision and Order becomes final without further proceedings on **Wednesday, May 9, 2007** (35 days after pronouncement), and effective one day thereafter, UNLESS an appeal to

⁴ Respondent Holley has an opportunity to reduce this period of disqualification by paying his civil penalties, including the \$2,000 balance of his previously imposed \$2,200 civil penalty. *See Transcript.*

⁵ "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in any area where spectators are not allowed, and financing the participation of others in equine events.

the Judicial Officer is filed⁶ with the Hearing Clerk by **Friday, May 4, 2007** (30 days after pronouncement), in accordance with 7 C.F.R. § 1.145 (see attached Appendix 1 and attached Appendix 2).

14. 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, and the Hearing Clerk is requested to FAX copies in addition to serving normally.

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

⁶ prior to 4:30 pm Eastern Daylight time

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,

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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: PERRY LACY.
HPA Docket No. 06-0004.
Decision and Order.
Filed June 29, 2007.**

HPA – Horse protection – Statutory Presumption – Sanctions – Admissibility of evidence.

The Judicial Officer reversed the initial decision by Administrative Law Judge Peter M. Davenport and concluded Respondent entered a horse known as "Mark of Buck" in a horse show while the horse was sore, in violation of 15 U.S.C. § 1824(2)(B). The Judicial Officer found the agency proved by a preponderance of the evidence that Mark of Buck was "sore" as that term is defined in the Horse Protection Act and Mark of Buck manifested abnormal sensitivity in both of his forelimbs triggering the statutory presumption that he was a horse which was sore (15 U.S.C. § 1825(d)(5)). The Judicial Officer found Mr. Lacy did not rebut the statutory presumption and found Mr. Lacy's evidence that Mark of Buck was diagnosed with West Nile virus 11 days after the horse showed pain reactions to palpation during an inspection at a horse show did not outweigh the agency's evidence that Mark of Buck was sore. The Judicial Officer assessed Mr. Lacy a \$2,200 civil penalty and disqualified Mr. Lacy for 1 year.

Robert A. Ertman, for Complainant.
David F. Broderick, Bowling Green, KY, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On January 18, 2006, the Administrator of the Animal and Plant Health Inspection Service [hereinafter APHIS], an agency of the United States Department of Agriculture [hereinafter USDA], filed a complaint alleging that Perry Lacy violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. The complaint specifically alleges that, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) on August 25, 2002, Mr. Lacy entered, for the purpose of showing or exhibiting, a horse named “Mark of Buck” in the 64th Annual Tennessee Walking Horse National Celebration [hereinafter the Celebration] in Shelbyville, Tennessee, while the horse was sore. The complaint also alleges that Mr. Lacy allowed the entry of Mark of Buck in the Celebration while the horse was sore, a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).¹

In his answer, Mr. Lacy admitted that he owned Mark of Buck and that he entered the horse in the Celebration. Mr. Lacy denied that Mark of Buck was sore and denied that he entered Mark of Buck in the Celebration while the horse was sore.

On August 22, 2006, in Bowling Green, Kentucky, the ALJ conducted a hearing. Robert A. Ertman, Office of the General Counsel, USDA, represented APHIS. David F. Broderick, Broderick & Associates, Bowling Green, Kentucky, represented Mr. Lacy. APHIS entered nine exhibits into evidence identified as “CX.” These exhibits included APHIS Form 7077, Summary of Alleged Violations (CX 2); National Horse Show Commission DQP² Ticket (CX 4); National Horse

¹APHIS did not present evidence on this allegation, the ALJ did not discuss this allegation, and APHIS did not raise this allegation on appeal to the Judicial Officer. Therefore, I find the question of whether Mr. Lacy violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of a sore horse waived, and I do not address the issue.

²Designated Qualified Person. DQPs are employed by the management of horse shows, and USDA veterinarians monitor their performance (9 C.F.R. §§ 11.7, .21). The

Show DQP examination forms summarizing the findings of both DQPs who examined Mark of Buck (CX 5, CX 7); and affidavits of the two DQPs and one of the two USDA veterinarians who examined Mark of Buck (CX 6, CX 8, CX 9). The ALJ refused to enter into the record a copy of a videotape showing the August 25, 2002, examinations of Mark of Buck (Tr. 6-7). Mr. Lacy entered two exhibits into evidence identified as "RX." These exhibits were a report by Dr. John O'Brien and a lab report, each indicating that Mark of Buck had contracted West Nile virus (RX 1, RX 2).

APHIS called three witnesses during the hearing. First called was Fernando Gattorno, who was objected to by Mr. Lacy and dismissed by the ALJ (Tr. 9-11). Next, APHIS called Timothy Jones, an APHIS investigator, and Lynn P. Bourgeois, a USDA veterinarian, who examined Mark of Buck on August 25, 2002, during the Celebration. Mr. Lacy testified on his own behalf and he also called John L. O'Brien, a veterinarian who diagnosed and treated Mark of Buck for West Nile virus. Prior to the hearing, on August 10, 2006, the ALJ denied an APHIS request to allow Michael Guedron, the other USDA veterinarian who examined Mark of Buck on August 25, 2002, to testify telephonically.

On October 23, 2006, the ALJ issued a Decision and Order [hereinafter ALJ Dec.] dismissing the complaint. The ALJ relied exclusively on the Horse Protection Act's statutory presumption (15 U.S.C. § 1825(d)(5))³ to determine if Mark of Buck was sore. The ALJ found that "the sensitivity in the horse's front limbs found by both the Designated Qualified Persons and the Veterinary Medical Officers was not the result of being 'sored,' but rather was consistent with the effects of [West Nile] virus." (ALJ Dec. at 6 (footnotes and parenthetical

Horse Protection Act provides that the management of a horse show may be held liable if it fails to utilize a DQP and a sore horse participates in the show (15 U.S.C. § 1824(3); 9 C.F.R. § 11.20).

³"In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs."

statements omitted).) The ALJ concluded that Mr. Lacy rebutted the presumption.

On January 23, 2007, APHIS appealed the ALJ's decision.

FINDINGS OF FACT

The Celebration took place in Shelbyville, Tennessee, from August 21, 2002, through August 31, 2002 (CX 1). On August 25, 2002, Perry Lacy entered a horse named "Mark of Buck" as entry number 131 in class number 77 of the Celebration (CX 3). Don Campbell, Mark of Buck's trainer, presented the horse for inspection (CX 6, CX 8). Two DQPs examined the horse (CX 5, CX 7). Each DQP found the horse "led slow" and reacted strongly to palpation on the front feet (CX 5-CX 8). Each DQP found Mark of Buck was "bilateral sore" in his front feet (CX 6, CX 8). DQP Ticket number 23383, signed by both DQPs, states Mark of Buck was "bilateral sore," in violation of the Horse Protection Act (CX 4). The DQPs excused Mark of Buck from showing (CX 4).

Two USDA veterinarians next examined the horse. First, Dr. Michael Guedron examined Mark of Buck (Tr. 60) eliciting "strong, repeatable, reproducible pain responses[.]" (CX 9 at 2.) Next, Dr. Lynn P. Bourgeois examined the horse. He noted the horse "led slowly and reluctantly." *Id.* Dr. Bourgeois approached the horse from the left side, patted the horse's neck, ran his hand down the left front leg, picked up Mark of Buck's foot and palpated the posterior pastern. *Id.* Mark of Buck's reactions were normal. *Id.* Then, Dr. Bourgeois palpated the left anterior pastern where he observed "strong, repeatable, reproducible pain responses" including severe clenching of abdominal muscles and attempts by the horse to withdraw that limb and to redistribute his weight to the hind limbs. *Id.* Dr. Bourgeois moved to Mark of Buck's right side, examining the horse, finding normal reactions until he palpated the anterior of the horse's right pastern. When Dr. Bourgeois palpated the anterior right pastern, Mark of Buck demonstrated "strong, repeatable, reproducible pain responses[.]" (CX 9 at 3.) Dr. Guedron and Dr. Bourgeois conferred, agreeing that Mark of Buck was sore as defined in the Horse Protection Act. *Id.* Dr. Guedron completed the bottom portion

of APHIS Form 7077, Summary of Alleged Violations, noting the locations on each foot where each veterinarian found “[a]reas of consistent, repeatable pain responses[.]” (CX-2.) Dr. Guedron and Dr. Bourgeois each signed the form indicating agreement with the findings noted on the form (Tr. 37). Dr. Bourgeois concluded that Mark of Buck “was sores with caustic chemicals and/or overwork in chains.” (CX 9 at 3.) Dr. Bourgeois testified that he knew of no naturally occurring condition, disease, or injury, “other than the deliberate application of caustic chemicals or the use of chains” that “would cause a horse to exhibit consistent pain responses on the anterior surfaces of the pasterns of its forefeet but to exhibit no pain responses elsewhere.” (Tr. 80-81.)

After the show, the trainer transported Mark of Buck back to his stables (Tr. 115-16). On September 5, 2002, Mark of Buck’s trainer took the horse to Dr. John O’Brien’s clinic because there was “something wrong with this horse.” (Tr. 116, 131.) Dr. O’Brien observed that Mark of Buck was “somewhat ataxic.” (Tr. 134, 142.) The horse was not “stumbling or falling down, but that he was just off.” (Tr. 134.) The doctor described the horse as acting as if his skin was “tingling” and he did not want to be touched. *Id.* Dr. O’Brien took a blood sample from Mark of Buck and had it tested for numerous conditions including West Nile virus (Tr. 138-39). The test results confirmed that Mark of Buck had West Nile virus (Tr. 139; RX 2).

DISCUSSION

The Horse Protection Act prohibits “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(2)(B).) To demonstrate an individual violated this provision of the Horse Protection Act, APHIS must prove two elements. First, APHIS must show that the individual entered a horse in a horse show or horse exhibition for the purpose of showing or exhibiting that horse. Next, APHIS must show that the horse was sore.

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

....
(3) The term “sore” when used to describe a horse means that—

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

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

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

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

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

15 U.S.C. § 1821(3). In addition, any horse that “manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs” shall be presumed to be sore (15 U.S.C. § 1825(d)(5)).

Regarding the first element of the violation – entry of the horse – Mr. Lacy admitted he entered Mark of Buck at the Celebration on August 25, 2002. The complaint, filed by APHIS alleging that Mr. Lacy violated the Horse Protection Act, states “[o]n August 25, 2002, respondent Perry Lacy entered ‘Mark of Buck’ as entry number 131 in class number 77, in the 64th Annual Tennessee Walking Horse National Celebration, in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse.” (Compl. I.2.) In his answer, Mr. Lacy responded,

“Respondent admits the facts contained in Paragraphs 1 and 2 in Section I of the Complaint.” Therefore, I find Mr. Lacy entered Mark of Buck in the Celebration for the purpose of showing or exhibiting the horse.

The remaining question is whether Mark of Buck was sore as that term is defined in the Horse Protection Act. For the reasons set forth below, I find Mark of Buck was sore.

On the evening of August 25, 2002, Mark of Buck was examined by two DQPs and two USDA veterinarians. Each of them found the horse had significant pain reactions when palpated on his front feet. The two DQPs stated in their affidavits that Mark of Buck “was bilateral sore in both front feet.” (CX 6, CX 8.) Dr. Guedron completed the bottom portion of APHIS Form 7077, Summary of Alleged Violations, concluding that Mark of Buck was sore. Dr. Guedron marked on the drawing in Block 31 of the form the four spots on each foot that were “[a]reas of consistent, repeatable pain responses[.]” (CX 2.) Dr. Bourgeois discussed his examination of the horse in his affidavit describing Mark of Buck’s strong responses to palpation of his feet (CX-9). He noted that he and Dr. Guedron consulted regarding their examinations of the horse, concluding that Mark of Buck was sore. *Id.* Dr. Bourgeois then stated that, in his professional opinion, Mark of Buck “was soled with caustic chemicals and/or overwork in chains.” *Id.* This evidence is sufficient to meet the statutory definition of a sore horse (15 U.S.C. § 1821(3)).

Mr. Lacy argues that West Nile virus, diagnosed by Dr. O’Brien after he examined Mark of Buck on September 5, 2002, caused the reactions to digital palpation observed by both USDA veterinarians and both DQPs on the evening of August 25, 2002. However, Dr. O’Brien does not identify a clear connection between his diagnosis on September 5, 2002, that Mark of Buck contracted West Nile virus and the observations of USDA veterinarians and the DQPs 11 days earlier.

Dr. O’Brien acknowledges that he “wasn’t privy to the initial examine that was done on the 25th” and he has “little knowledge of what happened at that particular point in time.” (Tr. 164.) Although he admits that “it’s hard to comment” (*id.*) on the examinations of Mark of Buck at the Celebration, he still offers his view that Mark of Buck was not sore when examined at the Celebration (Tr. 150, 170). Dr. O’Brien

concluded that the horse was not reacting to the soring of his feet, but rather was reacting to the hypersensitivity associated with the encephalitis, resulting from the West Nile virus.

[BY MR. BRODERICK:]

Q. Assuming that he was reacting to digital palpations that night, would that be consistent with his hypersensitivity in having West Nile virus?

[BY DR. O'BRIEN:]

A. It could be, yes.

Q. Within terms of your medical probability, that is more likely than not, do you think his reaction was because of his West Nile virus?

A. I feel confident that it was.

Tr. 150. Dr. O'Brien does not explain how the encephalitis caused hypersensitivity⁴ in Mark of Buck that was limited to pinpoint spots on the front of the horse's feet. As Dr. Bourgeois found, Mark of Buck "only exhibited pain in certain places. He didn't have pain in the back of his pasterns. He only had pain in certain pinpoint places." (Tr. 57.)

Dr. O'Brien's observation of Mark of Buck's presentation when he examined the horse on September 5, 2002, which pointed him to a neurological condition such as West Nile virus,⁵ is significantly different

⁴Dr. O'Brien explains hypersensitivity as: "Hypersensitivity would be a situation such that when you would touch a horse that was not hypersensitive he would allow you to touch him, rub him, whatever. The hypersensitive individual would act nervous about that touch, such that he just didn't want to be touched." (Tr. 134.)

⁵West Nile virus can only be confirmed by a blood test (Tr. 141). Dr. O'Brien had Mark of Buck's blood tested which confirmed the diagnosis of West Nile virus (RX 2).

from Mark of Buck's presentation on August 25, 2002, at the Celebration. As Dr. O'Brien testified:

A. . . . This horse was noticeably off. You could tell that it was off. And by that I mean it had a bit of ataxia to it. And it wasn't dramatic.

The basic thing was this hypersensitivity to touch that you would notice and this scared appearance, this anxious appearance that the horse had.

[BY MR. BRODERICK:]

Q. When you talk about a horse being anxious, sometimes does that mean its ears would be laid back?

A. Well, that means that you would see an expression about its face such that it had a scared look to it. It would be apprehensive to touch. And it might tend to want to move away from you. It might flare its nostrils a little bit, might breathe a little bit more rapidly, and actually present fear.

Q. Would that mean it might move back from you?

A. It might move away.

Tr. 142-43.

During the examination on August 25, 2002, Dr. Bourgeois found none of the ataxia, hypersensitivity, or anxiousness described by Dr. O'Brien.⁶ Dr. Bourgeois' testimony included the following partial

⁶Both Mr. Lacy and the ALJ make a point that Dr. Bourgeois had no training or experience with West Nile virus (Respondent's Reply to Complainant's Appeal at 5-6; ALJ Dec. at 6 n.6). Neither Mr. Lacy nor the ALJ mention that Dr. O'Brien and

Cont.

description of his examination of Mark of Buck:

[BY MR. ERTMAN:]

Q. . . . When you noted that there was abdominal tucking, when did this abdominal tucking occur?

[BY DR. BOURGEOIS:]

A. When?

Q. When?

A. In response to digital palpation.

Q. To what part of the digital palpation?

A. What part? Digital palpation of the anterior pastern.

Q. Did this horse display any abdominal tucking when the posteriors of the pasterns were palpated?

A. No.

Q. Did it display abdominal tucking when the shoulder was touched as you moved around the horse?

A. No.

Q. When you had the horse pick up its foot?

Dr. Bourgeois each testified that the symptomatology of West Nile virus includes encephalitis (Tr. 84-85, 129-30, 140) and that Dr. Bourgeois testified that he had studied and was familiar with encephalitis (Tr. 85-86).

A. No.

Q. When you put down the foot and moved to examine the anterior portion of the pastern but before you had begun to palpate the pastern?

A. No.

Q. Is this the same for the rocking back on the hind limbs?

A. Yes.

Q. So, Dr., when you say "other responses," you mean responses in addition to attempting to withdraw its foot?

A. Yes. The pain reactions go from just pulling the foot all the way to abdominal tucking and flinching in the shoulder muscles and laying ears back and there's a -- it's kind of a progression of pain signs.

Q. Dr., you testified that the horse was reluctant to walk and was led on a tight rein?

A. Yes.

Q. Did you observe any wobbliness when the horse walked?

A. No.

Q. Dr., are you aware of any naturally occurring condition which would cause a horse to exhibit consistent pain responses on the anterior surfaces of the pasterns of its forefeet but to exhibit no pain responses elsewhere?

A. Naturally, no.

Q. Are you aware of any disease condition which would do this?

A. No.

Q. Are you aware of any kind of injury which would do this other than the deliberate application of caustic chemicals or the use of chains?

A. No.

Tr. 78-81.

Dr. O'Brien testified that the symptoms of West Nile virus "may be varied. It's a neurological disease. Therefore, it can mimic a lot of other neurological diseases." The symptoms could "be all the way from asymptomatic to a sudden death syndrome. But most cases would be in between that, such that you might see simple ataxia of a horse. You might see a gait that might be off." (Tr. 129-30.) The symptoms described by Dr. O'Brien that point towards West Nile virus are not the symptoms seen in sore horses. Further, the symptoms found by Dr. Bourgeois during his examination of Mark of Buck are not consistent with how Dr. O'Brien described West Nile virus.

APHIS presented evidence that showed Mark of Buck met the statutory definition of being sore (15 U.S.C. § 1821(3)). In an effort to rebut the finding that the horse was sore, Mr. Lacy presented evidence that Mark of Buck contracted West Nile virus. Other than a conclusive statement by Dr. O'Brien, nothing presented by Mr. Lacy supports his position that Mark of Buck's reactions to palpation were a result of encephalitis associated with West Nile virus. Therefore, the evidence presented by Mr. Lacy does not overcome the statutory presumption that Mark of Buck was sore because the horse manifested an abnormal sensitivity in both front feet.

Based on the evidence before me, I conclude Mark of Buck was sore

when entered in the Celebration in Shelbyville, Tennessee, on August 25, 2002. Because Mark of Buck was sore when entered in the Celebration and because Mr. Lacy admitted he entered Mark of Buck in the Celebration, I conclude Mr. Lacy violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) on August 25, 2002, when Mr. Lacy entered, for the purpose of showing or exhibiting, Mark of Buck in the Celebration.

SANCTION

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes a civil penalty of not more than \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824).⁷ The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The minimum disqualification is not less than 1 year for a first violation and not less than 5 years for any subsequent violation (15 U.S.C. § 1825(c)).

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

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for

⁷Pursuant 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 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil monetary penalty from \$2,000 to \$2,200 (7 C.F.R. § 3.91(b)(2)(vii) (2005)).

achieving the congressional purpose.

The Horse Protection Act provides guidance in determining the amount of the civil penalty to be assessed as follows:

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

15 U.S.C. § 1825(b)(1).

APHIS recommends that I assess Mr. Lacy a \$2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof and Proposed Order at 4). The Horse Protection Act guides me regarding the appropriate sanction. Both DQPs and both USDA veterinarians elicited "strong" pain responses from Mark of Buck (CX 5, CX 7, CX 9). These pain responses indicate that the level of the violation was severe. Neither APHIS nor Mr. Lacy presented evidence indicating Mr. Lacy previously violated the Horse Protection Act. In addition, neither party presented evidence addressing Mr. Lacy's ability to pay a civil penalty or the effect of a civil penalty on Mr. Lacy's ability to continue to do business. The Horse Protection Act further instructs me to take into account "the degree of culpability" that the violator had in relation to the violation (15 U.S.C. § 1825(b)(1)). Again, neither Mr. Lacy nor APHIS addressed Mr. Lacy's culpability for Mark of Buck being sore when entered at the Celebration. Because Mr. Lacy admitted he entered the horse, I conclude that Mr. Lacy has some culpability for the violation.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005), *aff'd sub*

nom. Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007). I have considered all the factors that are required to be considered when determining the amount of the civil penalty to be assessed and, based on these factors and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to USDA's policy of assessing the maximum civil penalty for Mr. Lacy's violation of the Horse Protection Act. Therefore, I assess Mr. Lacy a \$2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) authorizes the Secretary of Agriculture to impose a disqualification on any person that is assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). The disqualification bars the violator from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification runs for not less than 1 year for the first violation of the Horse Protection Act and for not less than 5 years for any subsequent violation of the Horse Protection Act. Furthermore, section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)).

While disqualification is discretionary with the Secretary of Agriculture, I have held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. at 1505-06.

"Unique circumstances" in a particular case might justify a departure from this policy. *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1325 (1994). However, the record before me does not present any circumstance that would suggest an exception from the usual practice of imposing the minimum disqualification period for a violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted. Therefore, I impose a 1-year disqualification on Mr. Lacy for his violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C.

§ 1824(2)(B)) on August 25, 2002, when Mr. Lacy entered, for the purpose of showing or exhibiting, a horse named “Mark of Buck” in the Celebration in Shelbyville, Tennessee, while the horse was sore. During this disqualification, Mr. Lacy is prohibited from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

ADMISSIBILITY OF THE VIDEOTAPE

The National Horse Show Commission, the organization running the Celebration, videotaped the examination of Mark of Buck on August 25, 2002. On August 2, 2006, APHIS applied for a subpoena duces tecum to obtain the videotape. Subsequently, the ALJ issued the subpoena and APHIS received the videotape late on Monday, August 14, 2006. (Tr. 4-6; Application for Subpoena filed August 2, 2006; Complainant’s Appeal and Brief in Support Thereof at 6.) On Friday, August 18, 2006, APHIS provided a copy of the videotape to counsel for Mr. Lacy. *Id.* The hearing took place on Tuesday, August 22, 2006. Counsel for APHIS did not amend the exhibit list prior to the commencement of the hearing (Tr. 5).

The ALJ denied APHIS’ request to admit the videotape into evidence.

I’m disinclined to let it in at this time, Mr. Ertman. I just don’t think the timing is sufficient. In other words, it’s not really clear that that is really what’s at issue in this case. The real question is whether or not this horse was sored and whether the horse was sored by mechanical or chemical means, as opposed to having some other reason for its behavior.

So this eleventh hour location of evidence just I don’t really feel is appropriate. So I’m not going to allow the tape to be entered, to be shown.

Tr. 6-7. At various times throughout the hearing, the ALJ again stressed

his reasoning for excluding the videotape.

Mr. Ertman, I've already indicated that that portion is not admissible. Had you -- had APHIS made this tape available in sufficient time ahead of the trial, I would have had no objection to having it shown, displayed, and let you ask all the questions you want.

But when you get the tape at the very eleventh hour before this hearing -- this hearing was postponed once, by the way. And then it comes in and it's given to opposing counsel, in other words, less than a week before the hearing. I find that intolerable.

Tr. 43-44. Finally, the ALJ stated:

You have indicated that if this witness had had the opportunity to view the videotape then he might some additional testimony to offer. What I'm telling you is that the Government's failure to amend their Witness List, get the exhibit to Counsel in proper time, in other words, precludes you from being able to go there.

Now if that's what your testimony and Offer of Proof is, I have made it for you.

Tr. 168-69.

In its appeal petition, APHIS argues the ALJ erred in excluding the videotape. I agree. The Administrative Procedure Act imposes few restrictions on the admissibility of evidence in administrative proceedings. "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." (5 U.S.C. §

556(d).) The rules of practice applicable to this proceeding⁸ equally favor admitting evidence. “Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.” (7 C.F.R. § 1.141(h)(1)(iv).) The courts have long held that administrative fora are not bound by the strict evidentiary limitations found in judicial proceedings. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229-30 (1938). Evidence is admissible in administrative proceedings if it is probative and “fundamentally fair.” *Tun v. Gonzales*, 485 F.3d 1014, 1026 (8th Cir. 2007).

Considering the few restrictions on admissibility imposed by the Administrative Procedure Act and the Rules of Practice, as well as the recognition by the judiciary that admissibility of evidence in administrative proceedings is favored over exclusion, administrative law judges generally should exclude only evidence that is immaterial, irrelevant, or unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely. (7 C.F.R. § 1.141(h)(1)(iv).) Here, the ALJ excluded a videotape of the examination of Mark of Buck on August 25, 2002, at the Celebration. This evidence had the potential to demonstrate the horse’s reaction to touch and to clarify whether Mark of Buck was sensitive to all touching or whether the horse reacted only to the palpation of his front feet – an indication the sensitivity resulted from soring rather than West Nile virus encephalitis. The videotape falls into the category of evidence that should have been admitted during the hearing.

While I do not condone delay and I acknowledge that counsel for APHIS could have applied for the subpoena for the videotape earlier than he did, the appropriate action was not to exclude the evidence but rather to ensure that counsel for Mr. Lacy had a reasonable time to prepare for

⁸Subpart H—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].

its admission.⁹ The preparation delay should have been minimal. Considering the ALJ indicated in his original scheduling order the hearing was anticipated to take 2 days, allowing Mr. Lacy's counsel an additional day to prepare Mr. Lacy and Dr. O'Brien for their testimony regarding what they observed on the videotape would not have taken the hearing beyond its scheduled time.

Over 60 years ago, the United States Court of Appeals for the Second Circuit discussed the preference for admitting evidence in administrative proceedings.

Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.

Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 380 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). Still today, the preference in administrative proceedings is for admitting all evidence that is not "irrelevant, immaterial, or unduly repetitious." Therefore, the ALJ erred in excluding the videotape of the examination of Mark of Buck at the Celebration on August 25, 2002. However, even though I find the exclusion of the videotape was erroneous, I do not find the exclusion was

⁹The ALJ stated that, in cases where the non-government party produces evidence that is not on the exhibit list, "the Government has moved to strike that exhibit." (Tr. 5.) While that statement is true, administrative law judges usually admit such evidence into the record.

unduly prejudicial and I find I can reach a conclusion without viewing the videotape. Therefore, in this case, I do not find necessary remand of the case to the ALJ to include the videotape in the record.

CONCLUSION OF LAW

On August 25, 2002, Perry Lacy entered Mark of Buck as entry number 131 in class number 77 at the 64th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Mark of Buck while Mark of Buck was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

For the foregoing reasons, the following Order is issued.

ORDER

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

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

Mr. Lacy's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 60 days after service of this Order on Mr. Lacy. Mr. Lacy shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 06-0004.

2. Perry Lacy is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise

participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

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

RIGHT TO JUDICIAL REVIEW

Perry Lacy has the right to obtain review of the Order in this Decision and Order in the United States Court of Appeals for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Lacy must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. (15 U.S.C. § 1825(b)(2), (c).) The date of the Order in this Decision and Order is June 29, 2007.

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CONSUMER INFORMATION ACT**

COURT DECISION

**AMERICAN HONEY PRODUCERS ASSOCIATION, INC., et al. v.
USDA.**

No. CV-F-05-1619 LJO.

Filed May 8, 2007.

(Cite as 2007 WL 1345467).

HRPCIA – Honey promotion – First Amendment – Government speech.

The Court found that the evidence makes it overwhelmingly clear that the USDA's actions were in accordance with the law and not arbitrary and capricious and the case survives the challenge of First Amendment scrutiny regarding compelled subsidies and affirmed the Judicial Officer and Administrative Law Judge. Based upon *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), the Court concluded honey advertising and promotion was authorized by the Honey Research, Promotion, and Consumer Information Act (7 U.S.C. §§ 4601-4613) as government speech not susceptible to First Amendment compelled-subsidy challenge. Citing *Livestock Marketing Ass'n*, the Court rejected Petitioners' and The American Honey Producers, Inc.'s claim that honey promotion authorized by the Honey Research, Promotion, and Consumer Information Act was not government speech because the speech was not initiated by the government and United States Department of Agriculture oversight, review, and approval of the speech only served as a negative check on the speech, not as an affirmative mechanism for compelling particular content or viewpoints. The court found that the Petitioner's claims of lack of oversight by the USDA was not sustained by credible evidence.

**United States District Court
E.D. California.**

**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT; ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

HONEY RESEARCH PROMOTION AND
CONSUMER INFORMATION ACT

LAWRENCE J. O'NEILL, United States District Judge.

I. INTRODUCTION

The issue in these cross motions for summary judgment is whether the advertisements by the Honey Board, made pursuant to the Honey Act, 7 U.S.C. §§ 4601-4613, are impermissibly compelled speech in violation of the honey producers' First Amendment rights or whether the advertisements constitute "government speech," which survives First Amendment scrutiny. For support, or by way of distinction, each party points to the United States Supreme Court case of *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) ("*Livestock Marketing*"). Having read and reviewed the arguments, including the additional briefing the Court had requested on several issues, administrative record, and the various cases on this legal issue, the Court finds that Defendants' motion for summary judgment is properly to be GRANTED and Plaintiffs' motion for summary judgment should properly be DENIED.

II. BACKGROUND**A. Procedural History**

Plaintiffs, The American Honey Producers Association, Inc., an Oklahoma corporation, and nine individual honey producers, all of whom are voluntary members of The American Honey Producers Association, Inc. ("The American Honey Producers"), are required to have assessments deducted from them by their respective handlers. These assessments support the Honey Research, Promotion and Consumer Information Act, 7 U.S.C. § 4601 *et seq.* ("the Honey Act"). A substantial amount of those assessments are used by the National Honey Board to engaged in speech related activities like promotion, marketing, consumer education, advertising, trade negotiations, and government relations. The American Honey Procedures contend that the compelled assessments violate their free speech and free association rights under the

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United States Constitution.

On September 28, 2001, The American Honey Producers brought an administrative petition pursuant to 7 USC § 4609 contending that the Honey Act as written and applied violated their First Amendment rights. Plaintiffs sought exemption from the assessments and a refund of previously paid assessments. A hearing ensued, after which the Administrative Law Judge (“ALJ”) found that the Honey Program was “government speech” in accordance with *Livestock Marketing*. Plaintiffs appealed that judgement to a Judicial Officer (“JO”) of the USDA. On November 28, 2005, the JO affirmed the ALJ’s decision. Plaintiffs then filed a complaint before this Court pursuant to 7 U.S.C § 4609 against Defendant, United States Department of Agriculture (“USDA”). It is undisputed that The American Honey Producers have exhausted administrative remedies. The parties have agreed that cross motions for summary judgment based upon the administrative record are the appropriate proceedings before this Court.

B. The Honey Act¹

In 1986, Congress passed the Honey Act, 7 U.S.C. § § 4601-4613. The Honey Act established the Honey Board, which, under the supervision of the Secretary of Agriculture, administers the program mandated by Congress. 7 U.S.C. § 4606. The Honey Board consists of seven honey producers (at least 50 per cent of the National Honey Board are producers), two honey handlers, two honey importers, and one officer, director or employee of a national honey marketing cooperative. 7 U.S.C. 4606. The Honey Board’s goal is to increase the demand for honey. To achieve this goal, the Honey Board promotes honey as a desirable product. 7 U.S.C. § 4601. To that end, the Honey Board

¹ These facts are based on the Joint Statement of Undisputed Material Facts submitted by the parties on April 24, 2007 (Doc. 36).

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initiates budgets, marketing ideas, and program ideas. (Tr. 330-31, 607-08).²

The Honey Board is funded through assessments paid by honey producers and honey importers. 7 U.S.C. 4606(e). Initially, payment of assessments was voluntary. Thereafter, payment of assessments became mandatory. (Tr. 66, 107). Assessments are exacted by collecting from honey producers \$0.01 for each pound of honey produced in the United States and by collecting from honey importers \$.01 for each pound of honey or honey products imported into the United States. 7 U.S.C. 4606(e). First handlers, bottlers, or others who place honey in commerce, collect assessments on honey produced in the United States by deducting the assessments from the amount paid to the honey producers. These first handlers then forward the assessments to the National Honey Board. (Tr. 22)

The Honey Board itself is not a government entity, but it is supervised by the Secretary of Agriculture, and on behalf of the Secretary, by personnel of the USDA, specifically by the Chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service (“AMS”), Martha B. Ransom, and her staff. (Tr. 330-33, 424-29). All Honey Board budgets, contracts, and projects are submitted to the USDA for review and approval (RX 1-RX 52; Tr. 330-33, 425-29), but the Honey Board pays for the USDA’s oversight. (Tr. 353). The Honey Board staff are not government employees and their salaries are not set by the USDA. (Tr. 187, 346, 573-75). The property of the Honey Board is not government property. (Tr. 578).

The Secretary of Agriculture appoints each member of the Honey Board, in accordance with the specific directions contained in the Honey

² The Honey Research, Promotion and Consumer Information Order, promulgated by the United States Department of Agriculture (“USDA”) also outlines the creation and the functioning of the Honey Board. See XX C.F.R. 12401 et seq.

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Research, Promotion, and Consumer Information Act, from nominees proposed by the National Honey Nominations Committee. 7 U.S.C. § 4606. The National Honey Nominations Committee is appointed by the Secretary of Agriculture from nominees proposed by state beekeeper associations. *Id.*

The USDA's oversight and control of the Honey Board includes acting as supervisor to the Honey Board during the development of promotion, research, education, and information activities. (RX 1-RX 52; Tr. 427, 463-529). A representative of the USDA attends each meeting of the Honey Board as an active participant, providing comments or feedback to the Board (Tr. 427).³ The USDA retains final approval authority over every assessment dollar spent by the Board. (Tr. 427, 432-34). The USDA's review and approval of projects include evaluation in accordance with USDA policy, AMS guidelines, Federal Trade Commission ("FTC") advertising laws and regulations, and Food and Drug Administration ("FDA") labeling requirements. (RX 60; Tr. 429).

III. Standards of Review

A. Summary Judgment

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Poller v. Columbia Broadcast System*, 368 U.S.

³ While the American Honey Producers argue that a representative did not attend every meeting as an active participant in their motion for summary judgment, they provide no contradictory evidence and signed the statement of undisputed facts which asserts this to be true.

464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985); *Loeh v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir.1984). A genuine issue of material fact exists when "... there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Facts are material when so rendered by the applicable substantive law. *Id.* at 248. Thus, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Cataret*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial," and, in such circumstances, summary judgment should be granted "... so long as whatever is before the ... court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

Under summary judgment practice, the moving party:

[A]lways bears the initial responsibility of informing the ... court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id."[W]here the non-moving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file. *Id.* If the moving party in such cases meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue actually exists as to any material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *First Nat'l Bank of*

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Arizona v. Cities Serv. Co., 391 U.S. 253, 288-289, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir.1979), *cert. denied*, 455 U.S. 951 (1980).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed.R.Civ.P. 56(c); *Poller*, 368 U.S. at 468; *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305-1306 (9th Cir.1982). The evidence of the opposing party is to be believed and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam)); *Abramson v. University of Hawaii*, 594 F.2d 202, 208 (9th Cir.1978). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Richards v. Nielson Freight Lines*, 602 F.Supp. 1224, 1244-1245 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, or admissible discovery material, in support of its contention that the dispute exists. Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 586, fn. 11; *First Nat'l Bank*, 391 U.S. at 289; *Strong v. France*, 474 F.2d 747, 749 (9th Cir.1973). The opposing party must demonstrate that the fact in contention is material (i.e., a fact that might affect the outcome of the suit under the governing law). *Anderson*, 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). The opposing party must also show that the dispute is genuine (i.e., that the evidence is such that a reasonable jury could return a verdict for the non-moving party). *Anderson*, 477 U.S. at 248-249; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir.1987).

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In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "... the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 290; *T.W. Elec. Serv.*, 809 F.2d at 631. However, to demonstrate a genuine issue, the opposing party "... must do more than simply show that there is some metaphysical doubt as to the material facts ... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no -genuine issue for trial. *Matsushita*, 475 U.S. at 587 (citations omitted). Thus, the "... purpose of summary judgment is to -rce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. *Matsushita* 475 U.S. at 587 (quoting Fed.R.Civ.P. 56(e) advisory committee note on 1963 amendments); *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir.1985).

B. District Court's Review of the Decisions of the agency decision

The jurisdiction of this court to review the agency decisions derives from the Honey Act. U.S.C. § 4609(b) of the Honey Act holds:

The district courts of the United States in any district in which such person is an inhabitant, or carries on business, are hereby vested with jurisdiction to review such ruling [of the administrative process], provided a complaint for the is filed within twenty days from the date of the entry of such ruling....If the court determines that such a ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) *to make such ruling as the court shall determine to be in accordance with the law*, or (2) *to take such further proceedings as, in its opinion, the law requires* (emphasis added).

The language of 7 U.S.C. § 4609(b) of the Honey Act is virtually identical to 7 U.S.C. § 608c(15)(B) of the Agricultural Marketing Agreement Act ("AMAA"). The Ninth Circuit in *Wileman Bros. &*

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Elliot, Inc., et al v. Espy, 58 F.3d 1367 (9th Cir.1995) (reversed on other grounds in *Glickman v. Wileman Bros. & Elliot, Inc., et al*, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997) reviewed a USDA decision under 7 U.S.C. § 608c(15)(B) with respect to claims against assessments imposed for peaches, nectarines, and plums. The Ninth Circuit analyzed the agency's decision under 5 U.S.C. § 706(2)(A) as to whether the agency's decision was arbitrary and capricious under the "substantial evidence" test.⁴

4 5 U.S.C. 706 holds: This statute provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by

Cont.

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“Under the substantial evidence test, we consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency’s decision.”58 F.3d 1374-75. The Ninth Circuit also noted in *Wileman* that the Administrative Law Judge’s decisions are treated as part of the record, and when the agency and the “ALJ disagree, as they have in this case, we may give less deference to the agency’s findings than they would otherwise receive.”58 F.3d 1375, n. 4.

Prior to *Wileman*, the Ninth Circuit also reviewed *Cal-Almond, Inc., et al v. USDA*, 14 F.3d 429 (9th Cir.1993). In that case, the standard of review was de novo, because the district court’s (REC) decision followed cross-motions for summary judgment based upon the administrative record. 14 F.3d 430. Under the APA, 5 U.S.C. § 706(2), the court must analyze whether the agency’s actions are “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.”*Wileman Bros.*” When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test.”*Id.*”Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one.”*Id.*

Therefore, since this case is based on cross-motions for summary judgment on an agency review, this Court will review such agency decision on the basis of whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law standard. The

the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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agency decision has to be based upon “substantial evidence” and if it is not substantial, then the Court has to rule in favor of the non-moving party.⁵

**IV. GOVERNMENT SPEECH DOCTRINE AND
AGRICULTURAL COMMODITY MARKETING ACTS**

A. Introduction

“The government-speech doctrine is relatively new, and correspondingly imprecise.” *Livestock Marketing*, 544 U.S. 550, 125 S.Ct. 2055, 2070, 161 L.Ed.2d 896 (Souter, dissenting). On the issue, the Ninth Circuit has predicted, “Constitutional law classes will doubtless enjoy the superficially droll question, - does the Constitution prohibit the government from compelling mushroom growers, but allow government to compel nectarine, peach and plum growers, to pay for generic advertising? *Delano Farms Co. v. California Table Grape Commission*, 318 F.3d 895, 898 (9th Cir.2003). The Court concluded, “Doubtless many cases will arise that are hard to place on one side or the other of the *Glickman-United Fruit* distinction.” *Id.*

The current question is made even more “droll” with the *Livestock Marketing* opinion, which decides the beef case on a third theory. As Justice Scalia noted in the opening line of *Livestock Marketing*, “For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment.” The dispositive question in *Livestock Marketing* is the same as that presented before this Court; namely, whether the

⁵After supplemental briefing on the issue of standard of review, both parties agree this is the appropriate standard. See Pl. Response to Court’s “Order for Additional Briefing,” 1-3 (Doc. 32) (“Pl.Response”); Def. Response to Court’s “Order for Additional Briefing,” 1-2 (Doc. 34) (Def.Response”).

generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

B. Prior to *Livestock Marketing*

To understand the ruling of *Livestock Marketing* more clearly, a brief discussion of the preceding cases are warranted. In 1997, growers, handlers and processors of California tree fruits challenged a requirement to finance generic advertising under the Agricultural Marketing Agreement Act of 1937 ("AMA") (7 USC 601 et seq) as "abridging the freedom of speech within the meaning of the First Amendment." *Glickman v. Wileman*, 521 U.S. 457, 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). In *Glickman*, the Supreme Court reasoned:

In answering [the question of whether the AMA abridges freedom of speech] we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by their regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues. 521 U.S. 457, 469, 117 S.Ct. 2130, 138 L.Ed.2d 585.

Ultimately, the Court found that "generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme....what we are reviewing is a species of economic regulation that should enjoy the same strong

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presumption of validity that we accord to other policy judgments made by Congress.” 521 U.S. 457, 477, 117 S.Ct. 2130, 138 L.Ed.2d 585. (emphasis added). Accordingly, the assessments were upheld as Constitutional.

After *Glickman*, the Supreme Court was again presented with a challenge of required marketing subsidies in *United States v. United Foods*, 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). Recognizing that “[f]our terms ago, in *Glickman*, [we] rejected a First Amendment challenge to the constitutionality of a series of agricultural marketing orders that, as part of a larger regulatory scheme,” the Court distinguished the case because “the features of the marketing scheme found in *Glickman*” were not present in *United Foods*.” 533 U.S. 405, 411, 121 S.Ct. 2334, 150 L.Ed.2d 438. Unlike the AMA, which was designed to control the markets and had speech as an ancillary issue, the “statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object.” *Id.*

In *United Foods*, the Supreme Court did offer in dicta some concerns about the “government speech” issue currently before this Court

The Government’s failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the Government. For example, although the Government asserts that advertising subject to approval by the Secretary of Agriculture, respondent claims the approval is pro forma. This and other difficult questions would have to be addressed were the program to be labeled, and sustained, as government speech.” *Id.* at 417.

Identifying its concern with the argument of government speech in this context, the Court reserved judgment on the issue, until *Livestock*

*Marketing.**C. Livestock Marketing*

In *Livestock Marketing*, the Court described the Beef Promotional Act, noting that the Department of Agriculture oversees similar programs of promotional advertising, funded by checkoffs, for a number of agricultural commodities. 544 U.S. 550, 125 S.Ct. 2055, 2060, n. 2, 161 L.Ed.2d 896 (citing programs for cotton, potatoes, watermelons, peanuts, blueberries, hass avocados, soybeans, pork, honey, eggs, and lamb) (emphasis added). The Court further noted that it has “generally assumed, but not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.”*Id.*

In considering whether the compelled subsidies were government speech, the Court understood that the “Secretary of Agriculture does not write ad copy himself.”*Id.* at 560. Rather, the Beef Boards’s promotional campaigns are designed by the Beef Board’s Operating Committee, only half of whose members are Beef Board members appointed by the Secretary. All members are subject to removal by the Secretary. *Id.* All of the Beef Board’s members are appointed by the Secretary, pursuant to law. *Id.*

The Court also places great importance on the federal government controlling the message of the advertisements. “The message of the promotional campaigns is effectively controlled by the Federal Government itself.”*Id.* at 560. The “message set out in the beef promotions is from beginning to end the message established by the Federal government.”*Id.* For this assertion, the Court looks at the statute, which provides that Congress directed the implementation of a “coordinated program” of promotion, “including paid advertising, to advance the image and desirability of beef and beef products.”*Id.* at 561. In the Beef Promotional Act, Congress further specified, and the Court pointed to, what the promotional campaigns shall contain (taking into account different types of beef products) and what they shall not taken

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into account (shall not refer to a brand or trade name of any beef product).

Furthermore, the Secretary exercised final approval authority over every word used in every promotional campaign. All proposed promotional messages were reviewed by department officials both for substance and wording, and some proposals were rejected or rewritten by the department.” *Id* at 561 Additionally, the “Secretary of Agriculture, a politically accountable official, oversaw the program, appointed and dismissed the key personnel and retained absolute veto power over the advertisement’s content, right down to the wording.” Finally, “the secretary’s role was not limited to final approval or rejection: officials of the Department also attended and participated in the open meetings at which proposals were developed.”*Id*. Therefore, the challenged subsidies comprise government speech because Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary.

D. Since Livestock Marketing

Since Livestock *Marketing*, courts around the United States have considered and upheld similar agricultural products marketing acts. In *Dixon v. Johanns*, No CV-05-03740-PHX-NVW (Dist.Ariz.2006), the court upheld assessments imposed pursuant to a Watermelon Research and Promotion Act. In *Avacoados Plus, Inc. v. Johanns*, Civil Action NO. 02-1789, the U.S.District Court for the District of Columbia upheld the constitutionality of the hass avocado act. In *Cricket Hosiery v. United States*, 429 F.Supp. 1338 (U.S.Ct. Int’l Trade 2006), the court upheld the constitutionality of a Cotton Act. In *Cochran v. Veneman*, 3rd Cir.2005, the Court upheld assessments for the National Dairy Promotion Board. In sum, all of these cases, which challenge statutory provisions similar to the Honey Act, have been upheld under the government speech doctrine.

V. ANALYSIS*A. Livestock Marketing* is applicable

The American Honey Producers argue that the USDA, ALJ, and JO sought “refuge in the government speech doctrine,” but that this claim “tortures” the Court’s decision in *Livestock Marketing*. Pl. MSJ, 19. The American Honey Producers seek to distinguish *Livestock Marketing* in several ways. First, they argue that Congress did not prescribe the basic message to be used by the Honey Board, as it did in the statute for the Beef industry. Second, the American Honey Producers assert that “no proposals have ever been rejected or rewritten. The approval is simply a negative check for compliance, not participation in the basic message.” Third, the Honey Board can appeal to the “functional committee” if they disagree with the USDA. The functional committee resolves disputes. Thus, the USDA does not have the “final” authority. Fourth, while a USDA official may attend every Honey Board meeting, it offers no advice nor creative input into the Honey Board’s messages. The “heavy involvement” is simply not present here.

In sum, the American Honey Board argues that USDA limits itself to a review to make sure the Honey Board’s message is not disparaging to any other product, it is not false or misleading, is in good taste, and makes no unwarranted representations. It does not examine the efficacy of the promotional messages that are supposed to be its own message; instead, it totally defers to the Honey Board (private competitors) to determine how much they want to spend on research, promotion, or not spend on any of those categories, and the evidence shows that the USDA personnel are “potted plants” at the meetings and only review the Honey Board’s project to ensure the messages are consistent with legislation.

The American Honey Producers illustrate their position by way of analogy. For example, the State Bar of California may prohibit certain forms of attorney advertising, when the State Bar advises that an attorney cannot advertise certain things, cannot say certain things, cannot send

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certain messages, one would not equate that “oversight” or “control” to be a State Bar message. Also, for example, the FCC has veto power over advertisements or broadcasts, but a business’ advertisements do not become “government speech” just because the government entity reviews the content of the message to ensure it is not false or misleading. This is the relationship between the USDA and the Honey Board. The Honey Board promotes its own message, while the USDA simply checks for compliance similar to the State Bar and the FCC. Therefore, the message is not government speech.

In invoking this analogy to the State Bar of California, the American Honey Producers compare their issue with that decided in *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). In making this argument, the American Honey Producers concurrently admit that the Supreme Court has already considered and rejected this argument.

[*Livestock Marketing*] explained why it did not follow *Keller* [], based specifically on the fact of the lack of government control over the message. To Plaintiffs, that is the only issue before this Court, and the only cases of relevance. If the program, as applied, does not have such paternalistic oversight and control by USDA, it is not government speech, and thus unconstitutional. Pl. Response, 5.

The Court finds that fully *Livestock Marketing* is applicable in this case. The congressional act considered is nearly identical to the Honey Act. Further, the sole issue of whether the compelled subsidies are government speech was considered and settled. There is no question that *Livestock Marketing* controls this case.⁶

⁶ The Supreme Court left open the possibility of an exception to this rule in *Livestock Marketing*. 544 U.S. at 566-66. The American Honey Producers do not argue this exception and it will not be discussed in this opinion.

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B. The Messages of the Honey Board are “government speech” which survives First Amendment Scrutiny

The evidence in the administrative record substantially supports the conclusions of both the Administrative Law Judge and the Judicial Officer. A review of the administration record clearly establishes that those factors which controlled the decision in *Livestock Marketing* are present in this case. Martha Ransom (“Ms.Ransom”), chief of the Research and Promotion Branch for Fruits and Vegetables, Agricultural Marketing Service, testified that she supervises a staff of six persons who oversee several national promotion boards, including the Honey Board. She gave a detailed description of the extent of the Secretary of Agriculture’s supervision. (Tab 49, pg. 427-571)⁷ Ms. Ransom’s testimony was bolstered by several key pieces of evidence, including letters, emails, operating manuals, guidelines, proposed brochures and marketing materials. Considering this evidence in light of the Honey Act and *Livestock Marketing*, there is no error in the ruling that the advertisements by the Honey Board are government speech.

The USDA controls from beginning to end the message of the Honey Board. In the beginning, Congress outlines the type of content that may be permissibly included in any promotional messages created pursuant to it. 7 U.S.C. § 4601(b)(1) coordinates a program designed to

- (A) strengthen the position of the honey industry in the marketplace;
- (B) maintain, develop, and expand domestic and foreign

⁷ USDA offers little assistance to this Court by continuously citing to a record of almost 150 pages to summarily support large statements. This type of citation is not only unhelpful to this Court, but also in violation of our Local Rule 56-260(a), which requires a party in a motion for summary judgement to “cite the *particular* portion of any ... document relied upon to establish that fact.”(emphasis added)

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- markets and uses for honey and honey products;
- (C) maintain and improve the competitiveness and efficiency of the honey industry; and
- (D) sponsor research to develop better means of dealing with pest and disease problems.

This provision is similar to those of the Beef Act, 7 U.S.C. § 2904(4)(B) and the Mushroom Act, 7 U.S.C. § 6101(b)(1). To put forward this message, the Honey Board was established by the Honey Act and is made up of a group of people appointed by the Secretary of Agriculture in a way almost identical to the Beef Board. (*supra*; See also, “Congress set up each of the Acts almost identically, with each of the Boards being appointed by the Secretary ...” Pl. Response, 4). Finally, all messages created pursuant to the Honey Act are subject to direct government oversight by the Secretary of Agriculture. See § 1240.39(a)(1)-(8). *Compare* USDA oversight of Mushroom Board, § 1209.40(a)(1), (2)(b)-(d). Through the Honey Act, Congress provided for the USDA to exercise, and the USDA does exercise, close control over the messages that the Honey Board disseminates through the honey promotion program.

In addition to prescribing the overall message that the Board is to disseminate, the Act limits the scope of the Boards’s speech by prohibiting it from making false or unwarranted claims and prohibiting the use of funds to influence government action or policy. The Act provides for the Secretary to control the Board’s membership. 7 U.S.C. § 4606(c)(1). It also gives the Secretary control over the Board’s budget, plans, contracts, agreements, and projects before they may be implemented. 7 U.S.C. 4606(d)(I); Accord Order, 7 C.F.R. §§ 1240.39(a)(4), 1240.60, 1240.30, 1240.61, 1240.39, 1240.40(b). These provisions are substantially similar to those found in the Beef Promotion Act, 7 USC § 2902*et seq.*

The undisputed evidence in the record contradicts the American

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Honey Producers' contention at the USDA oversight of the message is "pro forma" only and that the degree and oversight by the USDA distinguishes the Honey Act from the Beef Act considered in *Livestock Marketing*. In fact, the testimony and evidence substantially supports the finding that the USDA maintains a high degree of oversight over the messages disseminated by the Honey Board and all promotional programs or other materials prepared or approved by the Honey Board.⁸ Letters are provided showing that the USDA actively advises the Honey Board in the development and promotion, research, and information activities and retains final approval authority over every assessment dollar the Board spends. See e.g. RX 24, (approving four contracts after USDA editing, identifying issues in a public service announcement and not approving, admonishing the Honey Board for having released a claim without prior approval, reminding the Honey Board of its oversight function) and RX 25 ("the display must be revised and resubmitted before it can be used.")

The uncontradicted evidence further shows that Ms. Ransom or a member of her staff actively participates in every Honey Board meeting. Promotional projects are discussed at these meetings and she or a member of her staff provides comments and feedback to the Honey Board. Before a project approved by the Honey Board may be implemented, a formal written request must be submitted to the USDA and a member of Ransom's staff reviews and consults with Ransom. Only after the Board makes the necessary changes to satisfy any concerns of USDA will the USDA grant final approval for implementation of the project. AMS reviews and approves both the content and the USDA reviews and approves any material that the Honey Board prepares for use. That review and approval is done in accordance with USDA policy, AMS guidelines, FTC advertising laws and

⁸ Citations to these facts are contained in the background section of this Order, *infra*.

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regulations and the FDA's labeling requirements. The USDA even controls the purse, with final approval authority over all contracts and the Honey Board's budget.

While the American Honey Producers claim that the degree of oversight by the USDA is insignificant, they have offered no evidence to support that claim. The facts upon which the American Honey Producers rely do not contradict the findings of the Judicial Officer, nor do they support the theory that the compelled subsidies violate the Constitution. While it may be true that the Honey Board members and staff are not "government employees" and the property owned by the Honey Board is not government property, the American Honey Producers mischaracterize the evidence presented and misunderstand the ruling of *Livestock Marketing*.

The Supreme Court was clear that government speech does not necessarily require that the Secretary of Agriculture personally writes the advertisements. Instead, it is the effective control the government has of the message from beginning to end. The evidence in this case substantially and overwhelmingly makes clear that the ruling by the ALJ and JO were in accordance with the law. Accordingly, those decisions were not arbitrary or capricious. The compelled subsidies fund government speech which survives First Amendment scrutiny.

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VI. CONCLUSION

For the foregoing reasons, the Court orders:

- I. The American Honey Producers motion for summary judgment is DENIED;
- II. The USDA's motion for summary judgment is GRANTED; and
- III. The motion hearing currently set for May 14, 2007 is VACATED.
IT IS SO ORDERED.

INSPECTION AND GRADING

COURT DECISION

LION RAISINS, INC., et al. v. USDA.

No. CV-F-04-5844 REC DLB

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT.

Filed May 12, 2005.

(Cited as:)

I&G – AMAA – APA – Failure to answer – Default, appeal of – Preliminary motion, not mandated by the rules – Abuse of discretion – ALJ findings, Court may consider – Meritorious objection – Merits, Decision on, when possible – Prejudice, lack of showing – Fairness, overall.

The Court reversed the Decision by the Judicial Officer (JO) and granted partial summary judgement to Petitioner by allowing a late filed answer to be received, albeit, procedurally defective regarding strict compliance with rules based upon a lack of showing of prejudice to government and a tenet that cases should be decided on their merits when possible based upon overall fairness.

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

Robert E. Coyle, Judge

On October 4, 2004, and February 7, 2005, the Court heard, respectively, Plaintiffs' and Defendant's motions for summary judgment. Upon due consideration of the written and oral arguments of the parties and the record herein, the Court resolves the motions as set forth below.

I. Factual Background

Plaintiffs ("Lion Raisins") are a California Corporation, Lion Raisins,

Inc., that produces and packs raisins, and four individuals - Al Lion Jr., Dan Lion, Jeff Lion, and Bruce Lion - who participate in the management of the corporation.

On August 26, 1997, Lion Raisins allegedly forged or altered an inspection certificate from the United States Department of Agriculture ("USDA") which they sent to a client. On October 11, 2002, the USDA's Agricultural Marketing Service ("AMS") filed a complaint with the Secretary of Agriculture against Lion Raisins for the alleged forgery (the "AMS Complaint"). AR 1. The Hearing Clerk served Lion Raisins¹ with the AMS Complaint, the Rules of Practice and the Hearing Clerk's service letter dated October 11, 2002. AR 1-2. The clerk's service letter stated that Lion Raisins had 20 days to file a written answer to the AMS Complaint and that failure to file an answer or filing an incomplete answer would constitute an admission of the allegations in the AMS Complaint and the waiver of a hearing. AR 2. The AMS Complaint also indicated that the Rules of Practice applied and that failure to file an answer would result in waiver of a hearing. AR 1.

On October 28, 2002, Lion Raisins filed a motion to extend the time in which to file an answer to the AMS Complaint. AMS did not oppose the request. The Chief Administrative Law Judge granted the motion and gave Lion Raisins until December 24, 2002 to file its answer. AR 8.

On December 20, 2002, Lion Raisins filed a motion to dismiss the AMS Complaint. AR 9. The two-page motion argued that the AMS Complaint was barred by a five-year statute of limitations.

On December 26, 2002, AMS moved for a decision upon admission of facts by reason of default on the grounds that Lion Raisins did not file an answer before December 24, 2002, as required by the Rules of Practice. AR 11. Entry of default would result in Lion Raisins' debarment from receiving USDA inspection services for, according to the proposed decision, a period of one year.

On January 8, 2003, Lion Raisins filed its objection to AMS's motion for default. AR 14. Lion Raisins argued that the motion to dismiss

¹Each of the individuals as well as the corporation were served between October 22, 2002 and November 5, 2002.

constituted a timely response to the AMS Complaint. On February 12, 2003, Lion Raisins filed a request to file an answer to the AMS Complaint. Lion Raisins argued that the Federal Rules of Civil Procedure permit a motion to dismiss in lieu of an answer and that AMS would not be prejudiced by the late filing because it knew through other litigation that Lion Raisins denied the allegations in the AMS Complaint. AR 14.

On November 28, 2003, the Administrative Law Judge (“ALJ”) denied AMS’s motion for default and issued an order to show cause why the case should not be dismissed based on the statute of limitations issue. The ALJ stated that “Respondents [Lion Raisins] were in default only because their timely filing was a Motion to Dismiss, rather than an Answer to the Complaint” and that Lion Raisins cured the default when it filed its Answer to the AMS Complaint. AR 29 at 1 n.1.

AMS appealed the ALJ’s decision to the USDA’s Judicial Officer (“JO”). AMS argued that Lion Raisins’ failure to file an answer within the time allotted should have resulted in a default and that the motion to dismiss was insufficient.

On February 9, 2004, the JO issued his order. The JO agreed with the ALJ to the extent that Lion Raisins was in default because it filed a motion to dismiss rather than an answer, but reversed the ALJ because, under the Rules of Practice, the filing of the late answer did not, as the ALJ held, “cure” the default. Rather, the failure to file an answer constitutes an “admission of the allegations in the Complaint and constitutes a waiver of hearing.” AR 42 at 11. The JO remanded the case to the ALJ for a “decision in accordance with the Rules of Practice.”

On remand, the ALJ stated that she had erred in determining that Lion Raisins “cured” the default when it submitted its late answer, but again denied the default. The ALJ ruled instead that Lion Raisins’ objections to AMS’s motion for default were “‘meritorious’ within the meaning of 7 C.F.R. § 1.139, even though mistaken.” AR 50 at 2. The ALJ’s reasons included:

- Neither Respondents’ counsel’s mistakes nor my errors should be permitted to deprive Respondents of a fair hearing on the merits. It would be unjust for Respondents to suffer such a disproportionately

harsh consequence as debarment without an opportunity for a hearing, just because their lawyer chose to file a preliminary motion, a motion to dismiss, as their response, a procedure that is not effective under the Rules of Practice. It likewise would be unjust for Respondents to suffer debarment without an opportunity for a hearing, just because I erred in failing to apply the Rules of Practice.

- Respondents have been and continue to be defending vigorously against the allegations in Docket No. I & G 01-0001 and in the within proceeding, and it is ludicrous to contemplate that they would default. . . .
- Respondents' response to the Complaint was timely filed, even though it was a Motion to Dismiss instead of an answer.
- Respondents' Motion to Dismiss, even while mistaken, raises a statute of limitations issue, which, even if not actionable under the Rules of Practice, is the type of jurisdictional issue that I prefer be brought to my attention at the beginning of a case. A judge needs to determine his authority to take action.
- Respondents' objections to Complainant's motion for the adoption of a default decision, even though mistaken, were timely filed.
- Respondents did not fail to file their answer. *See* 7 C.F.R. § 1.139, the first sentence. Respondents filed their answer 50 days late, on February 12, 2003. . . .
AR 50 at 4.

The ALJ also found, based on these reasons, that there was good cause to grant Lion Raisins' request to file its late answer. *Id.* at 5.

AMS again appealed and on May 24, 2004, the JO issued the final order. The JO reversed the ALJ's February 27, 2004 decision, finding that "the ALJ erroneously found Respondents' objection meritorious" because the Rules of Practice specifically "state the time within which an

answer must be filed and the consequences of failing to file a timely answer.” AR 59 at 14. The JO issued a Decision and Order which held that Lion Raisins’ failure to file an answer was an admission of the allegations in the complaint and constituted a waiver of a hearing under the Rules of Practice. AR 59 at 19.

The JO further held that application of the default provisions of the Rules of Practice was consistent with Lion Raisins’ Fifth Amendment due process rights and ordered that “Respondents, their agents, officers, subsidiaries, and affiliates, directly or indirectly through any corporate or other device are debarred for 1 year from receiving inspection services under the Agricultural Marketing Act.” AR 59 at 20.

II. Procedural History

Lion Raisins filed its Complaint for review of a final agency action on June 15, 2004. The USDA is named as Defendant, and the Complaint alleges eleven separate causes of action, summarized below:

1- Violation of the Administrative Procedures Act.

Lion Raisins alleges that the JO’s decision ordering the default and debarment was arbitrary, capricious and an abuse of discretion and/or otherwise not in accordance with the law.

2- Violation of Due Process. Lion Raisins alleges that the JO violated Lion Raisins’ due process rights in entering the default despite the filing of the motion to dismiss, the filing of the late answer and the ALJ’s decision allowing the late answer to be filed.

3- Lack of jurisdiction of the USDA. Lion Raisins alleges that because the underlying action was barred by the statute of limitations, the USDA was without jurisdiction to debar Lion Raisins.

4- Debarment is an improper penalty. Lion Raisins alleges

that debarment is not authorized under the Agricultural Marketing Act of 1946.

5- Debarment is an improper penalty. Lion Raisins alleges that the 1946 Act does not permit debarment from inspections that are mandatory under the Raisin Marketing Order.

6- Violation of Due Process. Lion Raisins alleges that the period of debarment was more onerous than the relief requested in the USDA complaint.

7- The JO lacked authority to debar Lion Raisins. As far as the Court can discern, this claim is identical to claim five.

8- Eighth Amendment Violation. Lion Raisins alleges that the debarment order runs afoul of the Eighth Amendment's cruel and unusual punishment and/or excessive fines provision.

9- Debarment cannot occur as to incoming inspections. Lion Raisins alleges that because the alleged falsification took place in outgoing inspections, debarment of inspections relating to incoming raisins is arbitrary and capricious.

10- The integrity of the USDA inspection system has been remedied. Lion Raisins alleges that, because the USDA has altered its inspection certificate process since the alleged falsification, debarment is not necessary to protect the integrity of the system.

11- Injunctive relief. Lion Raisins seeks to enjoin the USDA from debarring Lion Raisins pending full and final review of the administrative decision.

The Complaint seeks declaratory and injunctive relief. Lion Raisins filed a motion for partial summary judgment on the fourth and fifth causes of action only, arguing that summary adjudication in its favor on

either of those claims would obviate the need for further proceedings. USDA subsequently filed a motion for summary judgment as to claims one, two and six. USDA asserts that the two motions dispose of all of claims, arguing that Claims 3 and 7-10 are derivative and that Claim 11 is moot.

III. Issues for Review

Claim one states the two separate issues for review in this administrative decision. The first issue is whether the entry of default was proper. Claims two and three relate to this question. The second issue, which need only be reached if the Court determines that the entry of default was proper, is whether the debarment was proper. Claims four through ten relate to this question. Claim eleven is moot because the JO stayed the debarment order pending review.

IV. Legal Standard

Summary judgment is appropriate when the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is particularly appropriate in cases involving the review of an administrative record. *Adams v. United States*, 318 F.2d 861, 865 (9th Cir. 1963).

The Administrative Procedures Act (“APA”), 5 U.S.C. § 701 *et seq.*, sets forth the standard governing judicial review of decisions made by federal administrative agencies. *Dickinson v. Zurko*, 527 U.S. 150, 152, 119 S. Ct. 1816, 144 L. Ed. 2d 143 (1999). Under the APA, a decision in a formal agency action may be set aside if it is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). Agency decisions may also be reversed if they are contrary to constitutional right, in excess of statutory jurisdiction, or without observation of required procedure. *Id.*

Review under the arbitrary and capricious standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S.

Ct. 1851, 104 L. Ed. 2d 377 (1989). An agency's findings of fact must be upheld if supported by substantial evidence and its conclusions of law are reviewed *de novo*. *Potato Sales Co. v. USDA*, 92 F.3d 800, 803 (9th Cir. 1996). Also, while a JO is entitled to review an ALJ's determination, 7 C.F.R. § 557(b), a court is free to consider an ALJ's findings in determining whether the JO's decision was proper. *Bosma v. USDA*, 754 F.2d 804, 808 (9th Cir. 1984).

V. Propriety of the Default

A. The Relevant Rules of Practice

The Rules of Practice, 7, C.F.R. § 1.130 *et seq.*, apply to “[a]djudicatory proceedings under the regulations promulgated under the Agricultural Marketing act of 1946 (7 U.S.C. 1621 *et seq.*) for the denial or withdrawal of inspection, certification, or grading service.” 7 C.F.R. §§ 1.131(b)(1), 50.1, 52.54(a). It is the Rules of Practice rather than the Federal Rules of Civil Procedure, that govern USDA regulatory actions such as this.² See AR 29 (acknowledging that “although many administrative proceedings are governed by the Federal Rules of Civil Procedure, this one is not”); see also 7 Federal Administrative Practice § 7702 (West 2001) (Federal Rules of Civil Procedure “are not binding on the agency unless the agency adopts them”); Fed. R. Civ. P. 1 (specifying that rules govern proceedings in United States district courts); *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984) (finding federal rules inapplicable in agency proceedings).

The Rules of Practice differ from the Federal Rules of Civil Procedure in that an answer must be filed within 20 days after the service of the complaint. 7 C.F.R. § 1.136. Section 1.136 specifies the content of the answer and is similar to Rule 8(b) of the Federal Rules of Civil Procedure. It specifies that an answer shall “clearly admit, deny, or

²Obviously, if the Federal Rules of Civil Procedure did apply, this case would not have reached this point. Rule 55 specifies that default may only be had where a party fails to “[p]lead or otherwise respond.” Fed. R. Civ. P. 55(a)

explain each of the allegations” and set forth any defenses. *Id.* Section 1.136 further provides that “[f]ailure 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 . . .” *Id.*

Section 1.139 of the Rules of Practice describes the procedure upon failure to file an answer or admission of facts. It provides, in pertinent part, that:

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 . . . the respondent may file . . . objections thereto. If the Judge finds that meritorious objections have been filed, complainant’s Motion shall be denied with supporting reasons. . . .

7 C.F.R. § 1.139.

The Rules of Practice do not have an equivalent to Rule 12 of the Federal Rules of Civil Procedure. Section 1.143 of the Rules of Practice provides that “[a]ny motion will be entertained other than a motion to dismiss on the pleading.” *Id.* at § 1.143. Last, section 1.147 provides that the “time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial officer . . . if . . . there is good reason for the extension.” *Id.* at § 1.147(f).

B. Count Three - Lack of Subject Matter Jurisdiction³

Lion Raisins argues that because the AMS Complaint was barred by the statute of limitations the JO lacked jurisdiction to act in the case. Lion Raisins asserts that its “motion should be regarded as a permissible motion to dismiss for lack of jurisdiction, specifically for failure to state

³Though neither party moved for summary adjudication of this claim, Lion Raisins sufficiently briefed the issue in its opposition to USDA’s motion. *See* Pls.’ Opp’n at 5-7.

a claim upon which relief can be granted, rather than as an arguably impermissible motion to dismiss on the pleadings.” Pls.’ Opp’n at 6. In support of this argument Lion Raisins quotes from *EEOC v. Ingersoll Johnson Steel Co.*, 583 F. Supp. 983, 985 (D. Ind. 1984), in which the court construed a motion for judgment on the pleadings, made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, to be a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). This argument lacks merit. First, the Rules of Practice and not the Federal Rules of Civil Procedure governed the case below. Second, Lion Raisins misquotes the Rules of Practice, which prohibit a “motion to dismiss on the pleading” and not, as Lion Raisins asserts, a “motion to dismiss on the pleadings,” which Lion Raisins further argues is akin to a motion for judgment on the pleadings. Third, even if the Federal Rules of Civil Procedure did apply, the statute of limitations is an affirmative defense, *see* Fed. R. Civ. P. 8(c), to be raised pursuant to Rule 12(b)(6) and is irrelevant to a court’s subject matter jurisdiction, which is properly addressed under Rule 12(b)(1). Lion Raisins’ argument that a motion pursuant to Rule 12(b)(6) is a “motion to dismiss for lack of jurisdiction, specifically for failure to state a claim upon which relief can be granted” is untenable.

Lion Raisins similarly argues that “a meritorious statute of limitations defense deprives the USDA court of jurisdiction to act, or take any action in the case, except to resolve the statute of limitations defense.” Pls.’ Resp. to Def.’s UMF No. 6. Again, the case cited by Lion Raisins, *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996), does not support its position. In *Barnett*, the Federal Circuit determined that, because of a specific jurisdictional statute, the Court of Veteran’s Appeals “does not have jurisdiction to consider a claim which it previously adjudicated unless new and material evidence is presented and before the Board may reopen such a claim, it must so find.” *Id.* at 1384. No such statute has been argued to apply here and *Barnett* is irrelevant.

The ALJ’s characterization of the statute of limitations as jurisdictional issue was incorrect. Affirmative defenses relate to the merits of a case and the JO did not lack jurisdiction on this basis. Accordingly, the Court will exercise its authority to GRANT summary adjudication *sua sponte* in favor of USDA as to claim three.

C. Counts One & Two - The Default as a Violation of the APA

Claim one which alleges in part that the entry of the default violates the APA. Claim two alleges that the JO acted arbitrarily and capriciously, abused its discretion and violated Lion Raisins' due process rights when it treated Lion Raisins' motion to dismiss as an insufficient response and entered the default. The parties' papers do not completely distinguish arguments related to claim one from those related to claim two, and, because the relevant issue in both is whether the JO acted properly, the Court will address these claims together.

1. The JO's Decision

The objection Lion Raisins raised in the opposition to the motion for entry of default was that Lion Raisins "timely filed a response to the complaint, and filed it before the December 24, 2002 deadline." AR 14. The ALJ found the objection meritorious "even though mistaken" because such a filing would have been permissible under the Federal Rules of Civil Procedure. AR 50 at 3. The ALJ also found that good cause was shown for allowing Lion Raisins to file its answer because it "would be unjust" to deprive Lion Raisins of a hearing when debarment was at stake.

The JO disagreed and granted the default. The JO relied on the language of the Rules of Practice and on the fact that Lion Raisins was served with a copy of the Rules of Practice and otherwise had notice of the requirement. AR 59 at 14-18. The JO found that the motion to dismiss did not meet the requirements of an answer, that Lion Raisins' failure to file a timely answer was an admission of the allegations in the AMS Complaint and that default was appropriate. AR 59 at 19. While the JO noted that Lion Raisins filed a request to file an answer 50 days after the answer was due, the JO did not address the ALJ's determination that "good reason" existed for extending the time in which to file an answer and allowing the answer to be filed.

2. Discussion

The Court begins its discussion of these claims by noting that there is a lack of published authority regarding the entry of defaults pursuant to the Rules of Practice both in and out of the Ninth Circuit.⁴ Additionally, other than mentioning the words “arbitrary and capricious,” neither party sets forth the appropriate standard of review. In *Kirk v. INS*, 927 F.2d 1106, 1108-09 (9th Cir. 1991), the Ninth Circuit reviewed the entry of default in an immigration decision by an ALJ that was upheld by the chief administrative hearing officer (“CAHO”). The court declined to apply the standard of Rule 60 of the Federal Rules of Civil Procedure to the agency’s entry of default because “the administrative rules provide[d] a mechanism for vacating default judgment.” *Id.* at 1109.

Two paragraphs earlier, however, in ruling that “the ALJ did not err in ordering judgment by default, nor did the CAHO err in affirming that action,” the court cited *Direct Mail Spec. v. Eclat Computerized Tech.*, 840 F.2d 685, 690 (9th Cir. 1988). *Id.* *Direct Mail* involved the setting aside of an entry of default judgment pursuant to Rule 60. The only apparent basis for the pinpoint citation in *Kirk* is the standard for vacating default judgments: “We review the decision of the district court for abuse of discretion.” *Direct Mail*, 840 F.2d at 690. More important, the APA itself provides that agency actions may be reversed if shown to be an abuse of discretion. 5 U.S.C. § 706(2)(A). Thus while Rule 60 of the Federal Rules of Civil Procedure and the principles behind it do not necessarily establish the standard itself, both provide helpful guidelines for determining whether discretion has been abused. Additionally, unlike the situation in *Kirk*, 927 F.2d at 1109, the Rules of Practice do not have a “mechanism for vacating default judgment.” The only way to avoid default is to object beforehand; there is no procedural avenue for relief once a default is entered by the JO. Finally, the Court observes that the “meritorious objections” standard appears consistent with the

⁴ A search of the Ninth Circuit databases in both LEXIS and Westlaw for 7 C.F.R. § 1.136, section 1.136 or rule 1.136 did not reveal a single citation. A similar search for section 1.139 revealed one unpublished and inapposite case.

standard applied by other agencies, which is whether good cause existed for failing to file an answer.

The Court finds the Eighth Circuit case *Oberstar v. FDIC*, 987 F.2d 494, 504 (8th Cir. 1993),⁵ helpful in this matter. In *Oberstar*, the plaintiff, Oberstar, moved the court to set aside a default that was entered against him pursuant to the FDIC rules despite the fact that he had filed a late answer. At the time the default was entered, Oberstar was in the process of appealing the outcome of another FDIC case against him. The court reversed the default as an abuse of discretion. Stating:

The judicial preference for adjudication on the merits goes to the fundamental fairness of the adjudicatory proceedings. Fairness concerns are especially important when a government agency proposes to assess a quasi-criminal monetary penalty on a private individual. By entering the default judgment against Oberstar because of his minor deviation from the FDIC's procedural rule, with no showing of prejudice to the agency, the Board unfairly deprived Oberstar of his right to a statutorily mandated hearing. We hold that the Board's application of the FDIC default regulation in this case was an abuse of discretion.

Id.

The court further stated that even if it applied the FDIC's regulation, the default was still improper because the reason given for not filing the answer constituted good cause, particularly given that the FDIC commenced a second action against Oberstar while the outcome of the first was still pending. *Id.*

The Court agrees with the Eighth Circuit that fairness concerns are paramount in cases such as this where quasi-criminal sanctions are imposed. The ALJ based her decision finding the objection meritorious and allowing the late answer on this very premise. As quoted, *supra*,

⁵ USDA cites what appears to be one of the decisions that was overruled by the Eighth Circuit in *Oberstar*, *In the Matter of Paul E. Oberstar*, 1992 WL 813099. See Def.'s Reply at 9.

“[i]t would be unjust for [Lion Raisins] to suffer such a disproportionately harsh consequence as debarment without an opportunity for a hearing . . .” AR 50 at 4. Further, there a strong preference that cases be decided on their merits whenever possible. *O’Connor v. Nevada*, 27 F.3d 357, 364 (9th Cir. 1994). This principle is not rendered irrelevant by the fact that the adjudicatory proceeding is administrative rather than judicial.

Here, the JO, unlike the ALJ, ignored the tenet that cases should be decided on their merits whenever possible and failed to consider the overall fairness of the proceedings given what was at stake. The JO abused his discretion by entering the default judgment against Lion Raisins because of its minor deviation from the Rules of Practice with no showing of prejudice to the USDA. The refusal to allow the late answer similarly deprived Lion Raisins of the hearing to which it was entitled.

There is no indication that, as Lion Raisins’ asserted in its request to file its answer, USDA would be prejudiced by allowing the answer to be filed. USDA was made aware of Lion Raisins’ intent to defend itself in the matter when it received the motion to dismiss. Having been made aware of this intent, albeit through a technically procedurally ineffective method, USDA cannot possibly claim it would be prejudiced by the denial of the default and allowing the answer to be filed. This is unlike a typical default case, in which prejudice may be found where a party has failed to respond at all. Additionally, the ALJ took judicial notice on her own motion of the fact that all the parties, including herself, were involved in a second matter involving the same issues. The existence of this parallel action, in which Lion Raisins was “defending vigorously,” AR 50 at 4, further demonstrates lack of prejudice because, as the ALJ noted, it would be “ludicrous” to contemplate that Lion Raisins would default.⁶ Accordingly, there can be no argument that USDA somehow relied to its detriment on Lion Raisins’ failure to file an answer.

⁶This is not to imply that filings or occurrences in one action have any effect on those in a related case; the question here is prejudice. USDA was made aware by the motion to dismiss that Lion Raisins intended to defend in the action in addition to being aware that Lion Raisins was defending itself in other cases.

Also with respect to fairness, the Court notes, but does not base its decision on, that despite the fact that Lion Raisins filed its motion four days (two business days) prior to filing deadline for the answer, USDA did not bring the procedural error to Lion Raisins' attention, but rather leapt at the opportunity to capitalize on the mistake that was made. A party is not, of course, required to instruct an opponent on the applicable procedural rules. However, capitalization on a mere procedural error is wholly offensive to the judicial tenet that cases be decided on the merits.

Moreover, as in *Oberstar*, the outcome is the same even if the agency's Rules of Practice are applied. As characterized by the ALJ, Lion Raisins was apparently "oblivious" to the fact that the Rules of Practice were the applicable rules and did not allow for the filing of a motion to dismiss. As both the ALJ and Lion Raisins noted, in nearly any other proceeding before any other adjudicatory body, a motion to dismiss is permissible. While the Court acknowledges that ignorance of the law is generally no excuse, where, as here, it is coupled with a complete lack of prejudice to the opposing party, this mere procedural error constitutes both a meritorious objection to the default as well as good reason for allowing the answer to be filed. The Court finds none of the non-binding authority cited by USDA persuasive on this issue, particularly given the posture, as discussed above. The error made here was, as the ALJ determined, understandable.

Further, in *Oberstar*, the court characterized the FDIC's filing of a second action while the first was still pending as "unfair harassment" and found the attorney's delay in answering correspondingly understandable 987 F.2d at 504. Similarly, here, as mentioned, there was a second action that was already pending between the parties. It was not unreasonable for counsel for Lion Raisins to attempt to save all parties a procedural step by filing a motion to dismiss based on the statute of limitations, as a finding in Lion Raisins' favor would eliminate the need for further action.⁷

⁷ The Court comments that it appears contrary to all notions of judicial and administrative economy that the USDA apparently decided to bring a second complaint

Accordingly, because the JO abused his discretion⁸ in entering the default, USDA's request for summary adjudication is DENIED and summary adjudication is GRANTED *sua sponte* in favor of Lion Raisins as to the first portion of claim one and as to claim two. Because the default was inappropriate, the Court need not address the claims related to the imposition of the debarment.

ACCORDINGLY, IT IS ORDERED that summary adjudication as to claim three is GRANTED in favor of the USDA.

FURTHER, summary adjudication is GRANTED as to claim two is GRANTED in favor of Lion Raisins and DENIED as to the USDA.

FURTHER, summary adjudication is GRANTED IN PART as to claim one in favor of Lion Raisins and DENIED IN PART as to the USDA.

FURTHER, this case is remanded for further proceedings consistent with this order.

IT IS SO ORDERED.

rather than amend its other complaint to add the allegations at issue here.

⁸Although the JO abused his discretion, Lion Raisins' attacks on the JO's objectivity are not well taken. See Pls.' Opp'n at 9:5-9. None of the cases cited by Lion Raisins involve the JO who decided this case.

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ORGANIC FOODS PRODUCTION ACT

COURT DECISION

**MASSACHUSETTS INDEPENDENT CERTIFICATION, INC. v.
USDA.
Civil No. 05-40169-FDS.
Filed March 30, 2007.**

(Cite as: 486 F.Supp.2d 105).

**OFPA – NOP – APA – Fifth Amendment – First Amendment – Certification – Zone
of interest.**

Under the National Organic Program, MICI, a private certifier denied Organic label certification to Country Hen, an egg-farming operation based upon, among other criteria, [lack of] “access to ‘open range.’” Country Hen appealed the decision and the USDA NOP Administrator overruled the certifier and permitted Country Hen to carry the “Organic” label on its cartons over the certifier’s objection. The certifier appealed Administrator’s decision alleging: (1) regulation violates OFPA and the APA because they don’t allow MICI a right of appeal; (2) the regulations violate MICI’s due process rights; (3) regulations violate OFPA and the APA because they permit USDA to order certifying agents to grant Organic certification; (4) regulations violate MICI’s right of free speech and association. Court held that MICI had standing to appeal because it had injury-in-fact of invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical and there was a casual connection between the injury and conduct complained of, and not the independent action of some third party interest and that the injury is more, rather than less, likely to be addressed by a favorable decision. Using the *Chevron* test standard, the Court then held that the NOP Administrator was not acting in an arbitrary, capricious, or unlawful manner in applying its own regulations which MICI as a participant in the NOP was bound to follow.

**MEMORANDUM AND ORDER
ON DEFENDANT’S MOTION TO DISMISS**

SAYLOR, District Judge.

This is a challenge to regulations adopted by the United States Department of Agriculture (“USDA”) pursuant to the Organic Foods Production Act (“OFPA”), 7 U.S.C. § 6501 *et seq.* Plaintiff Massachusetts Independent Certification, Inc. (“MICI”) seeks declaratory and injunctive relief from the regulations, which deny private agencies that certify producers of organic foods the right to an administrative appeal of USDA decisions.

The regulatory scheme at issue is somewhat unusual. Congress enacted OFPA in 1990 for the purpose, among other things, of creating consistent national standards for the marketing of organic agricultural products. Food producers and handlers that meet the standards may be certified under the National Organic Program (“NOP”) and label their products as “organic” (or a variation of that term). Rather than creating a new network of USDA certifying agents, Congress decided to preserve the existing network of private certification programs, allowing those independent third parties to become accredited and certify operations in the field.¹ The certifying agents compete with one another and charge fees for their services. Packaged products from certification operations that are labeled “100% organic,” “organic,” or “made with organic [ingredients]” must bear the name of the certifying agent.

A food producer or handler that is denied certification by a certifying agent may appeal to the USDA. If the appeal is successful, the applicant is certified and the products will bear the label of the agent—even if the certifying agency disagrees with the decision. The certifying agent itself, however, may not appeal such a decision.

MICI is a certifying agent operating in Massachusetts. It contends that the regulations denying it a right to appeal violate OFPA and unlawfully deprive it of its due process and First Amendment rights. The Secretary

¹ Congress also preserved and incorporated state certification programs, although those programs are not at issue here.

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of Agriculture contends that MICI is without standing to challenge the regulations and that the regulations are a valid exercise of the Secretary's statutory authority.

Defendant has moved to dismiss the action for failure to state a claim upon which relief can be granted. For the reasons set forth below, the Court concludes that MICI has standing to challenge the regulations, but that the regulations are valid under OFPA and do not violate MICI's constitutional rights. Accordingly, defendant's motion to dismiss will be granted.

I. *Factual Background*

A. *The Regulatory Scheme*

The Organic Foods Production Act ("OFPA") was enacted in 1990 in order to (1) "establish national standards governing the marketing" of organically produced agricultural products, (2) "assure consumers that organically produced products meet a consistent standard," and (3) "facilitate interstate commerce in fresh and processed food that is organically produced." 7 U.S.C. § 6501. OFPA delegates authority to the Secretary of Agriculture to promulgate regulations to carry out the Act. *See id.* § 6521.²

1. *Certifying Agents*

In order to create uniform national standards for organic food, OFPA establishes a national certification program for producers and handlers of

²The final rule establishing the NOP was published on December 21, 2000. *See* 65 Fed. Reg. 80548 (Dec. 21, 2000) (codified at 7 C.F.R. pt. 205).

organic products and regulates the labeling of organic foods. *See id.* §§ 6503(a), 6504, 6505(a)(1)(A). Rather than requiring the USDA itself to conduct reviews and on-site farm inspections around the country, Congress elected to preserve the existing network of private and state certification programs, allowing independent third parties to act as certification agents. The Act accordingly delegates authority to the Secretary to establish a program for accrediting private “certifying agents” for the purpose of “certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this chapter.” *See id.* at § 6502(3); *see also id.* §§ 6503(d), 6515-6516.

Certifying agents are the first reviewers of applications for certification; they are required to “fully comply with the terms and conditions of the applicable organic certification program” and must agree to carry out OFPA’s provisions as well as “such other terms and conditions as the Secretary determines appropriate.” *See id.* §§ 6515(f), 6515(d). If a certifying agent determines that a producer or handler of crops or livestock meets the certification requirements, it may grant organic certification and the operation’s products may be sold or labeled as organically produced and may bear the USDA seal. *Id.* §§ 6513(a), 6504(3). A certifying agent that falsely or negligently certifies any operation risks losing its accreditation. *Id.* § 6519(e).³

Certifying agents under NOP charge applicants fees for certification services. 7 C.F.R. § 205.642. There is no restriction under OFPA or NOP on the number of certifiers in a given location, which permits competition among certifiers for “customers” of their certification services.

2. *The Certification Process*

³ In order to be labeled as “organic,” an agricultural product must be produced without the use of synthetic substances, except as otherwise provided in OFPA, and in accordance with an organic plan agreed to by an accredited certifying agent, the producer, and the handler of the product. 7 U.S.C. § 6504.

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The USDA regulations also contain detailed standards for certification, pursuant to which a producer or handler may label its products according to a four-tiered scheme as “100% organic,” “organic,” “made with organic [ingredients]” or “organic [ingredients],” depending on the percentage of organic contents. 7 C.F.R. §§ 205.300-305. All packaged products in the first three categories must identify the name of the certifying agent on the package. *Id.* §§ 205.303, 205.304. Only products in the first two categories may bear the USDA “organic” seal. *Id.* § 205.303

The regulations require certifying agents to accept applications from any producers or handlers within their areas of accreditation and to certify all qualified applicants. *Id.* § 205.501(a)(19). If a certifying agent determines that an applicant for certification is not in compliance with OFPA, the agent generally must issue a written notice of noncompliance. *See Id.* § 205.405(a). If the applicant is unable to resolve the issue, the certifying agent must issue a written notice of denial of certification. *Id.* § 205.405(c). An applicant who receives a notice of denial of certification may reapply for certification, request mediation with the certifier, or file an appeal. *Id.* at § 205.405(d).⁴

3. *The Appeal Process*

OFPA mandates that USDA provide an appeals procedure. First, under the heading of “General requirements,” the statute provides:

A program established under this chapter shall-

⁴If, after receiving a notice of noncompliance or denial of certification, a producer or handler applies for certification from a different certifying agent, the operation is required to include a copy of the notification of noncompliance or denial of certification and a description of actions it has taken, with supporting documentation, to correct the noncompliance. *Id.* § 205.405(e).

... provide for procedures that allow *producers and handlers* to appeal an adverse administrative determination under this chapter....

7 U.S.C. § 6506(a)(3) (emphasis added). In addition, 7 U.S.C. § 6520 provides specifically:

(a) The Secretary shall establish an expedited administrative appeals procedure under which *persons* may appeal an action of the Secretary ... or a certifying agent under this chapter that-

(1) adversely affects such person; or

(2) is inconsistent with the organic certification program established under this chapter.

(b) A final decision of the Secretary under subsection (a) of this section may be appealed to the United States district court for the district in which such person is located.

(emphasis added).

The principal challenged regulation, 7 C.F.R. § 205.681(a), provides as follows:

(a) An applicant for certification may appeal a certifying agent's notice of denial of certification, and a certified operation may appeal a certifying agent's notification of proposed suspension or revocation of certification to the Administrator [for the Agricultural Service]....

(1) If the Administrator ... sustains a certification applicant's or certified operation's appeal of a certifying agent's decision, the applicant will be issued organic certification, or a certified operation will continue its certification, as applicable to the operation. *The act of sustaining the appeal shall not be an adverse action subject to appeal by the affected certifying agent.*

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(2) If the Administrator ... denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such proceeding shall be conducted [before an Administrative Law Judge] pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice....

(emphasis added).⁵ The regulations separately provide for appeals of USDA actions that would deny, suspend, or revoke a certifying agent's accreditation. 7 C.F.R. § 205.681(b).

Thus, under the regulations, certifying agents are not afforded the opportunity to appeal the issuance of organic certification.

B. The Country Hen Proceedings

Plaintiff MICI is an independent organization that certifies organic producers and handlers of agricultural products. On April 29, 2002, the USDA accredited MICI to certify crop, livestock, wild crop, and handling operations to the USDA's National Organic Standards under the name "NOFA-Massachusetts Organic Certification Program."⁶

1. The Country Hen's Application for Organic Certification by MICI

On July 15, 2002, an egg-farming operation named The Country Hen applied to MICI for organic certification.⁷ After conducting an

⁵ MICI also challenges 7 C.F.R. § 205.680, which provides generally for appeals by persons who are adversely affected by various specified decisions, without expressly providing a right of appeal to certifying agents.

⁶ NOFA is an acronym for the Northeast Organic Farming Association. MICI now uses the name "Baystate Organic Certifiers."

⁷ Unknown to MICI, The Country Hen had previously applied for organic

Cont.

inspection of the Country Hen's operations, MICI issued a notice of noncompliance on October 4, 2002. The notice cited four areas of noncompliance, including failure to provide hens with access to the outdoors as required by NOP regulations.⁸ MICI gave The Country Hen until December 31, 2002, to take corrective actions.

On October 15, 2002, The Country Hen's owner, George Bass, met with MICI's certification administrator, Don Franczyk, to present a plan for providing its hens with outdoor access by attaching two-story porches to the existing hen houses. The Country Hen also sent MICI a letter detailing its proposed organic plan and explaining how and when the hens would have outdoor access. On October 21, 2002, MICI's organic certification committee met and voted to deny The Country Hen certification, concluding that the proposed plan was inadequate under the regulations. MICI issued a notice of denial of certification on October 24, 2002.

At some point prior to MICI's certification decision, it appears that The Country Hen submitted a proposed egg carton to NOP Program Manager Richard Matthews. The proposed carton bore the USDA Organic seal, stated that The Country Hen was "certified organic by NOFA/Mass," and stated that The Country Hen's "feed and eggs are certified organic by NOFA/Mass." The proposed egg carton was reviewed and approved before MICI's decision to issue a notice of intent to deny The Country Hen certification. Matthews did not consult MICI about his decision to approve the egg carton.

certification to another certifying agent, which rejected the application on the same grounds ultimately cited by MICI. The Country Hen was required under the regulations to disclose that fact to MICI. See 7 C.F.R. § 205.405(e).

⁸ The regulations state that an organic livestock producer must provide conditions that allow for exercise, freedom of movement, and reduction of stress appropriate to the species. 7 C.F.R. § 205.238(a)(4). The regulations also state that such a producer must establish and maintain livestock living conditions that accommodate the health and natural behavior of animals, including access to the outdoors. 7 C.F.R. § 205.239(a)(1).

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The Appeal of MICI's Denial of Certification

On October 22, 2002, The Country Hen appealed MICI's vote to deny its certification application to the Administrator for the Agricultural Marketing Service. Three days later, on October 25, 2002, Franczyk received a copy of the Administrator's decision letter, which stated that The Country Hen's appeal had been sustained by the NOP. The Administrator's decision directed MICI to grant certification to The Country Hen, retroactive to October 21, 2002.

After the decision was issued, The Country Hen released egg cartons onto the market that bore the USDA Organic seal and stated (inaccurately) that The Country Hen, its eggs, and its feed were "certified organic by NOFA/Mass." MICI repeatedly demanded that The Country Hen stop making claims that it was certified by NOFA/Mass. It was not until the summer of 2003, however-when The Country Hen obtained certification from another accredited certifying agent-that it stopped using the NOFA/Mass certification name on its egg cartons.

3. MICI's Administrative Efforts to Appeal the Decision

On October 28, 2002, MICI sent a letter to the Administrator objecting both to the procedure followed in deciding The Country Hen's appeal and the substance of the October 25 decision. After receiving no response, MICI filed a complaint with the USDA Office of Administrative Law Judges, petitioning to overturn the Administrator's decision and alleging that USDA had violated due process requirements. On November 4, 2003, an Administrative Law Judge issued an order dismissing MICI's complaint, concluding that subject matter jurisdiction was lacking under 7 C.F.R. § 205.681(a)(1).

On December 11, 2003, MICI filed an appeal petition and brief with the USDA Judicial Officer. MICI renewed its objection to the Administrator's decision, arguing that the Secretary had a duty under

OFPA and the United States Constitution to provide MICI with appeal rights. An order dismissing MICI's appeal on the basis of lack of subject matter jurisdiction was issued on April 21, 2004.

II. Procedural Background

MICI filed the current action on September 27, 2005. MICI contends that the failure of the NOP regulations to provide it with a right of appeal violates various legal and constitutional requirements. Specifically, the amended complaint makes the following four claims: (1) that the regulations violate OFPA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), because they do not provide MICI with a right of appeal (Count 1); (2) that the regulations violate MICI's due process rights under the Fifth Amendment (Count 2); (3) that the regulations violate OFPA and the APA because they permit the USDA to order certifying agents to grant organic certification (Count 3); and (4) that the regulations violate MICI's rights to freedom of speech and freedom of association under the First Amendment (Count 4). MICI seeks various forms of declaratory and injunctive relief.

Defendant has moved to dismiss the complaint pursuant to Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim upon which relief may be granted) on the ground that plaintiff is without standing to prosecute the claim.

III. Analysis

A. Whether Plaintiff Has Standing to Challenge the Regulation

Article III of the United States Constitution limits the jurisdiction of the federal courts to actual cases or controversies. U.S. Const. art. III, § 2; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Accordingly, a plaintiff in federal court must "establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). The standing doctrine serves to identify those disputes that are

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“appropriately resolved through the judicial process.” *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (quotations and internal citations omitted).⁹

Standing has both a constitutional and a prudential component. Constitutional standing requires proof of three elements:

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61, 112 S.Ct. 2130 (quotations and internal citations omitted). Where a statute affords procedural rights to a particular class of persons, the standing inquiry is less demanding: “The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Lujan*, 504 U.S. at 572 n. 7, 112 S.Ct. 2130.

Prudential standing “encompasses - general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint

⁹ MICI bears the burden of establishing the elements of standing, as those elements are “not mere pleading requirements but rather an indispensable part of the plaintiff’s case.” *Id.* at 561, 112 S.Ct. 2130.

fall within the zone of interests protected by the law invoked..*Elk Grove*, 542 U.S. at 12, 124 S.Ct. 2301 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

Defendant here contends that MICI does not have constitutional standing for essentially two reasons: that it does not allege a current or imminent injury and that the alleged harm is not redressable. It further contends that MICI does not have prudential standing, because its claim does not fall within “zone of interests” that the statute was meant to protect.

1. Constitutional Standing

a. *Injury in Fact*

As noted, to establish constitutional standing, MICI must show that it has suffered or is about to suffer an “injury in fact.” The injury must be “actual or imminent” in order “to reduce the possibility that a court might unconstitutionally render an advisory opinion by -iding a case in which no injury would have occurred at all..*Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 663 (D.C.Cir.1996) (quoting *Lujan*, 504 U.S. at 564 n. 2, 112 S.Ct. 2130).

In *Harvey v. Veneman*, 396 F.3d 28, 34-35 (1st Cir.2005), the First Circuit held that a producer and consumer of organic foods had standing to challenge various regulations promulgated by the USDA under OFPA. The plaintiff there contended, in substance, that the regulations were insufficiently strict and thus permitted food to be inaccurately labeled as “organic.” The claimed injury was that “the challenged regulations weaken the integrity of the organic program and the standards it sets forth,” which harmed the plaintiff “as a consumer of organic foods because it degrades the quality of organically labeled foods.” *Harvey*, 396 F.3d at 34.¹⁰ The court held that the claimed injury represented a

¹⁰The standing issue in *Harvey* appears to have been resolved entirely on the issue of the plaintiff’s standing as a consumer, rather than as a producer, of organic foods. *See*

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“concrete, redressable injury sufficient to confer Article III standing” to challenge the regulations. *Id.* It likewise found that the plaintiff’s alleged injuries “fall precisely within the zone of interests that the statutes at issue were meant to protect,” and thus the requirements of prudential standing were satisfied. *Id.* at 34-35.

Here, MICI contends that it has suffered an injury in fact as a result of defendant’s refusal to enact a regulation providing it with the opportunity to appeal when its decisions to deny certification are overturned. Specifically, MICI contends that because the current regulations do not give it such a right, (1) the integrity of the organic certification program as a whole is compromised, which may cause the demand for certification services to diminish, and (2) its name may appear on product labels that it believes do not meet NOP standards, which may lead food producers and handlers to choose to enlist the services of other certifiers. MICI contends that the regulations therefore cause harm to both its economic well-being and reputation.

MICI thus appears to claim an injury that is similar to, or indeed more substantial than, the injury claimed in *Harvey*. MICI’s claimed injury as to the “integrity” of the organic program is largely identical to the claimed injury in *Harvey*; certainly MICI-whose entire business appears to consist of certifying organic operations-has a far greater interest, and a far greater stake, in that program than a mere consumer of organic food. Furthermore, MICI claims a specific economic and reputational injury arising out of the regulatory scheme, which (it contends) would force it to affix its certification to products that it believes do not meet the requisite standards.

It is true, as defendant points out, that MICI’s name does not

currently appear on any product of a producer or handler to which it denied certification. It is also true that MICI does not contend that it continues to suffer an injury arising out of the use of its name by The Country Hen. Those facts, however, do not compel a different result. MICI continues to serve as a certifying agent, and continues to make certification decisions as to food producers and handlers on an ongoing basis. Presumably, those decisions are routinely, and continually, enforced and challenged on appeal. *See Osediacz v. City of Cranston*, 414 F.3d 136, 143 (1st Cir.2005) (plaintiff must only “indicate an objectively reasonable possibility that she would be subject to” cognizable harm). In that respect, therefore, MICI’s claimed injury is similar to (indeed, much more significant than) the consumer of organic food in *Harvey*, who simply asserted an interest in eating organic food that complied with appropriate standards. For purposes of constitutional standing, MICI’s alleged injury is sufficiently imminent to confer standing.

b. *Redressability*

Defendant further contends that the alleged injuries are not redressable. The redressability element of standing requires that the requested relief directly redress the injury alleged. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 105-09, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that plaintiffs lacked standing where the violations had been abated at the time of the suit). Plaintiff must establish that it is “likely,” as opposed to merely “speculative,” that its claimed injuries will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130.

Defendant contends that the relief sought-(1) a declaratory judgment that the Secretary has not complied with OFPA and has a duty to revise the regulations; (2) a declaratory judgment that the regulations violate due process; (3) an injunction against enforcement of the regulations preventing appeals by certifying agents; (4) a declaratory judgment that the Secretary may not compel an accredited certifying agent to certify a farm or handling operation as organic; and (5) a declaratory judgment

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that appeals under OFPA must be heard under the USDA Uniform Rules of Practice-cannot redress the injury alleged to have been suffered by MICI. Defendant argues that merely providing MICI with an opportunity to participate in an appeal would not necessarily prevent the economic and reputational harms MICI allegedly fears, as the Administrator, an administrative law judge, and (ultimately) the district court would retain the power to overturn any of MICI's certification denials. *See California Forestry Ass'n v. Thomas*, 936 F.Supp. 13, 18 (D.D.C.1996) (rejecting plaintiffs' claim that their economic injury would be alleviated if the Forest Service were enjoined from implementing interim guidelines protecting an endangered species, as the USDA would retain full authority to determine the size of the timber harvest). In other words, according to defendant, MICI's certification could still appear on products that it does not believe meet USDA standards, and MICI would be powerless to stop it.

That argument, however, conflates MICI's interest in participating in the process with MICI's desire to achieve a particular result. Indeed, if the rule were otherwise, no person could ever have standing to challenge his exclusion from a procedural process unless he could demonstrate that he was certain to prevail if he participated. Furthermore, while the Court cannot rewrite agency rules, or engage in policymaking, it does have the power to hold unlawful or set aside agency actions under appropriate circumstances. *See* 5 U.S.C. § 706(2); *see also Harvey*, 396 F.3d at 40 (finding regulations of USDA "contrary to the plain language of OFPA"). To that extent, therefore, the alleged injury is redressable for purposes of the standing analysis.

c. "*Procedural Rights*" Standing

MICI also contends that it has constitutional standing based upon its assertion of a procedural right under OFPA that threatens a concrete and particularized interest. MICI complains, in substance, that the USDA has violated a procedural right granted to it by Congress: the right to

participate in the appeal of a certification decision.

[I]n cases in which a party has been accorded a procedural right to protect his concrete interests, the primary focus of the standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury.

... [A] plaintiff may have standing to challenge the failure of an agency to abide by a procedural requirement only if that requirement was designed to protect some threatened concrete interest of the plaintiff. In this type of case, ... the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff. The mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement.

Florida Audubon, 94 F.3d at 664 (quotations and internal citations omitted).¹¹

The “concrete” interests asserted by MICI are its interests in the integrity of the organic program generally and its specific interests in maintaining its own viability as a certifying agent. There is, of course, an unusual aspect to the interests it asserts. MICI—unlike an organic food producer or consumer—has taken on a quasi-governmental role in the regulatory scheme, as the front-line decision-maker in the organic certification process. It is true, of course, that such decision-makers in

¹¹The proper inquiry is thus not whether any injury could result from the denial of procedural rights, but whether a constitutionally sufficient injury has resulted from the underlying substantive decision. *City of Orrville v. F.E.R.C.*, 147 F.3d 979, 986 (D.C.Cir.1998); *Florida Audubon*, 94 F.3d at 669 (“In other words, unless there is a substantial probability that the substantive agency action that disregarded a procedural requirement created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff, the plaintiff lacks standing.”).

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other contexts are almost always governmental officials, who do not have standing to participate in the appeal of their own decisions. However, MICI-at least for purposes of the standing analysis-is not a mere governmental agent, but a private economic entity with a separate and distinct economic and reputational interest. That interest, in this context, is sufficiently “concrete” and particularized to confer standing.

2. *Prudential Standing*

To satisfy the “zone of interest” test for prudential standing, a plaintiff’s interest in the litigation must be “arguably within the zone of interests to be protected or regulated by the statute ... in question.” *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). To apply this test, courts first discern the interests arguably to be protected or regulated by the statute, and then determine whether plaintiff’s interests arguably fall within that same zone of interests. *National Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998). Only a party claiming an interest that is “marginally related to or inconsistent with the purposes implicit in the statute” should be precluded from judicial review under this test. *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

Defendant argues that neither the statute nor the legislative history of OFPA contains any language suggesting that the statute was intended to benefit private certifying agents by increasing their market for certification or boosting their reputations. That argument, however, presupposes an unduly narrow focus to the standing inquiry: the inquiry is not whether there is an “indication of congressional purpose to benefit the would-be plaintiff.” *National Credit Union Admin.*, 522 U.S. at 489, 118 S.Ct. 927, quoting *Clarke*, 479 U.S. at 399-400. Rather, the Court should determine whether the claimed interests are only “marginally related to or inconsistent with the purposes” of the statute.

Here, the purposes of OFPA are to “establish national standards governing the marketing” of organic products, to “assure consumers that organically produced products meet a consistent standard,” and to “facilitate interstate commerce” in organic food. 7 U.S.C. § 6501. Congress intended to diminish the costs of implementing a national organic program by enlisting the pre-existing expertise of private organizations to perform the initial certification of producers and handlers. MICI’s claimed interests—to maintain the integrity of the organic program and to maintain its own viability as a certifying agent—fall easily within the zone of interests sought to be protected or regulated by the statute, and are thus sufficient to confer prudential standing.

B. Whether the Regulations Violate OFPA

In Counts 1 and 3, MICI claims that the challenged regulations, 7 C.F.R. §§ 205.680 and 205.681(a), are inconsistent with, or otherwise violate, OFPA.¹² The analytical framework for resolving that issue is set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

In *Chevron*, the Supreme Court established a two-step analysis for reviewing an agency’s statutory construction. *Id.* at 842-43, 104 S.Ct. 2778. The analysis begins with “whether Congress has directly spoken to the precise question at issue.” If Congress’s intent is clear, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43, 104 S.Ct. 2778. If Congress has not

¹² Plaintiff also contends that the regulations violate the APA. The APA provides a general cause of action to “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Plaintiff does not appear to claim, however, any additional procedural rights under the APA that are independent of whatever rights are provided in OFPA. Therefore, a separate analysis of whether the challenged regulations violate the APA is unnecessary.

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expressed its intent unambiguously, or if the Congress has left a gap for the agency to fill, the regulation is “given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 843-44, 104 S.Ct. 2778; *see also Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239, 124 S.Ct. 1741, 158 L.Ed.2d 450 (2004). Under this second step, the agency’s construction is accorded substantial deference. *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778; *see also United States v. Mead Corp.*, 533 U.S. 218, 227-28, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (“-siderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.. (internal citations omitted). This Court should not simply substitute its judgment for that of the agency. *See Mead*, 533 U.S. at 229, 121 S.Ct. 2164 (“a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise”).

1. *Step One: Whether Congress Has Directly Spoken to the Question*

The first question under *Chevron* is whether Congress has directly spoken to “the precise question at issue”: that is, whether Congress intended to prohibit appeals by certifying agents of certification decisions. *See* 467 U.S. at 842, 104 S.Ct. 2778.

As noted above, § 6506(a)(3) states that “[a] program established under this chapter shall ... provide for procedures that allow *producers and handlers* to appeal an adverse administration determination under this chapter.”(emphasis added). By contrast, § 6520(a) provides that the Secretary “shall establish an expedited administrative appeals procedure under which *persons* may appeal” (emphasis added).¹³ Those

¹³The term “person” is defined under OFPA to include “an individual, group of individuals, corporation, association, organization, cooperative, or other entity.” 7 U.S.C.

Cont.

“persons” may appeal “an action of the Secretary” or “an action of ... a certifying agent.” *Id.*¹⁴ The type of “actions” which those “persons” may appeal is any action that “adversely affects such person” or “is inconsistent with the organic certification program established under this title.” *Id.*

If the “precise question at issue” is whether Congress has limited appeals to producers and handlers, thereby excluding certifying agents, the answer to that question is almost certainly “yes.” Section 6506(a)(3) states, in unequivocal terms, that the NOP shall allow “producers and handlers” to appeal adverse decisions. It is hard to imagine that Congress intended by that language to allow appeals by certifying agents—who, by definition, are *not* producers or handlers.

The Court acknowledges, however, that § 6520(a) uses the term “persons,” rather than “producers and handlers,” which introduces at least a possible ambiguity. Arguably, the use of different terms at different points in OFPA was intended to convey different meanings, and that the term “person” was intended to have a broader meaning, possibly encompassing certifying agents. The Court will therefore assume that Congress has not expressed its intent unambiguously, and proceed to the second step of the analysis.

2. Step Two: Whether the Regulations Are Arbitrary, Capricious, or Manifestly Contrary to the Statute

The issue then becomes whether the regulations are entitled to deference under the second step of *Chevron*—that is, whether the regulations are arbitrary, capricious, or manifestly contrary to the statute. The Court concludes that they are not.

§ 6502(15). MICI, as a corporation, falls within the facial definition of “person.”

¹⁴ A “person” can also appeal an action of “the applicable governing state official.” *Id.*

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First, and as noted, § 6506(a)(3) plainly states that the NOP shall provide for appeals by “producers and handlers.” It is hardly arbitrary or capricious, or manifestly incorrect, for the Secretary to conclude that Congress intended such appeals to be limited to those specific categories of persons.

Second, Congress intended, as part of the statutory scheme, for a certifying agent to be a subordinate decision-maker, not a wholly independent party. Congress sought to use the pre-existing network of certifying agents (and state certifying agencies) as an efficient and cost-effective substitute for the creation of a new network of USDA certifiers, and thus for certifying agents to serve in a quasi-governmental function. It would be highly anomalous, indeed unprecedented, to permit individual governmental decision-makers the right to participate as parties in the appeals of their decisions. USDA inspectors, administrators, and administrative law judges do not normally participate as parties to appeals (nor, for that matter, do United States District Judges). Certainly it was not arbitrary or capricious for the Secretary to interpret the statute to produce such an orthodox result.

Third, there is nothing in the statute to suggest that Congress was concerned with protecting the reputational or economic interests of certifying agents. Those interests may be enough to confer standing, but the Secretary need not conclude that they require protection under the regulatory scheme.

Fourth, the Secretary’s interpretation of the term “person” as excluding the government and its agents is consistent with long-standing principles of statutory construction. *See, e.g., Vermont Agency of Nat’l Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (citing “longstanding interpretive presumption” that the word “person” does not include the sovereign).

Fifth, § 6520(a) uses the term “person” and “certifying agent” in the same sentence, suggesting that Congress did not intend the two to have overlapping meanings. It would be absurd, for example, to permit a certifying agent to appeal its own decision. The Secretary could therefore reasonably conclude that the term “person” was not intended to include certifying agents.

Sixth, the regulations specifically provide that a certifying agent must provide a written notice of denial of certification. 7 C.F.R. § 205.405(c). Such a notice must, among other things, “state the reason(s) for denial.” *Id.* at § 205.405(d). The Secretary could thus reasonably conclude that a certifying agent had an ample opportunity to set forth the reasons for its decision in the record, and that it would be duplicative and unnecessary to permit the certifying agent an additional opportunity to restate the reasons for its actions.

Accordingly, the Court concludes that the challenged regulations are neither arbitrary, capricious, nor manifestly contrary to OFPA. Counts 1 and 3 therefore fail to state a claim upon which relief can be granted.

C. The Due Process Claim

Count 2 alleges that the denial of a right to appeal deprives MICI of a constitutionally protected property interest without a hearing in violation of its rights to due process of law. The property interest which MICI claims is at issue is the use of its name—specifically, the right to control the use of its name in the certification process. That claim may be summarily rejected.

The Court does not doubt that MICI has property rights in the use of its name and any associated good will. However, it voluntarily surrendered a portion of those rights in exchange for consideration: the right to participate in the NOP and to charge fees for its certification services. By applying for and accepting accreditation, MICI agreed to “carry out the provisions of [OFPA]” and “to such other terms and conditions as the Secretary deems appropriate.” 7 U.S.C. § 6515(d).

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MICI did so with the understanding that the Secretary establishes the standards for organic production, *see generally* 7 U.S.C. § 6503 *et seq.*, and with the understanding that all of its decisions were subject to review by the Secretary, 7 U.S.C. § 6520(a); 7 C.F.R. §§ 205.680, 205.681. MICI also did so with the understanding that its name would be placed on product labels where it was the certifying agent. *See* 7 C.F.R. §§ 205.303-305. Finally, MICI was aware that because it is a private entity, the agency would not allow it to establish more stringent standards than those approved by the Secretary as a precondition for use of its identifying mark. *See* 7 C.F.R. § 205.501(b). To the extent, therefore, that MICI has given up any rights in the use of its name, it did so voluntarily.

Furthermore, MICI has been provided an opportunity to be heard in the process. MICI is required, when denying certification, to explain its decision to the producer or handler. *See* 7 C.F.R. §§ 205.405(a), (c). It is apparently free, under the regulations, to explain its decisions in as much detail as it sees fit. Those decisions are part of the record on appeal and are available for consideration by the administrator or administrative law judge

MICI therefore has not been deprived of any property right without notice and without an opportunity to be heard. Accordingly, Count 2 of the amended complaint fails to state a claim upon which relief can be granted.

D. The First Amendment Claim

Finally, Count 4 alleges a violation of MICI's rights to freedom of speech and freedom of association under the First Amendment. MICI argues that the "USDA's regulations force certifying agents, like MICI, to make a direct affirmation of belief that they agree that a particular producer or handler is in compliance with the requirements of the NOP, even when they do not agree," citing *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 976-77 (1st Cir.1993).

In essence, MICI contends that it is being required to engage in compelled speech and compelled association in violation of its constitutional rights. Certification under the organic program is not, however, a statement of personal belief. Rather, certification transmits a government message: a message that the specific producer or handler has been certified as meeting certain government standards. The government may “regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.” See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (cited in *Harvey*, 396 F.3d at 42-43). As the First Circuit noted in *Harvey*, the government under OFPA “has created a scheme that uses private certifiers to transmit information regarding the national certification program, [which is] a clear example of a governmental message.” *Harvey*, 396 F.3d at 42. MICI is thus not being compelled to engage in compelled speech or compelled association in violation of the First Amendment. Accordingly, Count 4 of the amended complaint fails to state a claim upon which relief can be granted.

III. Conclusion

For the foregoing reasons, defendant’s motion to dismiss is GRANTED.

So Ordered.

PLANT QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: ST. JOHNS SHIPPING COMPANY, INC., AND BOBBY L. SHIELDS, a/k/a LEBRON SHIELDS, a/k/a L. SHIELDS, a/k/a BOBBY LEBRON SHIELDS, a/k/a COOTER SHIELDS, d/b/a BAHAMAS RO RO SERVICES, INC.

P.Q. Docket No. 03-0015.

Decision and Order as to Bobby L. Shields

Filed March 1, 2005.

PQ – Plant quarantine – Default – Failure to deny or respond to allegations of the complaint – Inspection for entry or transit.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson's decision holding that Respondent Bobby L. Shields violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture. The Judicial Officer found Respondent Bobby L. Shields failed to file an answer that denied or otherwise responded to the Complaint; therefore, Respondent Bobby L. Shields was deemed to have admitted the allegations of the Complaint. The Judicial Officer assessed Respondent Bobby L. Shields a \$1,000 civil penalty. The Judicial Officer held that Respondent Bobby L. Shields failed to prove, by producing documents, that he was not able to pay the civil penalty.

Thomas N. Bolick, for Complainant.

Respondent, Pro se.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 23, 2003. Complainant instituted this proceeding under the Plant Protection Act (7 U.S.C. §§ 7701-7772) and

the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151; 380.1-.10) [hereinafter the Rules of Practice].

Complainant alleges that, on or about September 1, 2001, St. Johns Shipping Company, Inc., and Bobby L. Shields, a/k/a Lebron Shields, a/k/a L. Shields, a/k/a Bobby Lebron Shields, a/k/a Cooter Shields, d/b/a Bahamas RO RO Services, Inc. [hereinafter Respondents], violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas manifested as “toys and crafts” (container number 2929862, bill of lading number 1) without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine (Compl. ¶ II).

The Hearing Clerk served Respondent Bobby L. Shields with the Complaint, the Rules of Practice, and a service letter on October 23, 2003.¹ Respondent Bobby L. Shields was required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file a response to the Complaint within 20 days after service. On October 29, 2003, Respondent Bobby L. Shields requested an extension of time within which to file an answer to the Complaint. On October 30, 2003, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] granted Respondent Bobby L. Shields an extension to November 14, 2003, within which to file an answer to the Complaint.² On November 19, 2003, Respondent Bobby L. Shields filed a letter stating discrepancies regarding the handling of the shipment referenced in the Complaint should be addressed to Respondent St. Johns Shipping Company, Inc.

On February 26, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption

¹United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 4015.

²Order Extending Time to File Answer to Complaint.

of Proposed Default Decision and Order and a Proposed Default Decision and Order. The Hearing Clerk served Respondent Bobby L. Shields with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and a service letter on March 1, 2004.³ Respondent Bobby L. Shields failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On December 22, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Default Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on or about September 1, 2001, Respondent Bobby L. Shields violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas manifested as "toys and crafts" (container number 2929862, bill of lading number 1) without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine; (2) concluding that Respondent Bobby L. Shields violated the Plant Protection Act and the regulations issued under the Plant Protection Act; and (3) assessing Respondent Bobby L. Shields a \$1,000 civil penalty (Initial Decision and Order at 3-4).

On January 21, 2005, Respondent Bobby L. Shields appealed to the Judicial Officer. On January 27, 2005, Complainant filed "Complainant's Response to Respondent's Appeal." On January 31, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, pursuant to section

³United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 7696.

1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order as to Bobby L. Shields with minor modifications. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusion of law, as restated.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 104—PLANT PROTECTION

....

SUBCHAPTER I—PLANT PROTECTION

....

§ 7713. Notification and holding requirements upon arrival

....

(c) Prohibition on movement of items without authorization

No person shall move from a port of entry or interstate any imported plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance unless the imported plant, plant product, biological control organism, plant pest, noxious weed, article, or means of conveyance—

- (1) is inspected and authorized for entry into or transit movement through the United States; or
- (2) is otherwise released by the Secretary.

.....

**SUBCHAPTER II—INSPECTION AND
ENFORCEMENT**

.....

§ 7734. Penalties for violation

.....

(b) Civil penalties

(1) In general

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

(A) \$50,000 in the case of any individual (except that the civil penalty may not exceed \$1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), \$250,000 in the case of any other person for each violation, and \$500,000 for all violations adjudicated in a single proceeding; or

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

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider with respect to the violator—

- (A) ability to pay;
- (B) effect on ability to continue to do business;
- (C) any history of prior violations;
- (D) the degree of culpability; and
- (E) any other factors the Secretary considers appropriate.

....

(4) Finality of orders

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28. The validity of the Secretary's order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 U.S.C. §§ 7713(c), 7734(b)(1)-(2), (4).

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

Respondent Bobby L. Shields failed to file an answer that denies or otherwise responds to the allegations of the Complaint, as required by section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to deny or otherwise respond to the allegations of the complaint

shall be deemed an admission of the allegations in the complaint. Further, the admission by the answer of all material allegations of the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order as to Bobby L. Shields is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Bobby L. Shields is a cargo agent operating a freight forwarding business incorporated in Florida with a mailing address of 437 N.E. Bayberry Lane, Jensen Beach, Florida 34957.

2. On or about September 1, 2001, Respondent Bobby L. Shields violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) by moving from a port of entry cargo from the Bahamas manifested as “toys and crafts” (container number 2929862, bill of lading number 1), without inspection by, and authorization for entry into or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine.

3. Section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)) prohibits any person from moving any imported plant, plant product, plant pest, noxious weed, or article from a port of entry unless the imported plant, plant product, plant pest, noxious weed, or article is inspected and authorized for entry into or transit through the United States or otherwise released by the Secretary of Agriculture.

Conclusion of Law

By reason of the findings of fact, Respondent Bobby L. Shields has violated the Plant Protection Act and the regulations issued under the Plant Protection Act.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Bobby L. Shields raises two issues in his appeal petition. First, Respondent Bobby L. Shields contends Bahamas RO RO Services, Inc., had no authority to handle articles of international trade; therefore, Bahamas RO RO Services, Inc., cannot be found to have violated section 413(c) of the Plant Protection Act (7 U.S.C. § 7713(c)), as alleged in the Complaint.

As an initial matter, a respondent's authority to handle articles of international trade is not relevant to whether that same respondent actually moved from a port of entry cargo without inspection by, and authorization for entry or transit through the United States from, the United States Department of Agriculture, Animal and Plant Health Inspection Service, Plant Protection and Quarantine. Moreover, Respondent Bobby L. Shields, by his failure to file an answer denying or otherwise responding to the allegations of the Complaint, is deemed to have admitted the allegations of the Complaint and waived opportunity for hearing.

Second, Respondent Bobby L. Shields requests that no civil penalty be assessed because Bahamas RO RO Services, Inc., is not able to pay the \$1,000 civil penalty.

One of the factors the Secretary of Agriculture may consider in determining the amount of a civil penalty is the ability of the violator to pay the civil penalty.⁴ As an initial matter, Respondent Bobby L. Shields' assertion that Bahamas RO RO Services, Inc., is not able to pay the \$1,000 civil penalty is not relevant to the violator's ability to pay because the violator is not Bahamas RO RO Services, Inc., but rather Respondent Bobby L. Shields, d/b/a Bahamas RO RO Services, Inc. Moreover, even if Bahamas RO RO Services, Inc., were the violator, I would not reduce or eliminate the civil penalty based on Respondent Bobby L. Shields' assertion that Bahamas RO RO Services, Inc., is not able to pay the \$1,000 civil penalty. A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of

⁴See 7 U.S.C. § 7734(b)(2)(A).

determining the amount of the civil penalty to be assessed in plant quarantine cases; however, the burden is on the respondents in plant quarantine cases to prove, by producing documentation, the inability to pay the civil penalty.⁵ Respondent Bobby L. Shields has failed to produce any documentation supporting his assertion that Bahamas RO RO Services, Inc., cannot pay a civil penalty, and Respondent Bobby L. Shields' undocumented assertion that Bahamas RO RO Services, Inc., is not able to pay the civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.⁶

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

ORDER

Respondent Bobby L. Shields is assessed a \$1,000 civil penalty. The

⁵*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 634-35 (2001); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 208-09 (2001); *In re Cynthia Twum Bofo*, 60 Agric. Dec. 191, 197-98 (2001); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

⁶*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 635 (2001) (holding the undocumented assertion by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001) (holding the undocumented assertion by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Cynthia Twum Bofo*, 60 Agric. Dec. 191, 198 (2001) (holding undocumented assertions by the respondent that she was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent Bobby L. Shields. Respondent Bobby L. Shields shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0015.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent Bobby L. Shields a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.⁷ Respondent Bobby L. Shields must seek judicial review within 60 days after entry of the Order.⁸ The date of entry of the Order is March 1, 2005.

⁷See 7 U.S.C. § 7734(b)(4).

⁸See 28 U.S.C. § 2344.

SALARY OFFSET - GARNISHMENT

DEPARTMENTAL DECISION

In re: STEVEN A. KAUSE
APHIS Docket No. 07-0016.
Decision and Order.
Filed January 12, 2007.

AWG – Administrative error – Failure to review/correct.

Petitioner – Pro se.
Kitty Asper – APHIS.
Decision and Order by Administrative Law Judge, Peter M. Davenport.

DECISION AND ORDER

This is a salary offset case and is before the Administrative Law Judge upon the Petitioner's request for a hearing in accordance with 7 C.F.R. § 3.56 *et seq.*¹ A telephonic hearing was conducted on December 1, 2006. The Petitioner, Steven A. Kause, who was not represented by counsel participated *pro se* and the Respondent was represented by Kitty Asper, Human Resources Specialist-Compensation, USDA/APHIS Marketing and Regulatory Programs, Human Resources Operations, Minneapolis, Minnesota.

As the Petitioner was uncertain whether he had received the supporting documentation *concerning* the existence of the debt which was generated by the erroneous cancellation of his Federal Employees Health Benefit ("FEHB") deduction for Pay Period 5 of 2006, by Order

¹ The December 1, 2006 Order incorrectly referred to 7 U.S.C. § 1951.101, *et seq.* as the authority for the referral. Those provisions apply only to offsets by the Farm Services Agency (FSA), Rural Housing Service (RHS) and Rural Business-Cooperative Service (RBS).

dated December 1, 2006, I directed that documentation be resent to him and he was given an additional 14 days in which to submit any additional material he wished the Administrative Law Judge to consider. The Petitioner failed to submit any additional matter and the matter is ripe for disposition without further hearing.

The Petitioner was advised that the scope of the proceedings would be limited to *determining*: (1) whether he, as an employee, owed a debt to the Department; (2) whether the debt would be eligible to be the subject of an offset; (3) the amount of the debt, if any, and; (4) if appropriate, the percentage of disposable pay to be deducted in satisfaction of the debt. Allegations and matters concerning the identification of individuals responsible for the error generating the debt and discipline of any employee are beyond the statutory scope of the hearing and will not be considered.

Subsequent to the *Petitioner's* request for hearing, but before the telephonic hearing on December 1, 2006, the Petitioner ceased to be employed by the United States Department of Agriculture, with a separation date of June 11, 2006. The full amount of the indebtedness in question, plus accrued interest, in the amount of \$117.20 was deducted from the Petitioner's severance pay during pay period 13 of 2006, the official pay date for which was July 20, 2006.

As the Petitioner is no longer an employee of the United States Department of *Agriculture*, determination of whether his pay is eligible for offset and the percentage of his disposable pay which might be deducted in satisfaction of the debt has been essentially mooted by his separation; however, it still remains possible to resolve the other questions raised in the petition for hearing, including whether the Petitioner owed a debt to the Department and the amount of the debt if any.

As previously noted *the* indebtedness was generated by the erroneous cancellation of the Petitioner's FEHB coverage for Pay Period 5 of 2006, an error corrected the following pay period. Report of Investigation (ROI), Enclosures 4 and 5. The amount of the debt was originally \$116.76, the FEHB premium cost for one pay period. *Id.*, Enclosures 6 and 7. Interest in the amount of \$0.44 accrued before the debt was collected and was added to the deduction that was made from the

Petitioner's severance pay. Memorandum dated January 11, 2007, SUBJECT: *In re Steven A. Kause*- APHIS Docket No. 07-0016.

While the overpayment *which* created the debt was the result of an administrative error, the record establishes that the employee was provided records which, if reviewed, would have indicated the overpayment. In such circumstances, the Comptroller general has ruled that if the employee fails to review such documents, he is not without fault and requests for waiver of the indebtedness must be denied. *In the Matter of Sheldon H. Avenius, Jr.*, B-226465, 1988 WL 227286 (Comp Gen.). Such records were available to the Petitioner. ROI, Enclosure 9.

Accordingly, based *upon* the evidence before me, consisting of the exhibits contained in the record and the Petitioner's statements during the hearing, the following Findings of Fact, Conclusions of Law and Order will be issued.

FINDINGS OF FACT

1. The Petitioner, Steven A. Kause, was overpaid the amount of \$116.76 as a result of administrative error canceling his FEHB coverage for Pay Period 5 of 2006 incident to the making of a correction to his appointment status. No premium was collected for Pay Period 5; however, the error was detected the following pay period and a bill in the amount of \$116.76 was created.
2. Although the *Petitioner* was an employee of the United States Department of Agriculture when the debt was created, his employee status terminated on June 11, 2006. As the Petitioner is no longer an employee, the use of offset is moot.
3. The amount of the debt that was created by the overpayment was \$116.76, together with accrued interest, which was owed at the time of the Petitioner's request for hearing. As the amount of \$117.20 was collected from the Petitioner's severance pay, the original amount of the debt and accrued interest has since been paid and is no longer owed to the Department.

CONCLUSIONS OF LAW

1. The Petitioner is no *longer* an employee against whom offset is available.
2. The debt, having *been* collected from the Petitioner's severance pay, has been satisfied in full.

ORDER

The Petitioner no longer *being* an employee of the Department and the debt owed to the Department having been satisfied in full, the Petition is **DISMISSED**.

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

LION RAISINS, INC.
BOGHOSIAN RAISIN PACKING CO., INC.
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MISCELLANEOUS ORDERS

In re: LIONS RAISINS, INC.
In re: BOGHOSIAN RAISIN PACKING CO., INC.
2002 AMA Docket No. F & V 989-1.
2002 AMA Docket No. F & V 989-2.
Order.
Filed January 16, 2007.

AMA – Agricultural Marketing Agreement Act – Order show cause.

Frank Martin, Jr. and Babak Rastgoufard for AMS
Wesley T. Green and Howard A. Sagaser for Respondents.
Order by Administrative Law Judge Peter M. Davenport

ORDER

By Order dated November 16, 2006, the Petitioners in these two actions were ordered **TO SHOW CAUSE** on or before December 18, 2006 why these actions should not be **STRICKEN** from the docket for failure to prosecute these actions. The Petitions in both instances were filed with the Hearing Clerk's Office on August 5, 2002, seeking to modify the Raisin Marketing Order, to set aside reserve percentages for other seedless raisins, or to exempt the Petitioners from various provisions and or obligations imposed in connection with the Marketing Order. The cases had been consolidated for hearing and an oral hearing had been set in Fresno, California on November 1, 2005. Prior to the date set for the oral hearing, the Petitioners jointly sought to continue that hearing and without objection from the Respondent, the hearing was postponed by Order entered on October 27, 2005. As noted in the Order to Show Cause, over a year has passed since the entry of that Order without further pleadings being filed or other action taken by the Petitioners to reschedule the matter for hearing.

Accordingly, no pleading having been filed by either of the

Petitioners in response to the Order to Show Cause, these actions are **DISMISSED**, with prejudice.

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

In re: SAULSBURY ENTERPRISES, AN UNINCORPORATED ASSOCIATION; AND ROBERT J. SAULSBURY, AN INDIVIDUAL.

AMAA Docket No. 94-0002.

Order Lifting Stay Order.

Filed February 21, 2007.

AMAA – Agricultural Marketing Agreement Act – Order lifting stay.

Colleen A. Carroll, for Complainant.

Brian C. Leighton, Clovis, California, for Respondents.

Order issued by William G. Jenson, Judicial Officer.

On February 14, 2000, I issued a Decision and Order on Remand: (1) concluding Saulsbury Enterprises and Robert J. Saulsbury [hereinafter Respondents], violated the Marketing Order Regulating the Handling of Raisins Produced From Grapes Grown in California (7 C.F.R. pt. 989); (2) assessing Respondents a \$205,000 civil penalty; and (3) ordering Respondents to pay the Raisin Administrative Committee \$1,673.30 in assessments for crop years 1988-1989, 1989-1990, and 1990-1991.¹ Simultaneously with the issuance of the Decision and Order on Remand, I issued a stay of the Order in *In re Saulsbury Enterprises* (Decision on Remand), 59 Agric. Dec. 28 (2000), pending the outcome of proceedings for judicial review.²

¹*In re Saulsbury Enterprises* (Decision on Remand), 59 Agric. Dec. 28 (2000).

²*In re Saulsbury Enterprises* (Stay Order), 59 Agric. Dec. 49 (2000).

SAULSBURY ENTERPRISES
AND ROBERT J. SAULSBURY
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In *Saulsbury Enterprises v. U.S. Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. July 12, 2000), the Court: (1) substituted Lynette Saulsbury as plaintiff in place of Saulsbury Enterprises and the late Robert J. Saulsbury; (2) dismissed the Judicial Officer's February 14, 2000, Order assessing Respondents a civil penalty; and (3) directed entry of judgment in the amount of \$1,673.30, representing assessments to be paid to the Raisin Administrative Committee for crop years 1988-1989, 1989-1990, and 1990-1991.³

On January 4, 2007, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a motion to lift the February 14, 2000, Stay Order on the ground that proceedings for judicial review have concluded.⁴ On February 5, 2007, Respondents filed a response in opposition to Complainant's Motion to Lift Stay Order.⁵ On February 20, 2007, Complainant filed a supplement to Complainant's Motion to Lift Stay Order in which Complainant states, on October 31, 2000, Lynette Saulsbury paid the Raisin Administrative Committee \$1,673.30 in accordance with the July 12, 2000, Order issued by the United States District Court for the Eastern District of California.⁶ On February 21, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

Based on the foregoing, Complainant's Motion to Lift Stay Order is granted; the February 14, 2000, Stay Order is lifted; and the Order issued in *In re Saulsbury Enterprises* (Decision on Remand), 59 Agric. Dec. 28 (2000), as modified by the Order issued in *Saulsbury Enterprises v. U.S. Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. July 12, 2000), is

³*Saulsbury Enterprises v. U.S. Dep't of Agric.*, No. CV-F-97-5136 REC (E.D. Cal. July 12, 2000), at 1-2, 11.

⁴Complainant's Motion to Lift Stay Order.

⁵Respondents' Opposition to Complainant's Motion to Lift Stay Order.

⁶Complainant's Supplement to Motion to Lift Stay Order.

entered as the final order in this proceeding. As Lynette Saulsbury has paid the Raisin Administrative Committee in accordance with the July 12, 2000, Order of the United States District Court for the Eastern District of California, this proceeding is concluded.

In re: MARVIN and LAURA HORNE, d/b/a RAISIN VALLEY FARM; DON DURBAHAN; RAISIN VALLEY FARMS MARKETING ASSOCIATION; RAISIN VALLEY FARMS MARKETING, LLC; LASSEN VINEYARDS, LLC; and LASSEN VINEYARDS.

2007 AMA Docket No. F & V 989-0069.

Ruling.

Filed May 15, 2007.

AMA – Agricultural Marketing Agreement Act – Motion to dismiss.

Frank Martin, Jr for AMS.

Brian C. Leighton for Respondent.

Ruling by Administrative Law Judge Peter M. Davenport

ORDER

This matter is before the Administrative Law Judge upon the Motion of the Respondent to Dismiss the Petition for Review. The Respondent has filed its Opposition to Respondent's Motion to Dismiss.

The Petitioners filed their Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition To Exempt Petitioners From Various Provisions of the Raisin Marketing Order and Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law on March 5, 2007. On March 23, 2007, the Respondent moved to dismiss the Petition, arguing that Petitioners lack standing to file a Petition pursuant to Section 8c(15)(A) of the Agricultural Marketing Act of 1937 (AMAA), 7 U.S.C. §601, *et seq.*, that the Petitioners are precluded under the doctrine of *res judicata* from

relitigating claims and issues adjudicated in a prior litigation, and that the Petitioner's petition was not filed in good faith. The Petitioners' Opposition to the Respondent's Motion to Dismiss addresses each of the Respondent's arguments.

The Respondent's argument that the Petitioners lack standing to file the Petition for Review appears contrary to the holding of *Midway Farms v. United States Department of Agriculture*, 188 F. 3d 1136 (9th Cir. 1999), 58 Agric. Dec. 714 (1999). In that case, Midway was the purchaser of off-grade raisins and various raisin residue matter that raisin handlers grade out of the raisins intended for human consumption. Midway then processed those products into other than human consumption products, including distillery material, cattle feed and concentrate material. Midway had been asked to complete and submit certain forms to the Raisin Administrative Committee because it was considered a processor and, as such, a "handler" subject to the Raisin Marketing Order. Midway took the position that it was not a "handler," and completed and submitted the forms, but filed an administrative petition with the Secretary seeking a declaration that it was not subject to the Raisin Marketing Order. As in the instant case, the Department filed a motion to dismiss the petition, arguing that the plain language of section 608c(15)(A) made clear that only a "handler" could file an administrative petition and that Midway did not qualify as it was claiming *not* to be a handler.

The Department's motion to dismiss was granted without prejudice in an Initial Decision and Order by former Chief Administrative Law Judge Victor W. Palmer. In that decision, Judge Palmer held that he lacked the requisite power to conduct an *in camera* inspection of the Petitioner's records which had been subpoenaed by the Department, and without producing its records, the Petitioner could not show itself to be a handler having standing to bring the action.

The Petitioner appealed to the Judicial Officer. In his decision, Judicial Officer William G. Jenson modified the decision by the former Chief Administrative Law Judge and dismissed the petition with prejudice. *In re Midway Farms*, 56 Agric. Dec. 102 (1997). The

Petitioner again sought review, filing a petition for review with the United States District Court for the Eastern District of California which denied Petitioner's motion for summary judgment and granted summary judgment in favor of the Department. *Midway Farms v. United States Department of Agriculture*, CV F 97-5460 (E.D. Cal. May 18, 1998). Further review was sought, and on appeal, the Court of Appeals for the Ninth Circuit reversed and remanded the case.

In holding that Midway had standing to file an administrative petition with the Secretary, the Ninth Circuit court noted:

The operative statute allows "[a]ny handler subject to an order" to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A). The term "handler" is defined by regulation for the purposes of section 608c(15)(A) as "any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). Neither party contends, for the purposes of this action, that Midway is a "person who, by the terms of the marketing order, is subject thereto." Thus, the sole question is whether Midway is a "person... to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). (Footnotes omitted).

While in *Midway* the forms were sent to Midway by the Committee, there, as here, the Department sought additional information by subpoena. Despite the Department's assurances in this action that neither the Raisin Advisory Committee nor the Department have told the Petitioners that they are subject to the marketing order (Respondent's Motion to Dismiss, Exhibits 1 and 2), those declarations also make it abundantly clear that the purpose of the investigation being pursued is to determine whether the AMAA and the Raisin Marketing Order have been violated. *Id.* As it is difficult to conceive how a person to whom the marketing order is not applicable would have violated the Act or the order, The Department's actions are consistent with an overt intention to make the Petitioners persons to whom the marketing order is being sought to be made applicable. As such, the Petitioners will be found to have the standing to file the administrative petition and have the ultimate merits determined.

The Respondent also argues that *res judicata* applies and that the

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Petitioners should be barred from relitigating the issues decided in *In re Marvin D. Horne, et al.*, AMAA Docket No. 04-0002 (Decision and Order by Judge Victor W. Palmer, 65 Agric. Dec. 805 (2006)). As the Petitioner notes in their Opposition to the Motion to Dismiss, Judge Palmer's decision is limited to the years 2002 to 2003-4. As the previously cited Exhibits indicate that the period of inquiry is 2003 to 2006, the doctrine of *res judicata* is inapplicable.

The Respondent's last argument indicates that the Petitioners have not filed their Petition in good faith. As the points advanced by the Respondent fail to rise to the level required to demonstrate a lack of good faith, the argument will be rejected at this time.

Being sufficiently advised, it is **ORDERED** the Respondent's Motion to Dismiss is **DENIED**.

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

In re: DENNIS HILL, AN INDIVIDUAL, d/b/a WHITE TIGER FOUNDATION; AND WILLOW HILL CENTER FOR RARE & ENDANGERED SPECIES, LLC, AN INDIANA DOMESTIC LIMITED LIABILITY COMPANY, d/b/a HILL'S EXOTICS.

AWA Docket No. 04-0012.

Stay Order.

Filed January 27, 2005.

AWA – Order lifting stay.

Bernadette R. Juarez, for APHIS.

M. Michael Stephenson, Shelbyville, IN, for Respondents.

Order issued by William G. Jenson, Judicial Officer.

On October 8, 2004, I issued a Decision and Order: (1) concluding Dennis Hill, d/b/a White Tiger Foundation, and Willow Hill Center for Rare & Endangered Species, LLC, d/b/a Hill's Exotics [hereinafter

Respondents], willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; (2) ordering Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents a \$20,000 civil penalty; and (4) revoking Respondent Dennis Hill's Animal Welfare Act license.¹ On October 27, 2004, Respondents filed a petition for reconsideration, which I denied.²

On January 24, 2005, Respondents filed a Motion for Stay Pending Review requesting a stay of the Orders in *In re Dennis Hill*, __ Agric. Dec. __ (Oct. 8, 2004), and *In re Dennis Hill*, __ Agric. Dec. __ (Nov. 30, 2004) (Order Denying Pet. for Recons.), pending the outcome of proceedings for judicial review. Respondents state they have filed a timely petition for review of *In re Dennis Hill*, __ Agric. Dec. __ (Oct. 8, 2004), and *In re Dennis Hill*, __ Agric. Dec. __ (Nov. 30, 2004) (Order Denying Pet. for Recons.), with the United States Court of Appeals for the Seventh Circuit.

On January 26, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Response to Respondents' Motion for Stay Pending Review in which Complainant disputes some of the assertions made by Respondents in Respondents' Motion for Stay Pending Review, but does not oppose my granting Respondents' Motion for Stay Pending Review. On January 26, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on

¹*In re Dennis Hill*, __ Agric. Dec. __ (Oct. 8, 2004).

²*In re Dennis Hill*, 63 Agric. Dec. __ (Nov. 30, 2004) (Order Denying Pet. for Recons.).

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Respondents' Motion for Stay Pending Review.

In accordance with 5 U.S.C. § 705, Respondents' Motion for Stay Pending Review is granted.

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

ORDER

The Orders in *In re Dennis Hill*, __ Agric. Dec. ____ (Oct. 8, 2004), and *In re Dennis Hill*, __ Agric. Dec. ____ (Nov. 30, 2004) (Order Denying Pet. for Recons.), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until the Judicial Officer lifts it or a court of competent jurisdiction vacates it.

In re: RICKY M. WATSON, AN INDIVIDUAL; CHERI WATSON, AN INDIVIDUAL; TIGER'S EYES, INC., A TEXAS DOMESTIC NONPROFIT CORPORATION, d/b/a NOAH'S LAND WILDLIFE PARK; AND RICHARD J. BURNS, AN INDIVIDUAL. AWA Docket No. 04-0017.

Ruling Granting Complainant's Motion to Continue Time for Filing Amended Complaint and for Exchanging Documents. Filed January 28, 2005.

AWA – Animal Welfare Act – Deadline for amended complaint – Deadline for exchange of documents.

Bernadette R. Juarez, for APHIS.
Respondents Ricky M. Watson and Cheri Watson, Pro se.
Paul J. Coselli, Houston, Texas, for Respondent Richard J. Burns.
Ruling issued by William G. Jenson, Judicial Officer.

On September 3, 2004, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a "Motion for Adoption of Proposed Decision and Order" and a proposed "Decision and Order as to Ricky M. Watson and

Cheri Watson By Reason of Admission of Facts.” On October 12, 2004, Respondents Ricky M. Watson and Cheri Watson filed objections to Complainant’s Motion for Adoption of Proposed Decision and Order.

On November 22, 2004, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] filed a “Summary of Teleconference; Hearing Notice and Exchange Deadlines”: (1) denying Complainant’s Motion for Adoption of Proposed Decision and Order; (2) scheduling a hearing to commence in Houston, Texas, on June 28, 2005; (3) ordering that, by February 1, 2005, Complainant file an amended complaint with the Hearing Clerk and deliver to Respondents Ricky M. Watson, Cheri Watson, and Richard J. Burns copies of proposed exhibits, a list of proposed exhibits, and a list of anticipated witnesses; and (4) ordering that, by April 1, 2005, Respondents Ricky M. Watson, Cheri Watson, and Richard J. Burns deliver to Complainant copies of proposed exhibits, a list of proposed exhibits, and a list of anticipated witnesses.

On November 26, 2004, Complainant appealed the ALJ’s denial of Complainant’s Motion for Adoption of Proposed Decision and Order to the Judicial Officer. On January 18, 2005, Complainant moved to continue, without date, the February 1, 2005, deadline for filing an amended complaint and the February 1, 2005, and April 1, 2005, deadlines for the exchange of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses.¹

Due to the short period between the time Complainant filed Complainant’s Motion for Continuance and the February 1, 2005, deadlines, I requested that Respondents Ricky M. Watson, Cheri Watson, and Richard J. Burns file any responses to Complainant’s Motion for Continuance no later than January 26, 2005.

Respondent Cheri Watson did not file a response to Complainant’s Motion for Continuance; on January 25, 2005, Respondent Ricky M. Watson filed a response urging that I grant Complainant’s Motion for

¹“Complainant’s Motion to Continue Time for Complainant to File Amended Complaint and for Parties to Comply With Exchange Deadlines” [hereinafter Complainant’s Motion for Continuance].

Continuance; and on January 26, 2005, Respondent Richard J. Burns filed a response urging that I deny Complainant's Motion for Continuance. On January 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's Motion for Continuance.

I agree with Complainant's assertion that this matter will not be ready for hearing until the merits of Complainant's appeal of the ALJ's denial of Complainant's Motion for Adoption of Proposed Decision and Order have been resolved.² Moreover, any amended complaint Complainant files and the identity of the persons to whom Complainant must deliver copies of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses may be affected by the disposition of Complainant's appeal. Therefore, based on the current posture of this proceeding, I find good reason to continue, without date, the February 1, 2005, deadline for Complainant to file an amended complaint and the February 1, 2005, and April 1, 2005, deadlines for the parties to exchange copies of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses.

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

RULING

The February 1, 2005, deadline set by the ALJ for Complainant to file an amended complaint is continued, without date. The February 1, 2005, and April 1, 2005, deadlines set by the ALJ for the parties to exchange copies of proposed exhibits, lists of proposed exhibits, and lists of anticipated witnesses are continued, without date.

²See Memorandum of Points and Authorities at 2 attached to Complainant's Motion for Continuance.

In re: RICKY and RUBY KNIGHT.

AWA Docket No. 07-0076.

Ruling.

Filed April 2, 2007.

AWA –Default.

Healthier A. Pickelman for APHIS.

Respondents Pro se.

Ruling by Administrative Law Judge Peter M. Davenport.

ORDER

This matter is before the Administrative Law Judge upon the Motion of the Complainant to dismiss so much of the Complaint as concerns the Respondent Ruby Knight as she recently passed away.

Being sufficiently advised, it is **ORDERED** that so much of the Complaint as concerns Ruby Knight is **DISMISSED**.

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

**In re: JEROME SCHMIDT, d/b/a TOP OF THE OZARK
AUCTION.**

AWA Docket No. 05-0019.

Order Denying Petition to Reconsider.

Filed May 9, 2007.

AWA – Animal Welfare Act – Inspections unaccompanied by owners – Argument raised for the first time on appeal – Fourth Amendment warrantless search – Public officers presumed to properly discharge duties – Sixth Amendment right to call witnesses – Selective prosecution.

The Judicial Officer denied Dr. Schmidt's petition to reconsider *In re Jerome Schmidt*, __ Agric. Dec. __ (Mar. 26, 2007). The Judicial Officer held United States Department of Agriculture inspectors were not required to conduct inspections only when accompanied by the owner of the facility licensed under the Animal Welfare Act. The Judicial Officer rejected Dr. Schmidt's Fourth Amendment and Sixth Amendment

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arguments stating it is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer. The Judicial Officer also rejected Dr. Schmidt's assertion that United States Department of Agriculture inspection reports were inaccurate stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors are presumed to be motivated only by a desire to properly discharge their official duties and to have properly discharged their duty to document violations of the Animal Welfare Act accurately. The Judicial Officer rejected Dr. Schmidt's contention that the Judicial Officer ignored the testimony of his witnesses stating, contrary to Dr. Schmidt's assertion, the Judicial Officer read and carefully considered all of the testimony given by Dr. Schmidt's witnesses and, in the March 26, 2007, Decision and Order, addressed the testimony given by each of Dr. Schmidt's witnesses. Finally, the Judicial Officer rejected Dr. Schmidt's assertion that he was the subject of selective enforcement.

Frank Martin, Jr., for APHIS.

Respondent, Pro se.

Initial Decision issued by Administrative Law Judge Peter M. Davenport.

Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On March 26, 2007, I issued a Decision and Order concluding Jerome Schmidt, d/b/a Top of the Ozark Auction [hereinafter Dr. Schmidt], violated the regulations and standards issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Regulations and Standards].¹ On April 20, 2007, Dr. Schmidt filed a petition to reconsider that Decision and Order.² On April 30, 2007, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Dr. Schmidt's Petition to Reconsider,³ and the Hearing Clerk

¹*In re Jerome Schmidt*, __ Agric. Dec. __ (Mar. 26, 2007).

²"Reconsideration Petition" [hereinafter Petition to Reconsider].

³"Complainant's Opposition to Respondent's Petition for Reconsideration of the Judicial Officer's Decision and Order" [hereinafter Response to Petition to Reconsider].

transmitted the record to the Judicial Officer for a ruling on Dr. Schmidt's Petition to Reconsider.

Based upon a careful review of the record, I deny Dr. Schmidt's Petition to Reconsider and reinstate the Order in *In re Jerome Schmidt*, ___ Agric. Dec. ___ (Mar. 26, 2007). The Administrator's exhibits are designated by "CX." Transcript references are designated by "Tr."

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Dr. Schmidt raises six issues in his Petition to Reconsider. First, Dr. Schmidt asserts United States Department of Agriculture inspectors violated the Regulations and Standards when conducting inspections at Top of the Ozark Auction. Dr. Schmidt asserts, until August 2004, the Regulations and Standards required United States Department of Agriculture inspectors to conduct inspections only when accompanied by the owner of the facility and the United States Department of Agriculture inspectors who inspected Top of the Ozark Auction violated this requirement.

The record establishes that Dr. Schmidt, the owner of Top of the Ozark Auction, did not accompany Sandra K. Meek and Jan R. Feldman, the United States Department of Agriculture inspectors who conducted the inspections at issue in the instant proceeding, during their inspections. However, neither the Animal Welfare Act nor the Regulations and Standards requires that United States Department of Agriculture inspectors conduct inspections of a facility only when accompanied by the owner of that facility;⁴ therefore, I reject Dr.

⁴Section 2.126(b) of the Regulations and Standards (9 C.F.R. § 2.126(b)) was amended, effective August 13, 2004, to require dealers to make a responsible adult available to accompany Animal and Plant Health Inspection Service officials during the inspection process (69 Fed. Reg. 42,089, 42,102 (July 14, 2004)). During the only inspection at issue in the instant proceeding that occurred after the effective date of this amendment, Dr. Schmidt made a responsible adult available to accompany the United States Department of Agriculture inspector (CX 16 at 2).

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Schmidt's contention that United States Department of Agriculture inspectors violated the Regulations and Standards when they inspected Top of the Ozark Auction.

Second, Dr. Schmidt contends the inspections at issue in this proceeding were unreasonable searches in violation of the Fourth Amendment to the Constitution of the United States.

Dr. Schmidt raises the issue of the constitutionality of the inspections of Top of the Ozark Auction for the first time in his Petition to Reconsider. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer;⁵ therefore, Dr. Schmidt's Fourth Amendment argument comes too late for me to consider. Moreover, even if Dr. Schmidt had raised the issue timely, I would reject it. The United States Court of Appeals for the Seventh Circuit has specifically addressed the issue of warrantless inspections conducted under the Animal Welfare Act and has held that a search conducted by the United States Department of Agriculture pursuant to the Animal Welfare Act fits within the exception to the warrant requirement for "closely regulated" industries.⁶

Third, Dr. Schmidt asserts I erroneously concluded Sandra Meek prepared inspection reports that accurately reflect the conditions at Top of the Ozark Auction.

I find nothing in the record indicating the 10 inspection reports at issue in this proceeding are inaccurate. Moreover, I find the conditions at Top of the Ozark Auction, as reflected on the 10 inspection reports, which were prepared contemporaneously with Sandra Meek's

⁵*In re Bodie S. Knapp*, 64 Agric. Dec. 253, 289 (2005); *In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate).

⁶*Lesser v. Espy*, 34 F.3d 1301, 1306 (7th Cir. 1994).

observations, corroborated by other evidence in the record. Ms. Meek testified as to the accuracy of the inspection reports.⁷ Jan Feldman assisted Ms. Meek during five of the 10 inspections at issue in this proceeding and testified, based on her observations at Top of the Ozark Auction, she agreed with all of the violations cited by Ms. Meek on the inspection reports related to these five inspections.⁸ Moreover, Ms. Meek took photographs of some of Dr. Schmidt's violations during two of the 10 inspections at issue in this proceeding.⁹ The photographs confirm violations cited by Ms. Meek on the inspection reports that relate to these two inspections. Further still, Dr. Schmidt testified that he agreed with some of the violations cited in the inspection reports.¹⁰

Finally, I note, in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.¹¹

⁷Tr. 12-75.

⁸Tr. 77-79.

⁹CX 37-CX 48.

¹⁰Tr. 300-02.

¹¹See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating, although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating, without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *In re Karl Mitchell* (Order Granting Complainant's Pet. for Recons.), 60 Agric. Dec. 647, 665-67 (2001) (holding, in the absence of clear evidence to the contrary, Animal and Plant Health Inspection Service inspectors are

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United States Department of Agriculture inspectors are presumed to be motivated only by a desire to properly discharge their official duties and to have properly discharged their duty to document violations of the Animal Welfare Act accurately. Sandra Meek testified she was employed by the United States Department of Agriculture as an animal care inspector.¹² Based upon Ms. Meek's employment status, I infer she was a salaried United States Department of Agriculture employee and her salary, benefits, and continued employment by the United States Department of Agriculture were not dependent upon her findings during the inspections of Top of the Ozark Auction. Ms. Meek appears to have had no reason to record her findings in other than an impartial fashion.

Fourth, Dr. Schmidt asserts I erroneously ignored the testimony of his witnesses.

presumed to be motivated only by the desire to properly discharge their official duties); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auwil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting the respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit the respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

¹²Tr. 12.

Contrary to Dr. Schmidt's assertion, I read and carefully considered all of the testimony given by Dr. Schmidt's witnesses prior to issuing the March 26, 2007, Decision and Order, and, in the March 26, 2007, Decision and Order, I addressed the testimony given by each of Dr. Schmidt's 12 witnesses.¹³

Fifth, Dr. Schmidt asserts the administrative law judge who conducted the hearing in the instant proceeding, denied Dr. Schmidt the right to call witnesses in his favor in violation of the Sixth Amendment to the Constitution of the United States.

Dr. Schmidt raises the issue of the violation of the Sixth Amendment to the Constitution of the United States for the first time in his Petition to Reconsider. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer;¹⁴ therefore, Dr. Schmidt's Sixth Amendment argument comes too late for me to consider. Moreover, even if Dr. Schmidt had raised the issue timely, I would reject it.

The record does not support Dr. Schmidt's assertion that the administrative law judge denied him the right to call witnesses in his favor. During the hearing, Dr. Schmidt stated he did not want to call "any more witnesses,"¹⁵ and, at the close of the hearing, Dr. Schmidt stated he did not wish to offer any additional evidence.¹⁶ Further, the Sixth Amendment 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

¹³*In re Jerome Schmidt*, __ Agric. Dec. ___, slip op. at 22-40, 73-74 (Mar. 26, 2007).

¹⁴See note 5.

¹⁵Tr. 208.

¹⁶Tr. 305.

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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 defence.

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 Dr. Schmidt 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.¹⁷ Thus, I conclude Dr. Schmidt's rights under the Sixth Amendment to the Constitution of the United States are not implicated in this administrative proceeding.

Sixth, Dr. Schmidt asserts he has been singled out for selective enforcement by the United States Department of Agriculture.

¹⁷See *Austin v. United States*, 509 U.S. 602, 609 (1993) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *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. 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 Karen Schmidt*, 65 Agric. Dec. 971, 987 - 88 (2006) (concluding the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act); *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).

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation;¹⁸ however, sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Dr. Schmidt in this proceeding) proves that the prosecutor (the Administrator in this proceeding) singled out a defendant because of membership in a protected group or exercise of a constitutionally protected right.¹⁹

Dr. Schmidt bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.²⁰ In order to prove a selective enforcement claim, Dr. Schmidt must show one of two sets of circumstances. Dr. Schmidt must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.²¹ Dr. Schmidt has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Dr. Schmidt must show: (1) he exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) that this disciplinary proceeding

¹⁸*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

¹⁹*Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

²⁰*United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

²¹*See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

was initiated with intent to punish Dr. Schmidt for exercise of the protected right.²² Dr. Schmidt has not shown any of these circumstances.

For the foregoing reason and the reasons set forth in *In re Jerome Schmidt*, __ Agric. Dec. ____ (Mar. 26, 2007), Dr. Schmidt'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. Dr. Schmidt's Petition to Reconsider was timely filed and automatically stayed *In re Jerome Schmidt*, __ Agric. Dec. ____ (Mar. 26, 2007). Therefore, since Dr. Schmidt's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Jerome Schmidt*, __ Agric. Dec. ____ (Mar. 26, 2007), 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 is issued.

ORDER

1. Dr. Schmidt, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Regulations and Standards, and in particular shall cease and desist from:

(a) Failing to remove excreta from primary enclosures to prevent soiling of animals;

(b) Failing to provide housing facilities that are structurally sound and in good repair;

(c) Failing to ensure that primary surfaces coming in contact with animals are free of jagged edges or sharp points that might injure the animals;

²²*Id.*

ANIMAL WELFARE ACT

(d) Failing to provide a waste disposal system that keeps animals free from contamination and allows the animals to stay clean and dry;

(e) Failing to keep housing facilities clean and in good repair to facilitate husbandry practices;

(f) Failing to provide primary enclosures for dogs that are structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs;

(g) Failing to provide primary enclosures for dogs that contain the dogs securely;

(h) Failing to provide primary enclosures which have sufficient space to allow each dog to stand and sit in a comfortable position;

(i) Failing to spot-clean and sanitize hard surfaces with which dogs come in contact;

(j) Failing to provide an effective program for the control of insects and rodents;

(k) Failing to maintain housing facilities so as to keep them free of trash;

(l) Failing to house dogs in enclosures with suitable absorbent material to absorb and cover excreta;

(m) Failing to provide enclosures large enough to ensure each animal has sufficient space to stand and sit erect; and

(n) Housing dogs in enclosures which have bare wire strand floors.

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

2. Dr. Schmidt is assessed a \$6,800 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:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW

STEPHANIE TAUNTON
66 Agric. Dec. 607

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Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Frank Martin, Jr., within 60 days after service of this Order on Dr. Schmidt. Dr. Schmidt shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0019.

RIGHT TO JUDICIAL REVIEW

Dr. Schmidt 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. Dr. Schmidt must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.²³ The date of entry of the Order in this Order Denying Petition to Reconsider is May 9, 2007.

In re: STEPHANIE TAUNTON
AWA Docket No. D-07-0084.
Ruling on Petitioner's Request to Continue and Respondent's
Motion for Summary Judgment.
Filed May 29, 2007.

Bernadette R. Juarez for APHIS.
Respondent Pro se.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

²³ 7 U.S.C. § 2149(c).

On February 28, 2007, Petitioner Stephanie Taunton's application for an exhibitor's license under the Animal Welfare Act was denied by Robert M. Gibbens, Director Western Region, of the United States Department of Agriculture's Animal Plant and Health Inspection Service. The stated ground for denial was that Petitioner had failed to make her facilities available to animal welfare compliance inspections on at least six occasions over the previous four years. The letter advised Petitioner that "you may request a hearing in accordance with the applicable rules of practice for the purpose of showing why your application for license should not be denied."

On March 16, 2007, the Hearing Clerk received a letter from Petitioner, dated March 11, requesting a hearing on her license application. On April 9, 2007, Respondent filed a Response to Petitioner's Request for Hearing, in which it contended that there was no right to a hearing. Respondent contended that there were no issues of material fact since Petitioner did not deny in her petition that she failed to allow inspections of her facility, and that "a hearing in this matter will serve no useful purpose."

At a telephone conference attended by Petitioner and Bernadette Juarez, Esq., representing Respondent, Petitioner stated that she disagreed with the contention that there was no dispute as to the material facts. I stated that I would treat Respondent's response as a Motion for Summary Judgment, and directed Petitioner to respond by May 22, 2007.

Petitioner filed a letter on May 18, 2007, stating that she needed counsel to represent her in this matter, and requested that I "continue the process."

After careful review of the pertinent Rules of Procedure, I do not see any provision requiring Petitioner to do more than request a hearing to initialize the review process. While a complaint must state in some detail the nature of the proceeding, and the allegation of the facts and the provisions of law which constitute a basis for a proceeding, there is no such requirement specified for a challenge to a license denial. If the regulations required a petitioner to respond specifically to the reasons given by APHIS for denying a license request, then Petitioner would

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d/b//a THE ERNEST HEMINGWAY HOME AND MUSEUM
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obviously have fallen short in this matter. However, unlike when a complaint is filed, there is no requirement that allegations be admitted or denied. There is no requirement that a request for hearing address the reasons provided by APHIS in its letter denying an application for an exhibitor's license. Therefore, I have no basis at this point to deny the request for a hearing.

Respondent is correct in pointing out that there is no right to a hearing when there are no material facts in dispute. I have the authority to direct the parties to identify the material facts that are in dispute and to otherwise simplify the issues. However, in the telephone conference Petitioner took issue with Respondent's contention that inspection access was inappropriately denied. It appears thus that there are material facts which would at least justify the holding of a hearing.

Therefore the parties will be contacted shortly to arrange a followup telephone conference call where we will schedule this matter for a hearing.

In re: 907 WHITEHEAD STREET CORPORATION, d/b//a THE ERNEST HEMINGWAY HOME AND MUSEUM.

AWA Docket No. 06-0019.

Ruling Denying Respondent's Request for Production of Documents.

Filed May 30, 2007.

Frank Martin, Jr. for APHIS.

Respondent Pro se.

Ruling issued by Chief Administrative Law Judge Marc R. Hillson

Respondent has filed a Request for Production of Documents in this matter, which is opposed by Complainant. The Request is denied.

Respondent cites Rule 34 of the Federal Rules of Civil Procedure as authority for its request. However, the FRCP does not apply to administrative hearings at USDA, although it is frequently utilized as a

guide. Rather, this proceeding is governed by the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings, 7 C.F.R. Part 1. The principal discovery device contemplated by the Rules of Practice is the exchange of witness lists, summaries of anticipated witness testimony, and exhibits, which is traditionally ordered by the administrative law judge after the telephonic scheduling conference. Thus, following our conference call on March 8, 2007, I set this matter for a four day hearing beginning July 17, 2007 (subsequently changed to July 10, 2007), and directed Complainant to deliver its witness list, brief summary of witness testimony and any exhibits it intended to introduce at the hearing to Respondent by May 4, 2007, with Respondent's exchange to occur by June 4, 2007. The case file indicates that Complainant has named nine witnesses, provided a summary of the anticipated testimony for each, and provided copies of 48 exhibits it intends to introduce at the hearing. This is the only "discovery" to which Respondent is entitled.

Accordingly, the Request is denied.

**In re: BILLY G. ROLAND and BILLY GRAY ROLAND, Ltd.
DNS-RD Docket No. 07-0089.**

Ruling.

Filed May 8, 2007.

Respondent Pro se.

Ruling by Administrative Law Judge Victor W. Palmer.

Denial of Request For Stay

Included with Mr. Roland's appeal of the debarment decision, is a request for a 60 day stay of the debarment. This request is DENIED.

My powers as appeals officer are set forth at 7 C.F.R. § 3017.890. They do not include the power to stay a debarment.

Review of the regulatory definition of "suspension" (7 C.F.R. §§ 3017.1015) demonstrates that a person's participation in covered government programs is to be immediate and continuous from the time

FRANK CRAIG AND JEAN CRAIG,
d/b/a/ FRANKS WHOLESALE MEATS
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an agency official acts to suspend him. As stated in 7 C.F.R. § 3017.1015:

Suspension is an action taken ...that immediately prohibits a person from participating in covered transactions...pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

In other words, when a person is suspended, he may not participate in covered government transactions even during the time that there are pending administrative or judicial proceedings. The provisions respecting debarment do not contain any contrary provisions allowing participation after a debarment determination until such time as it may be vacated after an appeal.. *See, e.g.*, 7 C.F.R. §3017.930.

Suspensions and debarments are measures taken by an agency to protect the public interest and to promote an agency's policy of conducting business only with responsible persons. *See Sloan v. Dept. of Housing and Urban Development*, 231 F.3d 10, 14-15 (D.C. Cir 2000). Permitting a person who has been debarred a window of opportunity to continue to participate in government programs during the ninety day period in which an administrative appeal is required to be decided, is inconsistent with this objective.

**In re: FRANK CRAIG AND JEAN CRAIG, d/b/a FRANK'S
WHOLESALE MEATS.
FMIA Docket No. 05-0002.
PPIA Docket No. 05-0003.
Order Denying Petition to Reconsider.
Filed March 29, 2007.**

**FMIA – Federal Meat Inspection Act – PPIA – Poultry Products Inspection Act –
Requisites for petition to reconsider.**

The Judicial Officer denied Respondents' petition to reconsider *In re Frank Craig*,

__ Agric. Dec. __ (Feb. 21, 2007). The Judicial Officer stated: the Rules of Practice provide a petition to reconsider must state specifically the matters claimed to be erroneously decided and briefly state the alleged errors (7 C.F.R. § 1.146(a)(3)); Respondents' Petition to Reconsider did not state the matters claimed to be erroneously decided or the alleged errors in *In re Frank Craig*, __ Agric. Dec. __ (Feb. 21, 2007); and Respondents' Petition to Reconsider must be denied because it did not meet the requisites of a petition to reconsider set forth in the Rules of Practice.

Carlyne S. Cockrum and Rick D. Herndon, for Complainant.
Frank Craig and Jean Craig, San Bernardino, CA, Pro se.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Barbara Masters, Acting Administrator, Food Safety and Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint for Suspension of Federal Meat and Poultry Inspection Service [hereinafter the Complaint] on April 12, 2005. Complainant instituted the proceeding under the Federal Meat Inspection Act, as amended (21 U.S.C. §§ 601-695) [hereinafter the Federal Meat Inspection Act]; the Poultry Products Inspection Act, as amended (21 U.S.C. §§ 451-471) [hereinafter the Poultry Products Inspection Act]; 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 (9 C.F.R. pt. 500) [hereinafter the Rules of Practice].

Complainant alleges that on March 23, 2005, April 4, 2005, and April 5, 2005, Respondent Frank Craig intimidated and interfered with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act.¹ Complainant seeks an order indefinitely suspending inspection services under the Federal Meat Inspection Act and the Poultry Products

¹Compl. ¶ III.

Inspection Act from Frank Craig and Jean Craig, d/b/a Frank's Wholesale Meats [hereinafter Respondents], and Frank's Wholesale Meats, its owners, officers, operators, partners, affiliates, successors, and assigns.² On April 29, 2005, Respondents filed a response to the Complaint denying the material allegations of the Complaint.³

On October 24-26, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided at a hearing conducted in Washington, DC, and Diamond Bar, California. Carlyne S. Cockrum and Rick D. Herndon, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondents refused to participate in the hearing. The Chief ALJ issued a decision orally at the close of the hearing in which the Chief ALJ concluded Frank's Wholesale Meats harassed, intimidated, threatened, and interfered with Food Safety and Inspection Service employees performing duties under the Federal Meat Inspection Act and the Poultry Products Inspection Act and ordered the indefinite suspension of inspection services under title I of the Federal Meat Inspection Act and under the Poultry Products Inspection Act from Respondents and Frank's Wholesale Meats, its owners, officers, directors, partners, successors, and assigns.

The Chief ALJ excerpted from the transcript the decision orally announced at the close of the October 24-26, 2006, hearing, and on November 15, 2006, filed the written excerpt. On November 22, 2006, Respondents appealed to the Judicial Officer.⁴ On December 8, 2006, Complainant filed a response to Respondents' Appeal Petition.⁵ On December 11, 2006, the Hearing Clerk transmitted the record to the

²Compl. at 5.

³Answers to Complaint for Suspension of Federal Meat & Poultry Inspection Service.

⁴Letter dated November 21, 2006, from Respondent Frank Craig to the Chief ALJ [hereinafter Respondents' Appeal Petition].

⁵Response in Opposition to Appeal Petition.

Office of the Judicial Officer for consideration and decision.

On February 21, 2007, I issued a Decision and Order affirming the Chief ALJ's October 26, 2006, oral decision.⁶ On March 8, 2007, Respondents filed a petition to reconsider *In re Frank Craig*, __ Agric. Dec. __ (Feb. 21, 2007).⁷ On March 27, 2007, Complainant filed a response to Respondents' Petition to Reconsider,⁸ and the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Respondents' Petition to Reconsider. Based upon a careful consideration of the record, I deny Respondents' Petition to Reconsider.

CONCLUSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)) provides a petition to reconsider must state specifically the matters claimed to be erroneously decided and briefly state the alleged errors. Respondents' Petition to Reconsider does not state the matters claimed to be erroneously decided or the alleged errors in *In re Frank Craig*, __ Agric. Dec. __ (Feb. 21, 2007). Instead, Respondents' Petition to Reconsider consists of a series of allegations of United States Department of Agriculture wrong-doing that provides no basis for

⁶*In re Frank Craig*, __ Agric. Dec. __ (Feb. 21, 2007).

⁷Letter dated March 7, 2007, from Respondent Frank Craig to Joyce A. Dawson, Hearing Clerk [hereinafter Petition to Reconsider].

⁸Response in Opposition to Petition for Reconsideration.

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reconsideration of *In re Frank Craig*, __ Agric. Dec. ____ (Feb. 21, 2007).

For the foregoing reason and the reasons set forth in *In re Frank Craig*, __ Agric. Dec. ____ (Feb. 21, 2007), Respondents' Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondents' Petition to Reconsider was timely filed and automatically stayed *In re Frank Craig*, __ Agric. Dec. ____ (Feb. 21, 2007). Therefore, since Respondents' Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Frank Craig*, __ Agric. Dec. ____ (Feb. 21, 2007), 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

Inspection services under title I of the Federal Meat Inspection Act and under the Poultry Products Inspection Act are suspended indefinitely from Respondents and Frank's Wholesale Meats, its owners, officers, directors, operators, partners, affiliates, successors, and assigns, elected or incorporated. This Order shall become effective 30 days after service of the Order on Respondents.

**In re: IDAHO DEPARTMENT OF HEALTH AND WELFARE,
STATEWIDE SELF RELIANCE PROGRAMS.**

FSP Docket No. 06-0001.

Ruling.

Filed January 19, 2007.

FSP – Error rate –Appeal, when timely – Quality Control error.

Angela Guskey for FNS.

Jeffrey Vale for FNS.

James Tucker, James I. Vasile, Jocelyn B. Somers, Sara Denniston Eddie for Appellants.

Ruling by Chief Administrative Law Judge Marc R. Hillson.

Decision and Order Dismissing Appeal

Appellee Food and Nutrition Service's Motion to Dismiss is **GRANTED**. I conclude that, as a result of Appellant's late filing of its appeal petition, I have no jurisdiction to conduct a hearing in this matter. Accordingly, I must dismiss the appeal.

Procedural Background

On June 23, 2006, Roberto Salazar, Administrator of the United States Department of Agriculture's Food and Nutrition Service, sent a letter to Richard Armstrong, Director, Idaho Department of Health and Welfare, informing him that the Idaho Department of Health and Welfare was liable for penalties in the amount of \$240,951 for quality control (QC) errors resulting in excessive payments under the food stamp program pursuant to the Food Stamp Act of 1977 (the Act). The letter further informed Mr. Armstrong that "This letter serves as notice of your State's liability amount pursuant to Section 16(c)(I)(C) of the Act. Enclosed is a Notice of Claim/Bill for Collection in the amount of \$240,951.00." The letter advised Mr. Armstrong that if the State of Idaho wished to appeal this assessment it must file a Notice of Appeal within 10 days of receipt of the Notice of Claim/Bill for Collection.

On July 6, 2006, Russell Barron, Administrator of Appellant, filed Idaho's appeal with USDA's Office of Administrative Law Judges.¹ The Notice of Appeal was received on July 13, 2006, at which point Joyce

¹ An appeal dated July 3, 2006 was mistakenly filed with the wrong USDA office, but the timeliness of the filing of the Notice of Appeal is not an issue.

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Dawson, USDA's Hearing Clerk, sent a letter to Appellant assigning a docket number to the case. In her letter, the Hearing Clerk specifically informed appellant that "the State agency must file and serve its appeal petition, as set forth in § 283.22 not later than 60 days after receiving a notice of the claim. Failure to file a timely appeal petition may result in a waiver of further appeal rights." (emphasis in original).

A Petition to Appeal Error Rate Liability Assessment, dated September 8, 2006 was submitted that day via fax to the Hearing Clerk.

On November 6, 2006, Appellee filed a Motion to Dismiss, pursuant to 7 C.F.R. § 283.5, contending that Appellant filed its Appeal Petition in an untimely manner. Appellee contended that Appellant received the Notice of Claim letter on June 26, 2006, but did not file its appeal petition until September 8, 2006, 74 days after receipt of the notice of claim and 14 days out of time.

On November 20, 2006 Appellant filed a response to the Motion to Dismiss and requested that the case be scheduled for hearing.

I conducted a conference call with the parties on January 12, 2007 to discuss the Motion to Dismiss. Willard Abbott, Esq., represented Appellant and Angela Gusky, Esq. represented Appellee.

Discussion

The Food Stamp Act of 1977 requires the Secretary of Agriculture to notify states if their payment error rates give rise to a liability amount based on the difference between the state's error rate and the national average payment error rate. 7 U.S.C. § 2025(c). The Secretary must notify the state of the payment claims or liability amounts before June 30 after the end of the fiscal year in question. If the state disagrees with the Secretary's determination of the payment claim or liability amount, the state

. . . shall submit to an administrative law judge—

(i) a notice of appeal not later than 10 days after receiving a notice of the claim or liability amount; and

(ii) evidence in support of the appeal of the State agency, no later than 60 days after receiving a notice of the claim or liability amount.

7 U.S.C. § 2025 (c) (8) (D).

The Secretary promulgated regulations further detailing the procedures for appealing these claims. The procedures for appealing QC claims of over \$50,000 requires the Hearing Clerk, after receiving the Notice of Appeal, to assign the case a docket number and to instruct the state as to the requirements of the appeal petition. The Hearing Clerk is specifically required to notify the state of the necessity of filing the petition within 60 days of receipt of the notice of claim. 7 C.F.R. § 283.4(e)(iii).

It is undisputed that all the procedural niceties were complied with here. Appellant contends, however, that certain aspects of the regulations were ambiguous or confusing so that it can be excused for filing its petition late. I disagree.

First, Appellant contends that the word “claim” as defined in the regulations does not necessarily refer to the term “QC claim.” Appellant cites to an obvious typographical error in that the definition section of the regulations defines “OC claim” as the claim made pursuant to 7 U. S. C. § 2025(c). However, the absence of any such term as “OC claim” in the regulations, coupled by the fact that by its own terms the definition is referring to the claim specified in the statute, renders this contention feckless.

Second, Appellant contends that the fact Appellee referred to its demand for payment as a “Notice of Claim/Bill for Collection” somehow entitled Appellant to believe that it was not the document that was referred to in either the regulations or statute. This argument is particularly puzzling given that the June 23, 2006 letter specifically stated that the Act required the Secretary “to notify State agencies of payment claims or liability amounts. This letter serves as notice of your State’s liability amount pursuant to Section 16(c)(1)(C) of the Act. Enclosed is a Notice of Claim/Bill for Collection in the amount of

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\$240,951.00.” If that somehow did not indicate to Appellant that the Secretary was submitting a Notice of Claim, the next page of the letter clearly spells out Appellant’s appeal rights, with the cite to the governing regulations. Further, Appellant did file an appeal and one must ask what Appellant thought it was appealing if not the Notice of Claim. Moreover, upon receipt of the appeal the Hearing Clerk specifically and unambiguously notified Appellant of the requirement that the appeal petition be filed within 60 days of receipt of the Notice of Claim. There is nothing in this record that would justify me to find that Idaho had “no concrete basis” for construing the Notice of Claim as anything other than a claim made pursuant to 7 U. S. C. § 2025(c).

Likewise, Appellant’s final contention that the 60 day period in the Hearing Clerk’s letter referred to Idaho’s “claim” for a hearing rather than the “Notice of Claim” is weak. The letter clearly states that the 60 days was calculated from Idaho’s receipt of the notice of claim. This can hardly be confused with Idaho’s “claim”² for a hearing, which would not have been “received” by Appellant. Indeed, Appellant had not even requested a hearing in their appeal letter, but only indicated they would be submitting³ a “statement of the issues, our position and evidence supporting our position.” It was not until the untimely filed petition on September 8, 2006 that Idaho even requested a hearing, so the grounds for the State’s alleged confusion are basically nonexistent.

At the telephone conference, Counsel for Appellant suggested that I should find that the regulations, and perhaps the statute, were vague and obscure and that I should deny the Motion to Dismiss and schedule the matter for hearing. Unfortunately, the filing of evidence in support of the

² A hearing is normally requested or demanded or moved for rather than being claimed. Thus, the rules indicate that the appeal petition contain “A request for an oral hearing, if desired.” 7 C.F.R. § 283.4(g)(3).

³ Mr. Barron’s appeal letter stated “. . . evidence . . . will be sent within the next 30 days.”

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INFORMATION ACT

State's appeal within 60 days is a statutory mandate, something which I have no authority to overturn. While the Act allows me to extend deadlines "for cause shown," none of the reasons for late filing propounded by Appellant constitutes good cause. 7 U.S.C. 2025(c)(8)(i).

Order

Appellee's Motion to Dismiss is **GRANTED**.

This decision shall become final and effective 30 days after service unless appealed to the Judicial Officer within that time.

In re: AVOCADOS PLUS INCORPORATED, J. BONAFEDE CO., INC., J&K PRODUCE, INC., J.L. GONZALEZ PRODUCE, INC., AND LGS SPECIALTY SALES LTD.

HAPRIA Docket No. 04-0001.

Ruling.

Filed June 11, 2007.

Frank Martin, Jr. for AMS.

Dale E. McNiel for Petitioners.

Richard T. Rossier for Applicants.

Ruling by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case

Petitioners are represented by Dale E. McNiel, Esq. Respondent, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture ("AMS"), is represented by Frank Martin, Jr., Esq. The "Applicants" are represented by Richard T. Rossier, Esq.

By letter dated June 5, 2007, the Petitioners requested permission to withdraw their Petition. AMS and the "Applicants" had previously agreed that if Petitioners so requested, neither had any objection to my entering an Order dismissing this case. Accordingly, this case is **DISMISSED**.

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

The Hearing Clerk is requested also to send a courtesy copy of this Order to the “Applicants,” Charley Wolk and The Jerome J. Stehly and Christinia M. Stehly Living Trust.

In re: SONORA PRODUCE, INC.
HAPRIA Docket No. 04-0002.
Ruling.
Filed June 11, 2007.

Frank Martin, Jr. for AMS.
Dale E. McNiel for Petitioners.
Ruling by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case

Petitioner Sonora Produce, Inc. is represented by Dale E. McNiel, Esq. Respondent, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (“AMS”), is represented by Frank Martin, Jr., Esq. The “Applicants” are represented by Richard T. Rossier, Esq.

By letter dated June 5, 2007, Petitioner Sonora Produce, Inc. requested permission to withdraw its Petition. AMS and the “Applicants” had previously agreed that if Petitioner so requested, neither had any objection to my entering an Order dismissing this case. Accordingly, this case is **DISMISSED**.

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

The Hearing Clerk is requested also to send a courtesy copy of this

Order to the “Applicants,” Charley Wolk and The Jerome J. Stehly and Christinia M. Stehly Living Trust.

**In re: RONALD BELTZ, AN INDIVIDUAL; AND
CHRISTOPHER JEROME ZAHND, AN INDIVIDUAL.
HPA Docket No. 02-0001.
Order Lifting Stay Order as to Christopher Jerome Zahnd.
Filed March 8, 2007.**

HPA – Order Lifting Stay Order.

Brian T. Hill, for Complainant.
Greg Shelton, Decatur, Alabama, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On December 28, 2005, I issued a Decision and Order as to Christopher Jerome Zahnd: (1) concluding Christopher Jerome Zahnd [hereinafter Zahnd] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Zahnd a \$2,200 civil penalty; and (3) disqualifying Zahnd for 1 year from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.¹ On January 12, 2006, Zahnd filed a motion for reconsideration, which I denied.²

On March 8, 2006, Zahnd filed a petition for review of *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz* (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), 65 Agric. Dec. 281 (2006), with the United

¹*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005).

²*In re Ronald Beltz* (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), 65 Agric. Dec. 281 (2006).

States Court of Appeals for the Eleventh Circuit. On June 14, 2006, Zahnd requested a stay of the Orders in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz* (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), 65 Agric. Dec. 281 (2006), pending the outcome of proceedings for judicial review, which I granted.³

On February 21, 2007, the United States Court of Appeals for the Eleventh Circuit denied Zahnd's petition for review.⁴ On March 7, 2007, William R. DeHaven, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Acting Administrator], filed a "Request To Begin Suspension Immediately" attached to which is a letter dated February 27, 2007, in which Zahnd requests that the Order disqualifying him for 1 year from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction become effective immediately. The Acting Administrator states: (1) Zahnd has paid the \$2,200 civil penalty assessed in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz* (Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), 65 Agric. Dec. 281 (2006); and (2) the Acting Administrator does not oppose Zahnd's request that his disqualification become effective immediately.⁵

Based on the foregoing, Zahnd's request to lift the Stay Order as to Christopher Jerome Zahnd is granted and the following Order disqualifying Zahnd, effective March 8, 2007, should be issued.⁶

³*In re Ronald Beltz* (Stay Order as to Christopher Jerome Zahnd), 65 Agric. Dec. 291 (2006).

⁴*Zahnd v. Sec'y of Agric.*, No. 06-11571 (11th Cir. Feb. 21, 2007).

⁵Request To Begin Suspension Immediately.

⁶As Zahnd has paid the \$2,200 civil penalty assessed in *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487 (2005), and *In re Ronald Beltz*

ORDER

Zahnd is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

This Order is effective beginning March 8, 2007.

(Order Denying Mot. for Recons. as to Christopher Jerome Zahnd), 65 Agric. Dec. 281 (2006), I do not issue an Order assessing Zahnd a civil penalty in this Order Lifting Stay Order as to Christopher Jerome Zahnd.

**In re: MIKE TURNER AND SUSIE HARMON.
HPA Docket No. 01-0023.
Order Lifting Stay Order.
Filed April 16, 2007.**

HPA – Order lifting stay.

Robert A. Ertman, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On October 26, 2005, I issued a Decision and Order: (1) concluding Mike Turner and Susie Harmon [hereinafter Respondents] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing each Respondent a \$2,200 civil penalty; and (3) disqualifying each Respondent for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.¹

On November 30, 2005, Respondents filed a Motion for Stay of Judgment stating Respondents had filed a timely petition for review of *In re Mike Turner*, 64 Agric. Dec. 1456 (2005), with the United States Court of Appeals for the Sixth Circuit and requesting a stay of the Order in *In re Mike Turner*, 64 Agric. Dec. 1456 (2005), pending the outcome of proceedings for judicial review. On December 2, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a response to Respondents' November 30, 2005, motion stating Complainant does not oppose Respondents' motion for stay. On December 8, 2005, I granted Respondents' motion for stay.²

¹*In re Mike Turner*, 64 Agric. Dec. 1456 (2005).

²*In re Mike Turner* (Stay Order), 64 Agric. Dec. 1714 (2005).

The United States Court of Appeals for the Sixth Circuit denied Respondents' petition for review,³ and on April 6, 2007, Complainant filed a "Motion To Lift Stay." Respondents agree with Complainant's Motion To Lift Stay and request that the disqualification as to Respondent Mike Turner begin April 20, 2007, and the disqualification as to Respondent Susie Harmon begin April 13, 2007.⁴ On April 13, 2007, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion To Lift Stay.

Based upon agreement of the parties, Complainant's Motion To Lift Stay is granted; the Stay Order is lifted; and the Order in *In re Mike Turner*, 64 Agric. Dec. 1456 (2005), is effective, as follows:

ORDER

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

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

Respondent Mike Turner's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 60 days after service of this Order on Respondent Mike Turner. Respondent Mike Turner shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 01-0023.

³*Turner v. U.S. Dep't of Agric.*, No. 05-4487 (6th Cir. Feb. 15, 2007).

⁴Response to Motion To Lift Stay.

2. Respondent Mike Turner is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent Mike Turner shall become effective on April 20, 2007.

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

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

Respondent Susie Harmon's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 60 days after service of this Order on Respondent Susie Harmon. Respondent Susie Harmon shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 01-0023.

4. Respondent Susie Harmon is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or

otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent Susie Harmon became effective on April 13, 2007.

In re: JOSE LUIS JIMENEZ.

P.Q. Docket No. 06-0020.

Ruling.

February 27, 2007.

Thomas N. Bolick for APHIS.

Jose Luis Jimenez, Pro Se.

Ruling by Administrative Law Judge Peter M. Davenport.

ORDER

On February 2, 2007, a Default Decision and Order was entered in this action, finding that by reason of his failure to file an Answer, the Respondent had admitted the factual allegations contained in the Complaint, waived a hearing and further finding that he had violated the Plant Protection Act (7 U.S.C. § 7701 *et seq.*), but reserving the amount of the civil penalty to be exacted, pending submission of additional evidence by the Complainant that either the Respondent had prior violations, or evidence that the importation was for monetary gain. The Complainant has since filed a Motion for Revision of the Civil Penalty Recommendation.

Being sufficiently advised, it **ORDERED** as follows:

JOSE LUIS JIMENEZ
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1. The Respondent, Jose Luis Jimenez, is assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00). The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and shall be forwarded within thirty (30) days of the effective day of this Order to:

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

The Respondent shall indicate that the payment is in reference to P.Q. Docket No. 06-0020.

2. This Order shall be final and effective thirty-five (35) days after service of this Order upon the Respondent unless appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

A copy of this Order shall be served upon the Parties by the Hearing Clerk's Office.

630 AGRICULTURAL MARKETING AGREEMENT ACT
 WATERMELON RESEARCH
 AND PROMOTION ACT

DEFAULT DECISIONS

AGRICULTURAL MARKETING ACT

WATERMELON RESEARCH AND PROMOTION ACT

**In re: JOSE DE JESUS MARQUEZ, d/b/a MARQUEZ PRODUCE
AMA WRPA Docket No. 06-0001.**

Default Decision.

Filed March 8, 2007.

AMA – WPRP – Default.

Frank Martin, Jr., for APHIS

Jose de Jesus Marquez, Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Watermelon Research and Promotion Act, 7 U.S.C. § 4901 et seq. (the "Act"), alleging that the respondent violated the Watermelon Research and Promotion Plan, 7 C.F.R. § 1210.301-1210.405 (the "Plan"), and the rules and the Regulations issued thereunder, 7 C.F.R. § 1210.500-1210.532 (the "Regulations").

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the Respondent by the Office of the Hearing Clerk by certified mail on August 8, 2006. The Respondent was informed in the letter of service that an answer should be filed within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint would constitute an admission of the allegations in the complaint and a waiver of a hearing. Respondent never filed an answer to the complaint and the Hearing Clerk's Office mailed

him a No Answer Letter on September 20, 2006.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and Respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, Respondent's failure to answer is likewise deemed a waiver of hearing. Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

FINDINGS OF FACT

1. The Respondent Jose de Jesus Marquez is an individual doing business as Marquez Produce, and has a mailing address of 4906 Greenville Ct., Bakersfield, California 93313.

2. At all times material herein, the Respondent was a handler of watermelons as defined in the Act, 7 U.S.C. § 4902(4), and the Plan, 7 C.F.R. § 1210.308.

3. Respondent violated section 1210.341 of the Plan, 7 C.F.R. § 1210.341, section 1210.350 of the Plan, 7 C.F.R. § 1210.350, and section 1210.518 of the Regulations, 7 C.F.R. § 1210.518, by failing to maintain and file required reports, and by failing to remit assessments owed for the period of crop years 2003 and 2004.

4. On at least four occasions since June 2004, the Respondent has been reminded of his continuing violations and the various penalties that might be incurred.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. By reason of the Findings of Fact set forth above, Respondent

632 AGRICULTURAL MARKETING AGREEMENT ACT
 WATERMELON RESEARCH
 AND PROMOTION ACT

violated the Watermelon Research and Promotion Act, 7 U.S.C. § 4901 et seq.

ORDER

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act, the Plan and the Regulations issued thereunder, and in particular, shall cease and desist from failing to pay assessments for watermelons handled as required.

2. Respondent shall pay all past due assessments owed for the period of crop years 2003 and 2004 to the National Watermelon Promotion Board.

3. Respondent is assessed a civil penalty of \$10,000 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

4. The provisions of this order shall become effective on the first day after this decision becomes final. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

ANIMAL QUARANTINE ACT

DEFAULT DECISION

**In re: LINDA PENA.
A.Q. Docket No. 07-0020.
Default Decision.
Filed March 7, 2007.**

AQ – Default.

Cory S. Spiller for APHIS
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for violations of the Animal Health Protection Act (7 U.S.C. § 8301 et seq.) and regulations promulgated thereunder (9 C.F.R. § 93.103 et seq.), in accordance with the Rules of Practice in 7 C.F.R. § 1.130 et seq.

On November 13, 2006, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, instituted this proceeding by filing an administrative complaint against Linda Pena (hereinafter, Respondent). The complaint was mailed by certified mail to the Respondent on November 14, 2006 and was served on Respondent on November 21, 2006. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent's answer thus was due no later than December 12, 2006, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent never filed an

ANIMAL QUARANTINE ACT

answer to the complaint and the Hearing Clerk's Office mailed her a No Answer Letter on January 5, 2007.

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) or to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Since the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and Respondent's failure to file an answer is deemed such an admission pursuant to the Rules of Practice, Respondent's failure to answer is likewise deemed a waiver of hearing. Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

FINDINGS OF FACT

1. Linda Pena (hereinafter referred to as "the Respondent") has a mailing address of 252 Ellis Street, Lake Elsinore, California 92530.
2. On or about November 26, 2002, the Respondent imported 43 parrots into the United States from Mexico in violation of the regulations in 9 C.F.R Part 93, Subpart A, as follows:
 - a. The parrots were imported without a permit, as required in 9 C.F.R. § 93.103(a).
 - b. The parrots were imported without a veterinary certificate as required in 9 C.F.R. § 93.104(a).

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. By reason of the Findings of Fact set forth above, Respondent Linda Pena violated the Animal Health Protection Act (7 U.S.C. § 8301 et seq.).

ORDER

1. Respondent Linda Pena is hereby assessed a civil penalty of three

thousand dollars (\$3,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent Linda Pena shall indicate that payment is in reference to A.Q. Docket No. 07-0020.

2. This order shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent Linda Pena unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

Copies of this Default Decision and Order shall be served on the parties by the hearing Clerk's Office.

Done at Washington, D.C.

ANIMAL WELFARE ACT

ANIMAL WELFARE ACT

DEFAULT DECISIONS

In re: EVERETT LEROY KING.

AWA Docket No. 06-0012.

Default Decision.

Filed January 10, 2007.

AWA – Default.

Brian T. Hill for APHIS.

Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER**Preliminary Statement**

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 et seq.), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 et seq.).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7

C.F.R. §§ 1.130-1.151, were served by the Hearing Clerk on Everett Leroy King on April 24, 2006. The Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by Respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139

of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Everett Leroy King, hereinafter referred to as the Respondent, is an individual whose address is 412 South Main, West Salem, Illinois 62467.

2.. The Respondent, at all times material hereto, was not a licensed dealer as defined in the Act and the regulations.

3. On numerous occasions, continuing through at least May 6, 2004, Respondent conducted business for which a USDA license was required, without holding said license, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). Respondent sold, in commerce, forty-eight animals for resale. The animals were not born and raised on the premise of the respondent. The sale of each animal constitutes a separate violation.

4. On May 14, 2004, APHIS conducted a pre-licensing inspection of Respondent's premises and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. Primary enclosures used to transport live dogs had sharp wires exposed in such a way that the animals could be injured (9 C.F.R. § 3.14(a)(2));

b. Primary enclosures used to transport live dogs were latched with wire making it difficult for the animals to be removed in case of an emergency (9 C.F.R. § 3.14(a)(4));

c. Primary enclosures used to transport live dogs were not permanently attached to the conveyance, nor did they have handles or handholds which would enable the enclosure to be lifted without tilting (9 C.F.R. § 3.14(a)(5));

d.. Primary enclosures used to transport live dogs were not large enough to ensure that each animal had enough space to turn about normally while standing, to stand and sit erect, and to lie in a natural position (9 C.F.R. § 3.14(e)(1));

e. Primary enclosures used to transport live dogs were not positioned

so as to provide protection from the elements (9 C.F.R. § 3.14(e)(2));

f. Primary enclosures used to transport live dogs were not designed and maintained to as to protect the health and well being of the animals (9 C.F.R. § 3.15(a)); and

g. Sufficient water was not provided to animals while in transport and water bowls were not securely attached (9 C.F.R. §§ 3.16 (a),(c)).

Conclusions of Law

1 The Secretary has jurisdiction in this matter.

2. By reason of the foregoing Findings of Fact, the Respondent is found to have violated the Animal Welfare Act (7 U.S.C. § 2131 et seq.) and the Regulations promulgated thereunder (9 C.F.R. § 1.1 et seq.). Accordingly, the following Order is issued.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulation promulgated thereunder, and in particular, shall cease and desist from:

(a) Engaging in any activity for which a license is required under the Act and regulations without being licensed as required;

(b) Failing to provide animals with adequate shelter from the elements;

(c) Failing to provide sufficient space for animals in primary enclosures;

(d) Failing to provide animals with adequate potable water; and

(e) Failing to construct and maintain facilities for animals so that they are structurally sound, in good repair, and appropriate for the animals involved..

2. The Respondent is assessed a civil penalty of \$5,500.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States.

The provisions of this order shall become effective on the first day after this decision becomes final. Pursuant to the Rules of Practice, this

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decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

In re: STEVE NEILL and RONDA NEILL, d/b/a CEDAR CREST KENNEL.

AWA Docket No. 06-0015.

Default Decision.

Filed January 19, 2007.

AWA – Default.

Babak A. Rastgoufard for APHIS.

Respondents Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.) (the “Act”), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations and standards (9 C.F.R. § 1.1 et seq.) (the “Regulations”) issued thereunder.

On May 26, 2006, the Hearing Clerk sent to Respondents Steve Neill and Ronda Neill, by certified mail, return receipt requested, a copy of the Complaint. Respondents were informed in the accompanying letter of service that an Answer to the Complaint should be filed pursuant to the

Rules of Practice and that a failure to answer any allegation in the Complaint would constitute an admission of that allegation. Respondents received the Complaint on June 12, 2006.¹ Respondents failed to file an Answer within the time prescribed in the Rules of Practice; thus the material facts alleged in the Complaint, which are admitted by Respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rule of Practice, 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. Respondent Steve Neill is an individual whose mailing address is 1015 East Colgate Street, Bolivar, Missouri 65613.

2. Respondent Ronda Neill is an individual whose mailing address is 1015 East Colgate Street, Bolivar, Missouri 65613.

3. Respondents Steve Neill and Ronda Neill, collectively and individually do business as Cedar Crest Kennel, which is believed to be an unincorporated association or partnership with the mailing address 1015 East Colgate Street, Bolivar, Missouri 65613.

4. Respondents Steve Neill, Ronda Neill and Cedar Crest Kennel (collectively, "Respondents"), at all material times mentioned herein, were operating as dealers as defined in the Act and the Regulations.

5. Respondents have a medium-sized business, selling no fewer than 176 puppies of at least five different breeds, during the forty-eight month period (January 2001 through December 2004).

6. In addition, according to Respondents' own application for an Animal Welfare Act license, between April 29, 2003 and April 28, 2004, Respondents sold 100 animals and grossed at least \$15,000 from the sales of those animals.

7. Respondents were aware of the requirement to have a USDA license to sell puppies to a Distributor or Pet Store, but nonetheless continued to engage in regulated activity without the require license and

¹ See Domestic Return Receipt for Article Number 7003 3110 0003 7112 2922.

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sold a significant number of dogs to entities including licensed dealers.

8. On January 25, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, one Chow-Chow puppy to Tracy's K&J Pets, a licensed dealer (Animal Welfare Act license number 43-B-0015) ("Tracy's"), for resale use as pets or breeding purposes.

9. On May 10, 2001, Respondent Steve Neill, without being licensed, sold, in commerce, one Newfoundland puppy to Tracy's, for resale use as a pet or breeding purposes.

10. On May 16, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, four Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

11. On May 16, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, one Chow-Chow puppy to Tracy's, for resale use as a pet or breeding purposes.

12. On May 16, 2001, Respondent Ronda Neill transported and/or delivered, in commerce, one Chow-Chow puppy that was not yet eight weeks old.

13. On May 17, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, three Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

14. On May 24, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, one Chow-Chow puppy to Tracy's, for resale use as a pet or breeding purposes.

15. On May 31, 2001, Respondent Steve Neill, without being licensed, sold, in commerce, one Newfoundland puppy to Tracy's, for resale use as a pet or breeding purposes.

16. On June 21, 2001, Respondent Steve Neill, without being licensed, sold, in commerce, four Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

17. On August 30, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, four Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

18. On August 30, 2001, Respondent Ronda Neill transported and/or delivered, in commerce, four Labrador Retriever puppies that were not yet eight weeks old.

19. On December 12, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, three Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

20. On December 12, 2001, Respondent Ronda Neill transported and/or delivered, in commerce, three Chow-Chow puppies that were not yet eight weeks old.

21. On December 12, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, one Newfoundland puppy to Tracy's, for resale use as a pet or breeding purposes.

22. On December 12, 2001, Respondent Ronda Neill, without being licensed, sold, in commerce, four Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

23. On January 10, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, one Newfoundland puppy to Tracy's, for resale use as a pet or breeding purposes.

24. On January 10, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, two Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

25. On January 17, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, two Newfoundland puppies to Tracy's, for resale use as pets or breeding purposes.

26. On March 28, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, three Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

27. On April 25, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, six Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

28. On April 25, 2002, Respondent Ronda Neill transported and/or delivered, in commerce, six Labrador Retriever puppies that were not yet eight weeks old.

29. On May 16, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, five Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

30. On May 16, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, four Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

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31. On May 16, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, one Chow-Chow puppy to Tracy's, for resale use as a pet or breeding purposes.

32. On May 16, 2002, Respondent Ronda Neill transported and/or delivered, in commerce, one Chow-Chow puppy that was not yet eight weeks old.

33. On June 27, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, one Labrador Retriever puppy to Tracy's, for resale use as a pet or breeding purposes.

34. On June 27, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, two Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

35. On August 15, 2002, Respondent Ronda Neill, without being licensed, sold, in commerce, three English Springer Spaniel puppies to Tracy's, for resale use as pets or breeding purposes.

36. On January 10, 2003, Respondent Ronda Neill, without being licensed, sold, in commerce, four Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

37. On January 23, 2003, Respondent Ronda Neill, without being licensed, sold, in commerce, four Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

38. On May 1, 2003, Respondent Ronda Neill, without being licensed, sold, in commerce, one Golden Retriever puppy to Tracy's, for resale use as a pet or breeding purposes.

39. On May 1, 2003, Respondent Ronda Neill, without being licensed, sold, in commerce, six Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

40. On May 14, 2003, Respondent Steve Neill, without being licensed, sold, in commerce, eight Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

41. On July 17, 2003, Respondent Steve Neill, without being licensed, sold, in commerce, two Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

42. On October 29, 2003, Respondent Steve Neill, without being licensed, sold, in commerce, four Golden Retriever puppies to Tracy's,

for resale use as pets or breeding purposes.

43. On November 13, 2003, Respondent Steve Neill, without being licensed, sold, in commerce, one Golden Retriever puppy to Tracy's, for resale use as a pet or breeding purposes.

44. On November 13, 2003, Respondent Steve Neill, without being licensed, sold, in commerce, two Newfoundland puppies to Tracy's, for resale use as pets or breeding purposes.

45. On November 13, 2003, Respondent Steve Neill transported and/or delivered, in commerce, two Newfoundland puppies that were not yet eight weeks old.

46. On November 18, 2003, Respondent Steve Neill, without being licensed, sold, in commerce, one Newfoundland puppy to Tracy's, for resale use as a pet or breeding purposes.

47. On December 18, 2003, Respondent Ronda Neill, without being licensed, sold, in commerce, six Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

48. On January 21, 2004, Respondent Ronda Neill, without being licensed, sold, in commerce, five Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

49. On January 28, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, three Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

50. On January 28, 2004, Respondent Steve Neill transported and/or delivered, in commerce, three Chow-Chow puppies that were not yet eight weeks old.

51. On February 26, 2004, Respondent Ronda Neill, without being licensed, sold, in commerce, one Golden Retriever puppy to Tracy's, for resale use as a pet or breeding purposes.

52. On March 31, 2004, Respondent Ronda Neill, without being licensed, sold, in commerce, four Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

53. On May 13, 2004, Respondent Ronda Neill, without being licensed, sold, in commerce, two Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

54. On May 27, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, four Labrador Retriever puppies to Tracy's, for resale

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use as pets or breeding purposes.

55. On June 16, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, six Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

56. On June 16, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, three Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

57. On July 1, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, three Labrador puppies to Tracy's, for resale use as pets or breeding purposes.

58. On July 1, 2004, Respondent Steve Neill transported and/or delivered, in commerce, three Labrador puppies that were not yet eight weeks old.

59. On July 1, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, five Labrador puppies to Tracy's, for resale use as pets or breeding purposes.

60. On July 1, 2004, Respondent Steve Neill transported and/or delivered, in commerce, five Labrador puppies that were not yet eight weeks old.

61. On July 22, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, one Labrador puppy to Tracy's, for resale use as a pet or breeding purposes.

62. On July 22, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, one Labrador Retriever puppy to Tracy's, for resale use as a pet or breeding purposes.

63. On August 5, 2004, Respondent Ronda Neill, without being licensed, sold, in commerce, three Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

64. On August 5, 2004, Respondent Ronda Neill, without being licensed, sold, in commerce, nine Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

65. On August 5, 2004, Respondent Ronda Neill transported and/or delivered, in commerce, nine Labrador Retriever puppies that were not yet eight weeks old.

66. On August 25, 2004, Respondent Steve Neill, without being

licensed, sold, in commerce, two Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

67. On August 25, 2004, Respondent Steve Neill transported and/or delivered, in commerce, two Labrador Retriever puppies that were not yet eight weeks old.

68. On August 25, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, eight Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

69. On August 25, 2004, Respondent Steve Neill transported and/or delivered, in commerce, eight Golden Retriever puppies that were not yet eight weeks old.

70. On October 21, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, two Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

71. On October 21, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, seven Golden Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

72. On December 1, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, three Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

73. On December 1, 2004, Respondent Steve Neill, without being licensed, sold, in commerce, seven Labrador Retriever puppies to Tracy's, for resale use as pets or breeding purposes.

74. On December 27, 2004, Respondents failed to provide no fewer than ten dogs with shelter from sunlight.

75. On December 27, 2004, Respondents failed to provide no fewer than ten dogs with a shelter that contained a wind break and rain break at the entrance.

76. In December 2005, Respondent Steve Neill, without being licensed, sold, in commerce, no fewer than three Chow-Chow puppies to Tracy's, for resale use as pets or breeding purposes.

77. On March 14, 2006, Respondents failed to provide no fewer than eleven dogs with shelter from sunlight.

78. On March 14, 2006, Respondents failed to provide no fewer than ten dogs with a shelter that contained a wind break and rain break at the entrance.

79. Respondents do not have a previous history of violations; however, Respondents' conduct over the period described herein demonstrates a consistent disregard for, and unwillingness to abide by, the requirements of the Act and the Regulations. Despite having attested to Respondents' awareness that "we needed to have a USDA license to sell puppies to a Distributor or a Pet store", Respondents continued to engage in regulated activity without a license and have sold numerous dogs, including to licensed dealers.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. By reason of the foregoing Findings of Fact, the Respondents are found to have violated the Animal Welfare Act (7 U.S.C. § 2131 et seq.) and the regulations promulgated thereunder (9 C.F.R. § 1.1 et seq.)

3. The gravity of the violations is great and include repeated instances in which Respondents, without being licensed operated as a dealer, which is a serious violation because enforcement of the Act and Regulations depends upon the identification of persons operating as dealers. See 7 U.S.C. § 2131; *In re: Shaffer*, 60 Agric. Dec. 444, 478, 2001 WL 1143410, at 23 (U.S.D.A. Sept. 26, 2001) (opinion of Judicial Officer) ("[T]he failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers."); *In re: Zimmerman*, 56 Agric. Dec. 1419, 1453, 1997 WL 730380, at 22 (U.S.D.A. Nov. 6, 1997) (opinion of Judicial Officer) ("Respondent's failures to provide adequate veterinary care, and failures to remove excreta from primary enclosures...constitute 'serious' violations in that they directly affected the health and well-being of Respondent's animals").

4. The violations also include repeated instances in which Respondents transported and/or delivered, in commerce, puppies that were not yet eight weeks old, which is a serious violation because transporting dogs under eight weeks old endangers their health because

their immune systems are not developed enough to withstand the stress of long-distance travel and because it also interferes with their psychological development, and thus their ability to function when fully grown. See *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1106 (8th Cir. 1991); see also *In re: James & Julia Stuekerjuergen*, 44 Agric. Dec. 186, 189, 1985 WL 62918, at 2 (U.S.D.A. Feb. 27, 1985) (opinion of Judicial Officer) (“Violation of the minimum age requirement is a serious violation of the Act...the minimum age requirement is based on a finding by the Secretary that shipment of dogs under 8 weeks of age adversely affects ‘the animal’s ability to function in its adult environment,’ and is, therefore inhumane.”).

5. Between January 2001 and August 2004, Respondent Ronda Neill, without being licensed, sold, in commerce ninety-seven puppies to Tracy’s, for resale use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b). These violations took place on or about the following dates: January 25, 2001, May 16, 2001, May 17, 2001, May 24, 2001, August 30, 2001, December 12, 2001, January 10, 2002, January 17, 2002, March 28, 2002, April 25, 2002, May 16, 2002, June 27, 2002, August 15, 2002, January 10, 2003, January 23, 2003, May 1, 2003, December 18, 2003, January 21, 2004, February 26, 2004, March 31, 2004, May 13, 2004 and August 5, 2004.

6. Between May 2001 and August 2004, Respondent Ronda Neill transported and/or delivered, in commerce, twenty-four puppies that were not yet eight weeks old, in willful violation of section 2.130 of the Regulations. 9 C.F.R. § 2.130. The transportation and/or delivery of each dog constitutes a separate violation. 7 U.S.C. § 2149(b). These violations took place on or about the following dates: May 16, 2001, August 30, 2001, December 12, 2001, April 25, 2002, May 16, 2002 and August 5, 2004.

7. Between May 2001 and December 2005, Respondent Steve Neill, without being licensed, sold, in commerce eighty-two puppies to Tracy’s, for resale use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate

violation. 7 U.S.C. § 2149(b). These violations took place on or about the following dates: May 10, 2001, May 31, 2001, June 21, 2001, May 14, 2003, July 17, 2003, October 29, 2003, November 13, 2003, November 18, 2003, January 28, 2004, May 27, 2004, June 16, 2004, July 1, 2004, July 22, 2004, August 25, 2004, October 21, 2004, December 1, 2004 and December 2005.

8. Between November 2003 and August 2004, Respondent Steve Neill transported and/or delivered, in commerce, twenty-three puppies that were not yet eight weeks old, in willful violation of section 2.130 of the Regulations. 9 C.F.R. § 2.130. The transportation and/or delivery of each dog constitutes a separate violation. 7 U.S.C. § 2149(b). These violations took place on or about the following dates: November 13, 2003, January 28, 2004, July 1, 2004 and August 25, 2004.

9. On or about December 27, 2004, Respondents failed to provide no fewer than ten dogs with shelter from sunlight, in willful violation of section 3.4(b) of the Regulations. 9 C.F.R. § 3.4(b). The failure to maintain an appropriate facility for each animal constitutes a separate violation. 7 U.S.C. § 2149(b).

10. On or about December 27, 2004, Respondents failed to provide no fewer than ten dogs with a shelter that contained a wind break and rain break at the entrance, in willful violation of section 3.4(b)(3) of the Regulations. 9 C.F.R. § 3.4(b)(3). The failure to maintain an appropriate facility for each animal constitutes a separate violation. 7 U.S.C. § 2149(b).

11. On or about March 14, 2006, Respondents failed to provide no fewer than eleven dogs with shelter from sunlight, in willful violation of section 3.4(b) of the Regulations. 9 C.F.R. § 3.4(b). The failure to maintain an appropriate facility for each animal constitutes a separate violation. 7 U.S.C. § 2149(b).

12. On or about March 14, 2006, Respondents failed to provide no fewer than ten dogs with a shelter that contained a wind break and rain break at the entrance, in willful violation of section 3.4(b)(3) of the Regulations. 9 C.F.R. § 3.4(b)(3). The failure to maintain an appropriate facility for each animal constitutes a separate violation. 7 U.S.C. § 2149(b).

13. The ongoing pattern of violations by the Respondents establishes a “history of previous violations” for the purposes of section 2149(b) of the Act (7 U.S.C. § 2149(b)) and constitutes a lack of good faith.

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations issued thereunder, and, in particular, shall cease and desist from engaging in activities for which an Animal Welfare Act license is required

2. Respondents are jointly and severally assessed a civil penalty of \$25,850.00. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Washington, D.C. 20250-1417

Respondent shall state on the certified check or money order that the payment is in reference to AWA Docket No. 06-0015.

3. The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

**In re: CARL COBBLE.
AWA Docket No. 05-0011.
Default Decision.
Filed February 1, 2007.**

AWA – Default.

Brian T. Hill for APHIS
Respondent Pro se.
Default Decision by Administrative Law Judge

DEFAULT DECISION AND ORDER

This proceeding was instituted under the Animal Welfare Act (“Act”), as amended (7 U.S.C. § 2131 et seq.), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 et seq.).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7

C.F.R. §§ 1.130-1.151, were served via certified mail by the Hearing Clerk on Respondent Carl Cobble, on February 23, 2005. The respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondents’ failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. The Respondent Carl Cobble is an individual whose address is HC 67, Box 62A, Summersville, MO 65571.
2. The Respondent, at all times material hereto, was not licensed to operate as a dealer as defined in the Act, but carried on activities which required such a license.
3. On or about December 4, 1998, and continuing through at least June 22, 2000,

Respondent operated as a dealer as defined in the Act and the regulations, without being licensed, in violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). Respondent sold, in commerce, forty-six animals for resale for use as pets. The sale of each animal constitutes a separate violation.

4. On August 11, 1999, APHIS conducted a pre-licensing inspection of the Respondent's facility, and found the following violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. Housing facilities for animals were not kept neat and free of all materials other than those needed for proper husbandry practices (9 C.F.R. § 3.1(b));

b. Supplies of food were not kept in covered containers (9 C.F.R. § 3.1(e));

c. The floors and walls of indoor housing facilities and any other surfaces in contact with the animals were not impervious to moisture (9 C.F.R. § 3.2(d));

d. Building surfaces in contact with animals in outdoor housing facilities were not impervious to moisture (9 C.F.R. § 3.4(c));

e. An exercise program for the animals was not filled out and approved by an attending veterinarian (9 C.F.R. § 3.8);

f. Excreta and food waste were not removed from primary enclosures daily (9 C.F.R. § 3.11(a)); and

g. The buildings and surrounding grounds were not kept clean and in good repair to protect the animals from injury (9 C.F.R. § 3.11(c)).

5. On October 14, 1999, APHIS conducted a second pre-licensing inspection of the respondent's facility and found the following violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

a. An outdoor facility for dogs was not large enough to allow each animal to sit, stand, and lie in a normal manner and to turn about freely (9 C.F.R. § 3.4(b));

b. An exercise program for the animals was not filled out and approved by an attending veterinarian (9 C.F.R. § 3.8); and

c. Food and water receptacles were not cleaned and sanitized daily (9 C.F.R. § 3.11(b)).

6. On October 18, 1999, APHIS conducted a pre-licensing inspection of Respondent's premises and found that respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, in willful violation of section 2.40 of the regulations (9 C.F.R. § 2.40).

7. On October 18, 1999, APHIS conducted a pre-licensing inspection of the respondent's facility and found building surfaces in contact with animals in outdoor housing facilities were not impervious to moisture (9 C.F.R. § 3.4(c)).

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. For the reasons set forth in the Findings of Fact, the Respondent is found to have willfully violated the Act, the Regulations and the Standards. The non-compliant items found during pre-licensing inspection are willful violations of the regulations and standards due to the fact that the Respondent was already conducting business for which a license was required prior to actually obtaining a license, during the time period of the inspections.

ORDER

1. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall CEASE and DESIST from violating the Act, the regulations and the standards issued thereunder.

2. The Respondent is assessed a civil penalty of \$5,775.00, which shall be paid by a certified check or money order made payable to the Treasurer of United States, and sent to the attorney for the Complainant.

3. The provisions of this Decision and Order shall become final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

In re: J. KIRK MCKINNELL.
AWA Docket No. 07-0008.
Decision and Order by Reason of Default.
Filed April 23, 2007.

AWA – Default.

Heather M. Pichelman for APHIS.

Respondent Pro se.

Default Decision by Administrative Law Judge Jill S. Clifton

Procedural History

1. This administrative proceeding was initiated under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.) (herein frequently the “Act”), by a complaint filed on October 16, 2006. The complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (herein frequently “APHIS” or “Complainant”), is represented by Heather M. Pichelman, Esq., with the Marketing Division, Office of the General Counsel, United States Department of Agriculture.

2. The complaint alleged that J. Kirk McKinnell, the respondent (herein frequently “Respondent McKinnell”) willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 et seq.) (herein frequently the “Regulations”), specifically 7 U.S.C. § 2134 and 9 C.F.R. § 2.1, which prohibit operating as a dealer without having an Animal Welfare Act license. 3. A copy of the complaint was sent to Respondent McKinnell at Route 1, Box 3473, Ava, Missouri 65608, by certified mail on October 16, 2006. The complaint (together with the Hearing Clerk’s notice letter dated October 16, 2006 and a copy of the Rules of Practice) was delivered and signed for by Respondent McKinnell on October 21, 2006. No answer to the complaint has been received. The time for filing an answer expired on November 13, 2006.

4. The Complainant's motion for the issuance of a decision by reason of default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

5. Accordingly, the material allegations in the complaint, which are admitted by Respondent McKinnell's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. See 7 C.F.R. §1.130 et seq.

Findings of Fact and Conclusions

6. The Secretary of Agriculture has jurisdiction.

7. Respondent McKinnell is an individual whose address is Route 1, Box 3473, Ava, Missouri 65608.

8. From about September 29, 2004 through about June 14, 2005, Respondent McKinnell operated as a dealer without having obtained an Animal Welfare Act license and sold at least 81 dogs in commerce as specified in the complaint, in violation of 7 U.S.C. §§ 2131-2134 and the Regulations, particularly 9 C.F.R. § 2.1.

9. The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.

10. The size of Respondent McKinnell's business that sold at least 81 dogs during about 8-1/2 months appears to be small to medium. The gravity of the violations appears to be medium (repeated violations through an 8-1/2 month period). There are no allegations regarding Respondent McKinnell's good faith or lack thereof. There are no allegations of a history of previous violations.

11. Under these circumstances, \$18,975 is a reasonable and appropriate civil penalty for these 81 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

ANIMAL WELFARE ACT

Order

12. Respondent McKinnell, his 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.

13. Respondent McKinnell is assessed an \$18,975 civil penalty, which he shall pay by certified check(s) or cashier's check(s) or money order(s), made payable to the order of "Treasurer of the United States", and forwarded within thirty (30) days from the effective date of this Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Heather M. Pichelman, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent McKinnell shall include AWA Docket No. 07-0008 on the certified check(s) or cashier's check(s) or money order(s).

Finality

14. This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

Done at Washington, D.C.

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: DONALD L. WOOD AND SHOW ME FAMILY PETS, LLC.
AWA Docket No. 06-0008.
Default Decision.
Filed April 24, 2007.

AWA –Default.

Sharlene A. Deskins for APHIS.

Respondents Pro se.

Default Decision by Chief Administrative Law Judge Marc R. Hillson

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

Respondent willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 et seq.). Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7

C.F.R. §§ 1.130-1.151, were served by an APHIS employee upon Respondent Donald L. Wood and Show Me Family Pets, LLC on April 10, 2006. The Respondent was informed in the letter of

service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

The 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)) which provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the complaint are adopted as findings of fact and conclusions of law. 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 and Conclusions of Law

DONALD I. WOOD AND
SHOW ME FAMILY PETS, LLC.
66 Agric. Dec. 660

661

I

A. Donald L. Wood, hereinafter referred to as Respondent, is an individual whose mailing address is 111-A Box 12 North Center Street, Hartsburg, Missouri 65030.

B. Show Me Family Pets, LLC, hereinafter referred to as Respondent, is a limited liability corporation whose mailing address is 603 North Henry Clay Blvd., PO Box 252, Ashland, Missouri 65010. At all times material herein Show Me Family Pets was owned, operated and controlled by Donald Wood.

C. The Respondents, at all times material hereto, were operating as a dealer as defined in the Act and the regulations.

D. The Respondents were licensed pursuant to the Act until February 9, 2002.

II

A. From March 5, 2002, to approximately June 24, 2002 the Respondents operated as a dealer as defined in the Act and the regulations, without being licensed, in willful violation of section 4 of the Act (7 U.S.C. § 2131) and subsection 2.1 of the regulations (9 C.F.R. § 2.1).

Respondents offered for sale and sold, in commerce, at least 239 animals for resale for use as pets.

Each sale constitutes a separate violation of the Act and regulations.

B. On or about August 16, 2001, the respondents failed to notify APHIS within ten days of both a change in the operation of the business and the addition of a new site as required by section 2.8 of the regulations (9 C.F.R. § 2.8).

III

A. On or about March 22, 2001, APHIS inspected Respondents' premises and found that the Respondents' had failed to maintain

ANIMAL WELFARE ACT

programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of sections 2.40 and 3.17 (c) of the regulations (9 C.F.R. §§ 2.40 and 3.17 (c)) because at least nine puppies were transported which were ill or injured.

B. On or about March 22, 2001, APHIS inspected Respondents' facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

1. At least three puppies were transported without health certificates (9 C.F.R. §2.78(a));
2. Dogs were placed in enclosures that were not clean and sanitized (9 C.F.R. §3.11(b));
3. The primary enclosures used to transport dogs were not cleaned and sanitized (9 C.F.R. § 3.14(b)); and
4. The interior of the animal cargo area of the truck was not kept clean (9 C.F.R. § 3.15 (a)).

IV

A. On or about April 11, 2001, the Respondents' failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care while being transported, in willful violation of sections 2.40 and 3.17(c) of the regulations (9 C.F.R. §§ 2.40 and 3.17(c)) since puppies that were ill or injured were transported by the Respondents.

B. On or about April 11, 2001, the Respondents willfully violated section 2.100(a) of the regulation 9 C.F.R. § 2.100(a)) and the standards by transporting three puppies without health certificates (9 C.F.R. §2.78(a)).

V

On the dates specified below, the Respondents willfully violated section 2.100(a) of the regulation 9 C.F.R. § 2.100(a)) and the standards

as listed below:

A. On or about March 8, 2001, the Respondents transported a puppy that was ill (9 C.F.R. § 3.17 (c)).

B. From March 21, 2001 to March 22, 2001, the Respondents transported at least six puppies that were ill (9 C.F.R. § 3.17 (c)).

C. On or about April 11, 2001 the Respondents transported a puppy that was ill (9 C.F.R. § 3.17 (c)).

D. On or about April 18, 2001, the Respondents transported at least one puppy that was ill (9 C.F.R. § 3.17 (c)).

Conclusions

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts set forth in the “Findings of Fact” above, the Respondents have willfully violated the Act and regulations promulgated under the Act.

3. The following Order is authorized by the Act and warranted under the circumstances.

Order

1. The Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from :

(a) Engaging in any activity for which a license is required under the Act and regulations;

(b) Transporting animals without health certificates;

(c) Failing to place animals in clean enclosures;

(d) Failing to maintain the cargo space of the conveyance used to transport animals in a manner that protects the health and well-being of animals; and

(e) Failing to provide veterinary care to animals.

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2. The Respondents are jointly and severally assessed a civil penalty of \$18,875, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The notation "AWA Dkt. No. 06-0008" shall appear on the certified check or money order. The check shall be sent to Sharlene Deskins, USDA OGC Marketing Division, Mail Stop 1417, 1400 Independence Ave. S.W., Washington, D.C. 20250-1417.

The provisions of this Order shall become effective on the first day after service of this decision on the Respondents.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

In re: OCTAGON SEQUENCE OF EIGHT, INC.,d/b/a OCTAGON WILDLIFE SANCTUARY and OCTAGON ANIMAL SHOWCASE; LANCELOT KOLLMAN RAMOS, a/k/a LANCELOT RAMOS KOLLMAN; MANUEL RAMOS.

AWA Docket No. 05-0016.

Default Order.

Filed May 1, 2007.

AWA – Default.

Colleen A. Carroll for APHIS.

Kevin C. Shirley and Joseph R. Fritz for Respondents.

Default Decision by Administrative Law Judge Peter M. Davenport.

**DEFAULT DECISION AND ORDER
AS TO MANUEL RAMOS**

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondents willfully violated the Act and the Regulations and Standards promulgated

thereunder (9 C.F.R. § 1.1 *et seq.*)(the “Regulations” and “Standards”).

On May 2, 2005, the Hearing Clerk sent to Respondent Manuel Ramos, by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The address on the package was 12133 Baytree Drive, Riverview, Florida 33569. The package was returned with a notation that there was no such address. The street number contained a typographical error, and should have read “12123 Baytree Drive.” On November 8, 2005, the Hearing Clerk resent the package to Respondent Manuel Ramos, by certified mail, return receipt requested, at the 12123 Baytree Drive address. The package was returned as unclaimed by the United States Postal Service, on January 11, 2006. On that same date, the Hearing Clerk remailed the package to respondent Manuel Ramos, by ordinary mail, at the 12123 Baytree Drive address, pursuant to section 1.147(c) of the Rules of Practice.¹ Respondent Manuel Ramos failed to file an answer to the complaint within the time prescribed in section 1.136 of the Rules of Practice.

Respondent Manuel Ramos was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Said Respondent has failed to file an answer to the complaint.

Pursuant to sections 1.136 and 1.139 of the Rules of Practice, the material facts alleged in the complaint, are admitted by said Respondent’s failure to file an answer and the following Findings of Fact, Conclusions and Order will be entered.

FINDINGS OF FACT

¹The January 11, 2006, mailing was not returned to the Hearing Clerk, nor was the February 9, 2006, letter from the Hearing Clerk to Mr. Ramos, informing him that he had failed to file an answer to the complaint.

1. Manuel Ramos is an individual whose address is 12133[sic] Baytree Drive, Riverview, Florida 33569. At all times mentioned herein, said Respondent was operating as a dealer, as that term is defined in the Act and the Regulations.

2. Respondent Manuel Ramos has a small business. The gravity of his violations is great. He knowingly operated as a dealer without having a valid license and caused injuries to two lions that resulted in the death of one of the lions. He has been a respondent in at least three previous AWA enforcement cases, his AWA license was suspended, and was subsequently revoked.²

3. Between June 23, 2000, and the date of the filing of this proceeding, Respondent Manuel Ramos knowingly failed to obey the cease and desist order made by the Secretary pursuant to section 2149(b) of the Act, in *In re Manuel Ramos, dba Oscarian Brothers Circus*, 59 Agric. Dec. 296 (2000), AWA Docket No. 99-0041 (Consent Decision and Order). 7 U.S.C. § 2149(b). Said cease and desist order specifically provided that

“Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.”

Pursuant to section 2149(b) of the Act, any person who knowingly fails to obey such a cease and desist order shall be subject to a civil penalty of \$1,650 for each offense, and each day during which such failure continues shall be deemed a separate offense. 7 U.S.C. § 2149(b).

²*In re Arturo Ramos and Manuel Ramos dba Oscarian Bros. Circus*, AWA Docket No. 322; *In re Manuel Ramos, dba Oscarian Brothers Circus*, 51 Agric. Dec. 1225 (1992), AWA Docket No. 91-0042; *In re Manuel Ramos, dba Oscarian Brothers Circus*, AWA Docket No. 00-0025; *In re Manuel Ramos, dba Oscarian Brothers Circus*, 59 Agric. Dec. 296, AWA Docket No. 99-0041 (Consent Decision and Order, June 26, 2000)(revoking respondent Manuel Ramos's license).

OCTAGON SEQUENCE OF EIGHT, INC., et al.
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4. On or about September 13, 2000, Respondent Manuel Ramos operated as a dealer by delivering for transportation, or transporting, two lions for exhibition, without having a valid license to do so, in violation of §2.1, 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §2.1, 2.10(c) and 2.100(a).

5. On or about September 13, 2000, Respondent Manuel Ramos violated the Regulations governing the provision of veterinary care to animals.

a. Respondent failed to have an attending veterinarian provide adequate veterinary care to two juvenile lions in compliance with the Regulations.

b. Respondent failed to establish and maintain adequate programs of veterinary care that include the availability of appropriate facilities, personnel, equipment, and services.

c. Respondent failed to establish and maintain adequate programs of veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries.

d. Respondent failed to establish and maintain adequate programs of veterinary care that include daily observation of all animals to assess their health and well-being, and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health and well-being is conveyed to the attending veterinarian.

e. Respondent failed to establish and maintain adequate programs of veterinary care that include adequate guidance to personnel involved in the care and use of animals.

f. The above failures constitute violations of § 2.40(a) and (b)(1-4) of the Regulations. (9 C.F.R. § 2.40(a), (b)(1-4)).

6. On or about December 13, 2000, Respondent Manuel Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause trauma, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

7. On or about December 13, 2000, respondent Manuel Ramos failed

ANIMAL WELFARE ACT

to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause behavioral stress, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

8. On or about December 13, 2000, Respondent Manuel Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause physical harm, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

9. On or about December 13, 2000, Respondent Manuel Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause unnecessary discomfort, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

10. On or about December 13, 2000, Respondent Manuel Ramos, and/or his agents, used physical abuse to train, work, or otherwise handle two juvenile lions, in violation of § 2.131(a)(2)(i) of the Regulations. (9 C.F.R. § 2.131(a)(2)(i)).

11. In view of the Respondent's three prior consent decisions involving the Act, the above violations will be found to be willful.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Between June 23, 2000, and the date of the filing of this proceeding, as set forth in the above Findings of Fact, Respondent Manuel Ramos knowingly failed to obey the cease and desist order made by the Secretary pursuant to section 2149(b) of the Act, in *In re Manuel Ramos, dba Oscarian Brothers Circus*, 59 Agric. Dec. 296 (2000), AWA Docket No. 99-0041 (Consent Decision and Order). 7 U.S.C. § 2149(b).

3. For the reasons set forth in the Findings of Fact, the Respondent Manuel Ramos violated the Act and the Regulations and Standards.

ORDER

1. Respondent Manuel Ramos, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent Manuel Ramos is assessed a civil penalty of \$3,300,

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for his knowing failures to obey the cease and desist order entered by the Secretary pursuant to section 2149(b) of the Act, in *In re Manuel Ramos, dba Oscarian Brothers Circus*, 59 Agric. Dec. 296 (2000).

3. Respondent Manuel Ramos is assessed a civil penalty of \$43,500 for his violations of the Regulations set forth herein. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Manuel Ramos. Respondent Manuel Ramos shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0016.

4. The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

In re: OCTAGON SEQUENCE OF EIGHT, INC.,d/b/a OCTAGON WILDLIFE SANCTUARY and OCTAGON ANIMAL SHOWCASE; LANCELOT KOLLMAN RAMOS, a/k/a LANCELOT RAMOS KOLLMAN; MANUEL RAMOS.

AWA Docket No. 05-0016.

Default Order.

Filed May 9, 2007.

AWA – Default.

Colleen A. Carroll for APHIS.

Kevin C. Shirley and Joseph R. Fritz for Respondents.

Default Decision by Administrative Law Judge Peter M. Davenport.

**DEFAULT DECISION AND ORDER
AS TO LANCELOT KOLLMAN RAMOS,
a/k/a LANCELOT RAMOS KOLLMAN**

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.)(the “Act”), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondent Lancelot Kollman Ramos¹ and the other named respondents willfully violated the Act and the Regulations and Standards promulgated thereunder (9 C.F.R. § 1.1 et seq.)(the “Regulations” and “Standards”).

The Hearing Clerk served the Respondent “Lancelot Kollman Ramos” on July 5, 2005 with copies of the Complaint and the Rules of

¹The Complaint and the copy of the Rules of Practice were addressed to Lancelot Kollman Ramos; however, in his letter to the Hearing Clerk received on July 22, 2005, the Respondent identified himself as Lancelot Ramos Kollman. In view of his self identification, the caption will be amended to add Kollman as the Respondent’s last name with an also known as (a/k/a) designation. It is noted that the prior action brought against the Respondent was styled *In re: Lanceot Kollman, a/k/a Lancelot Ramos*, 60 Agric. Dec. 190 (2001).

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LANCELOT KOLLMAN RAMOS
66 Agric. Dec. 670

Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), by certified mail, return receipt requested.

On July 22, 2005, Respondent Lancelot Ramos Kollman filed a letter with the Hearing Clerk's Office which has been treated as his Answer. The letter reads, in pertinent part:

I Lancelot Ramos Kollman am responding to a complaint...

I Lancelot Ramos Kollman as an individual am to requesting an oral hearing of this complaint. Please send any or all responses to this address P.O Box 221 Balm , Fl 33503.

The letter from the Hearing Clerk that accompanied the Complaint served on the Respondent contained the following language:

...It is necessary that your answer set forth any defense that you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing...²

(Emphasis added).

It is well settled that entry of a default decision is appropriate where, as in this case, the Respondent has failed to deny the material allegations of the Complaint. *In re: Barnesville Livestock Sales Co., et al.* 60 Agric. Dec. 804, 805 (2002); *In re Van Buren Fruit Exchange, Inc.* 51 Agric. Dec. 744 (1992). As the Respondent's letter [Answer] failed to clearly deny the material allegations of the Complaint, it fails to meet with the specific requirements for an Answer under the Rules of Practice (See 7 C.F.R. § 1.136(b)). The material facts alleged in the complaint are accordingly admitted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of

² This language is lifted from Rule 1.139, 7 C.F.R. § 1.139. See also 7 C.F.R. § 1.136(b).

Practice, 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. Lancelot Ramos Kollman is an individual whose address is 12661 Andrew Road, Post Office Box 221, Balm, Florida 33503. At all times mentioned herein, said Respondent was operating as a dealer, as that term is defined in the Act and the Regulations. Said Respondent currently holds Animal Welfare Act license No. 58-C-0816.

2. Respondent Lancelot Ramos Kollman has a small business. The gravity of his violations is great. He knowingly operated as a dealer without having a valid license. He caused injuries to two lions that resulted in the death of one of the lions, and lied to investigators about his actions. He has been a respondent in one previous AWA enforcement cases.³

3. On or about September 13, 2000, Respondent Lancelot Ramos Kollman operated as a dealer by delivering for transportation, or transporting, two lions for exhibition, without having a valid license to do so, in violation of §2.1, 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §2.1, 2.10(c) and 2.100(a).

4. On or about September 13, 2000, Respondent Lancelot Ramos Kollman violated the Regulations governing the provision of veterinary care to animals.

a. Respondent failed to have an attending veterinarian provide adequate veterinary care to two juvenile lions in compliance with the Regulations.

b. Respondent failed to establish and maintain adequate programs of veterinary care that include the availability of appropriate facilities, personnel, equipment, and services.

c. Respondent failed to establish and maintain adequate programs

³*In re Lancelot Kollman, aka Lancelot Ramos*, 60 Agric. Dec. 190, AWA Docket No. 01-0012 (consent decision and order, May 10, 2001)(disqualifying respondent from becoming licensed under the Act until May 9, 2006).

of veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries.

d. Respondent failed to establish and maintain adequate programs of veterinary care that include daily observation of all animals to assess their health and well-being, and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health and well-being is conveyed to the attending veterinarian.

e. Respondent failed to establish and maintain adequate programs of veterinary care that include adequate guidance to personnel involved in the care and use of animals.

f. The above failures constitute violations of § 2.40(a) and (b)(1-4) of the Regulations. (9 C.F.R. § 2.40(a), (b)(1-4)).

5. On or about December 13, 2000, respondent Lancelot Ramos Kollman failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause trauma, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

6. On or about December 13, 2000, respondent Lancelot Ramos Kollman failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause behavioral stress, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

7. On or about December 13, 2000, Respondent Lancelot Ramos Kollman failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause physical harm, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

8. On or about December 13, 2000, Respondent Lancelot Ramos Kollman failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause unnecessary discomfort, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

9. On or about December 13, 2000, Respondent Lancelot Ramos Kollman, and/or his agents, used physical abuse to train, work, or otherwise handle two juvenile lions, in violation of § 2.131(a)(2)(i) of the

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Regulations. (9 C.F.R. § 2.131(a)(2)(i)).

10. In view of the Respondent's prior consent decision involving the Act, the above violations will be found to be willful.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. For the reasons set forth in the above Findings of Fact, the Respondent Lancelot Ramos Kollman violated the Act and the Regulations and Standards.

ORDER

1. Respondent Lancelot Ramos Kollman, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent Lancelot Ramos Kollman is assessed a civil penalty of \$43,500 for his violations of the Regulations set forth herein. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Lancelot Ramos Kollman. Respondent Lancelot Ramos Kollman shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0016.

3. Animal Welfare Act License Number 58-C-0816 is revoked.
4. The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without

further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.

In re: OCTAGON SEQUENCE OF EIGHT, INC., A FLORIDA CORPORATION D/B/A OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; LANCELOT KOLLMAN RAMOS, AN INDIVIDUAL, a/k/a LANCELOT RAMOS KOLLMAN; AND MANUEL RAMOS, AN INDIVIDUAL. AWA Docket No. 05-0016
Default Decision
Filed May 15, 2007

AWA – Default.

Colleen A. Carroll for APHIS.
Kevin C. Shirley and Joseph R. Fritz for Respondents.
Default Decision by Administrative Law Judge Peter M. Davenport.

**DEFAULT DECISION AND ORDER
AS TO MANUEL RAMOS**

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*)(the “Act”), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that respondents willfully violated the Act and the Regulations and Standards promulgated thereunder (9 C.F.R. § 1.1 *et seq.*)(the “Regulations” and “Standards”).

On May 2, 2005, the Hearing Clerk sent to Respondent Manuel Ramos, by certified mail, return receipt requested, copies of the complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151). The address on the package was 12133 Baytree Drive, Riverview, Florida 33569. The package was returned

with a notation that there was no such address. The street number contained a typographical error, and should have read “12123 Baytree Drive.”

On November 8, 2005, the Hearing Clerk resent the package to Respondent Manuel Ramos, by certified mail, return receipt requested, at the 12123 Baytree Drive address. The package was returned as “unclaimed” by the United States Postal Service, on January 11, 2006. On that same date, the Hearing Clerk remailed the package to respondent Manuel Ramos, by ordinary mail, at the 12123 Baytree Drive address, pursuant to section 1.147(c) of the Rules of Practice.¹ Respondent Manuel Ramos failed to file an answer to the complaint within the time prescribed in section 1.136 of the Rules of Practice.

Respondent Manuel Ramos was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Said Respondent failed to file an answer to the complaint and on April 12, 2007, the Complainant filed a Motion for Adoption of Proposed Decision and Order as to Manual Ramos By Reason of Admission of Facts. Service of the Motion was attempted to be served on the Respondent by certified mail; however, the mailing was again returned “unclaimed” and the Respondent was served by regular mail on May 9, 2007.

On May 11, 2007, the Hearing Clerk’s Office was finally contacted by the Respondent Manuel Ramos in a letter which reads, in pertinent part:

“I Manual Ramos hereby deny all charges and request a hearing on the allegations mentioned in the motion for adoption of proposed decision.

Sincerely,
/s/Manual Ramos

¹ The January 11, 2006, mailing was not returned to the Hearing Clerk, nor was the February 9, 2006, letter from the Hearing Clerk to Mr. Ramos, informing him that he had failed to file an answer to the complaint.

Manual Ramos

While Rule 1.139 (7 C.F.R. § 1.139) permits the judge to deny a motion, such as has been filed by the Complainant for adoption of a proposed decision, where a party against whom a default decision is being sought files “meritorious objections,” the belated letter denying the “charges” fails to satisfy the requirements of the Rule.

Pursuant to sections 1.136 and 1.139 of the Rules of Practice, the material facts alleged in the complaint are admitted by said Respondent’s failure to file a timely answer and the following Findings of Fact, Conclusions and Order will be entered.

FINDINGS OF FACT

1. Manuel Ramos is an individual whose address is 12123 Baytree Drive, Riverview, Florida 33569. At all times mentioned herein, said Respondent was operating as a dealer, as that term is defined in the Act and the Regulations.

2. Respondent Manuel Ramos has a small business. The gravity of his violations is great. He knowingly operated as a dealer without having a valid license and caused injuries to two lions that resulted in the death of one of the lions. He has been a respondent in at least three previous AWA enforcement cases, his AWA license was suspended, and was subsequently revoked.²

² *In re Arturo Ramos and Manuel Ramos dba Oscarian Bros. Circus*, AWA Docket No. 322; *In re Manuel Ramos, dba Oscarian Brothers Circus*, 51 Agric. Dec. 1225 (1992), AWA Docket No. 91-0042; *In re Manuel Ramos, dba Oscarian Brothers Circus*, AWA Docket No. 00-0025; *In re Manuel Ramos, dba Oscarian Brothers Circus*, 59 Agric. Dec. 296, AWA Docket No. 99-0041 (Consent Decision and Order, June 26, 2000)(revoking respondent Manuel Ramos’s license).

3. Between June 23, 2000, and the date of the filing of this proceeding, Respondent Manuel Ramos knowingly failed to obey the cease and desist order made by the Secretary pursuant to section 2149(b) of the Act, in *In re Manuel Ramos, dba Oscarian Brothers Circus*, 59 Agric. Dec. 296 (2000), AWA Docket No. 99-0041 (Consent Decision and Order). 7 U.S.C. § 2149(b). Said cease and desist order specifically provided that:

“Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.”

Pursuant to section 2149(b) of the Act, any person who knowingly fails to obey such a cease and desist order shall be subject to a civil penalty of \$1,650 for each offense, and each day during which such failure continues shall be deemed a separate offense. 7 U.S.C. § 2149(b).

4. On or about September 13, 2000, Respondent Manuel Ramos operated as a dealer by delivering for transportation, or transporting, two lions for exhibition, without having a valid license to do so, in violation of §2.1, 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §2.1, 2.10(c) and 2.100(a).

5. On or about September 13, 2000, Respondent Manuel Ramos violated the Regulations governing the provision of veterinary care to animals.

a. Respondent failed to have an attending veterinarian provide adequate veterinary care to two juvenile lions in compliance with the Regulations.

b. Respondent failed to establish and maintain adequate programs of veterinary care that include the availability of appropriate facilities, personnel, equipment, and services.

c. Respondent failed to establish and maintain adequate programs of veterinary care that include the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries.

d. Respondent failed to establish and maintain adequate programs of veterinary care that include daily observation of all animals to assess their health and well-being, and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health and well-being is conveyed to the attending veterinarian.

e. Respondent failed to establish and maintain adequate programs of veterinary care that include adequate guidance to personnel involved in the care and use of animals.

f. The above failures constitute violations of § 2.40(a) and (b)(1-4) of the Regulations. (9 C.F.R. § 2.40(a), (b)(1-4)).

6. On or about December 13, 2000, Respondent Manual Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause trauma, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

7. On or about December 13, 2000, Respondent Manual Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause behavioral stress, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

8. On or about December 13, 2000, Respondent Manual Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause physical harm, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

9. On or about December 13, 2000, Respondent Manual Ramos failed to handle two juvenile lions as carefully and expeditiously as possible in a manner that does not cause unnecessary discomfort, in violation of § 2.131(a)(1) of the Regulations. (9 C.F.R. § 2.131(a)(1)).

10. On or about December 13, 2000, Respondent Manual Ramos, and/or his agents, used physical abuse to train, work, or otherwise handle two juvenile lions, in violation of § 2.131(a)(2)(i) of the Regulations. (9 C.F.R. § 2.131(a)(2)(i)).

11. In view of the Respondent's three prior consent decisions involving the Act, the above violations will be found to be willful.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Between June 23, 2000, and the date of the filing of this proceeding, as set forth in the above Findings of Fact, Respondent Manuel Ramos knowingly failed to obey the cease and desist order made

by the Secretary pursuant to section 2149(b) of the Act, in *In re Manuel Ramos, dba Oscanian Brothers Circus*, 59 Agric. Dec. 296 (2000), AWA Docket No. 99-0041 (Consent Decision and Order). 7 U.S.C. § 2149(b).

3. For the reasons set forth in the Findings of Fact, the Respondent Manuel Ramos violated the Act and the Regulations and Standards.

ORDER

1. Respondent Manuel Ramos, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards.

2. Respondent Manuel Ramos is assessed a civil penalty of \$3,300, for his knowing failures to obey the cease and desist order entered by the Secretary pursuant to section 2149(b) of the Act, in *In re Manuel Ramos, dba Oscanian Brothers Circus*, 59 Agric. Dec. 296 (2000).

3. Respondent Manuel Ramos is assessed a civil penalty of \$43,500 for his violations of the Regulations set forth herein. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Manuel Ramos. Respondent Manuel Ramos shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0016.

4. The provisions of this order shall become effective on the first day after this decision becomes final. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice.

Copies of this decision shall be served upon the parties.
Done at Washington, D.C.

In re: TRACEY HARRINGTON.
AWA Docket No. 07-0036.
Decision and Order Reason of Default.
Filed June 20, 2007.

AWA – Default.

Brian T. Hill for APHIS.
Respondent Pro se.

Default Decision by Administrative Law Judge Jill S. Clifton.

Procedural History

1. This administrative proceeding was initiated under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.) (herein frequently the “Act”), by a complaint filed on December 6, 2006. The complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (herein frequently “APHIS” or “complainant”), is represented by Brian T. Hill, Esq., with the Marketing Division, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250.

2. The complaint alleged that Tracey Harrington, the respondent (herein frequently “Respondent Harrington” or “respondent”) willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 et seq.) (herein frequently the “regulations”).

3. A copy of the complaint was sent to Respondent Harrington at 1312 State Route 369, Chenango Forks, New York 13746, by certified mail on December 6, 2006.

The complaint (together with the Hearing Clerk’s notice letter dated December 6, 2006 and a copy of the Rules of Practice) was served on Respondent Harrington, delivered to and signed for by Steve Harrington,

on December 9, 2006. No answer to the complaint has been received. The time for filing an answer expired on December 29, 2006.

4. The complainant's motion for the issuance of a decision by reason of default is before me. The motion (together with proposed Decision and Order) was served on Respondent Harrington, delivered to and signed for by Stephen Christensen, on March 19, 2007. No objection to the motion has been received. The time for filing an objection expired on April 9, 2007.

5. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint, which are admitted by Respondent Harrington's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. See 7 C.F.R. §1.130 et seq.

Findings of Fact and Conclusions

6. The Secretary of Agriculture has jurisdiction.

7. Respondent Harrington is an individual whose address is 1312 State Route 369, Chenango Forks, New York 13746.

8. During May 10, 2004, and February 3, 2005, Respondent Harrington was licensed and operating as an exhibitor as defined in the Animal Welfare Act and the regulations.

9. When Respondent Harrington became licensed and annually thereafter, she received a copy of the Act and the regulations and standards issued thereunder and agreed in writing to comply with them.

10. On May 10, 2004, APHIS inspected Respondent Harrington's premises and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. The indoor facilities were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain the animals, in willful violation of section 3.125(a) of the regulations (9 C.F.R. § 3.125(a));

B. The facility lacked proper drainage, in willful violation of section 3.127(c) of the regulations (9 C.F.R. § 3.127(c));

C. Adequate measures were not taken to prevent molding, contamination and deterioration of food containers, in willful violation of section 3.129(b) of the regulations (9 C.F.R. § 3.129(b)); and

D. A sufficient number of adequately trained employees were not utilized to properly care for the animals, in willful violation of section 3.132 of the regulations (9 C.F.R. § 3.132).

11. On February 3, 2005, APHIS inspected respondent's premises and found that the respondent had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine, and failed to provide adequate veterinarian care for animals in distress, in willful violation of section 2.40(a) of the regulations (9 C.F.R. § 2.40(a)).

12. On February 3, 2005, APHIS inspected respondent's premises and found that the respondent had failed to maintain and provide the proper equipment necessary to euthanize her animals, in willful violation of section 2.40(b)(1) of the regulations (9 C.F.R. § 2.40(b)(1)).

13. On February 3, 2005, APHIS inspected respondent's premises and found that the respondent had failed to provide daily observations of her animals to prevent health issues, in willful violation of section 2.40(b)(3) of the regulations (9 C.F.R. § 2.40(b)(3)).

14. On February 3, 2005, APHIS inspected respondent's premises and respondent denied the inspectors access to fully inspect her records, in willful violation of section 2.126 of the regulations (9 C.F.R. § 2.126).

15. On February 3, 2005, APHIS inspected the respondent's facility and found the following willful violations of section 2.100(a) of the regulations (9 C.F.R. § 2.100(a)) and the standards specified below:

A. The facilities were not structurally sound and maintained in good repair so as to protect the animals from injury and to contain the animals, in willful violation of section 3.125(a) of the regulations (9 C.F.R. § 3.125(a));

B. The facility lacked proper drainage, in willful violation of section 3.127(c) of the regulations (9 C.F.R. § 3.127(c));

C. Adequate measures were not taken to prevent molding,

ANIMAL WELFARE ACT

contamination and deterioration of food containers, in willful violation of section 3.129(b) of the regulations (9 C.F.R. § 3.129(b)); and

D. Respondent failed to utilize a sufficient number of employees to maintain the prescribed level of husbandry practices, in willful violation of sections 3.32, 3.57 and 3.132 of the regulations (9 C.F.R. §§ 3.32, 3.57, 3.132).

16. The size of Respondent Harrington's business appears to be small to medium. The gravity of the violations appears to be medium (numerous violations, including repeated violations, during two inspections in an eight- to nine-month period). There are no allegations regarding Respondent Harrington's good faith or lack thereof. There are no allegations of a history of previous violations.

17. Under these circumstances, \$10,120.00 is a reasonable and appropriate civil penalty for the above-described violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

Order

18. The Animal Welfare Act license issued to Respondent Harrington is revoked, effective on the day after this Decision becomes final. [See paragraph 23 to determine the day on which this Decision and Order becomes final and effective.] Further, Respondent Harrington's privilege to engage in activities that require an Animal Welfare Act license is revoked, effective on the day after this Decision becomes final.

19. Respondent Harrington is permanently disqualified from becoming licensed under the Animal Welfare Act or from otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly, or through any corporate or other device or person, effective on the day after this Decision becomes final.

20. Under the Animal Welfare Act, revocations and permanent disqualifications are equally permanent.

21. Respondent Harrington, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder. Respondent Harrington, her 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 and Regulations without being licensed as required.

22. Respondent Harrington is assessed an \$10,120.00 civil penalty, which she shall pay by certified check(s) or cashier's check(s) or money order(s), made payable to the order of "Treasurer of the United States," and forwarded within sixty (60) days from the effective date of this Decision and Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Brian T. Hill, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent Harrington shall include AWA Docket No. 07-0036 on the certified check(s) or cashier's check(s) or money order(s).

Finality

23. This Decision and Order shall have the same force and effect as if entered after a full hearing and 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.

Done at Washington, D.C.

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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Volume 66

January - June 2007
Part Two (P & S)
Pages 692 - 745



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*.

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PACKERS AND STOCKYARDS ACT

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SWIFT & CO. v. ELIAS FARMS INC., STAN TURBES, AND WILLIAM JOHNSON.**Civil Nos. 05-2775, 2776, 2777.****May 9, 2007.****(Cite as: 2007 WL 1364691).****PS – Choice of law – Termination as affirmative act – Termination adjustments– USDA market reporting system – Unconscionable terms – Adhesive contract – Consumer fraud.**

Swift entered into hog purchase contract(s) with defendant hog producers. During the course of the contract, a change in the USDA market reporting system (part of contract pricing terms) required a unilateral change in the price paid to hog producers such that at the conclusion of the contract, there was over \$900,000 in their collective accounts. Swift did not affirmatively terminate the contracts but allowed them to expire. However, Swift demanded the monies in the hog producers' accounts. The court evaluated conflict of laws substantive and procedural matters as between Nebraska and Minnesota and resolved the case per the contract terms such that only upon the affirmative act of termination (not merely the lapse) of the contract did Swift have a contractual right to the monies in the hog producer's account .

United States District Court,D. Minnesota**MEMORANDUM AND ORDER**

PAUL A. MAGNUSON, United States District Court Judge.

This matter is before the Court on cross-Motions for Summary Judgment. For the reasons that follow, the Court grants in part and denies in part all Motions.

BACKGROUND**A. The Parties**

Plaintiff Swift & Co. is a Delaware corporation with its principal place of business in Colorado. Its primary business is beef and pork processing. Defendant Elias Farms, Inc. is a Minnesota corporation engaged in the

business of raising hogs in Adrian, Minnesota. Defendant Stan Turbes operates a hog production farm in Hanska, Minnesota. Defendant William Johnson operates a hog production farm in Comfrey, Minnesota.

B. The Original Hog Purchase Contracts

On January 1, 1998, Swift and Defendants entered into separate, but nearly identical, Hog Purchase Contracts (“Contracts”) under which Defendants were required to supply varying numbers of hogs to Swift.

1. Pricing Provisions

Article 6 of the Contracts, which described how the price of the hogs would be calculated, linked the price to United States Department of Agriculture (USDA) price reports. In particular, Section 6.01 explained that the price equaled the “Base Price” plus or minus an adjustment based on the percentage of meat to fat in the hog carcass. The “Base Price” was based on the “Market Price” set by the USDA’s daily market news service live weight report for hogs.¹(Corey-Edstrom Aff. Exs. 1-3 ¶ 6.01.)

Section 6.02 set the Base Price floor at \$40.00 per hundred pounds of live animal weight and the ceiling at \$45.00 per hundred pounds of live animal weight. Thus, if the Market Price for hogs was between \$40.00 and \$45.00 per hundred pounds of live animal weight, Swift would pay Defendants that Base Price. If the Market Price was lower than \$40.00, Swift paid the Base Price of \$40.00 per hundred pounds of live animal weight and debited an adjustment account “by the amount equal to the live cwt.² of Market Hogs delivered on that date multiplied by the amount by which \$40.00 exceeds the Market Price on such date.”(*Id.* ¶ 6.02.) If the Market Price exceeded \$45.00 and if there was a debit balance in the adjustment account, Swift would pay the Base Price of \$45.00 but would

¹ Section 6.01 also provided that the base price would be determined by the USDA’s live weight report “or any replacement thereof or successor thereto.”(Corey-Edstrom Aff. Exs. 1-3 § 6.01 .)

² “Cwt.” is an abbreviation for one hundred pounds of live animal weight.

credit the adjustment account “by an amount (not to exceed the then existing debit balance in the Adjustment Account) equal to the product of ... the live cwt. of Market Hogs delivered on such date, multiplied by ... the “Price Adjustment.” ”³ (*Id.*)

Finally, Section 6.02 provided: “If, at the termination of this Agreement, there is a debit balance in the Adjustment Account,” the hog producer would be required to pay Swift a cash amount equal to the debit balance. (*Id.*)

2. Termination Provisions

The Contracts were to “continue and remain in full force and effect through December 31, 2004, unless otherwise extended by the parties hereto or unless terminated in accordance with the terms hereof.” (*Id.* ¶1.01.) Article 9 of the Contracts provided that either party could terminate the Contracts by providing written notice to the other party if the other party defaulted. (*Id.* ¶¶ 9.03-.04.) A default occurred when: (1) a party failed to perform its contractual obligation and failed to cure the default within ninety days following receipt of written notice of the default from the other party; (2) a party was adjudged bankrupt; (3) a party made an assignment for the benefit of its creditors or ceased to carry on business; or (4) a party appointed a receiver or trustee for its business or affairs. (*Id.* ¶¶ 9.01-.02.)

3. Choice of Law Provision

Section 16.03 of the Contracts provided:

Seller and Buyer shall use their best efforts to settle any dispute, claim, question or disagreement arising out of or relating to this Contract or any alleged breach of this Contract. This Agreement and the legal relations among the parties hereto shall be governed by and construed in accordance with the laws of the State of Nebraska applicable to contracts

³The Price Adjustment varied depending on the Market Price. If the Market Price fell between \$45.00 and \$47.99, the Price Adjustment equaled \$0.50. If the Market Price equaled \$48.00 or greater, the Price Adjustment equaled \$1.00.

made and performed in Nebraska. Any and all disputes arising between the parties in respect to this Agreement shall be brought in the state or federal courts located in Nebraska. The parties submit to the jurisdiction of, and do hereby agree to voluntarily appear in such court.

(*Id.* at ¶16.03.)

C. Price Modifications to the Contracts

During the 1998-2004 term of the Contracts, Swift changed how the Base Price would be calculated. Defendants contend that the changes resulted in Swift paying Defendants less than what the original Contracts required.

1. 1999 Modification to the Base Price Calculation

On March 1, 1999, the USDA changed its price reporting system. The new report system changed from live weight price reporting to carcass weight price reporting. Because the USDA's live weight price report was no longer available, Swift determined that it needed to modify the pricing provisions of the Contracts.

On February 27, 1999, Swift notified Defendants that it was modifying Article 6 of the Contracts to change the method by which it calculated Market Price. (Corey-Edstrom Aff. Exs. 12-14.) The modification linked the Base Price to the USDA daily market report for the weighted average carcass price and established a price range of \$54.05 to \$60.81. Thus, if the Market Price was less than \$54.05 carcass weight, Swift would pay a Base Price of \$54.05 per hog but would debit the adjustment account by an amount equal to the carcass weight of the hogs multiplied by the amount by which \$54.05 exceeded the Market Price. If the Market Price exceeded \$60.81 and there existed a debit balance in the adjustment account, Swift would decrease the Base Price and credit the adjustment account "by an amount (not to exceed the then existing debit balance in the Adjustment Account) equal to the product of (i) the carcass cwt. of Market Hogs

delivered on such date, multiplied by (ii) the “Price Adjustment.”⁴ The letters explaining the modifications reiterated that if a debit balance existed in the adjustment account at the termination of the Contracts, then the hog producer was required to pay Swift a cash amount equal to the debit balance.

2. 2000 Modifications

Swift made two more changes to the pricing provisions in 2000. In January 2000, Swift notified Defendants that it would temporarily add \$0.40 per hundred pounds of carcass weight to the Market Price effective January 24, 2000. (Corey-Edstrom Aff. Exs. 16-18.) In July 2000, Swift proposed that Market Price would be calculated as the average of:

(a) Weighted average carcass price for the Base Market Hog, 49-51% Lean ..., reported by the USDA Market News Service at mid-season the day of delivery (the “Weighted Average Price”), and

(b) The highest reported price in the range of prices comprising the Weighted Average Price.

(Corey-Edstrom Aff. Exs. 20-22.) Each Defendant agreed in writing to the July 2000 modification.

Swift has submitted an economic analysis report completed by Marvin L. Hayenga. Hayenga opined that Swift “made reasonable efforts to take changes in government reporting and industry practices into account, even though all of those had not been anticipated and built into the original contract.”(Corey-Edstrom Aff. Ex. 33 at 9.) He further concluded that the 1999 modification, which converted live weight prices to carcass weight prices, resulted in prices that were at least equal to or higher than the prices for Defendants than would have been the case with the live weight prices defined by the original Contracts. (*Id.* at 9-10.)Finally, he concluded that

⁴The Price Adjustment varied depending on the Market Price. If the Market Price fell between \$60.81 and \$64.85, the Price Adjustment equaled \$0.68. If the Market Price equaled \$64.86 or greater, the Price Adjustment equaled \$1.35.

the modifications in 2000 likely resulted in higher prices to Defendants than what the original Contracts called for. (*Id.*) He summarized:

In my professional opinion, despite the impossibility of a clear statistical comparison of the old and new pricing systems, *it is highly like the Swift changes in the pricing system (required due to the loss of the USDA report specified in the contract) led to higher prices, and not to any economic loss, to Defendants over the life of these Contracts.*

(*Id.* at 10 (emphasis in original).)

D. Demand for Payment of Adjustment Account Balances

Each Contract ended on December 31, 2004. On January 3, 2005, Swift demanded that each Defendant pay the balance in their adjustment accounts. The adjustment account for Defendant Elias Farms equaled \$265,489.18. The adjustment account for Defendant Turbes equaled \$434,727.00. The adjustment account for Defendant Johnson equaled \$244,187.00. Defendants disputed the balances and refused to pay, causing Swift to commence these actions.

DISCUSSION

Swift asserts three claims against each Defendant: breach of contract, unjust enrichment, and account stated. Defendants deny liability and contend that the modifications that Swift made to the Contracts resulted in payments lower than required by the initial Contracts. They counterclaim for breach of contract, violation of the Minnesota Prevention of Consumer Fraud Act, and unjust enrichment.

Defendants move for summary judgment on all of Swift's claims, as well as their breach of contract and fraud counterclaims. Swift seeks summary judgment on its breach of contract claims and on all of Defendants' counterclaims.

A. Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir.1996). However, “summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enter. Bank*, 92 F.3d at 747. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

B. Swift's Breach of Contract Claims

Swift alleges that Defendants breached the Contracts by failing to pay the adjustment account balances. The parties have filed cross-motions on Swift's breach of contract claims. Defendants advance three arguments in support of dismissing the claims. First, they argue that the Contracts are void under Minnesota law because they do not contain mediation or arbitration provisions. Second, they argue that the Contracts are contracts of adhesion and are unconscionable. Third, they argue that Swift's breach of contract claims fail because Swift failed to terminate the Contracts before the Contracts expired.

1. *Lack of Arbitration or Mediation Provisions in the Contracts*

Defendants argue that the Contracts are void because they fail to contain mediation or arbitration provisions, as required by Minnesota Statute ¶ 17.91, which provides:

A contract for an agricultural commodity between a contractor and a producer must contain language providing for resolution of contract disputes by either mediation or arbitration. If there is a contract dispute, either may make a written request to the commissioner for mediation or arbitration services as specified in the contract, to facilitate resolution of the dispute.

Nebraska law has no such requirement. Thus, the first issue relating to this defense is whether Nebraska or Minnesota law applies. If the Court determines that Minnesota law applies, the second issue is whether the Contracts are void under Minnesota law because they do not contain the provisions.

a. *Choice of Law*

The parties dispute whether Nebraska or Minnesota substantive law applies. Although Swift ignored part of Section 16.03 that required it to bring its actions in a Nebraska court, it now relies on the part of Section 16.03 that requires all contractual disputes to be “governed by and construed in accordance with the laws of the State of Nebraska applicable to contracts made and performed in Nebraska.”(Corey-Edstrom Aff. Exs. 1-3 § 16.03.)

Defendants argue that application of Nebraska law would be unconstitutional because no party has a connection to Nebraska and because all events relating to the Contracts occurred in Minnesota. They also argue that Minnesota Statute ¶ 336.1-501 requires that there be a “reasonable relation” between the transaction and state before the choice-of-law provisions in a contract will be enforced.

As a federal court sitting in diversity, the Court must apply Minnesota law, including Minnesota's choice-of-law rules, to the breach of contract claims. *Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 595-96 (8th Cir.2007). Minnesota courts generally recognize and apply choice-of-law clauses in contracts requiring the application of a foreign state's law. *See id.* at 596 (citing *Milliken & Co. v. Eagle Packaging Co.*,

295 N.W.2d 377, 380 n. 1 (Minn.1980)). The choice-of-law provisions in the Contracts require the application of Nebraska law to disputes arising under the Contracts.

However, even when a general choice-of-law provision exists in a contract, Minnesota courts apply Minnesota law regarding matters of procedure and remedies. *Id.* (citing *U.S. Leasing v. Biba Info. Processing Servs., Inc.*, 436 N.W.2d 823, 825-26 (Minn.Ct.App.1989)); *see also Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 5 (Minn.Ct.App.2003) (“Traditionally when a conflict-of-law issue arises, the preliminary step is to decide whether the question is substantive or procedural.”). Indeed, Minnesota courts generally apply their own state's procedure and remedies in all cases involving conflicts of laws, whether the parties have a choice-of-law agreement or not. *Schwan's Sales Enters., Inc.*, 476 F.3d at 596 (citing *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn.1983)); *see also Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir.1995) (the first question is whether the law at issue is procedural or substantive; if the law is procedural, the court applies the law of the forum state); *Zaretsky v. Molecular Biosys., Inc.*, 464 N.W.2d 546, 548 (Minn.Ct.App.1990) (“In Minnesota, the well-settled rule is that matters of procedure and remedies are governed by the law of the forum.”). If the parties wish for the application of another state's law concerning procedural and remedial matters, they must expressly state it in their agreement. *Schwan's Sales Enters., Inc.*, 476 F.3d at 596 (citing *U.S. Leasing*, 436 N.W.2d at 826).

Thus, the issue is whether ¶ 17.91 is procedural or substantive. Minnesota law governs this determination. *Nesladek*, 46 F.3d at 736; *Zaretsky*, 464 N.W.2d at 548. The Minnesota Supreme Court has not addressed whether ¶ 17.91 is procedural or substantive. However, it has defined substantive law as “that part of law which creates, defines, and regulates rights,” as opposed to procedural or remedial law, “which prescribes method of enforcing the rights or obtaining redress for their invasion.” *Meagher v. Kavli*, 88 N.W.2d 871, 879-80 (Minn.1958).

Section 17.91 requires parties to resolve their contract disputes by either mediation or arbitration. As such, it defines how the parties will enforce their substantive rights under the contract. The law does not determine the

outcome of a contract dispute-it defines where the dispute will be resolved. Thus, the Court finds ¶ 17.91 applies to the case at hand.

b. *Whether the Contracts Are Void*

Because the Court finds that ¶ 17.91 applies, the Court must determine whether the Contracts are void because they do not contain mediation or arbitration provisions. Entering a contract in violation of a statute does not void the contract per se. *Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 92-93 (Minn.2006). Rather, the Court must examine the Contracts to determine whether the illegality has “so tainted the transaction” that enforcement of the Contracts would violate public policy. *Id.* Generally, “a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.”*Id.*

Categorically voiding the Contracts would not serve public policy. There is no indication that the legislature intended that a violation of 17.91 should void a contract. Moreover, allowing a party to avoid their contractual obligations does little to promote the efficiency of litigation or the interests of justice. Finally, the record does not demonstrate that the parties knowingly and intentionally failed to abide by Minnesota law or that illegality permeated the transaction. Thus, the violation of ¶ 17.91 does not void the Contracts. Defendants' argument on this point fails.

2. *Whether the Contracts Are Unconscionable or Contracts of Adhesion*

Defendants argue that the Contracts are void because they are contracts of adhesion and unconscionable. A contract of adhesion is one “drafted unilaterally by the business enterprise and forced upon an unwilling and often unknowing public for services that cannot readily be obtained elsewhere.”*Vierkant by Johnson v. AMCO Ins. Co.*, 543 N.W.2d 117, 120 (Minn.Ct.App.1996) (quoting *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 924 (Minn.1982)). A contract is unconscionable if it is “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”*Id.* (citations omitted).

The record does not support Defendants' contentions. Swift provided Defendants a copy of the Contracts several days to weeks before Defendants signed the Contracts. Indeed, William Elias, the majority shareholder of Defendant Elias Farms, had an attorney review his Contract. Moreover, Defendants were longtime hog producers who had specialized knowledge of the industry-including knowledge of the hog markets and Swift's competitors. Defendants had an opportunity to request changes in the Contracts, turn to one of Swift's competitors, or rely on the market for their prices.

Notably, a similar unfairness and adhesion argument was rejected in *Schoenrock v. John Morrell & Co., Inc.*, Nos. 03-848, 03-849, 03-853, 03-854, 2003 WL 21639161, at (D.Minn.2003) (Tunheim, J.). In that case, the hog producers argued that the contract was presented as "take it or leave it" and that the unsophisticated hog producers could not negotiate certain provisions. The court emphasized that there was no evidence that the hog producers attempted to negotiate the provisions or of bad faith. The same is true here. Defendants' argument on this point fails.

3. *Whether Defendants Breached the Contracts*

The crux of Swift's breach of contract claim involves interpretation of Section 6.02 of the Contracts, which states: "If, *at the termination of this Agreement*, there is a debit balance remaining in the Adjustment Account, Seller shall pay to Buyer a cash amount equal to such debit balance."(Corey-Edstrom Aff. Exs. 1-3 ¶ 6.02 (emphasis added).) Swift argues that Section 6.02 requires Defendants to pay Swift the balance due under the adjustment accounts at termination of the Contracts-whether that termination was due to a lapse in time or an affirmative act by a party. Defendants argue that termination could only occur by the affirmative act of a party-and not by the mere lapse in time.

a. *Choice of Law*

As an initial matter, a choice-of-law determination is made on an issue-by-issue basis. *Zaretsky*, 464 N.W.2d at 548. Thus, although

Minnesota law applies to the issue of whether the Contracts were void, it does not follow that Minnesota law will necessarily apply to the substantive breach of contract claim. *Id.* To determine whether a choice of law is necessary, the Court must first determine whether there is an actual conflict between the substantive law of the states. *Jepson v. Gen. Cas. Co.*, 513 N.W.2d 467, 469 (Minn.1994). Where choosing one state's law is "outcome determinative," an actual conflict of law exists. *Id.*

Minnesota and Nebraska courts apply the same general rules of contract interpretation. *Cf., e.g., Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn.1974) ("Where the language used in a contract is plain and unambiguous, there is no opportunity for interpretation of construction"), *with Gast v. Peters*, 671 N.W.2d 758, 763 (Neb.2003) ("When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as to the ordinary or reasonable person would understand them."). Because no conflict of law exists, there is no choice-of-law issue and the Court will apply Minnesota law to Swift's breach of contract claims. *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 356 F.3d 850, 854 (8th Cir.2004) (citing *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521-22 (Minn.1997)).

b. *Contract Interpretation*

The primary goal of contract interpretation is to determine and enforce the intent of the parties. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn.2003). Where there is a written agreement, the intent of the parties is determined from the plain language of the agreement itself. *Metro. Sports Facilities Comm'n v. Gen. Mills*, 470 N.W.2d 118, 123 (Minn.1991). The Court must construe the contract as a whole and give every part effect. *Country Club Oil Co. v. Lee*, 58 N.W.2d 247, 249 (Minn.1953) ("It is an elementary principle of law that a contract must be construed as a whole. The intention of the parties must be gathered from the entire instrument and not from isolated clauses. As far as is reasonably possible it is to be construed so as to harmonize all of its parts.").

Whether a contract is ambiguous is a question of law. *Blackburn, Nickels, & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 643 (Minn.Ct.App.1985). An ambiguous contract is one that, based solely on the plain language, is reasonably susceptible of more than one construction. *Hous. & Redev. Auth. of Chisholm v. Norman*, 696 N.W.2d 329, 337 (Minn.2005). If the contract language is ambiguous, the interpretation of the contract becomes a question of fact and extrinsic evidence may be considered to determine the intent of the parties.*Id.*; *Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn.1990).

The Court recognizes that the ordinary definition of “termination” includes an ending by an affirmative act as well as by a lapse in time. For example, Black's Law Dictionary defines “termination” as “(1) the act of ending something; extinguishment ...; (2) the end of something in time or existence; conclusion or discontinuance.” *Black's Law Dictionary* 1511 (8th ed.2006); *see also Webster's Third New Int'l Dictionary* 2359 (1986) (defining “termination” as “the act of determining” or “end in time or existence”).

However, the plain and clear language of the Contracts, read as a whole and providing full effect to all provisions, limits “termination” to an affirmative act by a party, precipitated by the other party's default. Section 1.01 states that the Contracts “shall continue and remain in full force and effect through December 31, 2004, unless otherwise extended by the parties hereto or unless *terminated in accordance with the terms hereof.*” Sections 9.03 and 9.04 define the “termination rights” of the parties as the right to terminate by providing written notice to the other party in the event of a default. These sections unequivocally limit when and how termination could occur. It is undisputed that Swift did not exercise its termination rights under the Contracts. Rather, the Contracts expired on December 31, 2004. Thus, Section 6 .02, which applies only at the “termination” of the Contracts, does not apply.

Moreover, Swift's reliance on *Carvel Corp. v. Eisenberg*, 692 F.Supp. 182 (S.D.N.Y.1998) and *Illinois Bell Telephone Co. v. Donnelley Corp.*, 595 F.Supp. 1192 (N.D.Ill.1984) is unavailing. *Carvel* involved a license

agreement that contained a non-compete provision prohibiting the licensees from engaging in certain business activities “in the event this License is terminated for any reason.” 692 F.Supp. at 184. The agreement also stated that the non-compete provision survived “termination, abandonment, or other cancellation” of the agreement. *Id.* After the agreement expired, the licensees continued to operate the store. The licensor sued to enjoin the licensees, arguing that the agreement had terminated by expiration and thus the licensees were restricted from operating the store. The licensees argued that they were not restricted because the agreement had only expired and had not been terminated by an action of a party. *Id.*

The court concluded that the parties intended the non-compete provision to apply in the event of termination by expiration as well as by any other form of termination. *Id.* The court further emphasized that the purpose of the provision was to protect the licensor's trademark and trade secrets once the license relationship had been severed. *Id.* at 185. Thus, there was no reason to conclude that the parties intended to provide the licensor with less protection from competition in the event of termination by expiration than in the event of some earlier termination of the license agreement. *Id.*

Carvel is unpersuasive for two reasons. First, *Carvel* is factually distinguishable, since the agreement in that case contained a clause that required the licensees to discontinue use of the licensor's name and trademark upon “expiration or any earlier termination” of the agreement. *Id.* at 185. The *Carvel* court relied on this provision to infer that the parties understood “expiration” to be a form of “termination.” *Id.* There is no such provision in the Contracts at issue. Second, Defendants aver that payment of the adjustment accounts was meant to be a penalty if Defendants defaulted and Swift terminated the Contracts before the contract term expired. Thus, there is a basis for determining that the parties understood that the adjustment account balances would disappear at the expiration of the Contracts. *Carvel* provides little help to Swift.

Illinois Bell Telephone provides even less assistance. In that case, the court found that the plain and ordinary meaning of the phrase “upon termination” “is at termination, or at the end, or when the contract

ends.” 595 F.Supp. at 1197. However, the contract in *Illinois Bell Telephone* required the defendant to *assign all un-expired contracts to the plaintiff if termination occurred*. *Id.* at 1196; *see also id.* at 1199-1200 (requiring the defendant to turn over “all unexpired” contracts on the termination date). Moreover, the specific performance the plaintiff sought included *immediate assignment of all unexpired contracts to the plaintiff*. *Id.* at 1195. This indicates that the parties contemplated a difference between termination and expiration.

Moreover, the *Illinois Bell Telephone* court merely determined that “upon termination” meant when the contract ends and not when a party gives notice of its intent to terminate. *Id.* at 1197. Indeed, the court expressly distinguished between the “natural expiration of the contract” and a “termination date.” *Id.* at 1198; *see also id.* (noting that the plaintiff used “the device of the notice to terminate a little over a month before expiration”). Thus, *Illinois Bell Telephone* actually supports the distinction between contract termination and contract expiration.⁵

The Contracts, interpreted as a whole, unequivocally limited “termination” to affirmative acts by one party, precipitated by the other party's default. Section 6.02 only applied after the Contracts were terminated. It is undisputed that no party exercised its termination rights under the Contracts. Consequently, Section 6.02 does not apply. The Court grants Defendants summary judgment on Swift's breach of contract claims.

C. Swift's Unjust Enrichment Claims

Swift asserts an unjust enrichment claim against each Defendant. Defendants argue that the claims fail as a matter of law because the rights of

⁵In addition, at least one Minnesota court has distinguished between contract interpretation and contract expiration. *See Upper Midwest Sales Co. v. EcoLab, Inc.*, 577 N.W.2d 236, 243 (Minn.Ct.App.1998) (rejecting a Minnesota Franchise Act claim because the statute referred to “termination during their term of the contract, ... which is not the situation in this case [because] the agreements expired by their own terms.”); *see also In re Morgan*, 181 B.R. 579, 583-84 (N.D.Ala.1994) (explaining the difference between “expiration” and “termination” of a contract). These decisions highlight the distinction between contract expiration and contract termination.

the parties are governed by the Contracts. “Equitable relief cannot be granted where the rights of the parties are governed by a valid contract.” *In re Air Transp. Excise Tax Litig.*, 37 F.Supp.2d 1133, 1143 (D.Minn.1999) (citing *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn.1981)). Thus, where the rights of the parties are governed by a valid contract, a claim for unjust enrichment must fail. *N.W. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1392 n. 4 (8th Cir.1997) (citing *Sharp v. Laubersheimer*, 347 N.W. 2d 268, 271 (Minn.1984)); *Colangelo v. Norwest Mortg., Inc.*, 598 N.W.2d 14, 19 (Minn.Ct.App.1999). Because unjust enrichment claims concern the same subject matter raised in the breach of contract claims, the Court grants summary judgment to Defendants on Swift's unjust enrichment claims.

D. Swift's Account Stated Claims

Defendants move for summary judgment on Swift's account stated claims.”An account stated is a manifestation of assent by a debtor and creditor to a stated sum as an accurate computation of an amount due the creditor.” *Am. Druggists Ins. v. Thompson Lumber Co.*, 349 N.W.2d 569, 573 (Minn.Ct.App.1984).”A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.” *Id.* (citing Restatement (2d) Contracts § 282(1) (1981); *Meagher v. Kavli*, 88 N.W.2d 871, 879 (1958)). Undisputed evidence shows that Defendants seasonably disputed the amount they owed under the Contracts. Thus, the Court grants Defendants summary judgment on the account stated claims.

E. Defendants' Breach of Contract Claims

Defendants assert that Swift breached the Contracts by unilaterally modifying the pricing formula from live weight to carcass weight. Both parties move for summary judgment on the breach of contract claims. Swift submits that the changes were made pursuant to the provision that defined Market Price as “the daily bulk top plant-delivered price per live cwt as reported by the U.S.D.A. Market News Service ... or any replacement thereof or successor thereto.”(Corey-Edstrom Aff. Exs. 1-3 § 6.01.) Because

the USDA live weight price report was not available after March 1, 1999, Swift had to adjust the price paid under the Contracts.

Swift presents expert testimony that Swift made reasonable efforts to address the change in the USDA daily price report from a live weight report to a carcass weight report, and that the changes resulted in prices that were at least equal to or higher than the prices under the original live weight contract prices. Defendants do not present contrary expert testimony. Instead, they argue that the expert report is inconclusive because the expert could not opine with exact certainty due to the lack of evidence in the hog markets and USDA reports. Neither Federal Rule of Evidence 702 nor *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny require that an expert opinion “resolve an ultimate issue of fact to a scientific absolute in order to be admissible.” *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir.2001) (citations omitted). Rather, the relevant inquiry is whether the evidence is sufficiently reliable and relevant to assist the jury's determination of a disputed issue. *Id.* (citations omitted). Defendants' challenges go to the weight of the expert's testimony-not the admissibility. *Clark v. Hendrick*, 150 F.3d 912, 915 (8th Cir.1998) (courts should resolve doubts regarding the usefulness of an expert's testimony in favor of admissibility); *see also Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir.1991) (noting that Rule 702 clearly “is one of admissibility rather than exclusion”). Thus, their argument on this point fails.⁶

⁶ Defendants also contend that Swift admitted that the Contracts could be modified only by a written agreement and that Swift should have paid an amount to Defendants. They base their contention on Swift's failure to respond timely to their requests for admissions and therefore ask the Court to deem the requests admitted. Generally, a matter is admitted unless the party responding to the request for admissions serves a written answer or objection within thirty days. Fed.R.Civ.P. 36(a). However, the Court “may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.” Fed.R.Civ.P. 36(b). “It does not further the interests of justice to automatically determine all the issues in a lawsuit and enter summary judgment against a party because a deadline is missed.” *American Petro, Inc. v. Shurtleff*, 159 F.R.D. 35, 36-37 (D.Minn.1994) (Erickson, Chief Mag. J.) (citation omitted). Moreover, Defendants have failed to point to any way in which they were prejudiced by the untimely responses. Thus, the untimely responses do not warrant the draconian measure that Defendants suggest.

The Contracts linked the prices to the USDA Market News Service “or any replacement thereof or successor thereto.” The record shows that Swift modified the price structure only after the USDA ceased issuing the live weight reports on which the parties initially relied. Although the conversion from live weight prices to carcass weight prices was not precise, Defendants present no evidence that the modifications were unreasonable. Moreover, Swift continued to modified the price structure to benefit Defendants, and undisputed expert testimony states that those modifications resulted in higher prices to Defendants over the term of the Contracts. Accordingly, the Court grants Swift summary judgment on Defendants' breach of contract claims.

F. Defendants' Minnesota Prevention of Consumer Fraud Act Claims

Defendants argue that Swift violated the Minnesota Prevention of Consumer Fraud Act, Minnesota Statute § 325F.69, in two ways. First, when Swift notified Defendants that it was unilaterally changing the pricing scheme under the Contracts, Swift quoted the calculation for pricing as “the daily plant-delivered price per live cwt.” The original Contracts defined Market Price as based on the “daily bulk top plant-delivered price per live cwt.” Defendants surmise that Swift omitted the “top” term because it wished to mislead Defendants into believing their Contract prices were lower so that the new weighted average price would seem similar to the original contract price. Second, Defendants argue that Swift hid from Defendants the fact that it offered a different type of contract to other hog producers—a contract that did not carry an adjustment account.

Defendants do not have standing to bring their § 325F.69 claims. To bring a cause of action under § 325F.69, Defendants must satisfy the requirements of the Private Attorney General Statute, Minnesota Statute § 8.31. *Davis v. U.S. Bancorp*, 383 F.3d 761, 767-68 (8th Cir.2004). Specifically, Defendants must show that their claims benefit the public. *Id.* at 768.”Litigation over an alleged misrepresentation that was made only to one person does not advance state interests and enforcement has no public benefit.”*Id.* (citations and internal quotations omitted). The Contracts were

executed during one-on-one business transactions. Moreover, Defendants seek compensatory damages-remedies for their exclusive benefit. Thus, the Court grants Swift summary judgment on the § 325F .69 claims.

G. Defendants' Unjust Enrichment Claims

Defendants assert unjust enrichment counterclaims against Swift. However, like the unjust enrichment claims by Swift, the counterclaims are based on rights governed by the Contracts. Thus, the Court grants summary judgment to Swift on the unjust enrichment counterclaims. *N.W. Airlines, Inc.*, 111 F.3d at 1392 n. 4 (citing *Sharp*, 347 N.W.2d at 271); *Colangelo*, 598 N.W.2d at 19.

CONCLUSION

For the foregoing reasons, and based upon all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Summary Judgment (Docket No. 32 in Civil No. 05-2775) is GRANTED in part and DENIED in part;
2. Defendant Elias Farm's Motion for Summary Judgment (Docket No. 27 in Civil No. 05-2775) is GRANTED in part and DENIED in part;
3. Defendant Stan Turbes's Motion for Summary Judgment (Docket No. 26 in Civil No. 05-2776) is GRANTED in part and DENIED in part;
4. Defendant William H. Johnson's Motion for Summary Judgment (Docket No. 26 in Civil No. 05-2777) is GRANTED in part and DENIED in part; and
5. All claims and counterclaims asserted in these cases are DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

MICHAEL CLAUDE EDWARDS,
d/b/a MICHAEL CLAUDE EDWARDS LIVESTOCK
66 Agric. Dec. 711

711

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: MICHAEL CLAUDE EDWARDS, D/B/A MICHAEL CLAUDE EDWARDS LIVESTOCK.

P. & S. DOCKET NO. D-06-0020.

Decision and Order.

Filed May 3, 2007.

PS – Custodial account, non-segregated – Prompt payment, failure to make – Records, failed to keep accurate.

Andrew Y. Stanton and Leah C. Battaglioli for GIPSA.
Respondent Pro se.

Decision and Order by Administrative Law Judge Peter M. Davenport .

DECISION AND ORDER

This is the second action brought by the Grain Inspection Packers and Stockyards Administration (GIPSA) against the Respondent for violations of the provisions of the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. § 181, *et seq.*) hereinafter referred to as the “Act” and the Regulations issued pursuant to the Act.¹ The Respondent filed his Answer on July 3, 2006, claiming that he purchased the livestock for another individual in the livestock business, Bert Smith, IV², and that Smith was liable for the purchase price of the livestock.

A hearing was held in Greensboro, North Carolina on February 21, 2007.³ The Complainant was represented by Andrew Y. Stanton, Esquire,

¹ A consent decision was previously entered against Michael C. Edwards and others in *In re Narrows Livestock Auction Market, Inc.* P & S Docket No. 6880 (March 18, 1988). CX 3 at 15-16

² Bert Smith IV has a prior case under this Act. See 61 Agric. Dec. 794 (2002).

³ At the hearing, four witnesses testified for the Complainant and Exhibits CX 1-42 were

and Leah C. Battaglioli, Esquire, both of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The Respondent who appeared after the hearing had commenced was not represented by counsel.

The Complaint alleged that Respondent violated the Act as follows:

1. In three separate transactions occurring on September 20, 2003, September 26, 2003, and September 29, 2003, respectively, the Respondent purchased livestock from two sellers, for a total of \$1,155,967.16, and failed to pay the full amount of the purchase price for the livestock within the time period required by the Act, with the total amount remaining unpaid of \$550,325.75,⁴ in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

2. On July 8, 2004, Respondent filed an Annual Report of Dealer or Market Agency Buying on Commission (hereinafter “Annual Report”) covering the calendar year 2003 that did not accurately reflect the total cost of livestock that Respondent purchased as a dealer during 2003 in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)) and definitions of “dealer” at 7 U.S.C. § 201(d).

3. The Respondent failed to keep such records as fully and correctly disclosed all transactions involved in his business as required by section 401 of the Act (7 U.S.C. § 221) in that Respondent failed to maintain a separate custodial account in a bank and failed to retain copies of the third-party checks that he used to pay for his livestock purchases in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)).

The Respondent had previously entered into a Consent Decision with the Secretary⁵ agreeing to cease and desist from failing to make timely payment for livestock purchases and had been sent a warning letter from Complainant concerning his failure to keep records that fully and correctly disclosed all transactions involved in his business. As a result of Respondent’s violations, the Complaint requested that an order be issued

admitted into evidence. The Respondent testified, but did not submit any documentary evidence at the hearing.

⁴ To conform to the proof, this amount was changed at the hearing to at least \$520,000.00.

⁵ See 47 Agric. Dec. 650 (1988).

requiring Respondent to cease and desist from the violations of the Act found to exist and suspending Respondent as a registrant⁶ under the Act.

The Complainant called Karen Collins, a Senior Auditor with the Packers and Stockyards Program, United States Department of Agriculture in Atlanta, Georgia as the first witness. Her testimony established that in October of 2003, based upon information received by the Program that the Respondent had failed to pay for livestock purchases, she conducted an investigation. Tr. 20-26. After assembling documents from the Packers and Stockyards Program Access Database,⁷ Ms. Collins attempted to contact the Respondent, both by mail and telephone, first reaching his ex-wife and eventually the Respondent. A meeting with the Respondent was arranged in Absher, North Carolina, where Ms. Collins hand delivered a second appointment letter which set forth a list of records that she needed for the investigation. CX 41, Tr. 42-45. The Respondent advised her that he only had records from May of 2003 to November of 2003, that he no longer maintained a checking account due to problems with his ex-wife and that many of the requested records had been burned by his ex-wife. Tr. 45. The records that were produced by the Respondent were copied and returned to him and an affidavit was taken from him. CX 8, 10-15, 19-23, 25, 29, 32, 34, 38, Tr. 46-55.

Ms. Collins then proceeded to contact the livestock markets where the Respondent had made purchases,⁸ obtained their records of the Respondent's transactions⁹ and prepared a summary of those transactions.¹⁰

The Complainant next introduced the testimony of Rick Barrett, the manager of Abingdon Stockyard and Tri-State Livestock Market who testified concerning his market's transactions with the Respondent and indicated that Abingdon Stockyard had eventually been paid for the

⁶ A dealer must be a registrant under the Act . See 7 U.S.C. § 203.

⁷ CX 1-3

⁸ CX 6 and CX 7.

⁹ CX 5-7, 11, 16-18, 24, 26-28, 30-31, 33, 35-37, 38-40.

¹⁰ CX 9

livestock purchased by the Respondent, but that Tri-State Livestock Market was still owed in excess of \$520,000.00. Tr. 111-12. He went on to testify that as a result of the Respondent's failure to pay for his purchases in a timely manner, the markets had to change banks and borrow \$1.2 million to cover amounts paid to consigners. Tr. 112-13.

Lloyd Franklin Blair was also called and testified that he used to run the Abingdon market, that he had known the Respondent for 25 or 30 years and that as a disinterested party he had witnessed the Respondent's re-signature on a document on December 11, 2003. Tr. 118-122; CX 8.

The Respondent also testified, reiterating his position that he didn't owe money for the livestock purchases he made, but rather Bert Smith IV was responsible "because he took all of the cattle and all of the money and I didn't get nothing." Tr. 125. He also admitted filing a false Annual Report of Dealer, explaining that he didn't think he had to include the purchases he made for Smith "because I though[t] you had to get a commission to be a dealer." Tr. 127-28, 140.

On the basis of the testimony at the hearing, the documentary evidence received into evidence and the entire record, the allegations contained in the Complaint are amply supported and the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Respondent, Michael Claude Edwards d/b/a Michael Claude Edwards Livestock (hereinafter "Respondent"), is an individual whose address is P.O. Box 783, Jefferson, North Carolina 28640-0783. (Compl. ¶ I(a); Answer ¶ I; CX 1 at 1.) Respondent has been working in the livestock industry for 30 years. CX 2 at 11.

2. Respondent is, and at all times material herein was, engaged in the business of a dealer, buying and selling livestock for his own account and/or the account of others. Compl. ¶ I(b)(1); CX 1 at 1; CX 8 at 2.

3. Respondent is registered with the Secretary of Agriculture as a dealer, buying and selling livestock for his own account. Compl. ¶ I(b)(2); CX 1 at 1; CX 8 at 2. At all times material herein, Respondent had a trust fund agreement, in lieu of a bond, in the amount of \$10,000.00. Tr. 29-30.

4. On March 18, 1988, a Consent Decision with Respect to Michael C. Edwards was issued in an administrative disciplinary proceeding which

Complainant had filed against a livestock market and several individuals, including Respondent. *In re: Narrows Livestock Auction Market, Inc.* (P. & S. Docket No. 6880); Compl. ¶ II(a); CX 3 at 14-16. Respondent signed the Consent Decision and agreed to cease and desist from, among other things, failing to pay, when due, the full purchase price of livestock. Compl. ¶ II(a); Answer ¶ II(a); CX 3 at 15-16. Respondent was also suspended as a registrant for three months and assessed a civil penalty in the amount of \$5,000.00. Comp. ¶ II(a); Answer ¶ II(a); CX 3 at 16.

5. In a certified letter dated January 26, 2000, served upon Respondent on February 12, 2000, John D. Barthel, Assistant Regional Supervisor of Complainant's Atlanta, Georgia regional office, informed Respondent that a recent investigation of Respondent's records disclosed that Respondent was failing to keep records that fully and correctly disclosed all transactions involved in Respondent's livestock business, in violation of section 401 of the Act (7 U.S.C. § 221). Compl. ¶ II(b); CX 3 at 1-2. Respondent was advised in the certified letter that if he continued to fail to keep and maintain adequate records, he could be subject to formal disciplinary action. Compl. ¶ II(b); CX 3 at 1.

6. In August or early September 2003, Rick Barrett, president, manager, and part-owner of Abingdon Stockyard Exchange, Inc. (hereinafter "Abingdon") and Tri-State Livestock Market (hereinafter "Tri-State"), both located in Abingdon, Virginia (Tr. 105-106), had a meeting in Abingdon's barn with Respondent and Bert Smith IV. Tr. 107. Respondent had asked Mr. Barrett for two separate bid numbers for his purchases; the first bid number would be for Respondent's own livestock purchases and the second bid number would be for livestock purchases that Respondent made for Mr. Smith. Tr. 107-08. Mr. Barrett agreed to the arrangement because Respondent said "[h]e was going to be sure that we got paid for our cattle." Tr. 109. Mr. Barrett would not have agreed to the arrangement with Mr. Smith alone, because Mr. Smith "beat a lot a people out of money in the cattle business. Got a bad reputation." Tr. 109. At the time of the meeting, Respondent had a clearing arrangement with Mr. Smith, which meant that Respondent agreed to be responsible for Mr. Smith's purchases of livestock. Tr. 135-36.

7. In August 2002, by order of the Secretary, Mr. Smith was suspended

as a registrant for a period of 10 years for failing to make payment for livestock purchases. Tr. 148-49; CX 42.

8. In October 2003, Ms. Karen D. Collins, senior auditor with the Atlanta, Georgia regional office of the Packers and Stockyards Program, was assigned by her supervisor, Mr. Robert Schmidt, to investigate whether Respondent had failed to make timely payment for livestock purchases. Tr. 20-21, 25-26.

9. Ms. Collins prepared an appointment letter and mailed it to Respondent. Tr. 39. The appointment letter requested that Respondent make bank records, invoices, and all other records related to Respondent's livestock business available to Ms. Collins. Tr. 42-43; CX 41 at 1.

10a. On or about November 3, 2003, Ms. Collins traveled to Absher, North Carolina, to the place designated by Respondent as the location where his business records were kept. Tr. 43-44. Upon arrival, Ms. Collins hand-delivered the appointment letter to Respondent. Tr. 44; CX 41. Ms. Collins requested that Respondent provide the records set forth in the appointment letter. Tr. 44-45.

10b. Respondent only had records from May 2003 through November 2003. Tr. 45; CX 8 at 7. Respondent gave Ms. Collins some buyers' and sellers' invoices, but Respondent did not have all of the requested records.¹¹

Tr. 46. In particular, Respondent did not have a checking account or copies of the third-party checks that he used to pay for his livestock purchases. Tr. 45, 142-44; CX 8 at 8; CX 41 at 2. Ms. Collins made copies of the records Respondent did have and returned them to Respondent. Tr. 46.

11. In November and December 2003, Ms. Collins contacted several auction markets to obtain copies of records relating to purchases made by Respondent. Tr. 55-56. Ms. Collins obtained records of Respondent's livestock purchases during the year 2003 from Kilby's Livestock Market, Inc., North Wilkesboro, North Carolina, and CV Livestock, Inc., Woodlawn, Virginia. Tr. 56. Ms. Collins also obtained livestock purchase invoices and banking records from 2003 from Abingdon and Tri-State. Tr. 76, 88.

12. On December 11, 2003, Respondent signed a written statement, witnessed by Lloyd Blair, former manager of Abingdon, in which Respondent acknowledged that he did not disclose to Tri-State that the

¹¹ *Infra* at page 3.

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livestock purchases he made on September 26, 2003, and September 29, 2003, were made for Mr. Smith. Tr. 118-22; CX 8 at 11.

13. On September 20, 2003, Respondent purchased livestock from Abingdon in the total amount of \$500,343.22. CX 5 at 1-59. The livestock was purchased for "Oak Grove Cattle Company." CX 5 at 1-59. Respondent uses the name "Oak Grove Cattle Co." when he purchases livestock for Mr. Smith. Tr. 84; CX 5 at 1-59; CX 8 at 4. Respondent used two third-party checks to pay for the livestock. Tr. 81-82; CX 5 at 60-62. The checks were returned for insufficient funds on October 3, 2003. Tr. 81-82; CX 5 at 60-62. Wire transfers to Abingdon from B4 Cattle Company, a name used by Mr. Smith (Tr. 84), were made in various amounts totaling \$495,641.41 on October 8, 9, 15, and 22, 2003, November 19, 26, and 28, 2003, December 23, 2003, February 20, 2004, and March 2, 2004, in payment for the September 20, 2003 purchase. Tr. 82-87; CX 4 at 1; CX 5 at 63-106. The balance owed by Respondent for the September 20, 2003, purchase was paid to Abingdon subsequent to March 2004. Tr. 115.

14. On September 26, 2003, Respondent purchased livestock from Tri-State in the total amount of \$362,239.80. CX 4 at 1; CX 6 at 1-46. Tri-State was partially paid for the September 26, 2003, purchase with three separate cashier's checks from B4 Cattle Company dated August 20, 2004, August 27, 2004, and September 8, 2004, totaling \$110,000.00. Tr. 90-91; CX 4 at 1; CX 6 at 47-55. Tri-State has not received the balance of the purchase price for Respondent's September 26, 2003, purchase. Tr. 111-12.

15. On September 29, 2003, Respondent purchased livestock from Tri-State in the total amount of \$293,384.14. CX 4 at 1; CX 7 at 1-18. Tri-State has not received any payment for Respondent's September 29, 2003, purchase. Tr. 93, 111-12.

16. Abingdon and Tri-State did not have a written agreement with Respondent authorizing Respondent to pay for livestock purchases on credit, in excess of the time period set forth in section 409(a) of the Act (7 U.S.C. § 228b(a)). Tr. 110-11.

17. As of the date of the hearing, February 21, 2007, Respondent still owed Tri-State at least \$520,000.00 for Respondent's September 26 and 29, 2003, livestock purchases. Tr. 111-12.

18. Abingdon and Tri-State experienced significant financial problems as

a result of Respondent's failure to make timely payment for his livestock purchases. Tr. 112-13. Abingdon and Tri-State were forced to borrow money to cover the approximately \$1.2 million worth of checks that they were required to issue to pay the consignors for the livestock purchases Respondent made in September of 2003 for which Respondent did not make timely payment. Tr. 113-14. As a result of Respondent's failure to make timely payment, the bank with which Abingdon and Tri-State had their custodial accounts gave them 30 days to close their accounts and find a new bank. Tr. 113.

19. Respondent submitted an Annual Report to GIPSA covering the calendar year 2003. Tr. 30-32; CX 2 at 1-4. Section 2(a) of the Annual Report seeks information regarding the "total cost of livestock purchased on a dealer basis for registrant's account." CX 2 at 2. In section 2(a) of the Annual Report, Respondent indicated that over the course the year, he had purchased livestock for his own account for a cost of \$2,609,963.61. Section 2(b) of the Annual Report seeks information regarding the "total cost of livestock purchased for the accounts of others" and includes the following explanatory language: "Include livestock purchased by registrant but, which was billed directly to customer by seller and paid for by customer to seller." CX 2 at 2. In section 2(b), Respondent indicated that over the course of the year, he had purchased livestock for the accounts of others for a cost of \$1,217,858.03, for a total cost of \$3,827,821.60.¹² The Annual Report contains Respondent's signature under a statement which reads: "I certify that this report has been prepared by me or my direction, and to the best of my knowledge and belief, this report correctly reflects the operation of the reporting firm." CX 2 at 1.

20. During the approximately three month period from August 1, 2003, through October 27, 2003, Respondent purchased livestock, on a dealer basis, in the amount of \$6,635,643.69. Tr. 95-100; CX 9-40.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. In three separate transactions occurring on September 20, 2003, September 26, 2003, and September 29, 2003, respectively, the Respondent

¹² The amounts included by Respondent actually total \$3,827,821.64.

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purchased livestock from two sellers for a total of \$1,155,967.16, and failed to pay the full amount of the purchase price for the livestock within the time period required by the Act, with the total amount remaining unpaid of \$550,325.75 (subsequently amended at the hearing to “at least \$520,000.00” to conform to the proof) in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

3. On July 8, 2004, Respondent filed an Annual Report of Dealer or Market Agency Buying on Commission (hereinafter “Annual Report”) covering the calendar year 2003 that did not accurately reflect the total cost of livestock that Respondent purchased on a dealer basis during 2003 in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)).

4. The Respondent failed to keep such records as fully and correctly disclosed all transactions involved in his business as required by section 401 of the Act (7 U.S.C. § 221) in that Respondent failed to maintain a separate custodial account in a bank and failed to retain copies of the third-party checks that he used to pay for his livestock purchases in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)).

ORDER

1. Respondent, Michael Claude Edwards d/b/a Michael Claude Edwards Livestock, 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:

- a. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act; and
- b. Filing any false information or report, including any false Annual Report.

2. Respondent shall keep accounts, records, and memoranda which fully and correctly disclose all transactions conducted subject to the Act; specifically Respondent shall maintain a checking account and retain copies of the third-party checks that Respondent uses to pay for his livestock purchases.

3. Respondent is suspended as a registrant under the Act for a period of five (5) years; provided, however, that upon application to the Packers and

Stockyards Program, a supplemental order may be issued terminating the suspension at any time after one year of the suspension term, upon demonstration of circumstances warranting modification of the Order; provided, further, that this Order may be modified upon application to the Packers and Stockyards Program to permit Respondent's salaried employment by another registrant or packer after the expiration of one year of the suspension term and upon demonstration of circumstances warranting modification of the Order.

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

Done at Washington, D.C.

APPENDIX

Pertinent Statutory and Regulatory Provisions

1. Section 301(c) of the Packers and Stockyards Act (7 U.S.C. § 201(c)):

The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.

2. Section 301(d) of the Packers and Stockyards Act (7 U.S.C. §201(d)):

The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

3. Packers and Stockyards Act, 7 U.S.C. § 204 (in pertinent part):

[A]nd whenever, after due notice and hearing the Secretary finds any registrant is insolvent or has violated any provisions of said Act he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction.

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4. Section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)):

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling of livestock.

5. Section 401 of the Packers and Stockyards Act (7 U.S.C. § 221):

Every packer, any swine contractor, and any live poultry dealer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than \$5,000, or imprisoned not more than three years, or both.

6. Section 409 of the Packers and Stockyards Act (7 U.S.C. § 228(b)):

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next

business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a). Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this Act. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this Act.

Section 201.97 (9 C.F.R. § 201.97):

Every packer, live poultry dealer, stockyard owner, market agency, and dealer (except a packer buyer registered to purchase livestock for slaughter only) shall file annually with the

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Administration a report on prescribed forms not later than April 15 following the calendar year end or, if the records are kept on a fiscal year basis, not later than 90 days after the close of his fiscal year. The Administrator on good cause shown, or on his own motion, may grant a reasonable extension of the filing date or may waive the filing of such reports in particular cases.

PACKERS AND STOCKYARDS ACT**MISCELLANEOUS ORDERS**

**In re: SA HALLAL MEAT, INC., AND MOHAMMED ARSHAD.
P. & S. Docket No. 0-04-0011.
Miscellaneous Order.
March 6, 2007.**

PS – Dismissal – Inactivity.

Christopher Young Morales for GIPSA.
Respondent Pro se.
Order by Administrative Law Judge Peter M. Davenport.

ORDER

On January 31, 2007 following a review of the docket, the Complainant was ordered to show cause why this action should not be dismissed for failure to effect service upon the Respondent. On February 28, 2007, counsel for the Complainant filed a Status Update and Response to the Order to Show Cause. As noted in the Order, this is a disciplinary case which was initiated by the filing of a Complaint on July 31, 2004.¹ The Status Update filed by the Complainant acknowledges that all prior service efforts have been unsuccessful, but indicates that efforts are now being made to obtain a current address through the Financial Crimes Information Network in the Department of the Treasury and advise that 2-3 months might be required and that it is possible that additional requests for more time might be required if circumstances beyond counsel's control preclude service before the currently projected target date.

Being sufficiently advise, given the length of time which has passed since the filing of this action and the lack of certainty in obtaining a more current address at which the respondent might be served, it is ORDERED this action is DISMISSED. Copies of this Order will be served upon the Complainant by the hearing Clerk.

¹ The underlying violations occurred between 1999 and 2000. Notice of the trust fund requirement was given on January 24, 2001.

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**In re: BERT L. HOOSE, JR., d/b/a HOOSE LIVESTOCK.
P. & S. Docket No. D-04-0018.
Miscellaneous Order.
Filed March 6, 2007.**

PS – Dismissal – Non service.

Christopher Young Morales for GIPSA.
Respondent Pro se.
Miscellaneous Order by Administrative Law Judge Peter M. Davenport.

ORDER

On January 31, 2007 following a review of the docket, the Complainant was ordered to show cause why this action' should not be dismissed for failure to effect service upon the Respondent. On February 28, 2007, counsel for the Complainant filed a Status Update and Response to the Order to Show Cause. As noted in the Order, this is a disciplinary case which was initiated by the filing of a Complaint on September 29, 2004. The Status Update filed by the Complainant acknowledges that all prior service efforts have been unsuccessful, but indicates that efforts are now being made to obtain a current address through the Financial Crimes Information Network in the Department of the Treasury and advise that 2-3 months might be required and that it is possible that additional requests for more time might be required if circumstances beyond counsel's control preclude service before the currently projected target date.

Being sufficiently advised, given the length of time which has passed since the filing of this action and the lack of certainty in obtaining a more current address at which the Respondent might be served, it is

ORDERED this action is **DISMISSED**, without prejudice, in the event the Complainant is able to obtain sufficient information in the future to effectuate service upon the Respondent.

Copies of this Order will be served upon the Complainant by the hearing Clerk.

PACKERS AND STOCKYARDS ACT**DEFAULT DECISIONS**

In re: LONDON AUCTION BARN, INC.

P. & S. Docket No. D-05-0015.

Default Decision.

Filed February 1, 2007.

PS – Default.

Mary Hobbie for GIPSA.

Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This proceeding was instituted by the filing of a Complaint under the Packers and Stockyards Act, (7 U.S.C. § 181 *et seq.* hereinafter “the Act”) on May 26, 2005, by the Deputy Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent continued to operate as a market agency subject to the requirements of the Act.

A copy of the Complaint was mailed by the Hearing Clerk’s Office to the Respondent by certified mail, return receipt requested, which was returned by the United States Postal Service on June 27, 2005, with the notation “unclaimed.” The Complaint was then re-mailed by the Hearing Clerk’s Office to the Respondent on June 28, 2005, by regular mail as provided by the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, hereinafter referred to as the Rules of Practice (7 C.F.R. § 1.147 *et seq.*). Respondent was informed in the accompanying letter of service that an Answer to the Complaint should be filed pursuant to the Rules of Practice and that a failure to answer any allegation in the Complaint would constitute an admission of that allegation. The Respondent failed to file an Answer within the time prescribed in the Rules of Practice; thus the material facts alleged in the Complaint, which are admitted by Respondent’s default, are adopted and set forth herein as Findings of Fact and this Decision and Order

is issued pursuant to section 1.139 of the Rule of Practice, 7 C.F.R. §1.139.

FINDINGS OF FACT

1. London Auction Barn, Inc., hereinafter referred to as Respondent, is a corporation organized and existing under the laws of the State of Arkansas. Respondent's business mailing address is 11096 Highway 64 West, London, Arkansas 72847-0277.

2. Respondent was at all times material herein:

(a) Engaged in the business of conducting and operating as a market agency selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency selling livestock in commerce on a commission basis.

3. Respondent was notified by certified letter dated June 28, 2004, that its practice of operating without a bond or bond equivalent constituted a violation of the Packers and Stockyards Act and was instructed to take immediate action to bring its operation into compliance with the Act.¹ Further, Respondent was notified that, if it continued its operations as a market agency under the Act after that date without providing adequate bond coverage or its equivalent, Respondent would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30). Notwithstanding this notice, Respondent continued to engage in the business of selling livestock on a commission basis without maintaining an adequate bond or its equivalent.

4. On or about the date and in the transactions listed below, Respondent engaged in the business of selling livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent.

¹ On July 01, 2004, Respondent signed and dated a return receipt for the certified letter.

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Seller	Purchase Date	No. of Live-stock	Invoice Amount	Check Amount
Jim Bearden	11/13/04	1	\$75.00	\$50.50
Steve Crossno	11/13/04	3	\$315.00	\$167.50
James Tharen	11/13/04	1	\$700.00	\$610.50
Terry Bestal	11/13/04	3	\$230.00	\$95.00
Belva Crouch	11/13/04	5	\$1,370.00	\$1,067.00
Jack Dwyer	11/13/04	1	\$1,050.00	\$923.00
Larry Hard-Castle	11/13/04	1	\$370.00	\$316.00
Chris Hicks	11/13/04	1	\$435.00	\$349.50
Bill Jeffrey	11/13/04	1	\$430.00	\$370.00
Pat Knight	11/13/04	1	\$200.00	\$138.00
Brenda Maness	11/13/04	2	\$330.00	\$270.00
Gary	11/13/04	1	P/O	N/A

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Seller	Purchase Date	No. of Live-stock	Invoice Amount	Check Amount
Miller				
Tammy Miller	11/13/04	2	\$160.00	\$117.00
Bill Mitchell	11/13/04	1	\$300.00	\$253.00
Justin Nalls	11/13/04	5	\$1,110.00	\$908.00
Fred Parker	11/13/04	8	\$1,210.00	\$950.50
Charlotte Sayers	11/13/04	2	\$760.00	\$602.50
DonSmith	11/13/04	1	\$475.00	\$410.50
Jane Stapleton	11/13/04	2	\$835.00	\$670.00
Bobby Wagoner	11/13/04	3	\$815.00	\$640.00
Bonnie Williams	11/13/04	2	\$155.00	\$60.50
Buyer	Purchase Date	No. Of Livestock	Invoice Amount	Check No.
Snowball	11/13/04	3	\$980.70	Unlisted

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Buyer	Purchase Date	No. Of Livestock	Invoice Amount	Check No.
Sylvia	11/13/04	2	\$450.00	Unlisted
Billy	11/13/04	2	\$1,144.55	8864
Daryl	11/13/04	1	\$500.00	Paid by
Gary & April	11/13/04	1	\$553.00	1053
Justin	11/13/04	2	\$489.00	Unlisted
No.2000	11/13/04	5	\$1,665.00	Unlisted
Jack	11/13/04	5	\$816.50	2594
No.1500	11/13/04	3	\$275.00	Unlisted
Pat	11/13/04	1	\$292.00	5864
No. 408	11/13/04	1	\$120.00	Unlisted
Michael	11/13/04	1	\$1,050.00	537
Jim	11/13/04	1	\$1,030.25	1014
Dean Baker	11/13/04	1	\$574.86	3400
No. 115	11/13/04	1	\$130.00	Unlisted
Chuck	11/13/04	1	\$95.00	Paid by
Aaron	11/13/04	1	\$200.00	1761
No. 142	11/13/04	1	\$150.00	Unlisted
Chad	11/13/04	1	\$75.00	Illegible

CONCLUSIONS OF LAW

By reason of the above Findings Of Fact, Respondent is found to have willfully violated Section 312(a) (7 U.S.C. § 213(a)) and Sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30).

ORDER

1. The Respondent, its agents and employees, directly or indirectly through any corporate or other device, in connection with its operation subject to the Act, shall **CEASE** and **DESIST** from engaging in business in any capacity for which bonding is required under the Act and the Regulations promulgated thereunder, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the Regulations.

2. The Respondent is suspended as a registrant under the Act until such time as it complies with the bonding requirements under the Act and the Regulations. When and at such time as the Respondent demonstrates that it is in full compliance with such bonding requirements, an appropriate Order may be issued terminating this suspension.

3. In accordance with Section 312(b) of the Act (7 U.S.C. § 213(b)), the Respondent is assessed a civil penalty in the amount of One Thousand Dollars (\$1,000.00), which shall be paid by certified check or money order made payable to the Treasurer of the United States.

4. This Decision and Order shall become final and effective without further proceedings thirty-five days after service on the Respondent, if not appealed to the Judicial Officer in accordance with the Rules of Practice (7 C.F.R. § 1.145).

**In re: SAMMY AND WENDY SIMMONS, d/b/a PEOPLES
LIVESTOCK OF CARTERSVILLE.**

P. & S. Docket No. D-05-0018.

Default Decision (CORRECTED COPY).

Filed April 18, 2007.

PS – Default.

Christopher Young-Morales for APHIS.

Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport .

DEFAULT DECISION AND ORDER

This is a disciplinary proceeding brought under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §181 *et seq.*), (hereinafter “the Act”). On July 14, 2005, a Complaint was issued against Respondents alleging that Respondents sold livestock on a commission basis, and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

The Complaint further alleged that Respondents failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43), in the amount of \$ 5,902.20, in violation of section 312(a) (7 U.S.C. §§ 213(a)) and section 201.43 of the regulations (9 C.F.R. § 201.43).

On August 15, 2005, Respondents’ Answer was filed. Respondents stated in their Answer, *inter alia*, that:

We do operate People Livestock of Cartersville as a sole proprietorship in the state of Georgia and have done so since October 2000. We are a market agency registered with the Dept. Of Agriculture and sell livestock on a commission basis.

We do admit our previous bank, Unity National Bank, returned the nine checks listed on page 2 of the complaint totaling \$5,902.20 unpaid.

Based on the admissions contained in Respondents' Answer,¹ Complainant has moved for a decision without hearing or further procedure in this case pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (the "Rules of Practice"). See 7 C.F.R. § 1.130 *et seq.* See *In re: Pryor Livestock Market, Inc., Jim W. Deberry and Douglas A. Landers*, 56 Agric. Dec. 843, 845 (January 7, 1997).

Respondents have admitted in their Answer the material allegations of the Complaint, specifically that Respondents sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented. Respondents further admitted in their answer that they failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43), in the amount of \$5,902.20, the exact dollar amount listed in the disciplinary complaint filed against Respondents on July 14, 2005.

In proceedings before the Secretary, it is unnecessary to hold a hearing when there is no material fact in dispute, and no valid defense is presented. See, e.g., *Veg-Mix, Inc. v. United States Department of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987). No material fact is at issue in this case, and the Secretary has consistently held that both the issuance of insufficient funds checks in purported payment, and failure to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis within the time period required by Section 201.43 of the regulations, are unfair and deceptive practices in violation of 312 (a). *In re: Joshua L. Martin d/b/a Martin Livestock*, 64 Agric. Dec. 919 (January 11, 2005); *In re: Sarcoxie Community Sales, Inc.*, 47 Agric. Dec. 1290, 1300 (1988); *In re: C.J. Edwards*, 37 Agric. Dec. 1880 (1978).

Respondents' primary defenses to the factual allegations in this case are

¹Sammy and Wendy Simmons both signed the answer.

that the violations were not willful and that the violations were outside of Respondents' control. These defenses are without merit.

Under the Administrative Procedure Act (APA) when license suspension or termination is a sanction, the violator must have notice and an opportunity to cure except in cases in which the violating action is willful. 5 U.S.C. § 558(c). Notice is not required in this proceeding because Complainant does not seek the suspension or termination of Respondents' registration; however, assuming, *arguendo*, that Complainant did seek suspension or termination of Respondents' registration in this case, notice of the violations is not required here because Respondents have previously received notice in writing of the violations with opportunity to demonstrate or achieve compliance. *See* 5 U.S.C. § 558(c); *In re: Jeff Palmer*, 50 Agric. Dec. 1762, 1780 (1991). There, the Judicial Officer wrote:

It is clear that only one notice is required by section 9(b) of the Administrative Procedure Act [(5 U.S.C. § 558(c)], that is, once a licensee has been adequately warned, if he subsequently violates the Act, the agency may proceed to suspend his license without any further warning, notice, or opportunity to demonstrate informally that he did not violate the Act.

In re: Jeff Palmer 50 Agric. Dec. at 1782.

In a prior case, Respondent Sammy Simmons consented to the entry of a cease and desist order that restrained Respondent from paying for livestock with checks returned for non-sufficient funds. *See In re: Samuel Gail Simmons d/b/a Sammy Simmons Livestock*, P&S Docket No. D-94-15 (August 31, 1995). This prior order serves as notice to Respondents of the violation.²

Given the prior history of violation as evidenced by the above Consent Decision, Respondents' violations will be found willful within the meaning of that term in USDA precedent. *In re: D.W. Produce*, 53 Agric. Dec. at 1678 (a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute). The Respondents knew or should have known that they had insufficient funds to

² *In re: Jeff Palmer*, 50 Agric. Dec. at 1782.

write checks in purported payment for the net proceeds due from the sale price of livestock on a commission basis and accordingly constitute violations that were willful. *See In re: D.W. Produce*, 53 Agric. Dec. at 1678.

Respondents Answer suggests that they issued insufficient funds checks and failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations, because “they did not receive checks from the buyers quickly enough.” As the damage done to livestock producers is the same regardless of the reasons underlying Respondent’s payment violations, their claim is immaterial. *In re Great American Veal*, 48 Agric. Dec. 183, 211 (1989). The Judicial Officer has addressed similar excuses for non-payment under the Perishable Agricultural Commodities Act: “[e]ven though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent’s failure to pay from being considered . . . willful.” *In re: The Caito Produce Co.*, 48 Agric. Dec. 602, 614 (1989).

Under the admitted facts of this case, Respondents have committed serious violations of the Act by issuing insufficient funds checks and failing to remit, when due, the amount of the net proceeds due from the sale price of livestock on a commission basis for livestock in nine transactions. *In re: Joshua L. Martin d/b/a Martin Livestock*, 64 Agric. Dec. 919 (January 11, 2005); *In re: Sarcoxie Community Sales, Inc*, 47 Agric. Dec. 1290, 1300 (1988); *In re: C.J. Edwards*, 37 Agric. Dec. 1880 (1978).

Accordingly, Complainant’s motion will be granted and the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Sammy and Wendy Simmons, d/b/a Peoples Livestock of Cartersville (hereinafter “Respondents”), are partners in a partnership organized and existing under the laws of Georgia, doing business in the State of Georgia. Its business mailing address is P.O. Box 964, Cartersville, Georgia 30120. Respondents’ full names are Samuel Gail Simmons and Wendy Dawn Simmons.

2. Respondents are, and at all times material herein were:

(a) Engaged in the business of conducting and operating Peoples Livestock of Cartersville, a posted stockyard subject to the provisions of the Act;

(b) Engaged in the business of a market agency selling livestock on a commission basis;

(c) Registered with the Secretary of Agriculture as a market agency selling livestock on a commission basis.

3. Respondents, between the dates October 25, 2003 and November 1, 2003, sold livestock on a commission basis and in purported payment of the net proceeds thereof issued checks to consignors or shippers of such livestock which were returned unpaid by the bank upon which they were drawn because Respondents did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

4. Respondents failed to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis in the transactions described in paragraph 3, above, in the amount of \$ 5,902.20, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43).

5. Respondent Sammy Simmons previously consented to the entry of a Consent Decision which contained cease and desist provisions from further violations of the Act.

6. Respondents operate a relatively sizeable business, selling at least 200 head of livestock per week according to their Answer.

CONCLUSIONS OF LAW

1 The Secretary has jurisdiction in this matter.

2 For the reasons set forth in the above Findings of Fact, the Respondents willfully violated the provisions of the Act.

ORDER

1. The Respondents Sammy and Wendy Simmons, their agents and employees, directly or through any corporate or other device, in connection with all their activities subject to the Act, shall cease and desist from 1)

issuing checks to consignors or shippers of such livestock which are returned unpaid by the bank upon which they were drawn because Respondents does not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented, and 2) failing to remit the full amount of the net proceeds due from the sale price of livestock on a commission basis, within the time period required by Section 201.43 of the regulations (9 C.F.R. § 201.43).

2. Pursuant to Section 312 (b) of the Act (7 U.S.C. § 213(b)), Respondents are assessed a civil penalty in the amount of \$6,000.00, payable to the United States Treasury within 60 days of the effective date of this Order. Such amount should be paid by certified check or money order and mailed to:

Christopher Young-Morales, Esquire
Office of the General Counsel
Room 2309 South
1400 Independence Avenue, SW
Washington, D.C. 20250

The payment should indicate that it is in reference to P & S Docket D-05-0018.

Copies of this decision shall be served upon the parties.
Done at Washington, D.C.

In re: BOBBY T. TINDEL.
P. & S. Docket No. D-07-0030.
Default Decision.
Filed April 24, 2007.

PS – Default.

Leah C. Battagiolo, for GIPSA.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson

Decision Without Hearing by Reason of Default

This disciplinary proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*; hereinafter “Act”), by a Complaint filed on November 21, 2006, by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (hereinafter “Complainant”), alleging that the Respondent willfully violated the Act.

The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*; hereinafter “Rules of Practice”) were served on Respondent by certified mail on November 29, 2006. Respondent was informed in a letter of service that an answer must be filed within twenty (20) days of service and that failure to file an answer would constitute an admission of all the material allegations contained in the Complaint and a waiver of the right to an oral hearing.

Respondent has failed to file an answer within the time period prescribed by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the Complaint, which are admitted by Respondent’s failure to file an answer, are adopted and set forth herein as findings of fact.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Bobby T. Tindel (hereinafter “Respondent”), is an individual whose mailing address is P.O. Box 53, Chandler, Texas, 75758.

2. Respondent, at all times material herein, was:

(a) Engaged in the business of buying and selling livestock in commerce as a dealer for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

3. Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions described below, purchased livestock and failed to pay, when due, the full purchase price of the livestock.

BOBBY T. TINDEL
66 Agric. Dec. 737

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Purchase Date	Seller	No . of Head	Due Date	Amount Due	Date Paid	Check No.	Check Amount	Days Late
1/18/06	Anderson County Livestock	9	1/19/06	\$4,705.40	1/25/06	2917	\$4,705.40	6
1/25/06	Anderson County Livestock	3	1/26/06	\$2,604.10	2/1/06	2920	\$2,604.10	6
2/1/06	Anderson County Livestock	4	2/2/06	\$2,320.95	2/8/06	2927	\$2,320.95	6
2/8/06	Anderson County Livestock	3	2/9/06	\$1,818.00	2/15/06	2942	\$1,818.00	6
2/15/06	Anderson County Livestock	15	2/16/06	\$8,441.80	2/22/06	2947	\$8,441.80	6
2/22/06	Anderson County Livestock	10	2/23/06	\$5,195.95	3/1/06	2953	\$5,195.95	6
3/1/06	Anderson County Livestock	10	3/2/06	\$6,594.60	3/15/06	2960	\$6,594.60	13
3/15/06	Anderson County Livestock	1	3/16/06	\$420.00	4/5/06	2966	\$420.00	20
3/22/06	Anderson County Livestock	2	3/23/06	\$855.00	4/5/06	2976	\$855.00	13
4/5/06	Anderson County Livestock	7	4/6/06	\$3,751.80	4/12/06	2987	\$3,751.80	6
4/12/06	Anderson County Livestock	8	4/13/06	\$3,700.20	4/19/06	2993	\$3,700.20	6
1/6/06	Athens Comm'n Co.	28	1/9/06	\$14,876.43	1/13/06	2906	\$14,876.43	4
1/13/06	Athens Comm'n Co.	14	1/17/06	\$6,855.80	1/20/06	2911	\$6,855.80	3
1/20/06	Athens Comm'n Co.	6	1/23/06	\$3,210.25	1/27/06	2916	\$3,210.25	4

PACKERS AND STOCKYARDS ACT

Purchase Date	Seller	No . of Head	Due Date	Amount Due	Date Paid	Check No.	Check Amount	Days Late
1/27/06	Athens Comm'n Co.	5	1/30/06	\$2,441.15	2/3/06	2924	\$2,441.15	4
2/17/06	Athens Comm'n Co.	6	2/21/06	\$3,463.00	2/24/06	2948	\$4,817.65	3
2/17/06	Athens Comm'n Co.	2	2/21/06	\$1,354.65	2/24/06	2948	\$4,817.65	3
2/24/06	Athens Comm'n Co.	10	2/27/06	\$7,002.50	3/3/06	2956	\$7,002.50	4
3/3/06	Athens Comm'n Co.	13	3/6/06	\$7,404.70	3/10/06	2961	\$7,404.70	4
3/24/06	Athens Comm'n Co.	1	3/27/06	\$749.00	4/14/06	2949	\$749.00	18
3/31/06	Athens Comm'n Co.	2	4/3/06	\$1,192.20	4/7/06	2982	\$1,192.20	4
4/7/06	Athens Comm'n Co.	9	4/10/06	\$5,098.85	4/14/06	2989	\$5,098.85	4
4/14/06	Athens Comm'n Co.	16	4/17/06	\$8,502.33	4/21/06	2996	\$8,502.33	4

Conclusions

By reason of the facts found in Findings of Fact 3, Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

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.

Pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is assessed a civil penalty in the amount of One Thousand Five Hundred dollars (\$1,500.00).

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, D.C.

**In re: DANE FINE, d/b/a DANE FINE MEAT PACKING.
P. & S. Docket No. D-07-0042.
Default Decision.
Filed June 12, 2007.**

PS – Default.

Gary F. Ball for GIPSA.

Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*; hereinafter the "Act"), instituted by a Complaint filed on December 14, 2006 by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that the Respondent violated the Act. The Complaint alleged that Respondent failed to pay, when due, for 611 head of livestock involving twenty-five livestock transactions.

A copy of the Complaint was mailed to Respondent by certified mail at its business mailing address on December 15, 2006 and was received by the Respondent on December 19, 2006. The time for filing an Answer to the

Complaint expired on January 8, 2007. Respondent has not answered the Complaint. The time for filing an Answer having expired, and upon motion of the Complainant, the following Findings of Fact, Conclusions of Law and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.131 *et seq*; hereinafter the "Rules of Practice").

FINDINGS OF FACT

1. Dane Fine, doing business as Dane Fine Meat Packing, hereinafter referred to as "Respondent," is an individual doing business in the Commonwealth of Pennsylvania whose mailing address is 1080 Butler Road, Saxonburg, Pennsylvania 16056.

2. Respondent, at all times material herein, was:

(a) Engaged in the business buying livestock in commerce for the purpose of slaughter; and

(b) A packer within the meaning of and subject to the provisions of the Act.

3. Respondent, during the period May 26, 2005 through June 27, 2005, purchased 611 head of livestock and failed to pay, when due, \$105,885.46 associated with such livestock purchases.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. By reason of the foregoing Findings of Fact, Respondent has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192, 228b).

ORDER

1. Respondent Dane Fine, his agents and employees, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay, when due, the full purchase price of livestock.

2. In accordance with section 203(b) of the Act (7 U.S.C. § 193),

DANE FINE, d/b/a DANE FINE MEAT PACKING
66 Agric. Dec. 741

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Respondent Dane Fine is assessed a civil penalty of One Thousand Five Hundred Dollars (\$1,500.00).

3. This decision shall become final and effective without further proceedings 35 days after the date of service upon 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.

Done at Washington, DC

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Choate's Stockyard, Inc. and Garry E. Richerson, PS-D-05-0010, 02/13/07.

Pork King Packing, Inc. and Thomas Mileski, PS- D-06-0023, 2/20/07.

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Wharton Livestock Auction, Inc. and Herman W. Billy) Schwertner PS-D-07-0055, 02/28/07.

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Volume 66

January - June 2007
Part Three (PACA)
Pages 746 - 970



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

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Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be 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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No. 06-1199.

Filed April 6, 2007.

Rehearing En Banc.

Filed June 20, 2007.

(Cite as: 482 F.3d 560).

PACA – Commercial bribery – Implied duty-not to allow bribes – Warning/Notice, no requirement to give – Willfulness.

The Court upheld the Judicial Officer’s decision that the PACA includes an “inherent duty not to bribe.” Invoking the *Chevron* doctrine, the Court determined the PACA to be ambiguous regarding inherent duties of the PACA licensee and proceeded to the second *Chevron* step in measuring the Secretary’s interpretation of the PACA statute. The Court found that the Secretary was not arbitrary, capricious, or contrary to law when he/she announced the “inherent duty not to bribe” interpretation. The Court found the PACA statute to be extremely broad and used the word “any” in modifying the words “undertaking,” “transaction,” “duty,” and “specification or duty, express or implied” to contemplate a wide range of behavior. The Court rejected Cooseman’s argument that the regulated behavior under PACA only applied to the parties of a buy/sell contract and does not reach the third party USDA inspector. Cooseman argued that under PACA “a license may not be revoked unless the licensee has been given written notice and an ‘opportunity to demonstrate or achieve compliance.’” However, under 5 U.S.C. § 558(c) “willfulness,” [a prohibited act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements] alleviates the Agency’s duty to forewarn participants in a bribery scheme.

Before: SENTELLE, RANDOLPH and BROWN, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

SENTELLE, Circuit Judge.

Wholesale produce merchant Coosemans Specialties, Inc., petitions for review of a decision by the Secretary of the Department of Agriculture to revoke the company’s license for violations of the Perishable Agricultural Commodities Act. The Secretary concluded that the company violated the

Act's prohibition on unfair conduct when one of its employees bribed a Department of Agriculture inspector. In addition to revoking the company's license, the Secretary also barred two principals of the company from employment in the industry. The company and the individuals seek review of the Secretary's decision, contending that bribery does not violate the Act, and that the employment restrictions were unlawful. Because we conclude that the agency's actions were proper, we deny the petitions for review.

I.

The Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-499s ("PACA" or the "Act"), was enacted in 1930 to regulate interstate and foreign commerce in fresh fruits and vegetables. The Act authorizes the agency to create a system for inspecting produce. Id. § 499n(a). It requires merchants to obtain licenses from the Secretary of the Department of Agriculture ("USDA" or "Secretary"), and subjects licensees to a number of requirements. Id. §§ 499b, 499c(a), 499e, 499i. Licensees who violate the Act may find their licenses suspended or revoked, and individuals affiliated with violators may be excluded from industry employment. Id. § 499h.

Petitioner Coosemans Specialties, Inc. ("CSI" or the "Company"), is a New York produce wholesaler whose PACA license was originally issued in 1986. The Company operates out of Hunts Point Terminal, a wholesale produce market in the Bronx, New York. At all times relevant to this matter, CSI had three principals, all of whom were part owners: Daniel F. Coosemans, president and founder; Eddy C. Creces, secretary, treasurer, and general manager; and Joe Faraci, vice president.

The perishable produce that arrives at Hunts Point often travels some distance between the supplier and a buyer, such as CSI. As a result, produce may arrive in a condition worse than expected. If the buyer then asks for a price reduction, the producer is at a disadvantage, because it has no way of knowing whether to trust the buyer's representations about the condition of the produce. The USDA's inspection process is intended to level the playing field by providing the faraway producer with an independent evaluation of the produce's condition so he can be assured that the price he receives is fair. A buyer, upon receipt of nonconforming goods, may request an inspection. An agency inspector reviews the produce and issues an official certificate assessing its condition that can help the producer and

buyer renegotiate the price. After their transaction is complete, however, the inspection certificate is of little use in subsequent transactions. If the initial buyer is a wholesaler like CSI, it sells the produce to another buyer who is typically able to personally inspect the produce at Hunts Point.

This inspection system has been subject to abuse. For two decades, corrupt USDA inspectors and buyers at Hunts Point participated in a scheme of illegal payments. An inspector who received a bribe might furnish a falsified certificate indicating that the produce's condition was worse than it actually was. The buyer would use that certificate to negotiate a lower price with the supplier. Once he paid the supplier, the buyer could resell the produce for a price that reflected the produce's actual condition. In this way, a buyer who bribed inspectors for this purpose could increase his profit margin to the detriment of the supplier. Additionally, some inspectors who had accepted bribes permitted those companies to jump to the front of the line for inspections, thereby delaying the inspections of their competitors. Produce being perishable, buyers who had to wait for inspections were likely to receive lower prices when the goods were eventually resold.

In 1999, one of the Hunts Point inspectors, William Cashin, was caught taking bribes. After his arrest, he agreed to cooperate with investigators. He conducted inspections from April until August 1999 while wearing audio and/or video recording devices to document the bribes he received. During this period, he reported that he received fourteen bribes from Joe Faraci-CSI's vice president-both to hasten inspections and to falsify the resulting certificates in CSI's favor. Faraci was charged with eight counts of bribery of a public official, subsequently pled guilty to one count, and was imprisoned and fined. In light of these events, the Secretary filed a complaint against CSI on August 16, 2002, alleging that the Company, through Faraci's actions, had violated the implied duty clause of PACA's unfair practices provision. The Secretary also filed complaints against Eddy Creces and Daniel Coosemans individually, alleging that they were responsibly connected to CSI at the time the violations occurred.

The Company and both individuals denied the allegations and sought agency review. The cases were consolidated and heard in late 2003 before an Administrative Law Judge, who concluded that the Company's license should be revoked and that Creces and Coosemans, as "responsibly connected" persons, should be subject to the employment restrictions. The

parties appealed to the Judicial Officer (“JO”), to whom the Secretary has delegated final authority in adjudicative proceedings. See 7 C.F.R. § 2.35. The JO affirmed the ALJ’s initial decision in a decision and order issued April 20, 2006, finding in particular that in exchange for Faraci’s bribes, Cashin would “falsify” USDA inspection certificates by, inter alia, “increasing the percentage of defects” and “changing the temperatures of the load.” *In re Coosemans Specialties, Inc.*, Dkt. No. D-02-0024, 2006 WL 1135512 (USDA). On June 13, 2006, CSI and the individual petitioners filed petitions before this Court seeking review of the Secretary’s decision. CSI disputes the Secretary’s interpretation of PACA’s “implied duty” clause as encompassing a duty not to pay bribes. The individual petitioners challenge the Secretary’s determination that they were subject to the employment restrictions as persons “responsibly connected” to CSI. The decision and order of the JO was stayed pending our ruling.

II.

A.

When reviewing an interpretation of a statute by an agency charged with the administration of that statute, we apply the two-step Chevron framework. *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). If the meaning of the statute is unambiguous, we must give effect to the clear congressional intent. *Id.* at 842-43, 104 S.Ct. 2778. If, however, the statutory language is ambiguous, we will uphold the agency’s interpretation as long as it is not “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844, 104 S.Ct. 2778. The USDA is entrusted to administer PACA, and therefore its interpretations are entitled to deference under *Chevron*. See *id.*

The Secretary’s basis for revoking CSI’s license is that the Company, through Faraci, violated the implied duty clause of PACA. That provision reads, in relevant part:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce ... [f]or any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction ... or to fail or refuse truly and correctly to account and make full payment

promptly in respect of any transaction ...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....

7 U.S.C. § 499b(4) (emphasis added).

CSI argues that the implied duty clause cannot fairly be read to include a duty not to bribe USDA inspectors. To do so runs contrary to a number of principles of statutory interpretation. We disagree. Initially, we note that Congress's language in this subsection is extremely broad. The word "any" appears no fewer than three times in the specific clause at issue, modifying the words "undertaking," "transaction" and "duty." *Id.* The breadth and ambiguity of the key phrase as well-"any specification or duty, express or implied"-contemplates a wide range of behavior. *See G&T Terminal Packaging Co. v. Dep't of Agric.*, 468 F.3d 86, 96 (2d Cir.2006) ("G&T"); cf. *Duties of Licensees*, 7 C.F.R. § 46.26 (noting that, because it is "impracticable to specify in detail all of the duties," conduct specified in the regulations is not exhaustive). Implied duties, by their nature, would not be spelled out in a contract or otherwise; they are given meaning by agency gap-filling. *See JSG Trading Corp. v. Dep't of Agric.*, 235 F.3d 608, 614 n. 8 (D.C.Cir.2001) ("*JSG Trading II*") ("Given the substantial ambiguity in § 499b(4), it is the Department's function, not ours, to define offenses under that provision."), quoted in *G & T*, 468 F.3d at 96 (noting that, since the "statutory language plainly leaves undelineated what implied duties and specifications a PACA licensee might be required to bear," it is the "province of the Secretary ... to fill in these gaps"). This is especially true if the term may be better fleshed out through application of the law to specific cases and their facts, rather than by drafting an exhaustive list of all hypothetical conduct that would constitute a violation. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999) (noting that an agency should be accorded *Chevron* deference "as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication" (internal quotation omitted)); cf. *G & T*, 468 F.3d at 97 (noting that "the expansiveness" of the implied duty clause "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”). In light of these considerations, we conclude that the implied duty clause is ambiguous.

We turn next to step two of *Chevron*, in which we consider whether the agency’s construction is unreasonable. *See Chevron*, 467 U.S. at 842-45, 104 S.Ct. 2778; 5 U.S.C. § 706(2)(A). The section in which the implied duty clause appears is labeled “unfair conduct,” and begins with the language “It shall be unlawful in or in connection with any transaction in interstate or foreign commerce” 7 U.S.C. § 499b. The section goes on to address specific types of dishonest or irresponsible conduct, such as failing to fulfill contract terms or misrepresenting material facts to another party. *Id.* § 499b(1)-(3), (5)-(7). The paragraph containing the implied duty clause also prohibits misrepresentations, late payments and failures to comply with other provisions of the Act designed to ensure financial responsibility of licensees. *Id.* § 499b(4). Petitioners argue that, since the paragraph and section deal with conduct between two parties to a particular transaction, the implied duty clause does not reach conduct relating to a third party, such as an inspector. Therefore, they argue, CSI’s conduct toward an inspector-not another merchant-cannot form the basis for a violation of the implied duty clause or any other part of the unfair practices provision.

We and other circuits have upheld the Secretary’s construction of the implied duty clause as including a prohibition on commercial bribery. In those cases, one party to a transaction violates a duty to the other party when it secretly bribes the latter’s agents. Commonly, a seller bribes employees of a buyer in order to ensure that the buyer remains a customer of the seller. *See, e.g., JSG Trading II*, 235 F.3d at 610-11 (affirming the Secretary’s description of “a duty of produce sellers not to corrupt agents and employees of their buyers”); *JSG Trading Corp. v. Dep’t of Agric.*, 176 F.3d 536, 543 (D.C.Cir.1999) (“*JSG Trading I*”) (affirming a construction of the implied duty clause to include commercial bribery); *Sid Goodman & Co. v. Dep’t of Agric.*, 945 F.2d 398 (4th Cir.1991) (per curiam) (unpublished table decision), available in 1991 WL 193489, at *3 (accepting as reasonable the Secretary’s construction of the clause as imposing an “implied duty to deal fairly with other members in the industry,” and that such duty is violated by commercial bribery); *cf. G & T*, 468 F.3d at 97 (noting that, in light of the statutory purposes, “we can hardly conceive of a duty more clearly implicated than the obligation of

recipients not to make side-payments to these inspectors”).

Although these cases arise under statutory law rather than the common law of contracts, the principle of contract law that requires parties to engage in honest dealing appears to have influenced how the statute was interpreted. For example, in *JSG Trading I*, we emphasized the JO’s finding in *Goodman* that the payments were made without the knowledge of the employers, echoing a key factor in the mistake of fact doctrine. 176 F.3d at 542. In *Goodman* itself, the Fourth Circuit stated that the duty extended to one’s competitors, even though they were not involved in the transactions at issue. 1991 WL 193489, at *4. The bribes were a violation of the Act because each licensee has “an implied duty to deal fairly with its competitors and by paying kickbacks, *Goodman*’s competitors were held at an unfair advantage.” *Id.*; see also *JSG Trading I*, 176 F.3d at 545 (discussing, in the context of the implied duty clause, whether the “marketplace is disturbed”); *In re Tipco, Inc.*, 953 F.2d 639 (4th Cir.1992) (per curiam) (unpublished table decision), available in 1992 WL 14586, at *2 (describing the duty breached by commercial bribery as, in the JO’s words, a “duty of fair dealing”).

The principle of honest dealing is also apparent in cases arising under the common law of contracts. For example, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 127 (2d Cir.2003), the court reviewed the Secretary’s reparation award to a party who was overcharged as a result of falsified inspection certificates that the other party had obtained by bribery. The court affirmed the award on the basis of the doctrine of mistake, holding that the seller’s reliance on the integrity of USDA inspections constituted a mistake of fact that adversely affected it. It noted that the mistake resulted from the informational advantage the buyer enjoyed over the seller, and that the buyer was at fault for not informing the seller of that information. *Id.* at 128; cf. *Produce Place v. Dep’t of Agric.*, 91 F.3d 173, 177 (D.C.Cir.1996) (holding that the false or misleading statement clause in § 499b(4) was violated when the buyer knowingly misrepresented the condition of the produce to the seller). These cases are consistent with the commercial bribery cases in concluding that one party breaches its duty of honest dealing when it seeks to benefit from concealing its illegal conduct that affected the contract price.

We similarly conclude that the Secretary’s decision to construe the “implied duty” clause as imposing a duty to engage in honest dealing-which

includes a duty not to bribe USDA inspectors-is reasonable. It is consistent with the purposes of the Act as understood by many courts over the years: to protect producers and other merchants from dishonest and irresponsible conduct. *See, e.g., JSG Trading I*, 176 F.3d at 538; *G & T*, 468 F.3d at 97; *Chidsey v. Geurin*, 443 F.2d 584, 587 (6th Cir.1971); *Rankin Sales Co. v. Morrie H. Morgan Co.*, 296 F.2d 113, 116-17 (9th Cir.1961). The Company's attempt to obtain speedier and more favorable inspections gave it an advantage over its sellers, who were improperly led to believe the inspections reflected accurate, independent analyses. We see no reason why merchants' duties under § 499b(4) should be limited to cases in which the unlawful conduct is visited directly upon the other party, rather than upon a third party who has some ability to affect the transaction. The statutory language does not limit the applicability of § 499b(4) to conduct in a transaction; rather, it extends to conduct "in connection with" a transaction. We hold that the agency's interpretation of the "implied duty" clause is reasonable.

B.

As a result of its conclusion that CSI violated PACA, the Secretary revoked the Company's license. Petitioners advance a number of arguments why this sanction was unlawful. Generally speaking, this Court will not overturn an agency's choice of sanction unless it is "unwarranted in law" or "without justification in fact." *See Norinsberg Corp. v. Dep't of Agric.*, 47 F.3d 1224, 1227-28 (D.C.Cir.1995) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)). As this Court recently noted, "[w]e will not lightly disturb the Department's choice of remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates." *JSG Trading II*, 235 F.3d at 617.

When the Secretary determines that a licensee "has violated any of the provisions of section 499b," "the Secretary may ... 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." 7 U.S.C. § 499h(a). If, as here, the violative conduct can be sanctioned in a number of different ways under the statute, the USDA may choose the appropriate sanction by "examining the nature of

the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.” *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991).

In reviewing these factors, the USDA noted that bribery undermines PACA’s remedial purpose of, inter alia, ensuring responsible and honest dealing by merchants. CSI argues that the agency failed to consider the mitigating circumstance of widespread extortion by USDA agents that existed for many years. The agency did acknowledge, however, that the corruption at Hunts Point was a serious problem that the agency had been battling unsuccessfully for some time. Nonetheless, it concluded that bribery was such an egregious violation of the Act that severe penalties were warranted in order to deter such conduct. CSI’s conduct not only gave it a competitive advantage, but it also increased the pressure on other merchants to engage in bribery to remain competitive. Even though the agency did not expressly describe the effect of the mitigating circumstances on its decision, its discussion of the circumstances that did impact its decision was sufficient to explain why the corruption among its inspectors did not warrant a lesser sanction. *Cf. Frank Tambone, Inc. v. Dep’t of Agric.*, 50 F.3d 52, 56 (D.C.Cir.1995) (upholding a sanction based on a decision and order that did not expressly mention the mitigating factors because the JO “adequately explained why [those factors] were insufficient to exonerate the company or to render the imposition of any sanction inappropriate”). The Secretary’s decision thus rested on a reasonable construction of the statute and was consistent with its sanction policy. We have no basis on which to disturb its choice of sanction.

C.

CSI argues that, even if revocation were appropriate, the Secretary was required to give notice before imposing the sanction. The Administrative Procedure Act, 5 U.S.C. § 558(c) (“APA”), provides that, “[e]xcept in cases of willfulness,” a license may not be revoked unless the licensee has been given written notice and an “opportunity to demonstrate or achieve compliance.” *Id.* In this context, “an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.” *Finer Foods Sales Co. v. Block*, 708

F.2d 774, 778 (D.C.Cir.1983). The Secretary concluded that the willfulness exception applied because Faraci's conduct constituted a willful violation of PACA. We agree. Even though Faraci pled guilty to one count, the record indicates that he repeatedly made these payments over several months. The indictment to which he pled guilty states that he "willfully" and "knowingly" committed the act "with intent to influence official acts." Faraci admitted that when he made the payments he knew it was unlawful to do so. We have already held that the unlawful acts constituted a violation of PACA, and prior cases put CSI on notice of that fact. *Cf. JSG Trading II*, 235 F.3d at 617 (concluding that the Secretary's revocation of a PACA license in commercial bribery cases provided "ample notice that commercial bribes may result in revocation"). We thus hold that the Secretary's conclusion that the willfulness exception applied was supported by substantial evidence that Faraci acted with at least careless disregard of the implied duty clause. APA notice, therefore, was not necessary.

D.

The individual petitioners challenge the Secretary's determination that they were "responsibly connected" to CSI at the time of the violations. This determination means that Coosemans and Creces cannot, for a period of time, affiliate in any way "with the business operations of a licensee, with or without compensation, including ownership or self-employment" without first obtaining permission from the Secretary. 7 U.S.C. §§ 499a(10), 499h(b). "Responsibly connected" persons include those who are "affiliated or connected with a commission merchant, dealer, or broker as ... officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation." *Id.* § 499a(9). Here, both Coosemans and Creces were 33.3% owners at the beginning of the period relevant to this matter, and became 45.5% owners in July 1999. Each is also an officer, Coosemans as president and Creces as secretary and treasurer.

Although Coosemans and Creces meet the definition of "responsibly connected" persons, a 1995 amendment to the statute permits an individual who is found to be responsibly connected to demonstrate that he is "not responsible for the specific violation." H.R. REP. NO. 104-207, at 11 (1995), as *reprinted in* 1995 U.S.C.C.A.N. 453, 458. That amendment qualified the definition of "responsibly connected" by stating that:

A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

Even before Congress added this provision to the statute, this Court recognized an alter ego exception to the “responsibly connected” determination that is identical to PACA’s current provision. *See Norinsberg v. Dep’t of Agric.*, 162 F.3d 1194, 1199 (D.C.Cir.1998). We held that the “alter ego” exception applied to “cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality.” *Id.* at 1197 (internal quotation omitted). A petitioner who was not a true owner of such a corporation would be spared the consequences of the responsibly connected determination. The amendment enacted as section 499a(b)(9) codifies this exception. This provision is plainly not applicable here because there is no claim that CSI is an alter ego rather than a formal corporation. Petitioners are required to “demonstrate[] by a preponderance of the evidence” that they fit within the nominal or alter ego exceptions. 7 U.S.C. § 499a(b)(9). As the Secretary reasonably concluded, petitioners have failed to meet this burden. We therefore affirm the Secretary’s determination that Coosemans and Creces were responsibly connected to CSI and subject to the employment restrictions.

Despite petitioners’ arguments to the contrary, we can find no other reason why subjecting petitioners to the employment restrictions is contrary to congressional intent. The use of absolute language in § 499h(b) describing the scope of the employment restrictions, the broad definition of employment to include “any affiliation,” and the inclusion of a specific exception for persons who make a certain showing-all militate against judicially created exceptions. *Id.* § 499a(b)(10) (emphasis added); *cf. Siegel v. Lyng*, 851 F.2d 412, 415-16 (D.C.Cir.1988) (relying on the first two factors, before the provision was amended in 1995, in declining to create an exception for non-PACA job descriptions).

III. Conclusion

We conclude that the agency's interpretation of the "implied duty" clause as prohibiting bribery of a USDA inspector is reasonable, and that the "responsibly connected" determination is not arbitrary, capricious or contrary to law. We thus deny the petitions for review.

So ordered.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.

PACA Docket No. D-06-0012.

Decision and Order.

Filed January 31, 2007.

PACA – Perishable agricultural commodities – Admissions in bankruptcy filing – Official notice – Default – Due process – Failure to pay – Willful, flagrant, and repeated violations – Publication of facts and circumstances.

The Judicial Officer affirmed Administrative Law Judge Peter M. Davenport's (ALJ) Decision Without Hearing by Reason of Admissions publishing the finding that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities. The Judicial Officer stated documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings and held the ALJ's taking official notice of documents Respondent filed in a bankruptcy proceeding is in accord with the Administrative Procedure Act (5 U.S.C. § 556(e)) and the Rules of Practice (7 C.F.R. § 1.141(h)(6)). The Judicial Officer found that Respondent had admitted the material allegations of the Complaint; therefore, there were no material issues of fact on which a meaningful hearing could be held and the ALJ properly issued a decision under the default provisions of the Rules of Practice (7 C.F.R. § 1.139). The Judicial Officer held the application of the default provisions in the Rules of Practice (7 C.F.R. § 1.139) did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer rejected Respondent's contention that a hearing should be conducted to allow it to present evidence that Respondent was not paid by one of its customers and to present evidence concerning the motive for, and circumstances surrounding, Respondent's voluntary petition in bankruptcy.

Jonathan Gordy, for Complainant.

John M. Lohner, Santurce, PR, for Respondent.

Initial decision issued by Peter M. Davenport, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary

administrative proceeding by filing a Complaint on May 2, 2006. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges: (1) during the period January 2005 through August 2005, Judith's Fine Foods International, Inc. [hereinafter Respondent], failed 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 Respondent purchased, received, and accepted in the course of interstate and foreign commerce;¹ (2) on October 10, 2005, Respondent filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, District of Puerto Rico;² (3) Respondent admitted in a document filed in the United States Bankruptcy Court, District of Puerto Rico, that the eight produce sellers referred to in paragraph III of the Complaint hold unsecured claims for \$338,942.07;³ and (4) Respondent's failure 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 Respondent purchased, received, and accepted in the course of interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).⁴ On July 10, 2006, Respondent filed an answer in which Respondent denied that it willfully violated the PACA, as alleged in the Complaint.⁵

On August 17, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a Decision Without Hearing by Reason of Admissions [hereinafter

¹ Compl. ¶ III.

² Compl. ¶ IV.

³ Compl. ¶ IV.

⁴ Compl. ¶ V.

⁵ Response to Compl.

Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. On October 24, 2006, Respondent filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On October 25, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision]: (1) finding, during the period 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 Respondent purchased, received, and accepted in the course of interstate and foreign commerce; (2) concluding Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering publication of the facts and circumstances of Respondent's PACA violations (Initial Decision at 4-5).

On December 12, 2006, Respondent appealed to the Judicial Officer.⁶ On January 11, 2007, Complainant filed a response to Respondent's Appeal Petition.⁷ On January 16, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

⁶Appeal of Decision Against Defendant [hereinafter Appeal Petition].

⁷Response to Appeal of Respondent.

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

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

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

DECISION**Discussion**

Complainant alleges, during the period 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 \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.⁸ Complainant identified these eight produce sellers as: (1) A & J Produce Corp., Bronx, New York; (2) Wada Farms Marketing Group, Idaho Falls, Idaho; (3) Herbs Unlimited, Inc., Miami, Florida; (4) K & R Farms Produce, Inc., Orlando, Florida; (5) Tristen's Brokerage Co., Inc., Los Angeles, California; (6) Mann Packing Co., Inc.; (7) Freedom Fresh, LLC; and (8) C.H. Robinson Co.⁹ On October 10, 2005, Respondent filed a voluntary petition under chapter 7 of the Bankruptcy Code in *In re Judith's Fine Foods International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005). Respondent admitted in Schedule F - Creditors Holding Unsecured Nonpriority Claims filed in this bankruptcy proceeding that it owed \$338,942.07 to the eight produce sellers that are identified in the Complaint.¹⁰ Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings are officially noticed in PACA disciplinary proceedings.¹¹

⁸Compl. ¶ III.

⁹Compl. ¶ III.

¹⁰A copy of Schedule F - Creditors Holding Unsecured Nonpriority Claims is attached to Complainant's Motion for Default Decision and marked Exhibit A.

¹¹*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 827, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), printed in 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammaro, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal*

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 PACA violations. Complainant is not required to summon witnesses to a hearing for the purpose of proving that Respondent was licensed under the PACA during the relevant period simply because Respondent has declined to answer these allegations. Pursuant to the Rules of Practice, if a respondent fails to deny or otherwise respond to specific allegations of the complaint, those allegations are deemed admitted.¹²

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.¹³ Respondent has admitted in a bankruptcy proceeding that it has failed to pay \$338,942.07 to the same produce sellers as are 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 (7 U.S.C. § 499b(4)), and Respondent has not asserted that it will achieve full compliance with the PACA by making full payment within 120 days of the date of service of the Complaint. Therefore, this proceeding is a "no-pay" proceeding.

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 PACA license has terminated, the appropriate sanction in lieu of revocation is publication of the facts and circumstances of the violations. A civil penalty is not appropriate in this case because "limiting

dismissed, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

¹²7 C.F.R. § 1.136(c).

¹³*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

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 United States a civil penalty while produce sellers remain unpaid.¹⁴ As there can be no debate over the appropriate sanction, a decision may be issued in this proceeding without hearing or further procedure based on the admitted facts.¹⁵

Moreover, I conclude Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful, flagrant, and repeated as a matter of law. Willfulness is not a prerequisite to the publication of facts and circumstances of violations of section 2 of the PACA (7 U.S.C. § 499b). Nonetheless, the record supports a finding that Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful.

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.¹⁶ Respondent failed to make full

¹⁴*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

¹⁵ 7 C.F.R. §§ 1.139, .141(b). See *Veg-Mix, Inc. v. United States Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (stating a hearing is only required where an issue of material fact is joined by the pleadings).

¹⁶ See, e.g., *Allred’s Produce v. United States Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep’t of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 504, (2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff’d*, 123 F. App’x 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff’d*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff’d*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric.

payment promptly to eight sellers of the agreed purchase prices in the total amount of \$338,924.07 for 115 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate and foreign commerce. These failures to pay took place over the period January 2005 through August 2005, a period of 8 months.

Willfulness is reflected in the length of time during which the violations occurred and the number and amount of violative transactions involved.

Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 30, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

Respondent knew or should have known that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over an 8-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not, and consequently could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.¹⁷

Likewise, Respondent's violations are repeated and flagrant. Respondent's violations are repeated because *repeated* means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 8-month period during which Respondent committed the violations.¹⁸

¹⁷*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. . 880, 897 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

¹⁸ See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.) (stating violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant), *cert. denied*, 528 U.S. 1021 (1999); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*) (describing 20 violations of the payment provisions of the PACA as flagrant), *cert*

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. Respondent's business address was Urb Ind El Commandante, San Marcos Avenue, Carolina, Puerto Rico 00087. Respondent's mailing address was P.O. Box 13301, Santurce, Puerto Rico 00908.

2. At all times material to this proceeding, Respondent was licensed under the PACA. PACA license number 19961052 was issued to Respondent on March 5, 1996. On March 5, 2006, Respondent's PACA 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 Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

Conclusion of Law

Respondent's failures to make full payment promptly with respect to the 115 transactions referenced in Finding of Fact number 3 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises four issues in its Appeal Petition. First, Respondent contends Schedule F - Creditors Holding Unsecured Nonpriority Claims,

denied, 450 U.S. 997 (1981); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding because the 295 violations of the payment provisions of the PACA did not occur simultaneously, the violations must be considered repeated violations within the context of the PACA and finding the 295 violations to be flagrant violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967).

filed by Respondent in *In re Judith's Fine Foods International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005), cannot be used as a basis for the issuance of a default decision pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Appeal Pet. at first and second unnumbered pages).

The Administrative Procedure Act authorizes official notice in adjudicative proceedings¹⁹ and the Rules of Practice provides that official notice may be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character.²⁰ Federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue.²¹ Therefore, under section 1.141(h)(6) of the Rules of Practice (7 C.F.R. § 1.141(h)(6)), an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Documents filed in bankruptcy proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.²² Schedule F - Creditors Holding Unsecured Nonpriority Claims, filed by Respondent in *In re Judith's Fine Foods*

¹⁹ 5 U.S.C. § 556(e).

²⁰ 7 C.F.R. § 1.141(h)(6).

²¹ *Conforti v. United States*, 74 F.3d 838, 840 (8th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *United States v. Hope*, 906 F.2d 254, 260-61 n.1 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *E.I. du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984) (per curiam); *Hart v. Commissioner*, 730 F.2d 1206, 1207-08 n.4 (8th Cir. 1984) (per curiam); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), *cert. denied*, 449 U.S. 996 (1980); *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947).

²² See note 11.

International, Inc., Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005), has a direct relation to the matters at issue in the instant proceeding. Therefore, I conclude the ALJ properly took official notice of Schedule F - Creditors Holding Unsecured Nonpriority Claims.

Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) sets forth the procedure to be followed when a respondent fails to file an answer or when a respondent admits the material allegations of fact contained in the complaint. As Respondent has admitted the material allegations of fact in the Complaint, I find the ALJ's issuance of the Initial Decision in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) was not error.

Second, Respondent contends a hearing should be conducted to allow Respondent the opportunity to present evidence that it was the victim of the failure of one of its customers to pay Respondent (Appeal Pet. at first and second unnumbered pages).

I disagree with Respondent's contention that a hearing should be conducted to allow Respondent to present evidence that it was the victim of the failure of one of its customers to pay. The PACA requires full payment promptly and an excuse for the failure to make full payment promptly is not a defense to a respondent's failure to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I have long held that a customer's failure to pay does not negate a respondent's failures to pay produce sellers in violation of the PACA.²³ Accordingly, proof that Respondent was not paid by one of its customers is not a defense to Respondent's violations of the PACA and would not alter the disposition of this proceeding.

²³ *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1158 (1983) (ordering publication of the facts and circumstances of respondent's failures to pay in accordance with the PACA, even though another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 595 (1983) (ordering publication of the facts and circumstances of respondent's failures to pay in accordance with the PACA, even though other firms failed to pay respondent); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 686 (1980) (ordering publication of the facts and circumstances of respondent's failures to pay in accordance with the PACA, even though other firms failed to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982).

Third, Respondent contends a hearing should be conducted to allow Respondent the opportunity to present evidence that it filed the bankruptcy petition in order to protect its unpaid produce sellers, that a bankruptcy stay prevents Respondent from proceeding against its creditors and paying its produce sellers, and that Respondent's counsel resigned from the bankruptcy proceeding without taking any action to pay Respondent's produce sellers (Appeal Pet. at first through third unnumbered pages).

Respondent's motive for filing a voluntary petition in bankruptcy and the resignation of Respondent's counsel in the bankruptcy proceeding have no relevance to the instant proceeding. Moreover, the bankruptcy stay, which may prevent Respondent from proceeding against its creditors and paying its debts is not a defense to Respondent's failures to make full payment promptly to its produce sellers in violation of the PACA. In a recent PACA disciplinary proceeding, I rejected the respondent's argument that an injunction prohibiting payment of PACA trust assets to produce sellers should excuse the respondent's PACA payment violations, as follows:

While Judge Lawrence M. McKenna enjoined Respondent from disbursing any of its PACA trust assets other than through the actions of the court-appointed escrow agent operating the PACA trust, the injunction does not act as a relief from Respondent's "no-pay" status. Since the PACA trust action arose directly from Respondent's failures to pay its produce sellers in the first place, to allow the PACA trust action to protect Respondent against "no-pay" sanctions would be counter to the clear purposes of the PACA.

In re Hunts Point Tomato Co., Inc., 64 Agric. Dec. 1914, 1926, (2005), *aff'd*, No. 06-1072-AG, 2006 WL 3307897 (2d Cir. Nov. 13, 2006).

Similarly, Respondent here asserts it is prevented by the bankruptcy proceeding from making payment to its produce sellers. However, the bankruptcy does not alter the prompt payment requirements of the PACA, and Respondent's proof that it is now prevented by a stay from paying its produce sellers is not an excuse for its failures to pay the produce sellers in accordance with the PACA.

Fourth, Respondent contends it is entitled to a hearing under the due

process clause of the Fifth Amendment to the Constitution of the United States (Appeal Pet. at third unnumbered page).

Respondent has admitted the material allegations of the Complaint. Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding and the ALJ properly issued the Initial Decision under the default provisions in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The application of the default provisions in the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.²⁴

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 PACA violations shall be published. The publication of the facts and circumstances of Respondent's PACA 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 in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. § 2341-2350. Respondent must seek judicial

²⁴ 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).

review within 60 days after entry of the Order in this Decision and Order.²⁵ The date of entry of the Order in this Decision and Order is January 31, 2007.

In re: B.T. PRODUCE CO., INC.

PACA Docket No. D-02-0023.

In re: LOUIS R. BONINO.

PACA Docket No. APP-03-0009.

In re: NAT TAUBENFELD.

PACA Docket No. APP-03-0011.

Decision and Order.

Filed May 4, 2007.

PACA – Perishable agricultural commodities – Bribery – Willful, flagrant, and repeated violations – Responsibly connected – License revocation – Civil penalty – Scope of employment – Liability for employee’s or agent’s violations – Irrebuttable presumption – Actively involved in activities resulting in violation – Alter ego – Nominal – Administrative Procedure Act opportunity to comply – Falsified inspection certificate – Interference with chosen occupation.

The Judicial Officer affirmed Chief Administrative Law Judge Marc R. Hillson’s (the Chief ALJ) decision that B.T. Produce Co., Inc. (B.T.), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of William Taubenfeld’s (B.T.’s secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities. The Judicial Officer also affirmed the Chief ALJ’s decision that Louis R. Bonino, the vice president, a director, and holder of 30 percent of the outstanding stock of B.T., and Nat Taubenfeld, the president and a director of B.T., were responsibly connected with B.T. when B.T. violated the PACA. Based on these conclusions, the Judicial Officer revoked B.T.’s PACA license and Louis R. Bonino and Nat Taubenfeld became subject to licensing restrictions and employment restrictions under the PACA (7 U.S.C. §§ 499d(b), 499h(b)). The Judicial Officer held that B.T. was liable for William Taubenfeld’s violations of the PACA under 7 U.S.C. § 499p. The Judicial Officer rejected B.T.’s contention that the Agricultural Marketing Service violated the Administrative Procedure Act because it failed to provide B.T. with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action against B.T., stating, since B.T.’s violations of the PACA were willful, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) was inapposite. The Judicial Officer also rejected

²⁵ See 28 U.S.C. § 2344.

B.T.'s unsupported contention that the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. liable for William Taubenfeld's bribery, stating the PACA provides that the act of any person employed by a commission merchant, dealer, or broker, within the scope of employment, shall, in every case, be deemed the act of the commission merchant, dealer, or broker. Liability under the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees. The Judicial Officer further rejected B.T.'s contention that the Agricultural Marketing Service's construction of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. is liable for William Taubenfeld's bribery, stating B.T. could avoid liability under the PACA for William Taubenfeld's bribery either by showing William Taubenfeld was not acting for or employed by B.T. or by showing that William Taubenfeld's bribes were not made within the scope of his employment. The Judicial Officer stated the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate he was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he 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 (2) the petitioner was not an owner of the violating PACA licensee, which was the alter ego of its owners. The Judicial Officer held Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they were only nominal officers and directors of B.T. The Judicial Officer rejected Louis R. Bonino's and Nat Taubenfeld's contention that the imposition of employment restrictions based on finding them responsibly connected with B.T. would violate their right under the Administrative Procedure Act (5 U.S.C. § 558(c)) to notice and opportunity to demonstrate or achieve compliance. The Judicial Officer stated the Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements and, as neither Louis R. Bonino nor Nat Taubenfeld were PACA licensees, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) was inapposite. The Judicial Officer also rejected Louis R. Bonino's and Nat Taubenfeld's contention that the imposition of employment restrictions based on finding them responsibly connected with B.T. violated their rights under the due process clause of the Fifth Amendment to the Constitution of the United States. The Judicial Officer stated, under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest and, since the restriction on the employment of responsibly connected individuals is rationally related to the purpose of the PACA, 7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations. The Judicial Officer rejected Louis R. Bonino's and Nat Taubenfeld's assertion that they had been irrebuttably presumed to be responsibly connected with B.T., stating, under the PACA, an individual who is connected with a commission merchant, dealer, or broker as an officer, a director, or a holder of more than 10 percent of the

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outstanding stock of a corporation is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, the PACA (7 U.S.C. § 499a(b)(9)) provides that an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation may rebut the presumption that he is responsibly connected. The Judicial Officer agreed with the Agricultural Marketing Service's and the Chief's contention that the civil penalty assessed by the Chief ALJ against B.T. was not in accord with the United States Department of Agriculture's sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T.'s PACA license into account when determining the sanction to be imposed upon B.T.

Christopher Young-Morales and Ann Parnes for the Agricultural Marketing Service and the Chief.

Jeffrey M. Chebot, Philadelphia, Pennsylvania, for B.T. Produce Co., Inc., and Nat Taubenfeld.

Mark C. H. Mandell, Annandale, New Jersey, for B.T. Produce Co., Inc., and Louis R. Bonino.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges: (1) B.T. Produce Co., Inc. [hereinafter B.T. Produce], during the period March 1999 through August 1999, through its officer, William Taubenfeld, made illegal payments to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) B.T. Produce, on numerous occasions prior to March 1999, made illegal payments to a United States Department

of Agriculture inspector; and (3) B.T. Produce, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).¹ On September 30, 2002, B.T. Produce filed an answer denying the material allegations of the Complaint and raising five affirmative defenses.²

On March 31, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce during the period March 1999 through August 1999, and prior to that time, when B.T. Produce violated the PACA. On April 18, 2003, Louis R. Bonino and Nat Taubenfeld each filed a Petition for Review of Chief's Determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's March 31, 2003, determinations that they were responsibly connected with B.T. Produce.

On June 20, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re B.T. Produce Co., Inc.*, PACA Docket No. D-02-0023, with the two responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011.³

On December 8-11, 2003, February 17-20, 2004, and August 3-4, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Christopher Young-Morales and Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C. H. Mandell, Annandale, New Jersey, represented B.T. Produce and Louis R. Bonino. Jeffrey M. Chebot, Whiteman, Bankes & Chebot, Philadelphia, Pennsylvania, represented B.T. Produce and Nat Taubenfeld.

¹ Compl. ¶¶ III-VI.

² Answer ¶¶ 4-21.

³ *In re Louis R. Bonino* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0009, filed June 20, 2003; *In re Nat Taubenfeld* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0011, filed June 20, 2003.

On December 6, 2005, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when William Taubenfeld paid bribes to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) concluded Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; and (3) assessed B.T. Produce a \$360,000 civil penalty in lieu of a 180-day suspension of B.T. Produce's PACA license.⁴ On February 15, 2006, the Chief ALJ modified the sanction imposed on B.T. Produce by assessing B.T. Produce a \$360,000 civil penalty in lieu of a 90-day suspension of B.T. Produce's PACA license.⁵

On April 10, 2006, B.T. Produce, Louis R. Bonino, Nat Taubenfeld, the Agricultural Marketing Service, and the Chief appealed to the Judicial Officer. On May 2, 2006, the Agricultural Marketing Service and the Chief filed a response to B.T. Produce's, Louis R. Bonino's, and Nat Taubenfeld's appeal petitions. On May 5, 2006, Nat Taubenfeld filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 8, 2006, Louis R. Bonino filed a response to the Agricultural Marketing Service's and the Chief's appeal petition, and B.T. Produce filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 16, 2006, the Hearing Clerk transmitted the record, except for an exhibit identified as CX 21,⁶ to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the Chief ALJ's conclusions that B.T. Produce committed violations of the PACA and that Louis R. Bonino and Nat Taubenfeld were responsibly connected with

⁴ Initial Decision at 1-2, 17-19, 32.

⁵ Modification of Decision.

⁶ CX 21 is a tape recording of an April 23, 1999, conversation between William Taubenfeld and William Cashin which the Chief ALJ received into evidence over the objection of counsel for B.T. Produce, Louis R. Bonino, and Nat Taubenfeld (Tr. 958-1030).

B.T. Produce when B.T. Produce violated the PACA. However, I reject the sanction imposed by the Chief ALJ and conclude the appropriate sanction is the revocation of B.T. Produce's PACA license. Consequently, Louis R. Bonino and Nat Taubenfeld 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)).

Agricultural Marketing Service exhibits are designated by "CX." B.T. Produce's exhibits are designated by "RX." Transcript references are designated by "Tr."⁷

The exhibits upon which the Chief relied for his responsibly connected determination related to Louis R. Bonino are designated by "RC-Bonino." The exhibits upon which the Chief relied for his responsibly connected determination related to Nat Taubenfeld are designated by "RC-Taubenfeld."

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:

⁷ Transcript page references in this Decision and Order differ from transcript page references in the Chief ALJ's Initial Decision. References to page numbers in this Decision and Order are determined by use of the printed official transcript file in the Hearing Clerk's office.

....
(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.

....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the

Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

....

**CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS
OF INTEREST**

§ 201. Bribery of public officials and witnesses

(a) *For the purpose of this section—*

(1) *the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]*

....

(3) *the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may*

at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act[.]

.....

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

.....

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (b)(2).

DECISION

Decision Summary

I conclude B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of

William Taubenfeld's (B.T. Produce's secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities which B.T. Produce purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke B.T. Produce's PACA license. I also conclude Louis R. Bonino and Nat Taubenfeld were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino and Nat Taubenfeld 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)).

Factual Background

Hunts Point Terminal Market, located in New York City, is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of B.T. Produce. The produce houses at Hunts Point Terminal Market handle large volumes of produce delivered from points throughout the world. Because produce may have been shipped from many thousands of miles away from New York City, inspections by United States Department of Agriculture inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point Terminal Market.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may request inspection at the behest of the shipper or another party. Approximately 22,000 produce inspections are conducted annually by United States Department of Agriculture inspectors at Hunts Point Terminal Market. These inspections are crucial to the successful working of the Hunts Point Terminal Market and other produce markets, as the United States Department of Agriculture is a neutral party that examines the produce and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the produce. The United States Department of Agriculture inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the produce and can result in the renegotiation of terms

regarding the sale of the produce.

As a general rule, produce must be sold as quickly as possible. This need for expedited sale is particularly true with produce that is near ripe or ripe or that has defects, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where a United States Department of Agriculture inspection is requested, immediate sale of the produce is often beneficial to the wholesaler and the shipper in order to obtain the best price for the produce. Essentially, every hour ripe or defective produce remains unsold costs someone money. However, inspection of the produce is in everyone's best interest, so that an accurate accounting of the state of the produce is available to settle possible disputes.

A 1999 investigation, known as Operation Forbidden Fruit, conducted primarily by the Federal Bureau of Investigation with the significant involvement of United States Department of Agriculture's Office of the Inspector General, identified a number of United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were receiving bribes in connection with the inspection of produce and a number of Hunts Point Terminal Market produce houses that were paying these bribes.

The Agricultural Marketing Service's principal witness, William J. Cashin, is a former United States Department of Agriculture inspector, who was caught accepting bribes and was arrested by the Federal Bureau of Investigation.⁸ To avoid a prison term, William Cashin agreed to cooperate with the investigation and to wear or carry devices allowing him to record, either through audio or audio-visual means, many of the transactions that involved the alleged offering and taking of bribes.⁹ During the course of William Cashin's participation in Operation Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, William Cashin continued his normal business activities as a United States Department of Agriculture produce inspector. At the conclusion of each business day, William Cashin would meet with Federal Bureau of Investigation and Office of the Inspector

⁸Tr. 60.

⁹CX 5; Tr. 60-62.

General agents to discuss the day's events, principally the transactions for which he received bribes and the amounts of the bribes. William Cashin gave the money he received as bribes during each of these meetings to Federal Bureau of Investigation and Office of the Inspector General agents.¹⁰ These meetings are recorded on the FBI 302 forms, many of which were received in evidence at the hearing.¹¹

William Cashin testified, for each of the 42 inspections that he conducted at B.T. Produce between the time of his arrest and his resignation, he was paid \$50 in bribes by William Taubenfeld, who at that time was the secretary and a director of B.T. Produce.¹² William Cashin stated, in connection with 60 percent to 75 percent of his inspections, he gave "help" to B.T. Produce in the form of overstating the percentage of defects, overstating the number of containers inspected, or misstating the temperatures of the load.¹³

William Taubenfeld, who is the son of Nat Taubenfeld, was indicted on October 21, 1999, for 13 counts of bribery of a public official.¹⁴ On May 16, 2000, William Taubenfeld pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to William Cashin on July 14, 1999.¹⁵ In his plea, William Taubenfeld stated he paid the bribes to a United States Department of Agriculture inspector "with the expectation that on some occasions he would give me favorable treatment by downgrading his rating of produce that he was inspecting."¹⁶ William Taubenfeld was sentenced to 15 months in prison, 3 years probation, and ordered to pay a \$4,000 fine and \$14,585 in restitution.¹⁷ William

¹⁰Tr. 61-62.

¹¹CX 6-CX 19.

¹²CX 1 at 9, 11-12, 15-16, 18-22, CX 20; Tr. 46-47.

¹³Tr. 48-53, 58-59.

¹⁴CX 3; Tr. 256-57.

¹⁵CX 4.

¹⁶RX QQ at 12.

¹⁷CX 4; Tr. 257-58.

Taubenfeld's connections with B.T. Produce were severed shortly after his arrest.¹⁸ William Taubenfeld did not appear at the hearing.

B.T. Produce handles second rate, third rate, and distressed produce.¹⁹ Much of the produce B.T. Produce handles has been rejected by other produce houses or stores. B.T. Produce has a reputation for being able to sell lower grades of produce or produce with significant defects for good value, so that others send B.T. Produce lower quality merchandise because B.T. Produce is able to make them more money than they could make otherwise. A number of witnesses testified they were aware that produce inspected by William Cashin at B.T. Produce contained many problems, since that was why they sent the produce to B.T. Produce in the first place, and they were not surprised when they saw the United States Department of Agriculture inspection certificates. Further, these witnesses were generally pleased with the results achieved by B.T. Produce in the sale of the produce.

Nat Taubenfeld,²⁰ the president and a director of B.T. Produce,²¹ has been in the fruit and vegetable business since he arrived in the United States in 1949.²² In 1990, Nat Taubenfeld founded the current B.T. Produce business (he had used the same name in a previous business a few decades earlier) with Louis R. Bonino as a part owner.²³ Nat Taubenfeld worked the fruit and vegetable side of the business, while Louis R. Bonino primarily served as office manager, supervising employees and managing money.²⁴ Nat Taubenfeld brought William Taubenfeld into the business from the time of its establishment and gradually brought his son David Taubenfeld in as well.²⁵ Nat Taubenfeld gave both William Taubenfeld and David

¹⁸Tr. 709.

¹⁹Tr. 605, 699, 1786-90.

²⁰Nat Taubenfeld's given name is Naftali, but he is referred to in his business and in this Decision and Order as Nat.

²¹ CX 1; RC-Taubenfeld 1.

²² Tr. 688-90.

²³Tr. 688, 696-99.

²⁴Tr. 698.

²⁵Tr. 701-02.

Taubenfeld shares in the business, although no compensation was involved for these transactions and no share certificates were issued.²⁶

Nat Taubenfeld stated he was unaware that his son William Taubenfeld was bribing William Cashin. He further stated he had never given money to any United States Department of Agriculture inspector to "attempt to influence the result of that produce inspection[.]"²⁷ However, Nat Taubenfeld stated that, on a number of occasions, he gave William Cashin money, not to influence inspections, but as an act of charity in response to solicitations from William Cashin for loans to help William Cashin in his relationship with his girlfriend.²⁸ Nat Taubenfeld was not sure of the time period for these loans. William Cashin testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Produce.²⁹

No evidence was introduced indicating that Louis R. Bonino knew anything about the bribes William Taubenfeld paid to William Cashin. Mr. Bonino was not involved in the buying and selling of fruit and vegetables and managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer and who owned a trucking business before joining Nat Taubenfeld in forming B.T. Produce, signed checks and contracts, established surveillance measures, and managed office staff at B.T. Produce.³⁰ Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce from the time it was created in 1990.³¹ As part of his duties, Louis R. Bonino handled the 30 to 40 reparation cases that arose as a result of Operation Forbidden Fruit, which resulted in B.T. Produce paying reparations of \$400,000 to \$500,000.³² Mr. Bonino expressed surprise as to

²⁶Tr. 703-04.

²⁷Tr. 707.

²⁸Tr. 711-12.

²⁹Tr. 42-44.

³⁰Tr. 595-602.

³¹CX 1; RC-Bonino 1.

³²Tr. 610-12.

why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T. Produce and stated he was not aware of the illegal payments.³³

Much of the hearing consisted of testimony concerning the 42 United States Department of Agriculture inspection certificates and the “help” William Cashin provided B.T. Produce with respect to the produce that was the subject of these United States Department of Agriculture inspection certificates. Since William Cashin steadfastly maintained that he had no specific memory of how he helped B.T. Produce in any particular inspections and since the Agricultural Marketing Service called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by William Cashin’s actions, there is no evidence that any particular United States Department of Agriculture inspection certificate was inaccurate. On the other hand, B.T. Produce personnel testified that each of the United States Department of Agriculture inspection certificates was accurate. Moreover, their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information on the United States Department of Agriculture inspection certificates was consistent with what they expected, given what these shippers knew of the condition of the produce.

While the Agricultural Marketing Service called no witnesses, other than William Cashin, who could have corroborated that any particular United States Department of Agriculture inspection certificate was falsified, B.T. Produce’s witnesses testified as to their recollection of each transaction. Not only did Nat Taubenfeld and David Taubenfeld testify regarding produce they handled that was the subject of the 42 United States Department of Agriculture inspection certificates, but office manager Robin Long; salesman Michael Bonino, who is the son of Louis R. Bonino; Steven Goodman, who was affiliated with the shipper JSG Trading Corp.; Peter Silverstein, the president of Northeast Trading, Inc.; and Harold Levy, a fruit broker at Northeast Trading, Inc.; all testified as to their roles in many of these transactions.

I find several of the transactions worth discussing in more detail. For

³³Tr. 613-14.

example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the Complaint, which was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which had been received by B.T. Produce 2 days earlier. On the receiving ticket, Nat Taubenfeld noted in his own handwriting that the plums were "very ripe."³⁴ This notation indicated to him that "the merchandise had to be moved quick, sold under any price, and not play around with it."³⁵ The shipment was "pas" or price after sale, indicating that a final price on the merchandise was not to be calculated until B.T. Produce sold or otherwise disposed of the produce.³⁶ United States Department of Agriculture inspection certificate number K-678085-2, indicating serious damage to 18 percent of the load³⁷ was not inconsistent with Nat Taubenfeld's observations that the plums were very ripe. While David Oppenheimer and Company suggested that the price be \$9 per box of plums, David Oppenheimer and Company agreed to an adjustment from \$9 per box to \$8 per box after factoring in the prices B.T. Produce was able to get for the plums (averaging \$8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld's opinion, B.T. Produce suffered a net loss on the transaction.³⁸

Another transaction is the June 14, 1999, United States Department of Agriculture inspection of cherries received by B.T. Produce from Northeast Trading, Inc.³⁹ Nat Taubenfeld indicated on the bill of lading that the cherries were "soft,"⁴⁰ as opposed to the firm cherries that customers desire.⁴¹ Nat Taubenfeld testified he received an average of \$5.26 per box

³⁴RX A at 1; Tr. 1095.

³⁵RX A at 1; Tr. 1095.

³⁶Tr. 1089.

³⁷RX A at 6.

³⁸RX A at 3; Tr. 1097-1100.

³⁹RX Q.

⁴⁰RX Q at 3.

⁴¹Tr. 1148.

under the market price for these cherries and he received a \$6 reduction from Northeast Trading, Inc., as a result. Nat Taubenfeld did not dispute United States Department of Agriculture inspection certificate number K-766717-3, which indicates the cherries had 21 percent defects.⁴² Peter Silverstein, the president of Northeast Trading, Inc., testified that he had no indication there was anything wrong with United States Department of Agriculture inspection certificate number 766717-3 and the shipper did not appeal the inspection. He thought it was likely that the older cherries in this shipment were competing against younger and fresher cherries.⁴³

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. Produce had a very flexible relationship and that sometimes, when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. Produce would be allowed to recoup a larger profit in a later transaction, to make up for a lesser profit or a loss for a different load.⁴⁴ Nat Taubenfeld pointed out that “the relationship between the shipper and us plays a tremendous role in our business[.]”⁴⁵ “[I]t’s one hand washes the other. Sometimes you can make a few dollars more, and sometimes the shipper says that’s what I can give you and that’s what we do.”⁴⁶ David Taubenfeld had a more dramatic explanation—“It’s a lot of begging. There’s a lot of begging to our customers and pleading and fighting over prices and things like that.”⁴⁷ David Taubenfeld added that they often “worked for nothing” on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time.⁴⁸

Even though the Agricultural Marketing Service was unable to demonstrate that any particular United States Department of Agriculture

⁴²Tr. 1150-54.

⁴³Tr. 1648-49.

⁴⁴Tr. 1089-92.

⁴⁵Tr. 1092.

⁴⁶Tr. 1100.

⁴⁷Tr. 1795.

⁴⁸Tr. 1936.

inspection certificate was falsified to benefit B.T. Produce, the only probative evidence offered as to the purpose for William Taubenfeld's bribes was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as-needed basis. The portrayal by B.T. Produce of its shippers as satisfied with the results of United States Department of Agriculture inspections is belied by the significant number of reparation actions against B.T. Produce and approximately \$500,000 in reparation payments by B.T. Produce generated by Operation Forbidden Fruit.⁴⁹ Certainly, even if produce which was expected by the shipper to be seconds or worse was falsely downgraded by the United States Department of Agriculture inspector, the shipper would have lower price expectations and the shipper would most likely view B.T. Produce as having done an apparently exceptional job of selling damaged goods, which view could inure, to B.T. Produce's benefit in terms of future business.⁵⁰

David Nielsen, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as to his role in the investigation of B.T. Produce. His methodology basically consisted of reviewing documents provided to the PACA Branch by the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General.⁵¹ He examined the B.T. Produce PACA license files and the complaint history of B.T. Produce, as well as the documents that were supplied to him.⁵² David Nielsen went to B.T. Produce's premises on March 26, 2001, as part of his investigation, particularly seeking out the purchase and sales records related to the United States Department of Agriculture inspection certificates that he had been given by the Federal Bureau of Investigation and the Office of the Inspector General. He spent about 2 weeks on site in March and April 2001, and returned for another 2 weeks several months later.⁵³ While Mr.

⁴⁹Tr. 610-12.

⁵⁰Tr. 1302-06.

⁵¹Tr. 247.

⁵²Tr. 252.

⁵³Tr. 279.

Nielsen testified that he produced a report of investigation concluding that B.T. Produce violated the PACA by paying bribes to a United States Department of Agriculture inspector to falsify 42 United States Department of Agriculture inspection certificates, he based that conclusion on the documents he had received from the Federal Bureau of Investigation and the Office of the Inspector General. Mr. Nielsen admitted under cross-examination that B.T. Produce had no records indicating any evidence of falsification of United States Department of Agriculture inspection certificates and no records supporting a finding that B.T. Produce paid bribes.⁵⁴ Likewise, although David Nielsen stated in his report that the 42 United States Department of Agriculture inspection certificates were used to obtain price adjustments, his report was not accurate.⁵⁵ David Nielsen also admitted that in other areas the conclusions in his investigation report were not accurate⁵⁶ and that his statement in his investigation report about falsification was an assumption based on “my understanding of the information that I had been given.”⁵⁷

John A. Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as the Agricultural Marketing Service’s sanctions witness. Mr. Koller testified that the payment of bribes by B.T. Produce “to a produce inspector, constitutes willful, repeated and flagrant violations of the PACA.”⁵⁸ Mr. Koller further testified that bribing an inspector “corrupts

⁵⁴Tr. 284-87.

⁵⁵Tr. 290-91.

⁵⁶Specifically, Mr. Nielsen testified B.T. Produce made no adjustment on the produce B.T. Produce received from Trinity Fruit Sales Co., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX I; Tr. 308); B.T. Produce made no adjustment on the produce B.T. Produce received from Garden Fresh Distribution Services, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX G; Tr. 310); and B.T. Produce made no adjustment on the produce B.T. Produce received from Mission Produce, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX T; Tr. 310).

⁵⁷Tr. 321.

⁵⁸Tr. 490.

the inspection process⁵⁹ and violates the fair trade practices provision of the PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. Produce since William Taubenfeld was an officer and employee of B.T. Produce and since his actions were within the scope of his employment.⁶⁰ Mr. Koller pointed out that, when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions.⁶¹

Mr. Koller recommended that an appropriate sanction would be revocation of B.T. Produce's PACA license.⁶² He stated that civil penalties were not appropriate here, because "bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and . . . the inspection process and its credibility."⁶³ Mr. Koller also stated revocation was warranted because of the length of time the bribery had continued and because "USDA has consistently recommended license revocation in the case of bribery. . . ."⁶⁴ Even in instances in which a bribe was paid and the particular United States Department of Agriculture inspection certificate was accurate, the bribe payer benefits, according to Mr. Koller, because the bribe payer could benefit at a later time⁶⁵ and because bribery creates an "unlevel playing field."⁶⁶ Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Agricultural Marketing Service was not able to identify a single one of the 42 United States Department of

⁵⁹Tr. 491.

⁶⁰Tr. 491.

⁶¹RX QQ; Tr. 496-97.

⁶²Tr. 499.

⁶³Tr. 502.

⁶⁴Tr. 503.

⁶⁵Tr. 516.

⁶⁶Tr. 591.

Agriculture inspections certificates that had been falsified.⁶⁷

Findings of Fact

1. B.T. Produce is a New York corporation whose business and mailing address is 163-166 Row A, Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to the instant proceeding, B.T. Produce was a PACA licensee.⁶⁸

2. William J. Cashin was employed as a produce inspector by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, at the Hunts Point Terminal Market, New York, from July 1979 through August 1999.⁶⁹

3. William Cashin participated in a scheme whereby he received bribes for the conduct of United States Department of Agriculture produce inspections. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation of bribery at Hunts Point Terminal Market.⁷⁰

4. With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General, William Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio or audio-visual recording devices. At the end of each day, William Cashin gave the Federal Bureau of Investigation agents his tapes, gave the Federal Bureau of Investigation any bribes he received, and recounted his activities. The Federal Bureau of Investigation agents would

⁶⁷Tr. 533.

⁶⁸CX 1.

⁶⁹Tr. 36.

⁷⁰CX 5; Tr. 60-62.

prepare a FBI 302 report summarizing what William Cashin told them about that day's activities.⁷¹

5. Beginning in 1994, and more specifically, during the period March 24, 1999, through August 12, 1999, William Taubenfeld paid bribes to William Cashin. In particular, during the period March 24, 1999, through August 12, 1999, B.T. Produce, through William Taubenfeld, made the following payments to William Cashin, a United States Department of Agriculture produce inspector, in connection with 42 inspections of perishable agricultural commodities that B.T. Produce purchased, received, and accepted from 26 produce sellers in interstate or foreign commerce:

a. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of apples shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-678083-7.

b. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-678084-5.

c. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by David Oppenheimer and Company, reflected on United States Department of Agriculture inspection certificate number K-678085-2.

d. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 23, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-679809-4.

e. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of lettuce shipped to B.T. Produce by Sun America Produce, reflected on United States Department of Agriculture

⁷¹CX 6-CX 19; Tr. 61-62.

inspection certificate number K-765852-9.

f. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Deschino Produce & Imports, Inc., reflected on United States Department of Agriculture inspection certificate number K-765853-7.

g. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765854-5.

h. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of mangos shipped to B.T. Produce by Diazteca Company, Inc., reflected on United States Department of Agriculture inspection certificate number K-765859-4.

i. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of cherries shipped to B.T. Produce by Trinity Fruit Sales Co., reflected on United States Department of Agriculture inspection certificate number K-765860-2.

j. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of hashiya and persimmons shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765861-0.

k. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of pears shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-765863-6.

l. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 4, 1999, inspection of berries shipped to B.T. Produce by Fresh Harvest Int'l, reflected on United States Department of Agriculture inspection certificate number K-766504-5.

m. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 4, 1999, inspection of apples shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-766507-8.

n. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 10, 1999, inspection of papaya and mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766702-5.

o. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-766714-0.

p. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of onions shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-766715-7.

q. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Primavera Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-766716-5.

r. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-766717-3.

s. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Sunniland Fruit, Inc., reflected on United States Department of Agriculture inspection certificate number K-766718-1.

t. B.T. Produce paid William Cashin, a United States

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Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766719-9.

u. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-768355-0.

v. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768356-8.

w. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Mission Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768357-6.

x. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768358-4.

y. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of plums and nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768729-6.

z. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768730-4.

aa. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Mission

Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768731-2.

bb. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768956-5.

cc. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768957-3.

dd. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of limes shipped to B.T. Produce by Produce Plus, reflected on United States Department of Agriculture inspection certificate number K-768958-1.

ee. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of cherries and apples shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768959-9.

ff. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of mangos shipped to B.T. Produce by New Zealand Gourmet, reflected on United States Department of Agriculture inspection certificate number K-768960-7.

gg. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768961-5.

hh. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Coast Tropical, reflected on United States Department of Agriculture

inspection certificate number K-769369-3.

ii. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Tavilla Sales Co., reflected on United States Department of Agriculture inspection certificate number K-769397-1.

jj. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of pears shipped to B.T. Produce by Fruit Patch, Inc., reflected on United States Department of Agriculture inspection certificate number K-769398-9.

kk. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 3, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-769883-0.

ll. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 3, 1999, inspection of oranges shipped to B.T. Produce by Paul Steinberg Associates, reflected on United States Department of Agriculture inspection certificate number K-769884-8.

mm. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Dade South Fruits & Vegetables, Inc., reflected on United States Department of Agriculture inspection certificate number K-769899-6.

nn. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of plums shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-769900-2.

oo. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Turino, reflected on United States Department of Agriculture inspection certificate number K-770151-9.

pp. B.T. Produce paid William Cashin, a United States

Department of Agriculture produce inspector, \$50 in connection with the August 9, 1999, inspection of tomatoes shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-770160-0.⁷²

6. During the period in which he paid bribes to William Cashin, William Taubenfeld was employed by, and was the secretary and a director of, B.T. Produce.⁷³

7. William Taubenfeld paid bribes to William Cashin with the expectation that William Cashin would downgrade the quality of the produce he was inspecting, on an as-needed basis, to benefit B.T. Produce.⁷⁴

8. There is no evidence that any of the 42 United States Department of Agriculture inspection certificates cited in the Complaint were falsified.

9. B.T. Produce's position was improved by William Cashin's falsification of United States Department of Agriculture inspection certificates, on an as-needed basis, in exchange for bribes.⁷⁵

10. On October 21, 1999, an indictment, in which the grand jury charged William Taubenfeld with 13 counts of bribery of a public official, in violation of 18 U.S.C. § 201(b), was filed in the United States District Court for the Southern District of New York. The indictment charges that William Taubenfeld:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, WILLIAM TAUBENFELD, the defendant, 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 B. T Produce Co., Inc., Hunts Point Terminal Market,

⁷²CX 6-CX 19; RX A-RX OO; Tr. 41-56, 58-59.

⁷³CX 1; CX 20 at 71-75.

⁷⁴RX QQ.

⁷⁵Tr. 48-53, 58-59.

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Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	3/24/99	\$150
TWO	4/23/99	\$50
THREE	5/24/99	\$150
FOUR	5/25/99	\$200
FIVE	6/4/99	\$100
SIX	6/14/99	\$400
SEVEN	7/8/99	\$200
EIGHT	7/14/99	\$150
NINE	7/21/99	\$300
TEN	7/30/99	\$150
ELEVEN	8/3/99	\$100
TWELVE	8/6/99	\$150
THIRTEEN	8/12/99	\$100

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)⁷⁶

The bribes charged in the indictment cover the payments William Taubenfeld made to William Cashin in connection with the 42 inspections of perishable agricultural commodities identified in Finding of Fact 5.⁷⁷

11. On May 16, 2000, William Taubenfeld pled guilty to Count 8 of the indictment referred to in Finding of Fact 10. Specifically, William Taubenfeld pled guilty to bribery of a public official (18 U.S.C. § 201(b)). William Taubenfeld was sentenced to 15 months in prison, 3-years probation, and ordered to pay a \$4,000 fine and \$14,585 in restitution.⁷⁸

12. During the period in which William Taubenfeld paid bribes to William Cashin, Nat Taubenfeld was the president and a director of B.T. Produce. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T. Produce, particularly in the area of buying and selling of

⁷⁶ CX 3.

⁷⁷ CX 6-CX 19.

⁷⁸ CX 4.

produce.⁷⁹

13. During the period in which William Taubenfeld paid bribes to William Cashin, Louis R. Bonino was the vice president, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce. Louis R. Bonino was involved in the day-to-day operations of B.T. Produce, principally managing the office aspect of operations.⁸⁰

14. There is no evidence that Nat Taubenfeld or Louis R. Bonino knew William Taubenfeld was bribing William Cashin.

Conclusions of Law

1. Payment of bribes to a United States Department of Agriculture produce inspector in connection with the inspection of produce constitutes a failure to perform an implied duty in connection with transactions involving perishable agricultural commodities in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), William Taubenfeld's payment of bribes to a United States Department of Agriculture produce inspector constitutes violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by B.T. Produce.

3. B.T. Produce committed 42 willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by paying bribes to a United States Department of Agriculture produce inspector.

4. The appropriate sanction for B.T. Produce's 42 violations of the PACA is revocation of B.T. Produce's PACA license.

5. Louis R. Bonino was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino 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)).

6. Nat Taubenfeld was *responsibly connected*, as defined by

⁷⁹CX 1; RC-Taubenfeld 1; Tr. 700-01.

⁸⁰CX 1.

section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Nat Taubenfeld 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)).

Discussion

I. Introduction

I find William Taubenfeld, an officer and a director of B.T. Produce, paid bribes to William Cashin in each of the 42 instances alleged in the Complaint. I further find bribery of a United States Department of Agriculture produce inspector violates the PACA and B.T. Produce's violations were willful, flagrant, and repeated. I find B.T. Produce is liable for these violations. I further find, while there is no evidence that any of the 42 United States Department of Agriculture inspection certificates that are the subject of this proceeding were falsified, the evidence shows William Taubenfeld paid the bribes with the expectation that B.T. Produce would receive help from William Cashin in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis, and William Cashin actually provided B.T. Produce help in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis. I conclude the purposes of the PACA can best be achieved by the revocation of B.T. Produce's PACA license. Therefore, Louis R. Bonino and Nat Taubenfeld 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)).

II. B.T. Produce Violated the PACA

A. William Taubenfeld Bribe a USDA Inspector

The evidence clearly establishes that William Taubenfeld made \$50 payments to William Cashin in the 42 instances alleged in the Complaint. While William Taubenfeld pled guilty to only a single count of bribery based on three inspections for which he paid bribes on July 14,

1999, William Cashin's undisputed testimony, as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that William Taubenfeld's bribing William Cashin was part of a long-standing practice. It is likewise undisputed that William Taubenfeld was the secretary and a director of B.T. Produce at the time the violations alleged in the Complaint were committed.

B. B.T. Produce Is Liable for William Taubenfeld's PACA Violations

Section 16 of the PACA (7 U.S.C. § 499p) states, in every case, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall be deemed the act of the commission merchant, dealer, or broker. There is no disputing that William Taubenfeld paid bribes to William Cashin in connection with 42 inspections of perishable agricultural commodities and that the purpose for the bribes was to benefit B.T. Produce.

Section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.⁸¹

As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, PACA violations committed by him are deemed to be violations by B.T. Produce.

Even if other officers, directors, and shareholders in B.T. Produce, as well as B.T. Produce's employees, were unaware of William Taubenfeld's PACA violations, the absence of actual knowledge is insufficient to rebut the burden imposed by section 16 of the PACA (7 U.S.C. § 499p). As a matter of law, PACA violations by an employee are violations by the PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations and would not have condoned them.⁸² If

⁸¹*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 500 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 820 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸²*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 501(2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

a PACA licensee can be held responsible for the acts of an employee, who was not an officer, a director, or an owner, even where the company's officers, directors, and owners had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is an officer and a director, whether or not the other officers and directors had actual knowledge of the violative conduct. The clear and specific language of the PACA would be defeated by any other interpretation.

C. *Bribery of a USDA Inspector Violates the PACA*

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful 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 received in interstate or foreign commerce. I have consistently interpreted this provision to hold that a payment of a bribe to a United States Department of Agriculture produce inspector in connection with a produce inspection is a violation of the PACA.⁸³ Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Second Circuit have affirmed this interpretation.⁸⁴ A produce buyer's payment of bribes to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection

⁸³*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸⁴*Coosemans Specialties, Inc. v. Department of Agric.*, No. 06-1199, 2007 WL 1029049 at *5 (D.C. Cir. Apr. 6, 2007); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86, 96-97 (2d Cir. 2006).

system and undermine the produce industry's trust in the entire inspection system.

D. B.T. Produce's PACA Violations Were Willful, Flagrant, and Repeated

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.⁸⁵ William Taubenfeld, and therefore B.T. Produce, knew the payments to William Cashin in connection with the 42 inspections involved in this proceeding were illegal, but essentially decided that he needed to make these payments for the benefit of B.T. Produce's business. Clearly, B.T. Produce made a business decision to violate the PACA. B.T. Produce's payments to William Cashin were clearly intentional.

Likewise, B.T. Produce's violations were flagrant. A violation of law is flagrant if it is conspicuously bad or objectionable or so bad that it can neither escape notice nor be condoned.⁸⁶ The payment of a bribe to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities is a conspicuously bad and objectionable act that cannot escape notice or be condoned because it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of the United States Department of Agriculture produce inspector. Here,

⁸⁵See, e.g., *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

⁸⁶*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482, 504 (2006), appeal docketed, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 829 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

where the purpose of the bribes undisputedly would be to benefit B.T. Produce to the detriment of its shippers, sellers, or growers, B.T. Produce's long-standing practice of bribing William Cashin easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, B.T. Produce's violations of the PACA are repeated because repeated means more than one.⁸⁷ The Agricultural Marketing Service demonstrated that William Taubenfeld bribed William Cashin 42 times during the period March 1999 through August 1999, and that this practice had begun long before Operation Forbidden Fruit.

Thus, I conclude B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

III. The Appropriate Sanction for B.T. Produce's Violations Is License Revocation

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.⁸⁸

⁸⁷ See, e.g., *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding, because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied*, 389 U.S. 835 (1967).

⁸⁸ 7 U.S.C. § 499h(a), (e).

The Agricultural Marketing Service requests revocation of B.T. Produce's PACA license as an appropriate sanction for B.T. Produce's PACA violations. B.T. Produce, on the other hand, urges that, if I find it has violated the PACA, I assess B.T. Produce a civil penalty of \$2,000 for each of the instances of bribery, for a total civil penalty of \$84,000.

While the Agricultural Marketing Service failed to show any particular instance in which William Cashin falsified a United States Department of Agriculture inspection certificate as a result of the bribes he was paid by William Taubenfeld, the evidence establishes that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T. Produce and to the detriment of shippers, sellers, or growers. William Taubenfeld admitted in his plea that the purpose of the bribes was to get William Cashin to downgrade produce on occasion.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

[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.

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. My views accord with those of John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, who testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the Agricultural Marketing Service's recommendation for PACA license revocation as follows:

[BY MS. PARNES:]

Q. Are you aware of the sanctions that Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I have participated in the sanction recommendation, preparation of the sanction recommendation.

Q. What is that sanction recommendation?

A. A revocation of Respondent's PACA license.

Q. And what is the basis of this sanction recommendation?

A. There's several factors that are in consideration for this recommendation. One factor is that several bribery payments have been made in this case, and the evidence overwhelmingly shows that -- the evidence overwhelming shows that Respondent, through William Taubenfeld made bribery payments to a produce inspector.

And the FBI has documented that 42 inspections, over a five-month period of time, have been affected by these bribery payments. As an aggravating factor, Mr. Cashin has already testified that he had been receiving bribery payments from Respondent as far back as 1994.

Another factor is that the trade relies on the inspection to be accurate and impartial, so they can use that inspection for resolving any disputes, and approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it's important that these inspections that are performed are accurate.

If there's any suspicion that these inspections have been tainted by bribery payments made to a produce inspector to affect the outcome of that inspection is something of concern, or is a concern.

If when an inspection has been fraudulently obtained, this effects [sic] the overall inspection process. It undermines the inspection process, and it also effects [sic] the credibility of the inspection certificate as well, in terms of it being an impartial and accurate reflection of the quality and condition of the product.

And if there's any questions on the part of the shipper, as to the credibility of that inspection, this would effect [sic] the ability of resolving hundreds of disputes that could be resolved each day, as well as tons [sic] of thousands of dollars with illegal adjustments being -- occurring in the transactions.

Another consideration or factor is the competitiveness. When you have someone who is paying bribes to a produce inspector, in order to get false information on the inspection, and price adjustments to the transaction, this provides an unfair advantage, and other wholesalers in the market, in order to compete, may feel that they have to make the bribery payments as well.

For example, if you have a wholesaler in the Hunts Point Market who is bribing a produce inspector to obtain false information and obtain price adjustments to the transaction, then other wholesalers on the market may well feel that in order to compete they will pay bribes to the inspectors as well.

Another consideration or another factor is that the Department strongly believes that a strong sanction will not only deter Respondent, but will deter other members of the industry from considering making or contemplating making a bribery payment to a produce inspector, and that is a serious violation, a serious

violation in making these bribery payments.

Q. And does the fact that Mr. Cashin's [sic] a USDA employee and he was the one who was receiving the bribes, does that have any impact on the Complainant's sanction recommendation?

A. No.

Q. Why is that?

A. Complainant feels that bribery payments to a produce -- whether the bribery payments are made to another member of the industry or to a produce inspector, it is a serious violation. And the fact that bribery payments are being made to a produce inspector does not excuse a PACA licensee from making those bribery payments.

Q. Does Complainant recommend a civil penalty as an alternative to the license revocation in this case?

A. No.

Q. Why not?

A. In this case where you have bribery payments being made to a produce inspector to obtain false information on the inspection, that undermines the credibility of the inspection certificate itself, and these bribery payments, as well, undermine the inspection process and its credibility. And that is a serious violation, and that the appropriate -- and it would be appropriate for a civil penalty and the sanction imposed in this matter.

Another consideration is that the bribery payments did occur over a long period of time, and again, the competitiveness concern here, is that when you have bribery payments being made to a produce inspector, you know, it is an advantage to those who are making those bribery payments, and for those firms that are

law abiding and not making those bribery payments, it's competitively hard for them to compete.

And another consideration here, is that bribery payments to a produce inspector are a serious violation of the PACA, and the appropriate sanction to deter this from occurring would be to have a license revocation on a licensee who has committed bribery payments.

And finally, it has been -- USDA has consistently recommended license revocation in the case of bribery and where these serious types of violations has occurred.

Tr. 499-503.

I find William Taubenfeld's payments of bribes to a United States Department of Agriculture produce inspector, within the scope of his employment, are deemed to be the actions of B.T. Produce and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.⁸⁹ While sanctions in similar cases are not required to be uniform,⁹⁰ I find no reason to depart

⁸⁹*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁹⁰*Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

from my normal practice of imposing the maximum sanction in this proceeding.

IV. Louis R. Bonino and Nat Taubenfeld Were Responsibly Connected

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.⁹¹ The record establishes Nat Taubenfeld was the president and a director of B.T. Produce during the period when B.T. Produce violated the PACA.⁹² The record also establishes Louis R. Bonino was the vice president, a director, and a holder of 30 percent of the outstanding stock of B.T. Produce during the period when B.T. Produce violated the PACA.⁹³ The burden is on Louis R. Bonino and Nat Taubenfeld to demonstrate by a preponderance of the evidence that they were not responsibly connected with B.T. Produce despite their positions at, and ownership of, B.T. Produce.

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 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 United States Department of Agriculture's standard for determining whether a petitioner was actively involved in the activities resulting in a

⁹¹7 U.S.C. § 499a(b)(9).

⁹²CX 1, CX 20 at 71-75.

⁹³CX 1, CX 20 at 71-75.

violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), 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.

I find Louis R. Bonino and Nat Taubenfeld each carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce's violations of the PACA. However, I find Nat Taubenfeld failed to carry his burden of proof that he was only nominally an officer and a director of B.T. Produce. I also find Louis R. Bonino 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 B.T. Produce.

In order for a petitioner to demonstrate that he or she was only nominally an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation, the petitioner must demonstrate 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 shareholders, 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 failed to counteract or obviate the fault of others.⁹⁴

⁹⁴*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756

The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period. Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.⁹⁵ He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.⁹⁶ His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.⁹⁷ Nat Taubenfeld brought both of his sons into the business.⁹⁸

Nat Taubenfeld failed to meet his burden that he was only nominally the president and director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.⁹⁹

Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.¹⁰⁰ Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.¹⁰¹ Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training

n.84 (D.C. Cir. 1975).

⁹⁵CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

⁹⁶RC-Taubenfeld 6; Tr. 705-07, 721.

⁹⁷Tr. 1281, 1298.

⁹⁸Tr. 701-03.

⁹⁹Tr. 669, 684, 1281, 1298.

¹⁰⁰CX 1; RC-Bonino 1.

¹⁰¹Tr. 595, 605-06, 652-53.

employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.¹⁰² Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.¹⁰³

Louis R. Bonino failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, he had substantial responsibilities in many aspects of the business, and he had authority over employees. Moreover, Louis R. Bonino failed to meet his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of B.T. Produce.

Requests for Oral Argument

B.T. Produce, Nat Taubenfeld, and Louis R. Bonino request oral argument before the Judicial Officer. B.T. Produce's, Nat Taubenfeld's, and Louis R. Bonino's requests for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,¹⁰⁴ are refused because the parties have thoroughly briefed the issues and oral argument would appear to serve no useful purpose.

Appeal Petitions

B.T. Produce's Appeal Petition

B.T. Produce raises six issues in its appeal petition.¹⁰⁵ First, B.T. Produce contends the Chief ALJ's finding of fact number 8 is not supported

¹⁰²Tr. 633.

¹⁰³Tr. 611-12.

¹⁰⁴7 C.F.R. § 1.145(d).

¹⁰⁵B.T. Produce filed "Respondent's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R § 1.145(a) from the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006" [hereinafter B.T. Produce's Appeal Petition].

by sufficient evidence.¹⁰⁶

The Chief ALJ found “[t]he evidence supports a finding that there were transactions where B.T.’s position was improved by the falsification of inspections as a result of bribes paid to Cashin.”¹⁰⁷ I agree with the Chief ALJ’s finding and reject B.T. Produce’s contention that the Chief ALJ’s finding is not supported by substantial evidence. William Cashin testified that, pursuant to his understanding with William Taubenfeld, he (Mr. Cashin) would “help” B.T. Produce on United States Department of Agriculture inspection certificates covering particular loads of produce in exchange for \$50 payments. William Cashin testified he was paid for each inspection he conducted for B.T. Produce, and he would provide “help” 60 percent to 75 percent of the time.¹⁰⁸ William Cashin’s testimony that he falsified United States Department of Agriculture inspection certificates issued in connection with the inspection of produce for B.T. Produce is corroborated by William Taubenfeld’s guilty plea in which William Taubenfeld admitted he paid bribes to William Cashin to induce him to falsify United States Department of Agriculture inspection certificates.¹⁰⁹

Nat Taubenfeld provided further testimony supporting William Cashin’s testimony that he gave “help” to B.T. Produce. Nat Taubenfeld testified that, when B.T. Produce received produce, B.T. Produce would start selling the produce immediately, before William Cashin performed an inspection.¹¹⁰ However, for every United States Department of Agriculture inspection certificate introduced as evidence, the amount of produce noted on the inspection certificate is the same as the full amount of produce received by B.T. Produce, as indicated by the bill of sale.¹¹¹ Nat Taubenfeld testified that he told William Cashin to write the original count on the United States Department of Agriculture inspection certificates even if some

¹⁰⁶B.T. Produce’s Appeal Pet. at 2-5.

¹⁰⁷Initial Decision at 18 (Finding of Fact 8).

¹⁰⁸Tr. 44-60.

¹⁰⁹CX 3, CX 4; RX QQ; Tr. 585.

¹¹⁰Tr. 1279, 1283.

¹¹¹CX 7-CX 19; RX A-RX Z, RX AA-RX OO; Tr. 1283.

of the produce had already been sold and was therefore not inspected.¹¹²

Many of the United States Department of Agriculture inspection certificates for which William Taubenfeld paid bribes indicate the produce inspected contained serious defects. The payments B.T. Produce made to shippers for this produce reflect the defects indicated on the United States Department of Agriculture inspection certificates. However, in many cases, B.T. Produce sold the produce near market price,¹¹³ at market price,¹¹⁴ or above market price.¹¹⁵ I find B.T. Produce's frequent ability to sell produce near, at, or above market prices suggests that the produce had fewer defects than stated on the United States Department of Agriculture inspection certificates and the United States Department of Agriculture inspection certificates were falsified.

Second, B.T. Produce contends the Agricultural Marketing Service failed to prove B.T. Produce violated the PACA because the Agricultural Marketing Service did not introduce any evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers.¹¹⁶

As discussed in this Decision and Order, *supra*, I disagree with B.T. Produce's contention that there is no evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers. However, even if I were to find no evidence of falsification of United States Department of Agriculture inspection certificates and no evidence of harm to B.T. Produce's shippers, I would still find William Taubenfeld's payments to a United States Department of Agriculture inspector violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The PACA does not expressly provide that a payment to a United States

¹¹²Tr. 1284.

¹¹³RX A-RX B, RX D, RX F-RX J, RX N, RX SS.

¹¹⁴RX R, RX W-RX Y, RX LL, RX SS.

¹¹⁵RX E, RX II, RX SS; Tr. 1279-81.

¹¹⁶B.T. Produce's Appeal Pet. at 6-21.

Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) 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.¹¹⁷

Bribery of 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 that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. 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 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 unlawful gratuities or bribes to United States Department of Agriculture produce inspectors.¹¹⁸

¹¹⁷7 U.S.C. § 499b(4).

¹¹⁸*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta &*

Third, B.T. Produce contends William Taubenfeld's payments to William Cashin were not within the scope of William Taubenfeld's employment with B.T. Produce; therefore, B.T. Produce did not violate the PACA.¹¹⁹

Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;¹²⁰ (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.¹²¹

The record establishes that William Taubenfeld was within the scope of his employment with B.T. Produce when he paid bribes to William Cashin. William Taubenfeld paid bribes to William Cashin at B.T. Produce's place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by B.T. Produce. William Taubenfeld was authorized to apply for United States Department of Agriculture inspections of perishable agricultural commodities and the bribes William Taubenfeld paid to William Cashin were intended to benefit B.T. Produce.¹²² Therefore, I find William Taubenfeld was acting within the scope of his employment when he paid William Cashin.

Fourth, B.T. Produce contends the Agricultural Marketing Service failed to provide B.T. Produce with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action

Sons, Inc., 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

¹¹⁹B.T. Produce's Appeal Pet. at 19-21.

¹²⁰Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

¹²¹*See generally* Restatement (Second) of Agency § 228 (1958).

¹²²Tr. 44-52.

against B.T. Produce on August 16, 2002, in violation of the Administrative Procedure Act.¹²³

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

....

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.¹²⁴ The record establishes that William Taubenfeld intentionally made unlawful payments to William

¹²³ B.T. Produce's Appeal Pet. at 21-27.

¹²⁴ See note 85.

Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is inapposite.

B.T. Produce argues that, while William Taubenfeld willfully violated the PACA, William Taubenfeld's willfulness cannot be imputed to B.T. Produce; therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is applicable to B.T. Produce.¹²⁵

I disagree with B.T. Produce's contention that William Taubenfeld's willful violations of the PACA cannot be imputed to B.T. Produce. The relationship between a commission merchant, dealer, or broker and its employees, acting within the scope of their employment, is governed by section 16 of the PACA (7 U.S.C. § 499p) which unambiguously provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

B.T. Produce's employee, secretary, and director, William Taubenfeld, was acting within the scope of employment when he knowingly and willfully bribed William Cashin. Thus, as a matter of law, the knowing and willful violations by William Taubenfeld are deemed to be knowing and willful violations by B.T. Produce, even if B.T. Produce's other officers and directors had no actual knowledge of the bribery and would not have condoned the bribery had they known of it.¹²⁶ The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action

¹²⁵ B.T. Produce's Appeal Pet. at 23.

¹²⁶ *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 790 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. U.S. Dep't of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler's employee to a United States Department of Agriculture

inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker" 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003).

Therefore, I conclude section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees and William Taubenfeld's willful violations of the PACA are B.T. Produce's willful violations of the PACA. Consequently, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is not applicable to B.T. Produce.

Fifth, B.T. Produce contends the Chief ALJ's construction of section 16 of the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. Produce liable for William Taubenfeld's payments to William Cashin, where B.T. Produce, even with the exercise of the utmost supervision, could not

discover or control William Taubenfeld's activities.¹²⁷

B.T. Produce does not cite any authority in support of its position that a corporation's liability for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional. Section 16 of the PACA (7 U.S.C. § 499p) unambiguously provides that the act, omission, or failure of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall, in every case, be deemed the act, omission, or failure of the commission merchant, dealer, or broker. Liability under section 16 of the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees,¹²⁸ and I am unable to locate any case holding the imposition of liability under section 16 of the PACA (7 U.S.C. § 499p) is unconstitutional. Therefore, I reject B.T. Produce's unsupported contention that holding a corporation liable for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional.

Sixth, B.T. Produce contends the Agricultural Marketing Service's construction of section 16 of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. Produce is liable for William Taubenfeld's payments to William Cashin.¹²⁹

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as B.T. Produce asserts. B.T. Produce could avoid liability under the PACA for William Taubenfeld's bribery either by

¹²⁷ B.T. Produce's Appeal Pet. at 27-29, 35-40.

¹²⁸ *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 606 (2006) (holding KOAM Produce, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at KOAM Produce, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector), *appeal docketed*, No. 06-4838 (2d Cir. Oct. 19, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1886-87 (2005) (holding M. Trombetta & Sons, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at M. Trombetta & Sons, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector).

¹²⁹ B.T. Produce's Appeal Pet. at 29-35.

showing William Taubenfeld was not acting for, or employed by, B.T. Produce at the time he bribed William Cashin or by showing that William Taubenfeld's bribes were not made within the scope of his employment or office. Therefore, I reject B.T. Produce's contention that B.T. Produce was irrebuttably presumed to be liable for William Taubenfeld's bribery.

Louis R. Bonino's and Nat Taubenfeld's Appeal Petitions

Louis R. Bonino and Nat Taubenfeld raise six issues in their appeal petitions.¹³⁰ First, Louis R. Bonino and Nat Taubenfeld contend they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.¹³¹

The Chief ALJ found Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.¹³² As discussed in this Decision and Order, I agree with the Chief ALJ's finding and Louis R. Bonino's and Nat Taubenfeld's contentions that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.

Second, Louis R. Bonino contends the record is bereft of any evidence that B.T. Produce was operating as the alter ego of Louis R. Bonino.¹³³

The second prong of the two-prong responsibly connected test requires a petitioner to 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

¹³⁰ Louis R. Bonino filed "Petitioner Louis R. Bonino's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, As Modified, February 6, 2006" [hereinafter Bonino's Appeal Petition]. Nat Taubenfeld filed "Petitioner Nat Taubenfeld's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, As Modified, February 6, 2006" [hereinafter Taubenfeld's Appeal Petition].

¹³¹ Bonino's Appeal Pet. at 2-3; Taubenfeld's Appeal Pet. at 2-5.

¹³² Initial Decision at 30-32.

¹³³ Bonino's Appeal Pet. at 4.

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 record establishes Louis R. Bonino was an owner of B.T. Produce; therefore, the defense that Louis R. Bonino was not an owner of B.T. Produce, which was the alter ego of its owners, is not available to Louis R. Bonino.¹³⁴

Third, Louis R. Bonino and Nat Taubenfeld contend they were nominal officers of B.T. Produce.¹³⁵

In order for a petitioner to show that he or she was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of a corporation or association, 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 a violation 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.¹³⁶ The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period.

During the period when B.T. Produce violated the PACA, Louis R. Bonino owned 30 percent of the outstanding stock of B.T. Produce. Louis R. Bonino's ownership of a substantial percentage of stock alone is

¹³⁴ *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1351 (2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1308 (2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 438-39 (2006), *aff'd per curiam*, 195 F. App'x 850 (11th Cir. 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).

¹³⁵ Bonino's Appeal Pet. at 4-5; Taubenfeld's Appeal Pet. at 5-6.

¹³⁶ See note 94.

very strong evidence that he was not a nominal shareholder.¹³⁷ Louis R. Bonino has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of B.T. Produce.

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.¹³⁸ Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.¹³⁹ Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.¹⁴⁰

¹³⁷ *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. U.S. 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. U.S. 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 Donald R. Beucke*, 65 Agric. Dec. 1372, 1387-88 (2006) (stating 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 substantially connected is a strong indication that a 33⅓ percent owner does not serve in a nominal capacity), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *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).

¹³⁸ *In re Donald R. Beucke*, 65 Agric. Dec. 1372, 1394 (2006), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1359 (2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1321 (2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

¹³⁹ CX 1; RC-Bonino 1.

¹⁴⁰ Tr. 595, 605-06, 652-53.

Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.¹⁴¹ Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.¹⁴²

Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.¹⁴³ He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.¹⁴⁴ His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.¹⁴⁵ Nat Taubenfeld brought both of his sons into the business.¹⁴⁶

Nat Taubenfeld failed to meet his burden that he was only nominally the president and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.¹⁴⁷

Louis R. Bonino and Nat Taubenfeld each failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that Louis R. Bonino and Nat Taubenfeld were intimately involved in the day-to-day workings of B.T. Produce, they each had substantial

¹⁴¹ Tr. 633.

¹⁴² Tr. 611-12.

¹⁴³ CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

¹⁴⁴ RC-Taubenfeld 6; Tr. 705-07, 721.

¹⁴⁵ Tr. 1281, 1298.

¹⁴⁶ Tr. 701-03.

¹⁴⁷ Tr. 669, 684, 1281, 1298.

responsibilities in many aspects of the business, and they had authority over employees. In short, I find Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce.

Fourth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their right under the Administrative Procedure Act to notice and opportunity to demonstrate or achieve compliance with the PACA.¹⁴⁸

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the *licensee* must be given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements, except in cases of willfulness.¹⁴⁹ Neither Louis R. Bonino nor Nat Taubenfeld is a PACA licensee. The responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, concern merely the determinations that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by Louis R. Bonino or Nat Taubenfeld. Therefore, with respect to the responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) inapposite.

Fifth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁵⁰

Individuals found to be responsibly connected with a commission

¹⁴⁸ Bonino's Appeal Pet. at 6-10; Taubenfeld's Appeal Pet. at 19-22.

¹⁴⁹ 5 U.S.C. § 558(c).

¹⁵⁰ Bonino's Appeal Pet. at 6-10, 14-18; Taubenfeld's Appeal Pet. at 6-9, 14-19.

merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.¹⁵¹

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.¹⁵² Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.¹⁵³

Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations.

Contrary to Louis R. Bonino's and Nat Taubenfeld's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.¹⁵⁴ A number of

¹⁵¹ *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹⁵² H.R. Rep. No. 1041 (1930).

¹⁵³ *Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

¹⁵⁴ *Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

courts have rejected constitutional challenges to the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.¹⁵⁵

Sixth, Louis R. Bonino and Nat Taubenfeld assert the irrebuttable presumption that they were responsibly connected with B.T. Produce is unconstitutional.¹⁵⁶

I disagree with Louis R. Bonino's and Nat Taubenfeld's assertion that they are irrebuttably presumed to have been responsibly connected with B.T. Produce when B.T. Produce violated the PACA. Under the PACA, an individual who is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that 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 may rebut the presumption that he or she is responsibly connected. Specifically, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test by which a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the

¹⁵⁵ *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee that has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee, who failed to pay a reparation award, from employment in the field of marketing perishable agricultural commodities, is not unconstitutional).

¹⁵⁶ Bonino Appeal Pet. at 10-14; Taubenfeld Appeal Pet. at 6-14.

outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected with the commission merchant, dealer, or broker. As discussed in this Decision and Order, *supra*, Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they met the second prong of the two-prong test.

The Agricultural Marketing Service's and the Chief's Appeal Petition

The Agricultural Marketing Service and the Chief raise three issues in "Complainant's and Respondent's Appeal of the Decision and Order" [hereinafter the Agricultural Marketing Service's and the Chief's Appeal Petition]. First, the Agricultural Marketing Service and the Chief contend the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture's sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T. Produce's PACA license into account when determining the sanction to be imposed upon B.T. Produce. The Agricultural Marketing Service and the Chief urge that I revoke B.T. Produce's PACA license.¹⁵⁷

I agree with the Agricultural Marketing Service and the Chief that the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture's sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), or United States Department of Agriculture precedent.

I have considered and discussed the nature of B.T. Produce's PACA violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. I find the nature of B.T. Produce's violations, as they relate to the purposes of the PACA, justify revocation of B.T. Produce's PACA license. In addition, the Agricultural Marketing Service, the agency charged with the responsibility for achieving the congressional purpose of the PACA, recommends the imposition of license revocation as the appropriate sanction for B.T. Produce's PACA violations. John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United

¹⁵⁷ The Agricultural Marketing Service's and the Chief's Appeal Pet. at 11-23.

States Department of Agriculture, testified that bribery of a United States Department of Agriculture produce inspector is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. After examining the relevant circumstances and the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA, I conclude revocation of B.T. Produce's PACA license is in accord with the United States Department of Agriculture's sanction policy and the sanction imposed by the Chief ALJ is not in accord with the United States Department of Agriculture's sanction policy.

Moreover, the Chief ALJ's assessment of a \$360,000 civil penalty, in lieu of a 90-day suspension of B.T. Produce's PACA license, is not in accord with United States Department of Agriculture precedent. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.¹⁵⁸

Further still, the Chief ALJ's reliance on collateral effects of the revocation of B.T. Produce's PACA license, when determining the sanction to be imposed upon B.T. Produce, is error. The Chief ALJ states, when determining the sanction to impose on B.T. Produce, he considered collateral effects of license revocation on B.T. Produce's employees, as follows:

In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent's employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose their jobs, and the fact that the significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an

¹⁵⁸ See note 89.

impact on company ownership than its non-culpable employees. Initial Decision at 27-28.

However, collateral effects of a respondent's PACA license revocation are neither relevant to a determination whether a respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) nor relevant to the sanction to be imposed for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Secretary of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's employees.¹⁵⁹ The adverse impact of license revocation on B.T. Produce's employees is unfortunate, but it is not relevant to this proceeding.

Second, the Agricultural Marketing Service and the Chief state, assuming for the sake of argument that a civil penalty is the appropriate sanction in this proceeding, the Chief ALJ did not correctly apply the formula mandated by the PACA to arrive at the \$360,000 civil penalty the Chief ALJ assessed against B.T. Produce. The Agricultural Marketing Service and the Chief contend, if a civil penalty were appropriate, B.T. Produce should be assessed a civil penalty of at least \$3,650,000.¹⁶⁰

I conclude revocation of B.T. Produce's PACA license is warranted in

¹⁵⁹ *In re JSG Trading Corp.* (Order Denying Pet. for Recons.), 57 Agric. Dec. 710, 728 (1998) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 (1997) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees and the effect of revocation of the respondent's PACA license on employment of 30 persons and on small and medium-sized businesses which rely on respondent is irrelevant), *aff'd*, 178 F.3d 743 (5th Cir.), *reprinted in* 58 Agric. Dec. 991, *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding the harm suffered by the respondent's 25 employees from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

¹⁶⁰ The Agricultural Marketing Service's and the Chief's Appeal Pet. at 23-24.

law and justified by the facts. Therefore, I find no purpose would be served by addressing the methodology used by the Chief ALJ to determine the amount of the civil penalty which he assessed against B.T. Produce or the amount of the civil penalty which the Chief ALJ should have assessed against B.T. Produce had a civil penalty been an appropriate sanction.

Third, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Louis R. Bonino and Nat Taubenfeld were not actively involved in the activities resulting in B.T. Produce's violations of the PACA, is error.¹⁶¹

I agree with the Chief ALJ that Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA. In their appeal petition, the Agricultural Marketing Service and the Chief cite portions of the record which establish that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce. While I find that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce, I reject the Agricultural Marketing Service's and the Chief's suggestion that an individual's active involvement in day-to-day management is, by itself, sufficient to establish that the individual was also actively involved in the activities resulting in a violation of the PACA. I find Louis R. Bonino and Nat Taubenfeld, although actively involved in the day-to-day management of B.T. Produce, proved by a preponderance of the evidence that they were not actively involved in activities resulting in B.T. Produce's violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Louis R. Bonino was actively involved in the activities resulting in B.T. Produce's violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of B.T. Produce. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual who owns more than 10 percent of the outstanding stock of a corporation is *per se* responsibly connected with that corporation. However, Congress has rejected the *per se* approach urged by the Agricultural Marketing Service

¹⁶¹ The Agricultural Marketing Service's and the Chief's Appeal Pet. at 24-28.

and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended to allow an individual who is a holder of more than 10 percent of the outstanding stock of a corporation to rebut his or her status as responsibly connected with the corporation. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

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 [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.

The applicable House of Representatives Report states the purpose of the 1995 amendment to the definition of *responsibly connected* is “to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation.”¹⁶² The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would “allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.”¹⁶³ Louis R. Bonino carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce’s violations of the PACA.

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

¹⁶² H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

¹⁶³ H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

ORDER

1. B.T. Produce has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). B.T. Produce's PACA license is revoked, effective 60 days after service of this Order on B.T. Produce.

2. I affirm the Chief's March 31, 2003, determination that Louis R. Bonino was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Louis R. Bonino 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 Louis R. Bonino.

3. I affirm the Chief's March 31, 2003, determination that Nat Taubenfeld was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Nat Taubenfeld 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 Nat Taubenfeld.

RIGHT TO JUDICIAL REVIEW

B.T. Produce, Louis R. Bonino, and Nat Taubenfeld 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. B.T. Produce, Louis R. Bonino, and Nat Taubenfeld must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁸⁹ The date of entry of the Order in this Decision and Order is May 4, 2007.

In re: JOSEPH T. CERNIGLIA.

¹⁸⁹ See 28 U.S.C. § 2344.

PACA-APP Docket No. 04-0012.

Decision and Order.

Filed June 6, 2007.

PACA-APP – Responsibly connected – *De facto* officer – Notice of corporate changes – Active involvement – Nominal Officer.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's decision concluding Joseph T. Cerniglia [hereinafter Petitioner] was responsibly connected with Fresh Solutions, Inc., when Fresh Solutions, Inc., violated the PACA. In a default decision, Fresh Solutions, Inc., was found to have violated the PACA during the period August 16, 2002, through April 29, 2003. The Judicial Officer found that during the violation period, Mr. Cerniglia was a *de facto* officer of Fresh Solutions, Inc. In addition, the Judicial Officer found that it was reasonable for the PACA Branch to treat Mr. Cerniglia as an officer, a director, and a holder of more than 10 percent of the outstanding stock of Fresh Solutions, Inc., as the company's PACA license indicated, because neither the company nor Mr. Cerniglia provided the PACA Branch with notice of the corporate changes. The PACA provides a two-prong test which an individual must meet in order to demonstrate that he or she was not responsibly connected. Mr. Cerniglia failed to address either prong of the test. The Judicial Officer, after examining the evidence, found Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of the PACA and he was not a nominal officer.

Charles E. Spicknall, for Respondent.

Joseph T. Cerniglia, Pro se.

Initial decision issued by Victor W. Palmer, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On December 3, 2003, the PACA Branch filed a complaint against Fresh Solutions, Inc., alleging it was a corporation licensed under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a-499s) [hereinafter the PACA], that had violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The PACA Branch further alleged that Fresh Solutions' pending application for a new PACA license should be denied.

The proceedings were initially assigned to Administrative Law Judge [hereinafter ALJ] Leslie B. Holt, but were subsequently reassigned to ALJ Jill S. Clifton. Judge Clifton, in a teleconference with the parties, cancelled the scheduled hearing because Fresh Solutions had not filed an answer. The PACA Branch moved for a decision by reason of default. Judge Clifton

ordered the PACA Branch to identify any responsibly connected proceedings that could be joined with this disciplinary proceeding against Fresh Solutions. The PACA defines the term “responsibly connected” and imposes employment and licensing restrictions on individuals who are found responsibly connected with a corporation that violated the PACA (7 U.S.C. § 499a(b)(9);¹ 7 U.S.C. § 499d(b)(A)-(B);² 7 U.S.C. § 499h(b)³).

In a letter dated January 20, 2004, the PACA Branch notified Joseph T. Cerniglia that it made an initial determination that he was responsibly connected with Fresh Solutions, Inc., during the period from August 16, 2002, through April 29, 2003, when the disciplinary complaint alleged that

¹ 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.

² 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; (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[.]

³ 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. . . . The Secretary may approve such employment . . . 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. . . . The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (RX 3). Mr. Cerniglia responded, in a letter dated February 19, 2004, that he resigned as an officer and a director of Fresh Solutions on January 1, 2002. He also stated that 100 percent of the stock of Fresh Solutions was transferred to Morris Lewis on the same date (RX 4).

On April 12, 2004, Judge Clifton issued a decision finding, because of its failure to pay produce vendors as alleged in the disciplinary complaint, Fresh Solutions committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Fresh Solutions, Inc.*, 63 Agric. Dec. 477 (2004). Because the company no longer held a PACA license, Judge Clifton ordered the publication of the facts and circumstances of the violations. In addition, Judge Clifton refused Fresh Solutions' application for a new PACA license finding Fresh Solutions "was not in full compliance with the PACA at the time of [its] licensing application" and "unfit to be licensed." (RX 26.) Fresh Solutions did not appeal the decision which then became final.

On July 7, 2004, James R. Frazier, Chief of the PACA Branch, issued the final determination that Mr. Cerniglia was responsibly connected with Fresh Solutions during the period of time the company violated the PACA. On August 5, 2004, Mr. Cerniglia filed a petition for review of the agency's determination.

On January 11, 2006, ALJ Victor W. Palmer conducted a hearing in Atlanta, Georgia, regarding Mr. Cerniglia's petition for review of the PACA Branch Chief's determination that he was responsibly connected with Fresh Solutions at the time the company violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture. Mr. Cerniglia represented himself *pro se*. In the course of the hearing, the PACA Branch entered 39 exhibits which are designated "RX ___." These exhibits include the original record used by the PACA Branch Chief to make his determination. Mr. Cerniglia entered 18 exhibits, 5 of which are designated "EX ___," and 13 of which were in the original record reviewed by the PACA Branch Chief and are designated as "PX ___." Two witnesses testified, Mr. Cerniglia on his own behalf and Josephine

Jenkins for the PACA Branch. Transcript pages are designated "Tr. ___."

On May 4, 2006, ALJ Palmer issued his Decision and Order finding "Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., a PACA licensee, when it committed willful, repeated and flagrant violations of section 2(4) of the PACA" (7 U.S.C. § 499b(4)). The ALJ held:

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. . . . [H]e therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

ALJ Decision and Order at 19.

On June 2, 2006, Mr. Cerniglia filed a timely appeal of the ALJ's Decision and Order. I have reviewed the record. After giving careful consideration to the evidence before me, I affirm the decision of the ALJ and find Joseph T. Cerniglia was responsibly connected with Fresh Solutions when it committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in the amount of \$351,968.50.

FINDINGS OF FACT

Joseph T. Cerniglia lives in Alpharetta, Georgia (Tr. 18). In 1972, he graduated from the University of West Georgia with a degree in history and environmental science. Mr. Cerniglia then went to work at his father's produce business, Cerniglia Produce Co., Inc. (Tr. 54.) When that company incorporated in 1976, he became one of the officers and owner of 10 percent of the company stock (Tr. 58). In 1989, Cerniglia Produce's PACA license was revoked for violating the PACA by failing to pay for

produce. *In re Cerniglia Produce Co.*, 48 Agric Dec. 1133 (1989). Mr. Cerniglia then went to work for Collins Brothers, the company that purchased Cerniglia Produce. (Tr. 55, 59.) He worked for Collins Brothers until the PACA Branch issued the determination that he was responsibly connected with Cerniglia Produce Co., Inc., when it violated the PACA, and he became subject to the PACA's employment restrictions that barred a PACA licensee from employing him (Tr. 59).

In 1993, Mr. Cerniglia started the business that would eventually become Fresh Solutions in the basement of his home. He incorporated the business in 1994 and first obtained a PACA license in or about 1995 (Tr. 18).⁴ During 1995, Mr. Cerniglia met Jonathan Scott Green. Mr. Green became a "partner" in the business and became the chief executive officer. In addition, Mr. Green's father, John Green, also became a partner in the company. (Tr. 89.) The senior Mr. Green helped with sales (Tr. 95). In 1996, the company was renamed Fresh Solutions, Inc. (EX 5 at 3).

Mr. Cerniglia started Fresh Solutions, Inc., as a company that would help chain restaurants buy produce in a better manner (Tr. 60). He acted as a consultant working with national chain restaurants and would "advise them on how to purchase fresh produce, suggest purchasing strategies and a list of criteria for the selection of produce vendors[.]" (Tr. 82.) For his services, Mr. Cerniglia would receive 3 percent of the purchase price of the produce his customers bought (Tr. 83-84).

After the Greens joined Fresh Solutions, Jonathan Scott Green managed the financial aspects of the company while John Green helped with sales to restaurants and Mr. Cerniglia managed the operations and produce matters (Tr. 95-97). The Greens brought in new customers who wanted different services. Fresh Solutions revised its business plan so that it would take title to the selected produce although it was shipped directly from the distributor to the restaurant. Fresh Solutions would then invoice the restaurant and pay the distributor for the produce. Fresh Solutions utilized 70 or 80 produce distributors throughout the country. (Tr. 87-88.) As part of the new plan, Fresh Solutions attempted to develop hand-held devices to allow chain restaurants to order produce on-line while checking inventories. This effort

⁴ Although Mr. Cerniglia testified that he incorporated Fresh Solutions in 1994, information provided on the company's application for a PACA license indicates the company incorporated in Georgia on May 30, 1996 (RX 2).

was not successful. (Tr. 114-16.)

In July of 1996, there were five shareholders of Fresh Solutions, each owning 20 percent of the company. The shareholders were Joseph Cerniglia, Joseph Cerniglia, Sr., Jonathan Scott Green, John Green, and Windsor Jordan (PX 8).⁵ At that time, Jonathan Scott Green was the chief executive officer and president of Fresh Solutions, and Mr. Cerniglia was the chief operating officer and secretary (RX 42 at 40). Two years later, additional shares of Fresh Solutions were issued and ownership was redistributed so that Mr. Cerniglia owned 45 percent, Jonathan Scott Green owned 33 percent, John Green owned 20 percent, and Windsor Jordan owned 2 percent (EX 1). In 2000-2001, corporate ownership changed again with two new shareholders, Morris Lewis and Mason McGowin, each obtaining 20 percent of the company's shares. Mr. Cerniglia's ownership decreased to 29 percent and Jonathon Scott Green's ownership interest became 31 percent (RX 1 at 4).

By the end of 2001, Mason McGowin and Morris Lewis had invested \$1,735,000 in Fresh Solutions and Mr. Lewis guaranteed a \$1 million loan for Fresh Solutions (RX 24 at 5). In 2001, Fresh Solutions, Inc., reported a net loss of \$2,267,291 (RX 24). As a condition for continuing to fund the corporation, Mr. Lewis proposed a scheme by which he would receive the tax benefit of the net loss suffered by Fresh Solutions (RX 42 at 295). The scheme required the other shareholders, including Mr. Cerniglia, to transfer their ownership interests in the corporation to Mr. Lewis. In addition, Mr. Cerniglia and the other officers decided to resign their corporate officer positions and to cease being directors. The scheme allowed Mr. Lewis to convert Fresh Solutions into an S Corporation and transfer Fresh Solutions' net income or loss to his personal income tax liability (RX 42 at 295-300). Mr. Cerniglia was told that, after the time required by law to allow the tax benefit for Mr. Lewis, the stock "would be redistributed back to where it was." (RX 42 at 295-96; Tr. 155-56.)

To facilitate Mr. Lewis' tax scheme, the directors of Fresh Solutions, Inc., held a meeting on December 28, 2001, at which Joseph T. Cerniglia and Jonathan Scott Green resigned as officers and directors of the

⁵ Mr. Jordan introduced the Greens to Mr. Cerniglia but did not participate in the operation of the company (Tr. 91-93).

corporation effective midnight January 1, 2002 (RX 8). Further, Mr. Cerniglia transferred his stock certificates to Morris Lewis on January 1, 2002 (RX 7 at 1-4). Finally, the stock ledger of Fresh Solutions indicates that as of January 1, 2002, all of the outstanding shares of stock of Fresh Solutions were held by Morris Lewis (PX 8).

Prior to the December 28, 2001, meeting, Mr. Cerniglia was an officer and director of Fresh Solutions (Tr. 10, 20, 99; EX 1). Mr. Cerniglia's titles varied over time. In the July 2, 1998, Minutes of Annual Meeting of the Shareholders and Directors of Fresh Solutions, Inc., he is identified as "Treasurer and CFO and Secretary." (EX 1 at 2.) Even though Mr. Cerniglia recorded and signed those minutes, he claims he was never the chief financial officer of Fresh Solutions (Tr. 99). In addition, on Fresh Solutions' PACA license application, which Mr. Cerniglia signed on August 1, 2001, he is identified as "COO." (RX 1 at 4.) Furthermore, Mr. Cerniglia owned 29 percent of the shares of Fresh Solutions (Tr. 229).

After the December 28, 2001, meeting, Mr. Cerniglia frequently held himself out as an officer of Fresh Solutions. On October 8, 2003, Mr. Cerniglia signed Fresh Solutions' new application for a PACA license. He identified himself as secretary, treasurer, chief operating officer, director, and the company's largest shareholder, with 29 percent of the company stock (RX 2). Fresh Solutions' corporate registration (current as of September 12, 2003) with the State of Georgia lists Mr. Cerniglia as the company's chief financial officer (RX 11). On March 21, 2003, Mr. Cerniglia signed a Master Agreement for Information Technology Services and the accompanying Statement of Work on behalf of Fresh Solutions with Automated Solutions Consulting Group, Inc. [hereinafter ASC].⁶ He signed as the Fresh Solutions' chief operating officer. (RX 32, RX 33.) Furthermore, the produce industry viewed Mr. Cerniglia as an officer of Fresh Solutions. In a June 2, 2003, article in the produce industry newspaper, *The Packer*, Mr. Cerniglia, who is identified as Fresh Solutions' chief operating officer, discussed the company's financial difficulties and

⁶ In February 2004, following Mr. Cerniglia's resignation from Fresh Solutions, his wife, together with the wife of the president of ASC, started a new produce firm under the name Fresh Works. Mr. Cerniglia worked for that firm for a short period of time. (Tr. 119-20.)

plans to pay its debt (RX 23). Red Book Credit Services, a produce industry information service, listed Mr. Cerniglia as chief operating officer of Fresh Solutions in its March 2002 publication (RX 22).

Throughout 2002, Mr. Cerniglia's responsibilities with Fresh Solutions remained identical to what they were prior to his relinquishing his officer and director positions and transferring his stock to facilitate Mr. Lewis' tax scheme (Tr. 128-30). In 2002, Mr. Cerniglia's salary increased by \$13,000 to over \$117,000 (Tr. 255; PX 9). He continued to receive a car allowance of \$550 per month and still used a company expense account (Tr. 256-58). In August 2002, he received a 30-day loan for \$40,000 from the company to assist in purchasing a new house (Tr. 258-59).

Mr. Cerniglia had signature authority on four of Fresh Solutions' checking accounts (RX 27, RX 28, RX 29, RX 30), including exclusive signature authority on one account which was opened in 1994 (RX 27). Mr. Cerniglia had a stamp of his signature made to facilitate check issuance. The accounting department used the stamp to sign checks (Tr. 20-21). Most of the checks issued by Fresh Solutions during the period August 16, 2002, through April 29, 2003, when Fresh Solutions was found to have violated the PACA by failing to make payment for produce, were signed using the signature stamp (Tr. 21). However, on occasion, Mr. Cerniglia exercised his signature authority by personally signing checks, including signing checks issued during the violation period (RX 19 at 24, 75, 105).

Shortly before Fresh Solutions' violation period began on August 16, 2002, three checks were issued payable to "Fresh Solutions, Inc." These checks totaled almost \$120,000⁷ and were signed with Mr. Cerniglia's signature stamp (RX 19 at 22, 299, 310). The checks were deposited into the one Fresh Solutions bank account on which Mr. Cerniglia was sole signatory (Tr. 75-81). In January 2003, prior to entering into the Master Agreement for Information Technology Services, Mr. Cerniglia personally signed two checks payable to ASC which totaled \$7,000 (RX 19 at 105, 157).

Despite expectations by Mr. Cerniglia that his shares in Fresh Solutions

⁷ Check number 10080 was issued on July 11, 2002, in the amount of \$10,000; check number 10091 was issued on July 18, 2002, in the amount of \$55,000; and check number 10140 was issued on August 15, 2002, in the amount of \$54,714.53.

would be reissued to him after Mr. Lewis implemented his tax scheme, that never happened (RX 42 at 295-96; Tr. 155). On May 16, 2003, Morris Lewis, as holder of all the outstanding shares of Fresh Solutions and chairman of the company, presided over a special meeting of the shareholders. At the meeting, he removed all directors from their positions; he appointed himself as sole director of the corporation; and he placed restrictions on "the corporation, its Officers, Directors, Employees and/or agents," prohibiting them from entering into contracts or hiring or employing anyone so as to create obligations or indebtedness (RX 36). After the May 16, 2003, meeting, Mr. Cerniglia's salary was significantly decreased (Tr. 49-52; PX 10a, PX 10b). Even though his salary was decreased, Mr. Cerniglia continued to represent Fresh Solutions, Inc., before the PACA Branch, and on October 2, 2003, signed a letter to the PACA Branch advising that Fresh Solutions, Inc., was diligently working to pay and resolve the debts it owed to produce vendors (EX 3 at 2). On February 23, 2004, Mr. Cerniglia resigned from Fresh Solutions (RX 42 at 8-9, 33; Tr. 245). On March 2, 2004, Mr. Cerniglia, along with Jonathan Scott Green and E. Mason McGowin, notified the PACA Branch that there had been a change in ownership of Fresh Solutions and that the change had taken effect on January 1, 2002 (RX 43).

On March 9, 2004, Fresh Solutions, Inc., by and through its sole shareholder, director, and president, Morris C. Lewis, III, filed a voluntary petition under Chapter 7 for bankruptcy protection from its unpaid creditors (RX 17).

DISCUSSION

In 1934, Congress amended the PACA to provide that the Secretary could, with notice, revoke the license of any PACA licensee that employed an individual "who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year of the date prior to such notice." Pub. L. No. 73-159, ch. 120, § 5, 48 Stat. 586. However, Congress did not define the term "responsibly connected" until 1962, when it amended the PACA to define "responsibly connected" to mean "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." (7 U.S.C. § 499a(b)(9) (1994).)

In the 1995 amendments to the PACA, Congress gave to the person who met the statutory definition of “responsibly connected” the opportunity to challenge the initial finding and, if successful, avoid the employment sanctions.

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 was not an owner of a violating licensee . . . which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

In 1998, the United States Court of Appeals for the District of Columbia Circuit, in *Norinsberg v. U.S. Dep’t of Agric.*, 162 F.3d 1194 (D.C. Cir. 1998), first examined the revised definition. The Court articulated the test for determining if an individual is responsibly connected. First, there is an initial determination whether the individual meets the statutory definition of “responsibly connected.” The Court indicated, if the individual fits the definition, the burden shifts to the individual to demonstrate, by a preponderance of the evidence, that the individual was not actively involved in the activities resulting in the violation of the PACA and that the individual was a nominal officer, nominal director, or nominal shareholder of the violating company. As an alternative to proving that the individual was nominal, the individual could prove he was not an owner of the violating company and that the violating company was the alter ego of the company’s owners. *Norinsberg*, 162 F.3d at 1197.

Mr. Cerniglia’s primary argument, that he should not be deemed responsibly connected and, thus, subject to PACA’s employment restrictions, is that he “was not a stockholder of Fresh Solutions, nor was he an officer or director of Fresh Solutions.” (Appeal Pet. at 2.) He further claims that he “transferred his stock in Fresh Solutions and resigned his positions as an officer and director many months prior to Fresh Solutions’ PACA violations.” *Id.* Assuming, *arguendo*, that Mr. Cerniglia resigned

from all his officer and director positions at Fresh Solutions and divested himself of all his ownership interest in the company, he failed to notify the PACA Branch that he was no longer an officer, director, or shareholder of Fresh Solutions. The PACA regulations mandate that notice of such corporate changes be sent promptly to the PACA Branch.

§46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.

The licensee shall:

(a) Promptly report to the Director in writing;

....

(2) Any change in officers, directors, members, managers, holders of more than 10 percent of the outstanding stock in a corporation, with the percentage of stock held by such person, and holders of more than 10 percent of the ownership stake in a limited liability company, and the percentage of ownership in the company held by each such person[.]

7 C.F.R § 46.13(a)(2).

While the regulation imposes the burden of notifying the PACA Branch about changes on the licensee, an individual hoping to avoid a responsibly connected determination must ensure the notice of his or her changes reaches the agency, even if that requires the individual to personally notify the PACA Branch. It is reasonable for the PACA Branch to treat each individual who is identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee as responsibly connected until the PACA Branch receives notice otherwise.

As a general rule, I find that any individual identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee is, for purposes of the PACA, an officer, director, or shareholder of the licensee until such time that the PACA Branch receives written notice that the person is no longer an officer, director, or holder of more than 10 percent of the outstanding stock of the licensee.

The PACA Branch did not receive notice that Mr. Cerniglia resigned as an officer and director of Fresh Solutions and that he divested his ownership interest in the company until March 2, 2004 (RX 43). Therefore, the PACA Branch correctly concluded that, for purposes of the PACA, Joseph T. Cerniglia was an officer, director, and holder of more than 10 percent of the outstanding stock of Fresh Solutions, Inc., during the period from August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Furthermore, as ALJ Palmer held, Mr. Cerniglia continued to serve as an officer of Fresh Solutions until the March 2, 2004, resignation.

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. . . . [H]e therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

ALJ Decision and Order at 19. Examples of evidence demonstrating Mr. Cerniglia's continuing role as an officer of Fresh Solutions include the following:

- Testimony from Mr. Cerniglia that his responsibilities remained the same after he allegedly relinquished his officer and director positions and transferred his stock to facilitate Mr. Lewis' tax scheme (Tr. 128-30).
- Fresh Solutions' October 2003 application for a PACA license identifying Mr. Cerniglia as secretary, treasurer, chief operating officer, director, and the company's largest shareholder (RX 2). Mr. Cerniglia signed the application certifying the "answers given to the foregoing questions are true." (RX 2 at 3.)

- Fresh Solutions' corporate registration with the State of Georgia that lists Mr. Cerniglia as a corporate officer as of September 2003 (RX 11).
- A contract for computer services, signed by Mr. Cerniglia as the corporation's chief operating officer on March 21, 2003. This contract was with a firm run by an individual whose wife would later start a business with Mr. Cerniglia's wife. (RX 32, RX 33.)
- Bank account signature cards showing Mr. Cerniglia had signature authority on four of Fresh Solutions' checking accounts (RX 27, RX 28, RX 29, RX 30), including exclusive signature authority on one account (RX 27).
- Fresh Solutions' continued reliance on Mr. Cerniglia's signature authority to conduct business (RX 19).
- A letter dated October 2, 2003, signed by Mr. Cerniglia to the PACA Branch advising that Fresh Solutions, Inc., was diligently working to pay and resolve the debts it owed to produce vendors (EX 3 at 2).
- Trade publications, including articles for which Mr. Cerniglia was interviewed, identifying him as chief operating officer (RX 22, RX 23).

As support for his argument that he no longer held any positions with or ownership interest in Fresh Solutions, Mr. Cerniglia entered into evidence copies of stock certificates endorsed for transfer to Mr. Lewis (PX 1-PX 6); Fresh Solutions' stock register (PX 8); minutes of the December 28, 2001, board of directors meeting (PX 7); copies of Mr. Cerniglia's W-2 Wage and Tax Statement for the years 2002 and 2003 (PX 9, PX 10a, PX 10b); and selected pages of Fresh Solutions' and Morris Lewis' tax returns (RX 10 at 1, 8, 33). Mr. Cerniglia's reliance on these documents as proof that he was no longer an officer, director, or shareholder of Fresh Solutions is misplaced. Courts have long held that, even though an individual may not formally hold an officer position, his actions can make him a *de facto*

officer and responsible for the actions of the company. *Neckles v. United States*, 579 F.2d 938, 940 (5th Cir. 1978); *O'Neill v. C.I.R.*, 271 F.2d 44, 49 (9th Cir. 1959). Mr. Cerniglia held himself out as an officer of Fresh Solutions, but more importantly he acted as an officer of Fresh Solutions. Therefore, I find Joseph T. Cerniglia was a *de facto* officer of Fresh Solutions during the time the corporation violated the PACA.

Mr. Cerniglia's effort to distinguish *In re Anthony L. Thomas*, 59 Agric. Dec. 367 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001), is misplaced. The teaching from the *Thomas* decision is that the PACA Branch may look beyond the formalities to an individual's actions and activities with a licensee to determine the individual's true role in a violating company. Without this ability to examine the details of a PACA licensee's corporate governance, unscrupulous individuals would have a safe haven to avoid enforcement of the PACA.

Mr. Cerniglia, in his appeal, did not address the balance of the *Norinsberg* test used to determine if an individual is responsibly connected. Therefore, he waives any argument that he was not actively involved, that he was a nominal officer, director, or shareholder, or that there was an alter ego that actually ran the company.

In the remand decision, *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999), I discussed the two-prong test an individual must meet to demonstrate that he was not responsibly connected with a violating company.

First, a petitioner must demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity

subject to a license which was the alter ego of its owners.

Id. at 608-09.

The question before me is whether Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of the PACA. I find he was. In *Norinsberg*, I established the standard to determine active involvement. "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." *Id.* at 610-11.

Mr. Cerniglia participated in activities that directly caused Fresh Solutions to miss payments to produce vendors. In August 2002, the month Fresh Solutions first missed payments for produce, Mr. Cerniglia borrowed \$40,000 from the company in order to purchase a new house (Tr. 258-59).⁸ In January 2003, during the time Fresh Solutions failed to make produce payments, Mr. Cerniglia personally signed two checks payable to ASC, a computer company run by an individual whose wife started a business with Mr. Cerniglia's wife (RX 19 at 105, 157). On March 21, 2003, Mr. Cerniglia entered into a contract on behalf of Fresh Solutions with ASC. Between July 11, 2002, and August 15, 2002, the day before Fresh Solutions' first violation of the PACA, three checks totaling almost \$120,000 were issued by Fresh Solutions and deposited in the account over which Mr. Cerniglia had exclusive control (RX 19 at 22, 299, 310). Mr. Cerniglia neither explained why the money was deposited in this account nor addressed when or why he, as sole signatory on this account, removed the funds from this account (Tr. 80-81). Each of these activities by Mr. Cerniglia deprived Fresh Solutions of money needed to pay its produce vendors. Each activity occurred just before or during the time period of August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Therefore, I find Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of

⁸ Mr. Cerniglia repaid the loan in approximately 30 days (Tr. 259).

the PACA.

A finding that an officer, director, or holder of more than 10 percent of a company's stock was actively involved in the activities resulting in a violation of the PACA is sufficient to hold that the individual is responsibly connected with the violating company. However, I also find Mr. Cerniglia was not a nominal officer of Fresh Solutions. The test to determine if an individual is a nominal officer is whether the individual had "an actual, significant nexus with the violating company during the violation period." *Thomas*, 59 Agric. Dec. at 380-81. The factors examined for this test are similar to those examined to determine if an individual is a *de facto* officer. I look at the role an individual had in the violating company to determine if he participated with the company as an officer.

Perhaps, most telling here is that Mr. Cerniglia's responsibilities did not change from the time period during which he acknowledges he was an officer of the company through the time period he claims to have no longer been an officer of Fresh Solutions. Mr. Cerniglia continued to have signature authority on the company's checking accounts and signed checks after he allegedly resigned as an officer and through the violation period; he entered into contracts for Fresh Solutions after he claims to have resigned; he completed and signed a PACA license application as an officer, although he now claims that he was not an officer; he continued to hold himself out as an officer and spokesperson for Fresh Solutions, during the time the company violated the PACA and after he allegedly resigned; and his compensation increased after he claims to have resigned as an officer. All these activities demonstrate that he had an actual, significant nexus with Fresh Solutions during the violation period. Therefore, I find Mr. Cerniglia was not merely a nominal officer of Fresh Solutions during the time the company violated the PACA.

CONCLUSIONS OF LAW

Joseph T. Cerniglia was an officer, director, and more than 10 percent shareholder of Fresh Solutions from the time the company was first incorporated until January 1, 2002. From January 1, 2002, until March 2, 2004, when he notified the PACA Branch of the changes to Fresh Solutions' ownership and corporate governance, he was a *de facto* officer of

the company. In addition, because Mr. Cerniglia failed to notify the PACA Branch of the changes, the PACA Branch was reasonable in treating Mr. Cerniglia as an officer, director, and more than 10 percent shareholder of Fresh Solutions, as Fresh Solutions' PACA license indicated, until he notified the PACA Branch that he was no longer part of the company.

From August 16, 2002, through April 29, 2003, Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors. *In re Fresh Solutions, Inc.*, 63 Agric. Dec. 477 (2004).

Mr. Cerniglia failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Fresh Solutions, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period from August 16, 2002, through April 29, 2003. Furthermore, Mr. Cerniglia failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Fresh Solutions during the same time frame.

Joseph T. Cerniglia was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) with Fresh Solutions, Inc., during the period August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

For the foregoing reasons, the following Order is issued.

ORDER

I affirm the PACA Branch's July 7, 2004, determination that Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., when Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Mr. Cerniglia 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 Mr. Cerniglia.

RIGHT TO JUDICIAL REVIEW

Mr. Cerniglia 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. Mr. Cerniglia must seek judicial review within 60 days after entry of the Order in this Decision and Order.⁹

The date of entry of the Order in this Decision and Order is June 6, 2007.

⁹ 28 U.S.C. § 2344.

862 PERISHABLE AGRICULTURAL COMMODITIES ACT

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISIONS

**JOE RANDAZZO'S FRUIT & VEGETABLE, INC. v. W-W
PRODUCE, INC.,
No. 04-75045.
Filed March 26, 2007.**

(Cite as: 2007 WL 925795).

PACA – Reparations – Evidence, unsworn documentary, not persuasive – Summary judgment sua sponte – USDA's finding of facts are prima facie evidence on appeal.

Buyer of corn (Randazzo) admits he received a shipment, but that he contracted with and paid Gibbons (a non-party vendor to this case) for the corn and should not owe the money to a second vendor (WW-Produce). The Judicial Officer (JO)'s decision discounted the unsworn documentary evidence favoring the Buyer. Randazzo appealed finding of JO that it failed to pay when due for receipt of the corn. In the appeal of the JO's decision, Randazzo tendered deposition evidence which was acquired in discovery after the JO's decision and which was of a greater weight than the unsworn documents previously offered.

The court decided the case on the record. Although favorable evidence was now more forthcoming from Randazzo, the finding of facts by the JO in the case below was prima facie evidence and conclusive unless effectively rebutted by the Petitioner (Buyer)

**United States District Court
E.D. Michigan,
Southern Division**

**OPINION AND ORDER REGARDING APPELLEE'S MOTION
FOR SUMMARY JUDGMENT AFFIRMING REPARATION ORDER**

GERALD E. ROSEN, United States District Judge.

I. INTRODUCTION

JOE RANDAZZO'S FRUIT & VEGETABLE, INC. 863
v. W-W PRODUCE, INC.
66 Agric. Dec. 862

In the present suit, Plaintiff/Appellant Joe Randazzo's Fruit & Vegetable, Inc. ("Randazzo") challenges a decision and order issued by a Judicial Officer of the United States Department of Agriculture ("USDA"), directing Randazzo to pay \$5,532.80 to Defendant/Appellee W-W Produce, Inc. ("W-W") for a shipment of corn that Randazzo allegedly received from W-W but did not pay for. Randazzo contends here, as it did in the proceedings before the USDA, that it purchased the load of corn in question from a third party, Gibbons, Inc., and not W-W, and that its payment is therefore owed to (and has been paid to) Gibbons.

Presently before the Court is W-W's motion for an award of summary judgment affirming the USDA's decision in its favor. Randazzo has responded to this motion, and W-W has filed a reply in further support of its motion. Having reviewed the parties' briefs, the accompanying exhibits, the underlying USDA decision, and the remaining materials in the record, the Court finds that the relevant facts and legal arguments are adequately presented in the parties' written submissions, and that oral argument would not aid the decisional process. Accordingly, the Court will decide W-W's motion "on the briefs." *See* Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This opinion and order sets forth the Court's rulings on this motion.¹

Contrary to W-W's assertion in its motion to dismiss, the limited case law on point does not indicate that a bond under § 499g(c) must incorporate the interest that has accrued between the USDA's decision and the filing of an appeal. To the contrary, one of the cases cited by W-W holds that interest accruing after the USDA's decision is *not* part of the "reparation

¹ In addition to seeking an award of summary judgment in its favor, W-W filed a motion to dismiss at the outset of this action, arguing that the bond posted by Randazzo did not meet the statutory threshold set forth at 7 U.S.C. § 499g(c). Under this provision, an appeal from a USDA reparation order must be supported by "a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail." 7 U.S.C. § 499g(c). In this case, Randazzo posted a bond in the amount of \$11,665.60-*i.e.*, double the underlying USDA award of \$5,532.80 plus a \$300 filing fee-without accounting for the accrual of interest that the USDA also awarded in its order.

awarded” within the meaning of the statute. *See Melmarkets, Inc. v. Victor Joseph & Son, Inc.*, No. 89-CIV-6585, 1990 WL 155594, at *3 (S.D.N.Y. Oct.11, 1990). Similarly, in a second case cited in W-W’s motion, the court merely assumed, without deciding, that “interest unto the date of appeal should be considered part of the award proper,” but then found that the somewhat smaller bond posted by the appellant “substantial[ly] compli[ed]” with the statutory requirement. *L. Gillarde Co. v. Joseph Martinelli & Co.*, 168 F.2d 276, 281 (1st Cir.), *amended on reh’g*, 169 F.2d 60 (1st Cir.1948). In light of this case law and the language of the underlying statutory provision, the Court finds that the bond posted by Randazzo here is sufficient to allow its appeal to go forward. Accordingly, W-W’s motion to dismiss is denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff/Appellant Joe Randazzo’s Fruit & Vegetable, Inc. (“Randazzo”) is a Michigan corporation that operates a fruit and vegetable market in Detroit, Michigan. Samuel Randazzo is the company’s president and handles all of the purchasing of produce sold at the market. Defendant/Appellee W-W Produce, Inc. (“W-W”) is a produce supplier located in Belle Glade, Florida.

On May 23, 2003, Samuel Randazzo determined that the Randazzo market needed corn, and he contacted a number of suppliers and brokers to determine pricing and availability. All are agreed that he purchased 1,008 crates of yellow sweet corn that day, and that this shipment of corn was loaded onto a truck in Brinson, Georgia and delivered to the Randazzo market on or around May 25, 2003.

The dispute in this case concerns the identity of the seller from which Randazzo purchased this load of corn. W-W asserts that it sold this shipment of corn to Randazzo, and it states without contradiction that it sent an invoice to Randazzo by facsimile on the date of this sale, May 23, 2003, reflecting a purchase price of \$5,392.80 for the corn and \$140.00 for top ice (for a total of \$5,532.80). Randazzo, in contrast, contends that it purchased the load of corn at issue from a third party, Gibbons, Inc., which acted as an intermediary between Randazzo and W-W as supplier, and it has produced a May 27, 2003 invoice from Gibbons reflecting a purchase price of \$4,989.60 for a shipment of corn and \$140.00 for top ice (for a total of

\$5,129.60). Having already paid this latter amount to Gibbons, Randazzo denies any obligation to, in its view, pay two different sellers for a single load of corn.

A. The Challenged USDA Decision and Order

Upon Randazzo's failure to remit the \$5,532.80 payment called for under its May 23, 2003 invoice, W-W commenced a reparation proceeding under the Perishable Agricultural Commodities Act, 7 U.S.C. § 499*aet seq.*, seeking an order from the United States Department of Agriculture ("USDA") directing Randazzo to pay for the shipment of corn. In a decision and order dated December 6, 2004, the USDA granted the relief requested by W-W, ordering Randazzo to pay W-W the invoiced amount of \$5,532.80 plus interest and a \$300.00 filing fee.

In so ruling, the USDA's judicial officer relied principally on Randazzo's failure to produce any admissible evidence of the claimed role of Gibbons, Inc., as an intermediary between Randazzo as purchaser and W-W as supplier. In particular, while it was clear that W-W was the supplier of the corn shipped from Georgia to Randazzo, there was no documentary evidence of any transaction between W-W and Gibbons regarding this shipment of corn. Rather, Randazzo's sole evidence on this point was an unsworn letter from Daniel Gibbons of Gibbons, Inc., stating that his company had contracted with W-W for the load of corn at issue and then sold this corn to Randazzo. The judicial officer found that this unsworn statement lacked evidentiary value, leaving Randazzo without any admissible evidence of an agreement between Gibbons, Inc. and W-W to provide a load of corn to Randazzo.

In contrast, W-W had produced at least some documentary evidence of an agreement directly with Randazzo to supply the load of corn at issue. First and foremost, W-W produced the invoice it had faxed to Randazzo on the day the corn was ordered, May 23, 2003, along with phone records reflecting the transmission of a fax from W-W to Randazzo that day. In addition, the judicial officer noted the undisputed evidence in the record that W-W provided the information necessary to trigger the shipment of corn from its grower in Georgia to the Randazzo market in Michigan.

Accordingly, because W-W indisputably held the initial title to this shipment of corn, and because there was no admissible evidence of a transaction that would have caused this title to pass from W-W to Gibbons, Inc., the judicial officer concluded that Randazzo was obligated to pay W-W for this shipment in accordance with W-W's May 23, 2003 invoice. The judicial officer further opined that any payment that Randazzo might have mistakenly made to Gibbons for this shipment was the result of Randazzo's failure to exercise due diligence or investigate upon receiving W-W's invoice for this same shipment.

B. The Evidence Adduced During Discovery in This Action

Following the USDA's unfavorable decision, Randazzo commenced the present appeal in this Court. As discussed at greater length below, the statutory provision that authorizes such an appeal entitles Randazzo to a "trial de novo" on its challenge to the USDA's ruling, with the exception that the USDA's decision and attendant findings of fact are treated as "prima-facie evidence of the facts therein stated." 7 U.S.C. § 499g(c). In anticipation of this potential "trial de novo," the parties have engaged in discovery in this case, resulting in a record more extensive than the limited documentation and competing sworn statements presented for consideration by the USDA's judicial officer.²

This latter claim seemingly is belied by the USDA decision itself, which explicitly refers to and addresses "a number of affirmative defenses" raised by Randazzo. (USDA 12/6/2004 Decision at 3.) Moreover, the applicable USDA regulations governing reparation proceedings expressly permit the filing of a counterclaim along with an answer to a complaint, *see* 7 C.F.R. § 47.8(a), and Randazzo has not provided any support for its contention that it was precluded from doing so. Similarly, to extent that Randazzo wished to present sworn deposition testimony to the USDA's judicial officer, or to have W-W's complaint addressed at an oral hearing rather than decided

² In its response to W-W's summary judgment motion, Randazzo seemingly suggests that the proceedings before the USDA's judicial officer were deficient for lack of any deposition transcripts, the taking of any testimony, or the cross-examination of witnesses. (*See* Randazzo's Response Br. at 13.) Randazzo further asserts, without evidentiary support, that it was "prevented from filing any affirmative defenses, counter claims or cross claims." (*Id.* at 10.)

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upon written submissions alone, the pertinent regulations permit such requests to be made, with the judicial officer then deciding whether such additional procedures are warranted in a particular case. *See* 7 C.F.R. § 47.16(a) (setting forth procedure for requesting leave to take depositions); 7 C.F.R. §§ 47.15(a)(1), 47.20(b)(1) (authorizing parties to request an oral hearing in cases where the claim for damages does not exceed \$30,000). There is no indication that Randazzo made any such requests during the proceedings before the USDA.

Most significantly, the record includes the deposition testimony of Daniel Gibbons of Gibbons, Inc. In this testimony, as in his letter submitted during the USDA reparation proceedings, Gibbons stated that he, through his company, had purchased the load of corn at issue from W-W and taken title to this produce, had identified Randazzo as a customer for this corn, and then had provided Randazzo with the information necessary to pick up the load from W-W's grower in Georgia and deliver it to the Randazzo market in Michigan. (*See* Randazzo's Response, Ex. 2, Gibbons Dep. at 14, 17-20.) More specifically, Gibbons testified that he spoke with a long-time acquaintance who was employed as a salesperson for W-W, Billy Mackey, and that he and Mackey reached a verbal agreement for W-W to sell and Gibbons to buy the load of corn at issue, without either of them knowing at the time who the end purchaser of the corn might be. (*See id.* at 12-14, 17-18, 26-28.)³

Although Gibbons testified that he typically would have received some sort of written confirmation of his oral agreement with W-W—consisting, for example, of a fax from W-W confirming that the corn had been loaded on a truck, (*see id.* at 20, 26, 29)—he failed to produce any such documentation at his deposition, nor do any such materials appear in the record. In addition, Gibbons stated that he never received a bill from W-W for the load of corn at issue here. Rather, Gibbons asserted that he first learned of a problem with the transaction when Randazzo informed him that W-W was seeking payment for the very same load of corn that Randazzo had purchased from Gibbons. Having already been paid by Randazzo, Gibbons agreed to issue a

³ Mackey evidently was terminated from his position at W-W at some point after the transaction at issue here, and has since passed away.

check to W-W, but was told that W-W was insisting on collecting from Randazzo rather than Gibbons. (*See id.* at 22-23.)⁴

The record also includes the deposition testimony of Randazzo's president, Samuel Randazzo, and its accounts payable clerk, Rhonda Ulmer. Mr. Randazzo testified that on May 23, 2003, after determining that his market needed some corn, he called a number of shippers and brokers and found that Gibbons was offering the best price. (*See* Randazzo's Response, Ex. 1, Randazzo Dep. at 8.) He then wrote out a purchase slip, reflecting a price between \$4.85 and \$4.95 per crate, and forwarded this document to another Randazzo employee, Mark Galli, who was responsible for arranging delivery of the corn. (*See id.* at 8-12; *see also* Randazzo's Response, Ex. 4, Purchase Slip.) When this load of corn arrived at Randazzo's dock, the accompanying bill of lading was matched with Mr. Randazzo's initial purchase slip and a fax confirmation subsequently received from Gibbons, and a check was issued to Gibbons in the amount of \$5,129.60, reflecting a price of \$4.95 per crate plus \$140 for top ice. (*See* Randazzo Dep. at 37-43; *see also* Randazzo's Response, Ex. 3, Ulmer Dep., Ex. 1, Bill of Lading; Randazzo's Response, Ex. 5, Gibbons Invoice.)⁵

Mr. Randazzo did not deny that his market might have received a faxed invoice from W-W on May 23, 2003, reflecting an apparent purchase of a load of corn from W-W at a price of \$5.35 per crate. In his view, however, any such invoice would have been ignored as mistakenly received, since it could not have been matched with any purchase slip from him reflecting such a transaction with W-W. (*See* Randazzo Dep. at 22-23, 37, 43-44.) Mr. Randazzo further testified that he did not know at the time that W-W was the supplier of the corn he had purchased from Gibbons, and that he learned of this only when a W-W representative subsequently called him and claimed that Randazzo owed W-W for a load of corn. (*See id.* at 16-17,

⁴ According to the sworn statement submitted by W-W in the USDA reparation proceeding, Randazzo ultimately did forward to W-W a check issued by Gibbons, but W-W determined upon investigation that Gibbons had insufficient funds in its bank account to cover this check. Accordingly, W-W returned the check to Randazzo and again demanded payment directly from the market. (*See* USDA 12/6/2004 Decision at 6.)

⁵ Ms. Ulmer's deposition testimony is essentially the same as Mr. Randazzo's with regard to the paper trail for this transaction and the market's usual procedures for ordering and payment. Thus, her testimony need not be recounted in any detail here.

34.)Mr. Randazzo responded that his market had purchased the corn in question from Gibbons, not W-W, but he nonetheless offered to help W-W in its effort, and he forwarded a check from Gibbons to W-W in an unsuccessful attempt to resolve this dispute. (*See id.* at 20-21.)

Dissatisfied with this outcome, W-W commenced a reparation proceeding before the USDA, and secured a decision and order directing Randazzo to pay W-W for the load of corn at issue. Through the present suit, Randazzo seeks to overturn the USDA's decision and order.

III. ANALYSIS

A. The Standards Governing W-W's Motion

Through the present motion, W-W seeks summary judgment in its favor on Randazzo's challenge to the USDA's decision and order directing Randazzo to pay \$5,532.80 plus interest and costs to W-W. Under the pertinent Federal Rule, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c).

The familiar principles governing the resolution of summary judgment motions are affected somewhat by the statutory provision governing appeals of USDA reparation orders. As noted earlier, this Court must conduct a "trial de novo" on Randazzo's challenge to the USDA's decision, "except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated."7 U.S.C. § 499g(c). Accordingly, as the courts have explained, the USDA's findings are "conclusive unless effectively rebutted." *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1033 (D.C.Cir.1988); *see also Genecco Produce, Inc. v. Sandia Depot, Inc.*, 386 F.Supp.2d 165, 170 (W.D.N.Y.2005).

In the specific context of a summary judgment motion, then, the prevailing party in the reparation proceeding-in this case, W-W-meets its initial burden as movant by citing "an absence of evidence to rebut the prima facie case presented by the [USDA's] order." *Frito-Lay*, 863 F.2d at

1032. This, in turn, imposes a burden of production upon the non-moving party, Randazzo, to “go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Frito-Lay*, 863 F.2d at 1033 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) (internal quotation marks and additional citation omitted). Unless Randazzo identifies evidence which, if credited by the trier of fact, would rebut the prima facie case established through the USDA’s decision, W-W is entitled to summary judgment in its favor—namely, a determination as a matter of law that Randazzo’s challenge to the USDA’s decision cannot succeed. See *Frito-Lay*, 863 F.2d at 1033; *B.T. Produce Co. v. Robert A. Johnson Sales, Inc.*, 354 F.Supp.2d 284, 288-89 (S.D.N.Y.2004). With these standards in mind, the Court turns to the present motion.

B. Randazzo Has Identified Issues of Fact as to Whether It Purchased the Load of Corn at Issue from Gibbons Rather Than W-W.

As discussed, the parties’ dispute in this case concerns the identity of the seller of the load of corn ordered by Randazzo on May 23, 2003 and delivered to the market within a day or two thereafter. In the decision and order now on appeal, the USDA determined that Randazzo had purchased this corn from W-W, and not from Gibbons as Randazzo had contended in its submissions in the reparation proceeding. Through its present motion, W-W argues that Randazzo has failed to produce evidence to rebut the USDA’s findings on this point. The Court cannot agree.

At first blush, the present motion appears to be easily resolved. The lynchpin of the USDA’s decision, after all, was the absence of any “indication in the record of any contractual relationship between [W-W] and Gibbons for the subject trucklot of corn.” (USDA 12/6/2004 Decision at 9.) W-W denied the existence of any such agreement, of course, and Randazzo was unable to present the sworn testimony or statement of anyone with personal knowledge to the contrary. Rather, the sole documentation submitted by Randazzo in support of a claimed contractual relationship between W-W and Gibbons was a letter from Daniel Gibbons attesting to such an agreement, and the USDA’s judicial officer discounted this letter as “not sworn” and hence lacking “any evidentiary value.” (*Id.*) Consequently,

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because it was undisputed that W-W held the initial title to the load of corn at issue, and because there was no evidence that title passed to an intermediary-whether Gibbons or some other third party-at any time during the shipment of the corn from W-W's grower in Georgia to the Randazzo market in Michigan, the USDA's judicial officer concluded that W-W had "sustained its burden to prove that [Randazzo] purchased and accepted the subject trucklot of corn at a contract price of \$5,532.80," (*id.* at 10)-*i.e.*, the price set forth on W-W's invoice.

The evidentiary deficiency noted by the USDA's judicial officer, however, has been cured in the record presented for this Court's consideration. In particular, Randazzo has produced the sworn deposition testimony of Daniel Gibbons, in which he confirms the thrust of his earlier letter-namely, that his company, Gibbons, Inc., entered into an oral agreement with W-W to purchase the load of corn at issue, and then sold this corn to Randazzo. Accepting this testimony as true, as the Court must at the present juncture, Randazzo seemingly has rebutted the *prima facie* case established through the USDA's decision and order, and has offered proof which, if credited by the trier of fact, demonstrates the passage of title from W-W to Gibbons.

Nonetheless, W-W insists that the deposition testimony of Daniel Gibbons, standing alone, is insufficient to establish the requisite agreement between W-W and Gibbons and passage of title from the former to the latter. As an initial matter, W-W points to Randazzo's failure to identify any documentary support for Gibbons's claim of an oral agreement with W-W. While Gibbons testified that he typically would have received some sort of written confirmation of this agreement, he failed to produce any such documentation at his deposition, nor do any such materials appear in the record. Next, to the extent that Randazzo has produced some documentary support for its claimed purchase of a load of corn from Gibbons at around the same time as the transaction at issue here, W-W argues that these materials appear to evidence Randazzo's purchase of a *different* load of corn, and not the load supplied by W-W.

Neither of W-W's challenges, however, would permit this Court to reject *as a matter of law* the account offered at Daniel Gibbons's deposition. First, while Gibbons's testimony is undeniably weakened by his failure to

produce the documentation that, by his own admission, should have accompanied and memorialized his oral agreement with W-W, this Court is unaware of any requirement that a witness's sworn testimony must be supported by documentary evidence in order to be credited.⁶ Rather, this lack of documentary support affects only the weight of Gibbons's testimony, and this is a matter that must be left for the trier of fact to determine.

Similarly, any questions that might arise from Randazzo's documentary evidence of a transaction with Gibbons would merely permit, but not require, a trier of fact to discount the direct testimony of Samuel Randazzo and Daniel Gibbons, based on their own personal knowledge, that Randazzo purchased the load of corn at issue here from Gibbons rather than W-W. In W-W's view, the documents produced by Randazzo tend to undermine this deposition testimony in two respects. First, W-W notes that the invoice issued by Gibbons to Randazzo refers to a shipment of corn that was loaded on May 24, 2003 and delivered on May 27, 2003. (*See* W-W's Motion, Ex. C.) Yet, W-W construes other evidence in the record as indicating that the load of corn at issue here was shipped on May 23, 2003 and delivered on May 25, 2003.⁷ It follows, in W-W's view, that the invoice issued by Gibbons must refer to a *different* shipment of corn that was loaded and delivered shortly *after* the corn at issue here.

Next, W-W points to an apparent discrepancy in the prices quoted in the two invoices separately issued to Randazzo by W-W and Gibbons. Specifically, the Gibbons invoice lists a price of \$4.95 per crate of corn, while the W-W invoice billed Randazzo at a rate of \$5.35 per crate. W-W

⁶ Along the same lines, W-W observes in its motion that Randazzo will be unable to offer the testimony of Billy Mackey—who, as noted earlier, was employed by W-W at the time of the transaction at issue here, but is now deceased—to corroborate Gibbons's claim that his oral agreement with W-W arose during a telephone call with Mackey. Again, however, a trier of fact remains free to credit the testimony of a witness despite the absence of corroborating testimony from another witness.

⁷ It is not clear how W-W arrives at a delivery date of May 25, 2003. The collection of documents cited in support of this proposition includes (i) W-W's invoice to Randazzo, which reflects a "[d]eliver[y]" date of May 23, 2003; (ii) a bill of lading dated May 23, 2003, which lacks any reference to the dates that the truck was loaded or arrived at its destination; and (iii) an invoice from the trucking company to Randazzo, which lists May 23, 2003 as both the ship date and the delivery date. (*See* W-W's Motion, Ex. D.)

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reasons, and the USDA's judicial officer agreed, (*see* USDA 12/6/2004 Decision at 9), that it would make no sense for Gibbons to act as an intermediary between W-W and Randazzo, and yet charge Randazzo 40 cents per crate *less* than the price charged by the supplier, W-W, from which Gibbons purportedly obtained the load of corn at issue here. Rather, the logical conclusion, in W-W's view, is that the Gibbons and W-W invoices refer to two different shipments of corn.

Once again, however, these arguments go only to the weight that a trier of fact should give to the deposition testimony of Samuel Randazzo and Daniel Gibbons. To the extent that the accounts of Mr. Randazzo and Mr. Gibbons deviate from the corresponding documentary evidence of the transactions about which they testified, W-W has not explained why it would not be possible for a trier of fact to favor the former over the latter. Documents, after all, can be mistaken too—they can be drafted, for example, by someone who lacks personal knowledge of the statements they contain, or by someone who is simply wrong about the dates on which events occurred. Indeed, while W-W is quite prepared to discount the testimony of Daniel Gibbons, it seemingly has no doubt about the accuracy of the dates shown on *Gibbons's own invoice* as the shipment and delivery dates of a particular load of corn. Accordingly, while W-W surely is entitled to impeach Randazzo and Gibbons with any purportedly inconsistent statements found in their records, it must be left to the trier of fact to resolve any such inconsistencies.

More fundamentally, at least some of the purported "inconsistencies" identified by W-W rest upon the premise that W-W's own documentation is correct. With regard to the discrepancy in the prices shown on the W-W and Gibbons invoices, for example, the price charged by Gibbons is economically irrationally *only if* one assumes that the price stated in the W-W invoice accurately reflects the amount that W-W actually charged for a crate of corn at the time. Yet, accepting as true, for the moment, Samuel Randazzo's testimony that the purchase reflected in W-W's invoice *did not occur*, this Court surely cannot safely assume, at the present juncture, that the price quoted in this wholly spurious invoice is an accurate reflection of

W-W's pricing at the time.⁸

Thus, in order to discount Randazzo's evidence as involving a different sale of corn, rather than the sale of the corn at issue here with Gibbons serving as intermediary, this Court would have to credit, to some extent at least, W-W's contrary evidence depicting a direct transaction with Randazzo. W-W has not explained why its own documentation of the transaction at issue here should be entitled to the status of immutable truth, particularly where none of these documents, on its face, evidences an agreement between W-W and Randazzo under the terms claimed by W-W. While the USDA chose to credit W-W's evidence, this was primarily due to the absence of contrary evidence. As explained, this evidentiary deficiency has been cured in the record before this Court. Under these circumstances, Randazzo has overcome the presumption that the USDA's findings are correct, and has established its entitlement to the "trial de novo" called for under 7 U.S.C. § 499g(c).

IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant/Appellee's motion for summary judgment is DENIED. IT IS FURTHER ORDERED that Defendant/Appellee's motion to dismiss appeal also is DENIED.

⁸ Indeed, such an assumption would be particularly problematic here, where the parties disagree as to the very nature of the transaction that occurred here. W-W asserts that it sold directly to the Randazzo market, while Randazzo contends that it purchased through an intermediary. Even assuming that W-W's invoice reflects the price it would have charged for a direct sale to a market, it does not necessarily follow that W-W would have charged the same price to an intermediary that planned to turn around and resell to a retail market

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

DEPARTMENTAL DECISIONS

**WILLIAM S. KINZER, D/B/A KOUNTRY LANE HARVEST v.
NATHEL & NATHEL, INC. AND/OR ORLANDO TOMATO, INC.**

**PACA Docket No. R-07-009.
Reparation Decision.
Filed November 15, 2007**

PACA –R –Broker – Breach of Duty.

Where Respondent A, a broker, was in violation of the Regulations for hiring a second broker without authority from Complainant to do so, Respondent A was held liable to Complainant for the difference between the original contract price of the produce, and the reduced price paid by the buyer, Respondent B, in accordance with a revised confirmation received from the second broker. Complaint dismissed against Respondent B.

Presiding Officer Leslie Wonk
Decision and Order by William G. Jenson, Judicial Officer.

Decision and Order

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 the Respondents in the amount of \$6,245.75 in connection with one truckload of tomatoes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were

served upon the parties. Copies of the formal Complaint were served upon the Respondents, which filed Answers thereto, denying liability to Complainant. Respondent Orlando Tomato, Inc. also asserted a Counterclaim against Complainant seeking to recover a \$2,000.00 freight expense allegedly incurred in connection with the subject load of tomatoes. Complainant filed a reply to the Counterclaim denying liability.

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 Nathel & Nathel, Inc. elected not to file any additional evidence. Respondent Orlando Tomato, Inc. filed an Answering Statement. Complainant and Respondent Orlando Tomato, Inc. also submitted Briefs.

Findings of Fact

1. Complainant is an individual, William S. Kinzer, doing business as Kountry Lane Harvest, whose post office address is 150 Fern Springs Way, Salem, South Carolina, 29676. At the time of the transaction involved herein, Complainant was not licensed under the Act.

2. Respondent, Nathel & Nathel, Inc. (hereafter "Nathel"), is a corporation whose post office address is 354-361 Row C, New York City Terminal Market, Bronx, New York, 10474-7403. At the time of the transaction involved herein, Respondent Nathel was licensed under the Act.

3. Respondent, Orlando Tomato, Inc. (hereafter "Orlando"), is a corporation whose post office address is 121 Parris Ridge Drive, Boiling Springs, South Carolina, 29316. At the time of the transaction involved herein, Respondent Orlando was licensed under the Act.

4. On or about August 8, 2005, Complainant sold to Respondent Nathel, and shipped from loading point in the state of North Carolina, to Nathel, in Bronx, New York, 1,400 cartons of extra large field-packed vine ripe tomatoes.

5. A broker, Dino Mainolfi, issued an "Order Confirmation" to

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Respondent Nathel on August 8, 2005, listing the sale of the tomatoes on a delivered "P.A.S." basis. The confirmation also states "count is 45-48... color on ¾ load is pink... Orlando Tomato will bill you on product & freight. (Dino's commission 25¢ per Box. I will bill you my brokerage.)"

6. Respondent Orlando issued a "Confirmation of Sale & Purchase" to Complainant on August 8, 2005, also listing the sale on a delivered "P.A.S." basis. Beside the term "P.A.S.," Orlando wrote "but bill 6.20." Orlando also described the color of the tomatoes as "¾ load pink, 3 to 4 pallets 5 color."

7. On August 9, 2005, Complainant issued invoice number 5010 billing Respondent Nathel for 1,400 cartons of field pack large tomatoes at \$6.20 per carton, for a total invoice price of \$8,680.00.

8. On August 12, 2005, Dino Mainolfi issued a second "Order Confirmation" to Respondent Nathel, instructing Nathel to pay Complainant \$1.75 per carton, delivered, for the tomatoes. The confirmation also states "these tomato's [sic] were sent to you on a price after sale basis... note: in house inspection & pictures, tomato's [sic] overripe & decay."

9. Respondent Nathel paid Complainant \$1.75 per carton, or a total of \$2,434.25, for the 1,391 cartons of tomatoes it accepted¹ with check number 80140, dated September 15, 2005. Respondent Nathel also paid Dino Mainolfi \$350.00 for brokerage with check number 79996, dated September 12, 2005.

10. The informal complaint was filed on October 6, 2005, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant asserts that it sold one truckload of tomatoes to Respondent Nathel, under the broker services of Respondent Orlando, at an agreed purchase price of \$6.20 per carton, or a total of \$8,680.00. Complainant

¹ The shipment was originally comprised of 1,400 cartons of tomatoes, but a handwritten notation on Respondent Orlando's confirmation indicates that nine cartons of the tomatoes were placed back on the truck (see Report of Investigation Exhibit No. 1-7), so Respondent Nathel actually received only 1,391 cartons of tomatoes.

states it shipped the tomatoes in compliance with the contract of sale, but that upon arrival of the tomatoes an agreement was made without Complainant's knowledge or consent with Dino Mainolfi, an individual unknown to Complainant, that the price of the load could be changed. In accordance with this agreement, Respondent Nathel paid Complainant only \$2,434.25 for the tomatoes, thereby leaving an unpaid invoice balance of \$6,245.75, which amount Complainant seeks to recover from the Respondents through this proceeding.

Initially, we note that Complainant and Respondent Orlando are in agreement that Complainant hired Respondent Orlando as its broker to negotiate the sale of the tomatoes.² The record shows that Respondent Orlando thereafter hired a third party, Dino Mainolfi, to effectuate the sale of the tomatoes to Respondent Nathel.³ A broker employed to negotiate the sale of produce may not employ another broker or selling agent, including auction companies, without the specific prior approval of his principal. See 7 C.F.R. § 46.28(b). Complainant vehemently denies granting Respondent Orlando such authority. Respondent Orlando is, therefore, in violation of the Regulations for having hired a second broker to sell the tomatoes without first obtaining Complainant's permission to do so.

The record shows both Respondent Orlando, and the other broker, Dino Mainolfi, confirmed the sale of the tomatoes on a "P.A.S." or price after sale basis.⁴ The term "price after sale" is not defined in either the Uniform Commercial Code (U.C.C.) or the Act and Regulations. It is considered a subcategory of the "open price term" (U.C.C. § 2-305(1)), and is generally understood as meaning that the parties will agree upon a price after the buyer effects its resales.⁵ If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery.

Respondent Orlando's president, Don Turner, asserts in an affidavit submitted as Respondent's Answering Statement, that he did not agree on a

² See Formal Complaint, paragraph 6, and Answer, paragraph 6.

³ See Report of Investigation, Exhibit No. 8-1.

⁴ See Report of Investigation, Exhibit Nos. 1-7 and 4-2

⁵ U.C.C. § 2-305(1), "Open Price Term," provides that, "the parties if they so intend can conclude a contract for sale even though the price is not settled."

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price with Dino Mainolfi or Respondent Nathel, and that since there had not been an agreement on a price, he instructed Complainant to bill Respondent Nathel \$6.20 per carton for the tomatoes.⁶ The record shows, however, that following delivery of the tomatoes, Mr. Mainolfi issued a second “Order Confirmation” to Respondent Nathel, showing the price of the tomatoes as settled at \$1.75 per carton, delivered.⁷ The record shows further that Mr. Mainolfi also sent Respondent Nathel a copy of Complainant’s invoice whereon the invoice price of \$6.20 per carton is crossed through, and the settled price of \$1.75 per carton is written in below it, beside which are the initials “DM.”⁸ Respondent Nathel paid Complainant in accordance with the confirmation received from Mr. Mainolfi⁹, and there is no indication that Respondent Nathel was negligent in doing so, as it was not given any indication that Mr. Mainolfi was acting outside the authority granted to it by its principal to negotiate a sales price for the tomatoes. Accordingly, we find that the Complaint against Respondent Nathel should be dismissed.

As we mentioned, Respondent Orlando’s Don Turner denies agreeing upon a price for the tomatoes with Mr. Mainolfi. However, whether or not Mr. Mainolfi acted outside his authority as broker by confirming a sales price of \$1.75 per carton to Respondent Nathel, Respondent Orlando is nevertheless culpable, as it is Respondent Orlando who violated the Regulations by bringing an additional broker into the transaction. Although Respondent Orlando’s Don Turner asserts that there was never an agreement regarding the price of the tomatoes, Mr. Turner admittedly instructed Complainant to bill Respondent Nathel \$6.20 per carton, or a total of \$8,680.00, for the tomatoes. As there is no independent evidence, such as a U.S.D.A. inspection, to establish that the tomatoes were not in accordance with the contract requirements, Complainant is entitled to

⁶ See Answering Statements, paragraphs 4 and 6.

⁷ See Report of Investigation, Exhibit No. 4-4.

⁸ See Report of Investigation, Exhibit No. 4-5.

⁹ See Report of Investigation, Exhibit No. 4-7.

recover as damages from Respondent Orlando the difference between the invoice price, \$8,680.00, and the \$2,434.25 payment received from Respondent Nathel, or \$6,245.75.

There remains for our consideration Respondent Orlando's Counterclaim, wherein it seeks to recover \$2,000.00 from Complainant for the freight expense it allegedly incurred in connection with the tomatoes. In its reply to the Counterclaim, Complainant asserts that Respondent Orlando was instructed that all sales were to be made on an f.o.b. basis, so it should not have incurred the freight expense claimed. In addition, Complainant points out that Respondent Orlando has not submitted any proof that it actually paid the freight bill.

Respondent Orlando does not dispute Complainant's contention that all sales were to be made on an f.o.b. basis. We also note that the \$6.20 per carton price that Respondent Orlando instructed Complainant to bill for the tomatoes is within the \$6.00 to \$7.00 per carton price range listed in the August 8, 2005 shipping point price report issued by U.S.D.A. Market News for similar tomatoes shipped from Asheville, North Carolina, the nearest reporting location to Complainant. The prices included in this report do not include freight. Therefore, if it was anticipated that Complainant would be paying the freight for the load, then the sales price that Respondent Orlando instructed Complainant to bill for the tomatoes should have been sufficient to cover the f.o.b. cost plus freight. However, since the sales price reported by Respondent Orlando was more in line with prevailing f.o.b. prices, we are unconvinced by Respondent Orlando's assertion that it was ever contemplated that Complainant would pay the freight associated with this shipment. Moreover, although Respondent Orlando submitted a copy of the invoice for \$2,000.00 received from the freight company¹⁰, it did not submit any evidence, such as a cancelled check, to establish that it paid this bill. Respondent Orlando cannot claim reimbursement for an expense that it has not actually incurred. Consequently, Respondent Orlando's Counterclaim should be dismissed.

Respondent Orlando's failure to pay Complainant \$6,245.75 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

¹⁰ See Report of Investigation, Exhibit No. 9-6.

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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 Orlando shall pay Complainant as reparation \$6,245.75, with interest thereon at the rate of 4.86% per annum from September 1, 2005, until paid, plus the amount of \$300.00.

The Complaint against Respondent Nathel is dismissed.

Respondent Orlando's Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

**DIAMOND FRUIT & VEGETABLE DISTRIBUTORS, INC. v.
MULLER TRADING COMPANY, INC.**

PACA Docket No. R-07-019.

Reparation Decision.

Filed May 16, 2007.

PACA-R – Damages – Material Breach .

Where Complainant materially breached the contract by shipping seeded watermelons, rather than the seedless watermelons called for in the contract of sale, but Respondent's damages resulting from the breach could not be measured using the normal method, i.e., the difference between the value of the watermelons as accepted and the value they would have had if they had been as warranted, because the account of sales prepared by Respondent's customer did not accurately account for the number of watermelons shipped, we found that the case presented special circumstances such that a more appropriate measure of Respondent's damages was the difference at the time of sale between the market value of the seedless watermelons called for in the contract of sale, and the market value of the seeded watermelons actually shipped.

Presiding Officer Leslie Wonk.

Decision and Order by William G. Jenson, Judicial Officer.

Decision and Order

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 \$4,466.60 in connection with one trucklot of watermelons shipped in the course of interstate commerce. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

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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. 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, Diamond Fruit & Vegetable Distributors, Inc., is a corporation whose post office address is 30 Old Tucson Road #5, Nogales, Arizona, 85621. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Muller Trading Company, Inc., is a corporation whose post office address is 545 N. Milwaukee Avenue, Suite 201, Libertyville, Illinois, 60048. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about November 17, 2005, Complainant, by oral contract, agreed to sell and ship to Respondent, from loading point in Nogales, Arizona, to Respondent's customer, Del Monte Fresh, in Kankakee, Illinois, 140 cartons of 4-count seedless watermelons at \$0.22 per carton, or \$2,006.84, 196 cartons of 5-count seedless watermelons at \$0.20 per carton, or \$2,584.40, and 84 cartons of 6-count seedless watermelons at \$0.18 per carton, or \$973.44, for a total f.o.b. contract price of \$5,564.68.

4. Following arrival and unloading of the watermelons at the place of business of Del Monte Fresh, in Kankakee, Illinois, a U.S.D.A. inspection was performed on the watermelons at 12:44 p.m., on November 22, 2005, the report of which disclosed 13% average defects, including 10% quality (hollow heart), and 3% bruising. The watermelons failed to grade U.S. No. 1 "account condition." In the remarks section of the inspection certificate, the inspector wrote "faces of cut quarters have 18 to 96 seeds per

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melon, with 2 to 40 seeds brown to black, remainder white. Seed count reported at applicant's request."

5. Following the inspection, Del Monte Fresh notified Respondent that it was rejecting the watermelons "due to brown/black seeds," after which the watermelons were moved to Anthony Marano Company, Chicago, Illinois, who resold the watermelons and accounted to Respondent as follows:

Lot: 8F987 MULLER TRADING CO INC.

WATER-
MELON
SDLS 1S

11/29/2005	1 @	\$7.50	\$7.50
11/30/2005	18 @	\$8.50	\$153.00
11/30/2005	2 @	\$5.00	\$10.00
12/01/2005	25 @	\$8.50	\$212.50
12/02/2005	20 @	\$8.50	\$170.00
12/02/2005	1 @	\$7.50	\$7.50
12/05/2005	2 @	\$7.50	\$15.00
<u>12/13/2005</u>	<u>3 @</u>	<u>\$7.50</u>	<u>\$22.50</u>
	72	\$8.31	\$598.00

WATER-
MELON
SDLS 4S

11/25/2005	111 @	\$22.00	\$2,442.00
11/26/2005	4 @	\$25.00	\$100.00
11/28/2005	15 @	\$22.00	\$330.00
<u>11/29/2005</u>	<u>1 @</u>	<u>\$22.00</u>	<u>\$22.00</u>
	131	\$22.09	\$2,894.00

WATER-
MELON
SDLS 5S

11/09/2005	84 @	\$10.00	\$840.00
11/10/2005	12 @	\$20.00	\$240.00

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11/10/2005	32 @	\$8.00	\$256.00
11/25/2005	56 @	\$21.50	\$1,204.00
11/26/2005	24 @	\$22.00	\$528.00
11/28/2005	14 @	\$22.00	\$308.00
11/28/2005	28 @	\$20.00	\$560.00
11/29/2005	12 @	\$22.00	\$264.00
<u>11/29/2005</u>	<u>4 @</u>	<u>\$20.00</u>	<u>\$80.00</u>
	266	\$16.09	\$4,280.00

WATER-
MELON
SDLS 6S

11/26/2005	26 @	\$22.0	\$572.00
<u>11/28/2005</u>	<u>44 @</u>	<u>\$22.00</u>	<u>\$968.00</u>
	70	\$22.00	\$1,540.00

WATER-
MELON
SDLS 1S

11/29/2005	1 @	\$210.00	\$210.00
<u>11/30/2005</u>	<u>2 @</u>	<u>\$210.00</u>	<u>\$420.00</u>
	3	\$210.00	\$630.00

<u>Received</u>		Merchandise	\$8,020.00
11/23	1.00	140 Freight	\$0.00
WATERMELON SDLS 4'S			
11/23	1.00	196 Unloading	\$0.00
WATERMELON SDLS 5'S			
11/23	1.00	84 Inspection	\$0.00
WATERMELON SDLS 6'S			
11/23	1.00	1 Cartage	\$6.55
WATERMELON SDLS 1S			
11/23	1.00	1 <u>Other</u>	<u>\$0.00</u>
WATERMELON SDLS 35 CT BINS			

<u>Total Cost</u>	<u>\$8,026.75</u>
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6. Anthony Marano Company paid Respondent \$8,020.20 for the watermelons with check number 111276, dated November 30, 2005.

7. Respondent paid Complainant \$1,098.08 for the watermelons with check number 9334, dated December 27, 2005.

8. The informal complaint was filed on March 25, 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 trucklot of watermelons sold to Respondent. Complainant states Respondent accepted the watermelons in compliance with the contract of sale, but that it has since paid only \$1,098.08 of the agreed purchase price thereof, leaving a balance due Complainant of \$4,466.60. In response to Complainant's allegations, Respondent asserts that Complainant shipped seeded watermelons, rather than seedless watermelons as specified in the contract of sale, resulting in rejection of the entire lot.

We will first consider Respondent's allegation that the watermelons were rejected. Review of the record discloses that the subject watermelons were unloaded into the warehouse of Respondent's customer, Del Monte Fresh, before they were inspected on November 22, 2005.¹ The unloading or partial unloading of the transport is an act of acceptance. See 7 C.F.R. § 46.2 (dd)(1). We therefore find that Del Monte Fresh accepted the watermelons. Once the watermelons were accepted by Del Monte Fresh, Respondent was precluded from rejecting the watermelons to Complainant. See *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996). Consequently, we find that Respondent accepted the watermelons.

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. *Ocean Breeze Export, Inc. v. Rialto Distributing,*

¹ See Formal Complaint, Exhibit #01.

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Inc., 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988). *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). The burden to prove both a breach and damages rests with the buyer of accepted goods. *Perez Ranches, Inc. d/b/a P.R.I. Sales v. Pawel Distributing Co.*, 48 Agric. Dec. 725 (1989); *Santa Clara Produce, Inc., v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971).

As we mentioned, Respondent asserts that Complainant breached the contract by shipping seeded rather than seedless watermelons. There is no dispute that the contract called for seedless watermelons. The U.S.D.A. inspection performed on the watermelons at Del Monte Fresh, in Kankakee, Illinois, disclosed that the faces of cut quarters had 18 to 96 seeds per melon, with 2 to 40 seeds brown to black, and the remainder white. The United States Standards for Grades of Watermelons define “seedless watermelons” as those having 10 or less mature seeds, not including pips/caplets, on the face of a watermelon cut into four equal sections (one lengthwise cut and one crosswise cut). See 7 C.F.R. § 51.1982. With 2 to 40 seeds per cut quarter, we find that the watermelons shipped by Complainant do not meet the definition for seedless watermelons. The failure of Complainant to ship seedless watermelons constitutes a material breach of contract for which Respondent is entitled to recover provable damages.

The general measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale. *R. F. Taplett Fruit & Cold Storage Co. v. Chinnok Marketing Co. et al.*, 39 Agric. Dec. 1537 (1980). In the instant case, the resale of the watermelons was handled by Anthony Marano Company, in Chicago, Illinois (hereafter “Marano”).

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Marano reported total sales for the watermelons of \$8,020.20.² Respondent asserts, however, that this amount includes sales of 196 cartons of 5-count watermelons from another shipper³, CH Rivas (hereafter “Rivas”), which were on the same truck as the watermelons from Complainant.⁴ We note that the account of sales prepared by Marano lists the following watermelons as received on November 23, 2005:

11/23	1.00	140	WATERMELON	SDLS	4’S
11/23	1.00	196	WATERMELON	SDLS	5’S
11/23	1.00	84	WATERMELON	SDLS	6’S
11/23	1.00	1	WATERMELON	SDLS	1S
11/23	1.00	1	WATERMELON	SDLS	35 CT BINS

There is no mention in this list of another 196 cartons of 5-count seedless watermelons, although the list of individual sales shows sales of 266 cartons of 5-count seedless watermelons, which is more than the 196 cartons shipped by Complainant, but less than the total of 392 cartons of 5-count watermelons reportedly shipped. We also note that for the 4 and 6-count watermelons, the sales listed are also less than the quantity received, and there is no explanation given for this discrepancy. While it is possible that some of the watermelons were resold in 35-count bins, we cannot presume that this was the case. Additionally, the account of sales shows sales of 5-count watermelons took place on November 9 and 10, 2005, presumably two weeks before the shipment at issue was received on November 23, 2005. Consequently, given the noted discrepancies in the account of sales prepared by Marano, we are unable to use the account of sales to determine the value of the watermelons as accepted.

Since we are determining damages for a material breach of contract, as opposed to a breach concerning the condition of the product, we also cannot resort to the use of the percentage of condition defects disclosed by the U.S.D.A. inspection to determine the value of the watermelons as accepted. As we mentioned, U.C.C. Section 2-714(2) provides that damages for a

² See Opening Statement, Exhibit #01-A.

³ See Answer, Exhibit #16.

⁴ See Answer, Exhibit #09.

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breach of contract shall be measured as 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*. We believe such special circumstances exist here. Specifically, in the instant case, Complainant breached the contract by shipping seeded rather than seedless watermelons. Accordingly, to determine Respondent's damages resulting from this breach, we should inquire as to whether there was, at the time of sale, a difference in value between seeded and seedless watermelons. This difference would, in our opinion, provide a more accurate measure of Respondent's damages resulting from Complainant's breach.

The U.S.D.A. Market News Recap of Available Fruit F.O.B. Prices for Monday, November 21, 2005, the first reporting date following the date of shipment for the watermelons in question, shows that 4-count seeded watermelons shipped from Mexico through Nogales, Arizona, were mostly selling for \$0.16 to \$0.18 per pound, and that 4-count seedless watermelons of the same origin were mostly selling for \$0.24 to \$0.26 per pound. Based on the average reported price of \$0.17 per pound for seeded 4-count watermelons, and \$0.25 per pound for 4-count seedless watermelons, we find that the seeded watermelons shipped by Complainant were worth \$0.08 per pound less than the seedless watermelons ordered. No prices were reported for 5 and 6-count watermelons on the referenced report; however, we assume that there was a similar discrepancy in the prices for these watermelons. Accordingly, we find that for the 27,452 pounds of watermelons shipped by Complainant, Respondent is entitled to recover damages equal to \$0.08 per pound, or \$2,196.16. In addition, Respondent may recover the \$309.00 U.S.D.A. inspection fee as incidental damages. With this, Respondent's total damages amount to \$2,505.16. When this amount is deducted from the contract price of the watermelons of \$5,564.68, there remains an amount due Complainant for the watermelons of \$3,059.52. Respondent paid Complainant \$1,098.08 for the watermelons. Therefore, there remains a balance due Complainant from Respondent of \$1,961.44.

Respondent's failure to pay Complainant \$1,961.44 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 \$1,961.44, with interest thereon at the rate of 4.89 % per annum from January 1, 2006, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

ALBERT GOOD, d/b/a CASTLE ROCK VINEYARDS v. EURO-PACIFIC FRUIT EXPORT, INC.

PACA Docket No. R-06-0005.

Reparation Decision.

Filed June 7, 2007.

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PACA-R – Importation requirements – Labels not affixed – Delays.

Where a buyer has specified the method of transportation and the carrier to a foreign country, the buyer is in a better position to know the importation requirements of that country. Accordingly, in an f.o.b. contract, the buyer was responsible for delays caused by the failure to affix labels required by that country when the contract terms did not require the seller to affix those labels.

The warranty of suitable shipping condition warrants that the produce was in a condition when loaded such that under normal shipping conditions, it would arrive at contract destination without abnormal deterioration. What is abnormal deterioration, which would constitute a breach of the warranty, is determined by PACA standards and regulations, and abnormal deterioration is not determined by the laws and regulations of the foreign country which is the ultimate destination.

Presiding Officer Jonathan Gordy
Decision and Order by William G. Jenson, Judicial Officer.

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“PACA”). A timely formal Complaint was filed with the Department on May 9, 2005, in which Complainant seeks a reparation award in the amount of \$36,233.16 in connection with transactions in interstate and foreign commerce involving two container loads of table grapes.

The Department served the formal Complaint and copies of the Department’s Report of Investigation on the parties. Respondent did not file an Answer to the Complaint, and therefore a Default Order was issued on June 27, 2005. We set aside the default by Order on September 20, 2005, after Respondent petitioned to reopen the proceeding. The September 20, 2005 Order allowed Complainant to submit an Amended Complaint, which Complainant filed on September 29, 2005. In response to the Amended Complaint, Respondent filed an Application for Orders on September 30, 2005, which was granted in part and denied in part by Order on December 12, 2005. On February 21, 2006, an additional Order was

entered that served the Answer.

The amount claimed in the Amended Complaint exceeds \$30,000.00, however, the parties waived oral hearing, and therefore the documentary method of procedure provided for in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's Report of Investigation ("ROI Ex. #"). The procedure also gives the parties an opportunity to file evidence in the form of sworn statements. Complainant filed an Opening Statement, Respondent filed an Answering Statement, and Complainant filed a Statement in Reply. After the period for filing statements, the parties were given an opportunity to file Briefs. Respondent filed a Brief.

Findings of Fact

1. Complainant, Albert L. Good, is an individual doing business as Castle Rock Vineyards, whose postal address is Route 2, Box 299, Delano, California 90245-4336.
2. At all times material to this decision, Albert Good was licensed under the PACA, license number 19920921 that was issued on April 1, 1992.
3. Respondent, Euro-Pacific Fruit Export, Inc., is a California Corporation whose postal address is 1550 E. Franklin Avenue, Suite B, El Segundo, California 90245-4336.
4. At all times material to this decision, Respondent was licensed under the PACA, license number 19990103 that was issued on October 16, 1998.
5. On November 3, 2004, Mathias Mentges, the President of Respondent, negotiated the purchase of three containers of "CAT 1", or USDA fancy grade, "Red Globe" variety of table grapes from Complainant.
6. The grapes were to be bagged and packed in boxes, for a total of 5,472 packages for all three containers.
7. The sale was F.O.B., with the delivery of the grapes made at Complainant's cooler in Richgrove, California with the intended destination of Sweden.
8. The containers of grapes were delivered into Respondent's possession on November 15, 2004 and shipped to Helsingborg, Sweden.

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9. Complainant invoiced Respondent for the two relevant containers, OOLU600642-5 and OOLU6107708 for a total of \$61,800.72, on November 16, 2004.¹

10. The two containers of grapes arrived in Helsingborg, Sweden on December 10, 2004.

11. Mathias Mentges e-mailed Complainant's salesman Nick Bikakis on December 13, 2004, stating:

Nick,

The above referenced orders [CRV#11677, CRV #11679] arrived in Helsingborg this past Friday 12/10/04. The Swedish Ministry of Agriculture / Swedish Health Authorities inspected the contents at the port and held up the release due to the boxes not being stamped "CAT 1". Our customer called the right people and obtained the release but had to stamp the boxes prior to distribution. At the time of the inspection at the port the buyer from the chain-store that purchased the goods also saw the fruit. He rejected it due to decay. A Survey was immediately taken. First report is that the transit temperatures were good with arrival pulp temps of 32.3 and 33.1

I have instructed that the Temp Charts we [sic] sent a.s.a.p. as well as the preliminary report and that the original survey be complete a.s.a.p.

Above are the photos I received with the notification of problems. I will keep you posted daily.

Regards
Mathias

¹ The record in this proceeding does not establish what happened to the third load that Respondent negotiated for on November 3, 2004.

1. Attached to that e-mail was a file that contained the inspection report and photographs. The report, dated Dec. 10, 2004,² indicates:

At the request of Scandinavian Fruit Partners AB, I the undersigned by the Chamber of Commerce of southern Sweden appointed surveyor for fruits and vegetables, have inspected 2 containers of California table grapes of the variety "Red Globe" as follows:

Container No.: OOLU 600642-5 and OOLU 610770-8
arrived to [sic] Helsingborg on the 10th of december [sic] in 2004
Quantity: 1.824 boxes 1.824 boxes /bagged merchandise/
Brand: "1st Place" 1st Place"
Packer and Shipper: Alg Enterprises, Delano, Ca. 93215
Pulp-temperature at arrival: 32.3 F 33.1 F

Container OOLU 600642-5 had 3 slanting pallets, cause by three lost pallets [sic] having been placed between first and second row in the front of container. The boxes have to be repalletized by hand.

On inspect the merchandize from 16 boxes, taken from different pallets, of each container has been carefully examined.

Statement of quality:

Juicy [sic] from split grapes, too hard packed and pressed, has started a process of rot in certain numbers of bunches and caused [sic] a deteriorating [sic] of quality.

Presence of rot and white-mould.

Presence of grapes with black spots on the rind.

² This one-page report can be found in the Report of Investigation at 6e, with black and white copies of the attached pictures at 6o-6aa. Mathias Mentges refers to the report attached to his Declaration of Mathias Mentges at Exhibit 5 with the eight pages of attached black and white copies of the photographs. The same report, with color copies of the photographs, is found in Exhibit 1 of Respondent's verified Answer.

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The lots have to be sold in original condition. Claims of clients are to be expected. The presence of injury prejudices the presentation on sale. The final value of commerce can first be fixed after selling and awaiting reactions of clients.

In case of making a larger control by the Swedish Board of Agricultural Protection Service these lots would have been refused and a sorting should have been required before selling on the fresh fruit market.

Enclosure: 14 pictures showing the appearance of the merchandise.

2. Because of the inspection report, and the failure to mark the boxes "CAT 1" Respondent was unable to directly import the grapes into Sweden and deliver them to its retail customer.

3. On January 3, 2005, Mathias Mentges, Michael Mentges (the Secretary-Treasurer of Respondent), Nick Bikakis, Laurie Renard (a salesperson for Complainant), and Brent Hillen (another salesperson for Complainant) met and discussed the inspection reports.

4. Respondent remitted to Complainant, in two checks dated January 7, 2005, a total of \$25,567.56. Along with the checks, Respondent also presented an undated liquidation accounting that shows that the grapes sold for \$53,330.15 with a net return of \$25,567.56 after \$27,762.58 in deductions for: "Terminal/haulage OOCL" of \$356.72, "Forwarding" of \$119.40, "DUTY - Full value 11.5%" of \$9,756.12, "Handling/Storage" of \$746.27, "Survey etc (DHL not charges)" of \$373.13, "Truck to Holland" of \$1,511.19, "Ocean Freight" of \$13,675.75, and "Trucking L.B. Delano L.B." of \$1,224.00.

5. Complainant never cashed the two checks, and instead sent the checks to the Regional Office of the PACA Branch in Fort Worth, Texas which received them on April 5, 2006, and they were forwarded to the Tucson, Arizona Office of the PACA Branch on April 7, 2006. Complainant requested, in a letter accompanying the checks, in reference to this proceeding that: "We would seek the assistance of your office in requesting that Euro-Pacific Fruit Export Inc. replace the two stale dated checks with no limited

endorsements as the undisputed amount so we may pursue the disputed portion through this reparation proceeding.”³

6. An informal complaint was filed on March 11, 2005 within nine months after the cause of action for this proceeding accrued.

Respondent’s procedural and evidentiary objections

Before we discuss the merits of Complainant's claims, Respondent has raised numerous objections during the course of this proceeding, some of which have been adequately addressed in earlier rulings, others of which remain unresolved. Most recently, Respondent filed an "Objections to the Opening Statement," along with its Answering Statement, and in its Brief, Respondent lodged additional objections. These objections fall into two categories: procedural and evidentiary.

First, Respondent raises more than a half a dozen procedural objections, all of which are overruled.

The following example establishes Respondent’s tone: Respondent objects to Complainant’s filing of a “Complaint” on September 29, 2005, because our Order of September 20, 2005 required Complainant to file an “Amended Complaint”. (Respondent’s Brief at 2.) Respondent writes in its most emphatic font: “*Complainant never filed an Amended Formal Complaint as he was ordered to do.*” (Respondent’s Brief at 2.) Respondent insists that the filing of the document captioned “COMPLAINT” “*must* be rejected and an Order in the usual form denying Complainant relief *must* be entered in favor of Euro-Pacific Fruit Export, Inc.” (Respondent’s Brief at 2.) The Rules of Practice do not require that documents be captioned with technical accuracy. *See B. G. Sales v. Sin-Son Produce Co., Inc.*, 43 Agric. Dec. 1991 (1984) (holding that a misdated document was valid irrespective of the mistake). We have already recognized the captioned “Complaint” filed on September 29, 2005, as the “Amended Complaint,” on the first page of our “Order Denying in Part and Granting in Part Respondent's Applications for Orders” dated December 12,

³ The Letter (and the two checks) were sent to Respondent on April 11, 2006 by David Studer, Acting Regional Director of the Western Region of the PACA Branch. The Letter did not appear to have the check stubs attached. Copies of the Checks and the Stubs can be found attached to the Declaration of Michael Mentges Ex. 3 and Ex. 4.

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2005.⁴

Respondent maintains seven additional baseless objections: Complainant's Opening Statement was not properly verified (Objections to Opening Statement at 3.);⁵ the Opening Statement does not include "pertinent documents that must be identified in the Statement" (*id.*);⁶ Nick Bikakis has not been shown as authorized to sign the Opening Statement (*id.*);⁷ California Bus. & Prof. Code section 17918 prevents action because Complainant has not presented any evidence that it was operating in accordance with the California fictitious business name statement laws (*id.* at 5.);⁸ Complainant has had purported *ex parte* communications with the

⁴We also note that the Order of September 20, 2005 considered a document captioned "Application to Vacate Default Order and Reparation Award Against Euro-Pacific Fruit Export, Inc." as a "Petition to Reopen After Default", which would have been the technically accurate caption for that pleading. If technical inaccuracy of Respondent's caption had not been overlooked, Respondent would not have made it this far.

⁵This objection is based on an imprecise verification. Complainant's verification in its entirety reads:

Nick Bikakis, being first duly sworn, says that he has read the foregoing complaint and knows the contents thereof and that the same are true, except as to those matters therein stated on information and belief, and as to such matters he believes them to be true, and that he is duly authorized to sign the complaint on behalf of the Complainant.

Respondent has argued that "the foregoing complaint" language in the verification renders the verification inadequate. An example of verification language that parties may use is in the Rules of Practice, 7 C.F.R. § 47.20(h). The example is substantially similar in substance to Complainant's language, but not identical in form. Regardless, Nick Bikakis signed on behalf of Albert L. Good d/b/a Castle Rock Vineyards. (Opening Statement at 5.) Nick Bikakis signed the verification. (*Id.*) The notary signed, stamped and dated the document. (*Id.*) The Rules of Practice require nothing more. See 7 C.F.R. § 47.20(c).

⁶This objection is without any foundation in the Rules of Practice because Complainant is not required to provide documents with his statements.

⁷See discussion *supra* fn. 5.

⁸Complainant is not required to prove that it is operating in accordance with the California statute; Complainant is licensed by the PACA as Albert L. Good with the trade name Castle Rock Vineyards.

Department (see Objections to Opening Statement at 1-2.);⁹ we should hold an oral hearing instead of a documentary procedure;¹⁰ and, Nick Bikakis made deliberately false and misleading statements in violation of 7 U.S.C. § 499b when he failed to correctly identify his employer (*id.*).¹¹ These objections are meritless, and are overruled.

Respondent's second category of objections is to the evidence. Respondent objects to the evidence presented in the Opening Statement and the Statement in Reply. Respondent patterns these evidentiary objections after the Federal Rules of Evidence ("FRE"). (Objections to Opening

⁹ Respondent's objections to *ex parte* communications with the Department are meritless because: (1) no *ex parte* communication has occurred between Complainant and the examiner and (2) the nature of procedure under the Rules of Practice is for sequential filings.

First, disallowed *ex parte* communication occurs when a judge discusses the merits of the proceeding with one side of a case without the opposing side present to participate. *See e.g.* 7 C.F.R. § 1.149; ABA Model Rules of Professional Conduct, Rule 3.5. The "judge" is the examiner who prepares the decision for the Judicial Officer's signature. No *ex parte* communication has occurred in this case because the examiner, an OGC attorney, never communicated with either party on the merits in writing or otherwise outside the documents filed with the Department.

Second, Respondent has fundamentally misunderstood the sequential nature of the service in the Rules of Practice. The current method of service in the Rules of Practice is that a party serves the documents on the PACA Branch, and the PACA Branch serves the opposing party. 7 C.F.R. § 47.4. For example, Respondent has objected to the letter dated April 4, 2006 (and the attached checks) that Complainant served on the PACA Branch on April 5, 2006. The PACA Branch served Respondent the letter and checks on April 11, 2006. Respondent has had an opportunity to comment on that communication. This is the sequence that the Rules establish. This example and all of Respondent's other objections to *ex parte* communications follow this pattern. Therefore, all of Respondent's objections to *ex parte* communications are overruled.

¹⁰ Respondent explains its objection: "Respondent has timely requested Oral Argument and . . . the amount in controversy is greater than \$30,000." (Objections to Opening Statement at 1.) A careful examination of the record does not reveal a timely request for an in-person hearing. Respondent has not cited the document that contains the request. Because no request for an oral hearing was timely filed as required by 7 C.F.R. § 47.15, Respondent's objection is overruled.

¹¹ Nick Bikakis has identified his employer in his verification: Albert L. Good d/b/a Castle Rock Vineyards. If this is false, Respondent has not shown that it is false.

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Statement at 4-14; Respondent's Brief at 6-8.)

Respondent's evidentiary objections are overruled for one reason: The FRE do not apply to this proceeding. This is an administrative forum that is conducted pursuant to the requirements of the Administrative Procedure Act. *See In re: Fred Hodgins*, 56 Agric. Dec. 1242, 1295 (1997). In this administrative forum, the rules for exclusion are contained in our Rules of Practice. The Rules of Practice require that examiners exclude evidence at an oral hearing only when the evidence is "immaterial, irrelevant, or unduly repetitious, or which is not the sort of evidence upon which responsible persons are accustomed to rely." 7 C.F.R. § 47.15(2)(g). In the documentary procedure portions of the Rules of Practice, there is no rule that requires the exclusion of evidence at all. 7 C.F.R. § 47.20. Even under the rules for an oral hearing (7 C.F.R. § 47.15(2)(g)), Respondent has not presented any valid objections that would cause us to exclude this evidence.

For example, Respondent has objected on hearsay grounds to the following passages in the Opening Statement which read: "My Employer, Mr. Al Good had spoke with Mr. [Mathias] Mentges previously and told him we would ship two loads of Red Globe Grapes. I called up Mr. Mentges to confirm the sale as well as the P.O. numbers, and prices." (Opening Statement at 1.) Neither sentence would be excluded in an oral hearing because the testimony is not hearsay. But even if Respondent had presented a legitimate hearsay objection, reliable hearsay is admissible under the Rules of Practice, and when it is admitted, hearsay evidence is given its appropriate weight. *See G&S Farms v. Mendelson-Zeller, Co.*, 20 Agric. Dec. 272 (1961). Therefore, all of Respondent's hearsay objections are overruled.

Similarly, Respondent variously objects to the Opening Statement and the Statement in Reply based on: lack of foundation, lack of authentication, lay legal opinions, best evidence rule,¹² inadmissible opinion, inadmissible

¹² The best evidence rule only requires that an original of a document be produced as proof of its contents, and not "secondary evidence" in its place. *See* FRE 1002. When a party's understanding of a document is at issue, his testimony should not be excluded. *See U.S. v. Mayans*, 17 F.3d 1174, 1184-85 (9th Cir. 1994). Every document that Nick Bikakis refers to is already in evidence, and his testimony does not appear to be intended to prove the contents of those documents. A fair reading of the Opening Statement reveals that Nick

settlement discussions, lack of personal knowledge, irrelevance and hearsay.¹³ In sum, Respondent objects to all but a few sentences of the Opening Statement and the Statement in Reply. It is not necessary to discuss in detail all of these immaterial objections, and all of these objections are overruled. The evidence is given its appropriate weight.¹⁴

Respondent's Pending Motions

Respondent has also presented two motions that must be resolved: A motion to extend the time to file declarations and a motion for Judicial Notice.

First, Respondent appears to have requested an extension of time to file the declarations of two individuals residing in the United Kingdom and Sweden. (See Declaration of Merl Ledford III at 2.) Respondent's request was filed with the Answering Statement, and served on Complainant. However, Respondent never filed additional declarations, or renewed its request to submit additional affidavits in its Brief, even though Respondent continued to maintain a number of its objections. (See Respondent's Brief at 1-2.) The time for filing additional affidavits has long past, and therefore the motion for an extension of time is denied.

Second, On June 22, 2006, Respondent filed a "Declaration of Michael

Bikaksi discussed the contents of the document to show his state of mind concerning the document and his actions in accordance with his state of mind. Complainant's interpretation of the inspection report is relevant to Complainant's belief that the inspection report was inadequate to show the table grapes' condition when they arrived in Sweden. Therefore, Respondent's objections based on the "Best Evidence Rule" are overruled.

¹³ Not included in this list are Respondent's numerous objections that the Opening Statement contains inappropriate "spin", or is misleading and deceptive. (e.g. Objection to Opening Statement at 5, 7-8, 10.) These "spin" objections, unlike those listed, have no basis in the FRE at all. The best place to point out factual errors in an opening statement is in the answering statement or the brief. Accordingly, Respondent's poorly grounded objections based on purported fraud or deception, even if not specifically identified here, are also overruled.

¹⁴ For instance, Complainant refers in the Statement in Reply to the opinion of the PACA Branch as a reason to support a finding against Respondent. (Statement in Reply at 1.) The opinions of the PACA Branch in the Report of Investigation, in so far as they state legal conclusions, do not dictate the resolution of this proceeding, nor do those opinions shift the burden of proof onto the opposing party.

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P. Mentges for Judicial Notice of Non-Conforming Produce; to Close Evidence and For Order and Judgment for Respondent Euro-Pacific Fruit Export, Inc.” (“Motion for Judicial Notice”). In the Motion for Judicial Notice, Respondent requests the following: that judicial notice be taken that the grapes were improperly marked for import into Sweden; that judicial notice be taken that the grapes arrived in a condition that made the grapes illegal to import into Sweden; that because Complainant failed to respond to the Objections found in the Answering Statement, the objections must be sustained; and that the evidence in the proceeding be closed and an order entered in favor of Respondent because Complainant has not met his burden of proof.

The Motion for Judicial Notice is denied for three reasons: First, to the extent that the Motion for Judicial Notice seeks to establish facts outside of the Answering Statement, it was untimely filed, because it was filed more than 20 days after the Opening Statement. Second, the Motion for Judicial Notice requests that we take judicial notice of facts from a commonly available source, in accordance with FRE § 201(b)(2), that Respondent has not produced or referenced. Third, there is no requirement in the Rules of Practice that we ever find in favor of a party that has made objections simply because the opposing party has not answered them. The motion is denied.¹⁵

Now that we have addressed the procedural issues, we will turn to the merits of this case.

Conclusions

Most of the contract terms for the sale are not in dispute. The parties agree that Complainant sold to Respondent two containers of “CAT 1” table grapes F.O.B. with the contract destination of Sweden. (See Declaration of Mathias Mentges at 5, Exhibits 1-3; Complainant’s Opening Statement at 1.) Both parties agree that Complainant delivered the grapes into

¹⁵ The Motion for Judicial Notice has not been served on Complainant. However, it does not prejudice Complainant to deny the motion, and no benefit would be obtained by granting Complainant time to respond.

Respondent's possession, and that Respondent shipped the grapes to Helsingborg, Sweden. (See Complainant's Opening Statement at 2; Declaration of Mathias Mentges at 6; ROI Ex. 1a, 1c.) There is no serious dispute that the price owed on the original contract was \$61,772.52 as described in the two invoices attached to the Complaint.¹⁶ (Complaint at Ex. 1 and Ex. 2.) Nor is there any dispute that Respondent did not pay Complainant the full invoice price on the grapes (\$61,800.72), and instead Respondent issued two checks that were \$36,233.16 less than the originally invoiced amount. (See Declaration of Michael Mentges at 5; Letter.) The parties agree that Complainant did not cash the checks for \$25,567.56, and therefore Complainant has not been paid in any amount for the two container loads of grapes. (See *id.*)

However, Respondent claims that when the grapes reached Sweden, it rejected the grapes because Complainant had breached the contract. Respondent also claims that it was authorized to resell the grapes and remit the proceeds based on an "open" contract. As discussed below, Respondent has failed to demonstrate that it rejected the grapes, that Complainant breached the agreement, or that Respondent negotiated a new agreement to sell the grapes on an "open" basis. Because Respondent has breached the contract by failing to pay the full contract price, we will award Complainant its full claim for \$36,233.16 in damages.

I. Respondent Has Not Shown that It Timely Rejected the Grapes in Clear and Unmistakable Terms.

Respondent has claimed that it rejected the grapes when they reached Sweden. The burden of proving rejection is on Respondent. *Crawford v. Ralph & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 806 (1992); *San Tan Tillage Co. v. Kaps Foods*, 38 Agric. Dec. 867, 871 (1979). Respondent seems to have claimed that it rejected the grapes in a phone call on December 11, 2004, in an e-mail on December 13, 2004, and in a meeting on January 3, 2005. Rejections are only effective if the rejection is

¹⁶There are two invoices in the ROI that have slightly different terms than the invoices Complainant attached to the Complaint (and which can also be found in the ROI Exhibits 1a and 1c). These invoices have the same invoice numbers, but with slightly lower amounts due. Invoice no. 11677 is for \$30,861.96 and invoice no. 11679 is for \$30,868.76. (ROI Exhibit 6c, 6d.) The \$35.00 difference in both cases appears to be the addition of "Phyto". (Compare ROI Exhibits 6c, 6d with ROI Exhibits 1a, 1c.)

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made in clear, unmistakable terms. *Firman Pinkerton Co. v. Casey*, 55 Agric. Dec. 1287, 1292 (1996); *Farm Market Service, Inc. v. Albertson's Inc.*, 42 Agric. Dec. 429, 431 (1983). And, the rejection is not effective unless the buyer seasonably notifies the seller. *Firman Pinkerton Co.*, 55 Agric. Dec. at 1292-93. The statements of Mathias and Michael Mentges have failed to establish that a timely rejection was tendered, or that Respondent was clearly and unmistakably rejecting the grapes.

Respondent claims that Mathias Mentges notified Complainant's office by telephone on December 11, 2004 that (1) Respondent was rejecting the non-conforming grapes, (2) the grapes had been rejected for importation into Sweden, (3) Complaint had failed to properly mark the grapes, and (4) an official inspection was being performed. (Declaration of Mathias Mentges at 8.)

Mathias Mentges's claims that he timely rejected the grapes as non-conforming in the purported telephone call are not credible because the contemporaneous e-mail does not support his testimony. The e-mail Mathias Mentges sent Mr. Bikakis on December 13, 2004, only two days after the purported telephone call, never mentions that Respondent had rejected the grapes, only that the ultimate customer had rejected them. Further, the e-mail specifically promises to "keep you posted daily." (Declaration of Mathias Mentges Ex. 4.) Respondent did not request guidance on grapes from Complainant that, if properly rejected, would not be Respondent's property. *See* U.C.C. § 2-603 ("when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty . . . to follow any reasonable instructions received from the seller with respect to the goods . . .").

Complainant did not submit testimony to rebut Mathias Mentges's rejection claims in the Statement in Reply. However, Mathias Mentges states in his Declaration: "I telephoned ALBERT L. GOOD's office with notice (i) that the [sic] EURO-PACIFIC was rejecting ALBERT L. GOOD'S [sic] non-conforming Grapes" (Declaration of Mathias Mentges at 8.) Without identifying to whom Mathias Mentges spoke, Complainant would have the task of bringing forward an unidentified member of his office staff to reject Mathias Mentges's claim. Moreover, if the rejection had actually occurred, Mathias Mentges should have been able

to identify the person with whom he discussed the rejection, which he does not do. Because Mathias Menteges's purported rejection is inconsistent with the contemporaneous e-mail, his bare assertion - that he telephoned his rejection to Complainant's "office" - lacks sufficient credibility for us to rely upon it. Respondent has failed to prove that an effective rejection was made by telephone on December 11, 2004.

The e-mail of December 13, 2004 is also inadequate to show rejection because Mathias Menteges did not state in clear, unmistakable terms that Respondent was rejecting the grapes. The only clear rejection described was that of Respondent's buyer. A notice that Respondent's ultimate buyer rejected the produce is not sufficient to operate as a rejection between the Respondent and Complainant. *See In re: Mathis v. Kenneth Rose Co.*, 46 Agric. Dec. 1562, 1566 (1987) (citing *Womack Bros. Produce v. P.L. Echols*, 20 Agric. Dec. 895 (1961)).

The witnesses' statements imply that Respondent rejected the produce during the meeting on January 3, 2005. Even if we concluded that the content of the meeting itself included a clear, unmistakable rejection, (which we do not conclude), the rejection would not have been timely, occurring two weeks after the grapes had arrived in Sweden. *See* 7 C.F.R. 46.2(cc) (defining a "reasonable time" for rejection does not exceed 24 hours after the fresh fruits or vegetables are unloaded and made available for inspection).¹⁷

An ineffective rejection has the same consequence as acceptance. *Dew-Grow, Inc., a/t/a Central West Produce v. First National Supermarkets, Inc.*, 42 Agric. Dec. 2020 (1983); *Nikademos Dist. Co. v. D & J Tomato Co.*, 50 Agric. Dec. 1884, 1888 (1991). Because of Respondent's ineffective rejection, Respondent is deemed to have accepted the grapes and therefore is liable for the full invoice price of the grapes, unless it can prove that Complainant breached the contract.

¹⁷ Respondent's witnesses have also implied that Complainant's employees accepted the inspection report at this meeting. Respondent's witnesses noted that Mr. Hillen, one of the Complainant's employees, "shook his head in a manner" expressing "disbelief" or "disappointment" in the quality of the grapes. (Declaration of Mathias Mentges at 9; Declaration of Michael Mentges at 3-4.) This testimony is too speculative to be given any serious credit, because Respondent's witnesses were not inside Mr. Hillen's mind to indicate why he shook his head.

II. Respondent Has Not Proved that Complainant Breached the Contract.

Respondent claims that Complainant breached the contract in three ways: (1) by failing to label the boxes as “CAT 1”, therefore preventing the importation of the grapes, (2) by packing the grapes in the wrong boxes, and (3), by breaching the warranty of suitable shipping condition. Respondent has not shown that the contract was breached.

1. Respondent Has Failed to Show that Labeling the Grapes “CAT 1” Was a Contract Term for which Complainant is Liable.

Respondent’s first claim centers on EU grade standards. According to Respondent, under EU standards only “CAT 1” produce, which is comparable to USDA grade fancy, may be directly imported to retailers in EU countries. (Declaration of Mathias Mentges at 4.) For direct import, the label of “CAT 1” must be affixed before the produce arrives at the foreign dock. (*Id.*) Respondent does not claim that an entire container of produce is irrevocably returned to the United States when the produce is unlabeled, but rather that the produce must be sold to a wholesaler for repacking and grading before it is accepted into an EU country. (See *id.* at 4-5.) Mathias Mentges discussed at length that only “CAT 1” grapes could be imported into Sweden, (Declaration of Mathias Mentges at 4-5) and that if the boxes are not stamped “CAT 1” the grapes are automatically downgraded to “CAT 2”, which is the equivalent of U.S. No. 1 grade. (Declaration of Mathias Mentges at 4-6.) This would result (and did result) in Respondent having to label the grapes on the dock before it could deliver the grapes to its Swedish retail customer. (See *id.* at 6.)

The burden is on the proponent of a contract term to prove that term. *Merit Packing Company v. Pamco Airfresh, Inc.*, 47 Agric. Dec. 1345, 1346 (1988). The written testimony in this case is inadequate to show that this specific labeling was a contract term.

Mathias Mentges testified sufficiently to show that the contract did require red globe variety table grapes that met the “CAT 1” grade standards.

(Declaration of Mathias Mentges at 5.) And, Complainant has not attempted to dispute that “CAT 1” labels were not affixed to the grapes. Respondent has presented un rebutted testimony that the labeling on boxes was important to Respondent, and that the boxes were unlabeled. (See Declaration of Mathias Mentges at 4-5.)

However, as the party bearing the burden to show this contract term, Respondent did not demonstrate that the contract *required* Complainant to label the boxes. The purchase orders make no reference to the grade of the grapes at all (See Declaration of Mathias Mentges Exhibits 1-3), and neither do the invoices (ROI Ex. 1a, 1c). Mathias Mentges’s description of the contract does not present any labeling terms either:

On November 3, 2004, I made an oral agreement on behalf of EURO-PACIFIC with ALBERT L. GOOD for FOB purchase of three containers of 19 pound Bagged Cat 1 (“First Place”) red globe grapes totaling 5,472 packages . . . for delivery by MR. GOOD as “Shipper” to a known and disclosed destination in the Kingdom of Sweden, an EU country.

(Declaration of Mathias Mentges at 5.) There is no indication in the evidence that the contract required Complainant to label the grapes “CAT 1” before shipment. Respondent asserts that “the Shipper (Complainant)¹⁸ must clearly label each box of table grapes . . .” (Respondent’s Brief at 3.) The evidence supports a conclusion that grapes must be properly labeled for importation into Sweden, but there is no reason to assume that Complainant was obligated to label the grapes “CAT 1” absent an express contract that required Complaint to so label the grapes.

Moreover, this was an f.o.b. contract. “[In an f.o.b. transaction,] the buyer assumes all risk of damage and delay in transit not caused by the seller.” 7 C.F.R. § 46.43(i).¹⁹ Buyers in an f.o.b. transaction are responsible for the risk of loss during transportation, including non-

¹⁸ Contrary to Respondent’s assertion, it appears that Respondent arranged for shipment of the containers to Sweden (See Declaration of Mathias Mentges, Ex. 1-3.) This would make Respondent the “shipper”.

¹⁹ Similarly, under the U.C.C. § 2-509(1)(a), the risk of loss transfers when the seller delivers the goods to the carrier.

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delivery. *See In re: East Produce v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 856 (2000). Sellers in an f.o.b. contract are only required as a general rule to “put the goods in the possession of a carrier and make such a contract for their transportation as may be reasonable . . .” *See* U.C.C. § 2-504.²⁰ Respondent appears to have made the transportation arrangements, because, in its purchase orders, Respondent specified the method of transportation and the carrier. (See Declaration of Mathias Mentges, Ex. 1-3.) Complainant put the grapes in the carrier’s possession according to the proven terms of the contract. As the importer into Sweden, Respondent was in the better position to notify Complainant what Sweden required in labeling. There is no evidence that Respondent notified Complainant of this requirement. Respondent therefore bore the risk that the Swedish authorities might delay or prevent delivery to Respondent’s customer.

Respondent reached a specific agreement with Complainant as to the amount, quality, and price of the grapes. Complainant fully performed the agreement when he placed the grapes on the truck in California. Respondent’s first claim of breach fails because it has not shown with testimony or other evidence that this f.o.b. contract required Complainant to label these grapes “CAT 1”.

2. Respondent Has Not Shown that Complainant Packaged the Grapes in Breach of the Contract.

Respondent’s second claim of a breach centers on the packaging of the grapes. Respondent alleges that Complainant packed one container of grapes in the wrong sort of boxes, and that this was a breach of the contract. (Respondent’s Brief at 4.) The purchase orders appear to show that the contract required Complainant to package the grapes in “Styro-Pack” boxes for at least one of the two containers. (Declaration of Mathias Mentges Ex. 1, Ex. 2, Ex. 3.)

However, the invoices show that the contract required Complainant to package the grapes in hard plastic boxes. The invoices contain the one-line

²⁰ Complainant’s warranty of suitable shipping condition, discussed *infra* section II.3, is separate from the default rule described in the U.C.C.

description: “Red Globe Grapes 19# Bags Hard Plast 1st Place.” (ROI Ex. 1a, 1c.) From the invoice date until the delivery date, Respondent would have had several weeks to review the invoice and seek clarification or correction of the contract terms listed on the invoice. Yet even after the grapes arrived, there is no indication that Respondent objected to the boxes listed on the invoice until Respondent filed the Declaration of Mathias Mentges in this proceeding. Respondent’s failure to promptly object to the terms on the invoice is a strong indication that the terms set forth on the invoice were correctly stated. See *Lisenby v. Craft Tomato Co.*, 46 Agric. Dec. 1870 (1989); *Smith Potato, Inc. v. Wood Bros. Produce*, 45 Agric. Dec. 2091, 2095 (1986); *Pemberton Produce, Inc. v. Tom Lange Co.*, 42 Agric. Dec. 1630 (1983); *Graff v. Chandler-Topic Co.*, 41 Agric. Dec. 1787, 1789 (1982); *Sunshine Produce Co. v. Si Si Fruit Distributors*, 34 Agric. Dec. 104, 108 (1975); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218 (1960). Therefore, we conclude that the contract required Complainant to package the grapes in plastic boxes. There is no indication in the record that Complainant breached this contract term.

3. Respondent Failed to Show that Complainant Breached the Warranty of Suitable Shipping Condition.

Respondent’s main claim in its pleadings is that Complainant breached the warranty of suitable shipping condition. In this instance, the contract called for the grapes to be shipped f.o.b. to Sweden. 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, 7 C.F.R. § 46.43(j), “that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.”

The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination “without

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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 generally *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703, 708 (1980); see Williston, Sales § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the PACA dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should negotiate a delivered sale rather than an f.o.b. sale. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined. See *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. at 708.

Respondent has stated the law concerning the warranty of suitable shipping condition somewhat differently: “It is uncontroverted that all ‘F.O.B.’ sales are warranted for ‘suitable shipping condition for good

arrival at the [known] and disclosed point of intended destination.” (Respondent’s Brief at 3.) Taken alone, this paraphrase of the law is merely imprecise. However, Respondent then states a conclusion that is a bold misstatement of the law: “It is uncontroverted that ‘Good Arrival’ is determined under the laws of the known and disclosed destination according to inspection standards established by that jurisdiction.” (Respondent’s Brief at 3.) With this misstatement, Respondent errs in two major respects.

First, the warranty of suitable shipping condition, as the above cited cases indicate, is not a warranty that the produce will arrive in a condition acceptable to the buyer (or a foreign inspector) at the delivery point. A shipper warrants that the produce was the proper grade when loaded so that under normal shipping conditions, only normal deterioration will occur. We ask the question: “[W]ere the perishables, at shipping point, in suitable condition for shipment to a specific destination?” *Lookout Mountain Tomato & Banana Co. v. Consumer Produce, Co.*, 50 Agric. Dec. 960, 966 (1991).

Second, the law of the United States applies in this situation. “[T]he validity of contracts to sell perishable agricultural commodities in interstate commerce is to be determined by the federal act and the regulations issued under it to the extent that they are applicable . . .” A. *Sam & Sons Produce Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1059 (1991). The warranty of suitable shipping condition attaches through the regulations promulgated under the PACA whenever the term “f.o.b.” is used in a produce transaction. See *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 980 (1997). Therefore, what is “abnormal deterioration” is the question and the answer will be determined based on PACA standards and regulations.

Respondent’s misstatement causes Respondent to make several irrelevant arguments concerning the warranty of suitable shipping condition. Specifically: Complainant accepted European Union inspections in the past, the health ministry of Sweden will not permit table grapes with any amount of mildew, mold or rot to be imported into Sweden, and the grapes were illegal to import into Sweden. (See Respondent’s Brief at 4). The scope of the warranty is not concerned with those events, even if all of those assertions are true. If Respondent wanted the grapes to be of a certain condition at the arrival point, it could have arranged for “delivered” terms.

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The only relevant issue is whether Complainant has breached the warranty.

As the party who accepted the grapes, it is Respondent's burden to show breach of the warranty of suitable shipping condition. See *Anthony Farms v. Bushman's*, 45 Agric. Dec. 1640, 1642-43 (1986); *Martori Bros. Distributors v. Anthony Gagliano & Co.*, 45 Agric. Dec. 1621, 1623 (1986); *Fresh Western Marketing, Inc. v. Corgan & Son, Inc.*, 45 Agric. Dec. 1313, 1318 (1986). In order to carry its burden, Respondent must show that the shipping conditions were normal. See *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 856, (1992). If the shipping conditions were normal, Respondent must also present adequate proof that abnormal deterioration occurred such that the Complainant breached the warranty of suitable shipping condition. See *Western Vegetable Exchange v. R. Moyers & Sons Wholesale Produce*, 50 Agric. Dec. 998, 1001 (1991). There is some evidence, in the form of temperature recorder tapes, that suggests that the shipping conditions were normal. However, we will presume without deciding that the shipping conditions were normal, because we conclude in any event that Respondent has not presented adequate evidence of abnormal deterioration.

The kind of evidence required to show abnormal deterioration is well established in our case law. In this instance, there is a case directly on point. In *Ontario International, Inc. v. The Nunes Company*, 52 Agric. Dec. 1658 (1993), we considered a Swedish inspection report and photographs similar to the report and photographs submitted in this case. *Id.* at 1669-70. In that case, we held that the inspection report's general statements concerning the value of the produce, without statements of percentages of defects, were inadequate to demonstrate that the warranty of suitable shipping condition was breached. *Id.* Supplying percentages of defects is the basic function of an inspection or survey. *Id.* This function is only accomplished when the inspector carefully counts the defective items in a representative sample taken from a load as a whole, and the inspector describes the type of defects or damage in the report. *Id.* And, we do not rely on photographs as evidence of percentage of defects or damage. *Id.* at 1669.

Like the inspection report in *Ontario International*, Respondent's one page inspection report does not have any indication of the percentage of

defects.²¹ Without a statement of the percentages of defects or damage, it is impossible for us to determine whether the defects and damage that are present are abnormal or normal for shipments from California to Sweden. Further, the inspector may not have utilized a representative sample. The sample size utilized in the inspection was very small, 0.44% of the entire load. In previous cases, we have declared inspections taken on small samples as inadequate. *See Borton & Sons v. Firman Pinkerton Co.*, 51 Agric. Dec. 905, 910 (1992) (discussing a sample size of 0.36%). Finally, the close-up pictures, which graphically display serious condition problems in the grapes photographed, are insufficient evidence that the entire load suffered from similar defects and damage.

Therefore, Respondent has failed to show that Complainant breached the warranty of suitable shipping condition.

III. Respondent Has Not Proven that Complainant Agreed to a New Contract.

Respondent has also claimed that it formed a new agreement with Complainant, which it fully performed. The burden of showing a new contract is on the party alleging it, which in this proceeding is Respondent. *See Turbana Corp. v. Tom Lange, Co.*, 49 Agric. Dec. 1221, 1226 (1990). The new agreement supposedly allowed Respondent to sell the grapes on Complainant's behalf. (*See* Declaration of Mathias Mentges at 10.) The evidence of this new agreement is in Mathias Mentges's and Michael Mentges's declarations and a "claim liquidation" which appears to be an accounting of a purported sale of the grapes. (Declaration of Michael Mentges at 3-4; Declaration of Mathias Mentges at 9, Ex. 4 at 2.)

Respondent's specific assertions of a new agreement are largely unanswered by Complainant. Complainant's Nick Bikakis does not

²¹ Respondent refers to a 15-page inspection report at many places in the declarations and other filings. For example, Mathias Mentges purportedly had delivered on December 22, 2004, "the fifteen page Official Swedish Survey and Report" to Complainant. (Declaration of Mathias Mentges at 8; *see also* Objections to Opening Statement at 8.) However, the report in evidence is plainly a single page of text. If there is a larger report, with more than one page of text, Respondent has not introduced it. There are photographs that accompany the report, but they vary from thirteen pages in Exhibits 60-6aa of the Report of Investigation to five pages in Exhibit 4 as attached to the Answer.

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mention the purported post-delivery agreement at any point in the Opening Statement or the Statement in Reply. Nor does Nick Bikakis discuss the meeting on January 3, 2005, where Respondents purportedly received an instruction to liquidate the fruit on Complainant's behalf. However, Nick Bikakis has insisted that he did not accept the inspection report as sufficient evidence which would warrant an adjustment to the contract. (*See* Opening Statement at 3, 4; Statement in Reply at 1.)

It is possible that the original contract could have been modified by the parties if there was mutual assent to the modification. *See Faris Farms v. Lassen Farms*, 59 Agric. Dec. 471, 479 (2000). However, with no written agreement showing a contract modification, determining whether Complainant agreed to an "open" sale is based entirely on the credibility of Respondent's witnesses. As noted in *Farris Farms*, 59 Agric. Dec. at 480, the trier of fact in a written procedure case is heavily dependant on the verified statements of witnesses to develop the facts that establish the parties' claims. Subtleties in those statements must be considered. *Id.* Particularly when an attorney appears to have written the statements, and those statements contain closely reasoned legal arguments, we give those statements less weight than clear statements by the witnesses themselves. *See id.*

In this case, Respondent's declarations have a number of tendencies that make it difficult to give full credit to Respondent's witnesses. For example, Mathias Mentges asserted that on January 3, 2005:

The meeting concluded with an instruction from Mr. Bikakis to liquidate the fruit and remit a customary liquidation accounting. I understood (and in the context of his statement, it was clear Mr. Bikakis intended me and Michael Mentges, as officers of EURO-PACIFIC, to understand) that EURO-PACIFIC was being tasked on [Complainant's] behalf to perform the liquidation on an 'open' price basis.

(Declaration of Mathias Mentges at 10.) Michael Mentges's description is identical, except that "Michael" is "Mathias" in his declaration. (Declaration of Michael Mentges at 4.) Nor is this the only example of similarities; whole paragraphs of the declarations have substantially similar

wording, with only minor variations. Further, the Mentgeses' statements delve into specific declarations of law. For instance, both witnesses (incorrectly) insist that the breach of the warranty of suitable shipping condition is determined by the laws of the European Union. (Declaration of Michael Mentges at 2; Declaration of Mathias Mentges at 3.)

Further, Respondent's witnesses "understood" that a new contract was formed. (*See* Declaration of Mathias Mentges at 10.) The Mentgeses' "understanding" seems little more than an assumption that the Mentgeses ought to have clarified. Instead, the meeting is left in ambiguous terms. That ambiguity undermines Respondent's insistence that Complainant agreed to a new contract.

The accounting is the only written proof that the parties later agreed to different terms than the original contract. Respondent makes no effort to refer to or to explain the accounting in its Brief or in the Declarations. The accounting may be little more than Respondent's settlement offer. Complainant has unequivocally rejected that offer and the checks that accompanied it.

In this case, the similarities in the witnesses' statements naturally lead to the conclusion that Respondent's counsel prepared the declarations. The written evidence of a new agreement is ambiguous. This is a close question, but on balance, Respondent's assertions of a new contract are less credible than Complainant's assertions that the inspection report did not provide a basis for contract adjustments. This, coupled with Complainant's rejection of the settlement checks, leads to the conclusion that Respondent has failed to prove that the parties formed a new contract.

IV. Complainant Is Due Damages from Respondent's Breach

Complainant has proven that Respondent breached the contract, and Respondent has not presented a successful defense. All that remains is to determine the amount Complainant is due from Respondent's breach.

In the Complaint, Complainant requested that Respondent pay \$36,233.16 as the amount remaining unpaid from the total sale price of \$61,800.72. (Complaint at 2.) No amount of the \$61,800.72 has been paid because Complainant never cashed the checks for \$25,567.56 that Respondent delivered to Complainant. Complainant brought this fact to the attention of the Department belatedly, on April 5, 2006, more than a year after the checks were issued, and well after the Complaint was filed.

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(Letter.) However, Complainant's most recent filing continues to seek payment for \$36,233.16 with interest. (Statement in Reply at 2.) While an award of the full amount of \$61,800.72 as the amount unpaid and owing would be appropriate if Complainant had timely amended the Complaint, Complainant currently does not seek the full \$61,800.72. Therefore, we are constrained to award the amount requested in Complainant's formal filings of \$36,233.16.

Section 5(a) of the PACA requires that we award to the person or persons injured by a violation of Section 2 of the PACA "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. See *Thomas Produce Co. v. Lange Trading Co.*, 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. *PGB International, LLC, v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Decision on Reconsideration, 65 Agric. Dec. 669 (2006).¹

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 PACA is liable to the injured party for its handling fees.

Order

¹ See Notice of Change of Interest Rate Awarded in Reparation, 71 Fed. Reg. 25,133 (April 28, 2006).

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Within 30 days from the date of this Order, Respondent shall pay to Complainant, as reparation, \$36,233.16 with interest thereon at the rate of 4.96% per annum from January 1, 2005, until paid, plus \$300.00 reimbursement for Complainant's handling fee.

Copies of this Order shall be served upon the parties.

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PACA Docket No. R-07-039.

Reparation Decision.

Filed June 21, 2007.

Evidence – Normal Transportation.

While acknowledging that a negative inference may be taken when a receiver neglects to retrieve a temperature recorder from the truck, held that such failure is nevertheless insufficient cause to conclude that the buyer failed to sustain its burden to prove normal transportation where there were no other factors present indicating that the transportation conditions were not normal.

Presiding Officer Leslie Wonk.

Decision and Order by William G. Jenson, Judicial Officer.

Decision and Order

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 \$15,600.00 in connection with one truckload of asparagus 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. Respondent filed an Answering Statement. Complainant also submitted a Brief.

Findings of Fact

1. Complainant, Southern Specialties, Inc., is a corporation whose post office address is 6830 Artesia Boulevard, Buena Park, California, 90620. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Amerifresh, Inc., is a corporation whose post office address is 17767 N. Perimeter Drive B103, Scottsdale, Arizona, 98106-5452. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about September 16, 2005, Complainant, by oral contract, sold to Respondent, and shipped from loading point in the state of Florida, to Respondent's customer, Courchesne Larose Limitee, in Montreal, Quebec, Canada, 1,200 boxes of small green asparagus at \$14.75 per carton, or \$17,700.00, plus \$23.50 for a temperature recorder, for a total f.o.b. contract price of \$17,723.50.

4. On September 19, 2005, at 7:59 a.m., a Canadian Food Inspection Agency inspection was performed on the asparagus at the place of business of Courchesne Larose Limitee, in Montreal, Quebec, Canada, the report of which disclosed 17% average defects, including 7% spreading, 5% shriveled, 1% flabby, 1% decay at cupped ends, and 3% decay at tips. Pulp temperatures at the time of the inspection were 2 degrees Celsius (35.6 degrees Fahrenheit).

5. On October 14, 2005, Respondent's customer, Courchesne Larose Limitee, accounted to Respondent for the asparagus as follows:

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20 CTN	@ \$10.00	\$200.00
780 CTN	@ \$5.00	\$3,900.00
240 CTN	@ \$4.00	\$960.00
100 CTN	@ \$3.00	\$300.00
<u>60 CTN</u>	@ \$1.00	<u>\$60.00</u>
1200		\$5,420.00
	Less 15%	<u>\$813.00</u>
		\$4,607.00
	Inspection Cost	<u>\$ 94.35</u>
	CDN \$	<u>\$4,512.65</u>
	U.S. \$	\$3,760.54
	Less Freight	<u>\$1,500.00</u>
	Net in U.S.	\$2,260.54
	Remitting in U.S.	\$2,400.00

6. Respondent paid Complainant \$2,123.50 for the asparagus, thereby leaving an unpaid invoice balance of \$15,600.00.

7. The informal complaint was filed on November 18, 2005, 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 asparagus sold to Respondent. Complainant states Respondent accepted the asparagus in compliance with the contract of sale, but that it has since paid only \$2,123.50 of the agreed purchase price thereof, leaving a balance due Complainant of \$15,600.00. In response to Complainant's allegations, Respondent asserts in its sworn Answer that the asparagus failed to meet the contract specifications, as a result of which Respondent handled the asparagus on a consignment basis.

Review of the record discloses that following arrival of the asparagus at the place of business of Respondent's customer, Courchesne Larose Limitee (hereafter "Courchesne"), in Montreal, Quebec, Canada, Courchesne unloaded the asparagus and called for an inspection. The unloading or partial unloading of the transport is an act of acceptance. See 7 C.F.R. §

46.2 (dd)(1). We therefore find that Courchesne accepted the asparagus. Once Courchesne accepted the asparagus, Respondent was precluded from rejecting the asparagus to Complainant. Accordingly, we find that Respondent also accepted the asparagus.

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. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. See U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

The asparagus was sold under f.o.b. terms,² which means that the warranty of suitable shipping condition is applicable. The Regulations (7 C.F.R. § 46.43(j)) define “suitable shipping condition” 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.³

² 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.

³ 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

The warranty of suitable shipping condition is, by definition, only applicable when the transportation service and conditions are normal. While Complainant does not specifically allege that the transportation conditions were abnormal, Complainant does assert that “the warranty of suitable shipping condition... was waived in this case because Respondent has failed, neglected and refused to provide Complainant with a copy of the temperature recorder on this shipment after numerous requests.”⁴ Complainant bases this allegation on its invoice, which bears a statement that reads: “THE WARRANTY OF SUITABLE SHIPPING CONDITION, DUE TO CONDITION DEFECTS, SHALL BE DEEMED WAIVED IF, ON F.O.B. SHIPMENTS, WHICH WERE SIGNED FOR BY THE DRIVER, THE RECEIVER DOES NOT RECOVER THE TEMPERATURE RECORDER(S) INCLUDED WITH THE LOAD.”⁵ We note, however, that the invoice also bears a statement that reads: “THE PRODUCE DESCRIBED ON THIS INVOICE IS FOR DOMESTIC SHIPMENT ONLY,” and there is no dispute that Respondent purchased the asparagus for shipment to its customer in Montreal.⁶ We are therefore

federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) 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).

⁴ See Opening Statement, paragraph 5.

⁵ See Formal Complaint, Exhibit No. 1.

⁶ See Respondent’s Answering Statement Affidavit of Mark Krauter, Respondent’s Sales Associate, paragraph 2.

hesitant to conclude that the stipulations listed on the invoice were made a part of the contract negotiated between the parties.

Nevertheless, a negative inference may be taken when a receiver, who should have access to the recorder when the load arrives at the contract destination, neglects to retrieve the recorder from the truck.⁷ We hasten to point out, however, that there are no other factors present indicating that the transportation conditions were not normal. The bill of lading for the shipment shows that the asparagus was shipped at 9:58 p.m., on September 16, 2005. The Canadian inspection was requested at 5:51 a.m., on September 19, 2005. Thus, it took approximately two days to ship the product from Florida to Montreal. We consider this to be a timely delivery. The inspection of the asparagus disclosed a pulp temperature of 35.6 degrees Fahrenheit, which is less than two degrees above the 34 degree Fahrenheit temperature listed under temperature instructions on the bill of lading. Finally, we note that the defects listed on the inspection indicate nothing other than the normal deterioration of the product. Therefore, since there is no indication that the asparagus was exposed to abnormal conditions in transit, we are not inclined to find that the warranty of suitable shipping condition is void simply because the recorder tape was not secured by Respondent's customer.

Next we will consider whether the Canadian inspection establishes a breach by Complainant of the warranty of suitable shipping condition. The United States Standards for Grades of Asparagus⁸ provide a tolerance at shipping point of ten percent for stalks in any lot that fail to meet the requirements of the U.S. No. 1 grade, including therein not more than five percent for defects causing serious damage and one percent for stalks affected by decay. Although there is no indication that the asparagus in question was sold as a specified grade, these tolerances nevertheless apply to the condition defects disclosed by the inspection. For commodities sold

⁷ Failure to submit a temperature tape when asked to do so raises the negative inference that the tape would show abnormal transit. *Sharyland, LP v. Lloyd A. Miller*, 57 Agric. Dec. 762 (1998); *G.D.I.C., Inc. v. Misty Shores Trading, Inc.*, 51 Agric. Dec. 850 (1992); and *Monc's Consolidated Produce, Inc. v. A&J Produce Corp.*, 43 Agric. Dec. 563 (1984).

⁸ 7 C.F.R. §§ 51.3720 through 51.3733. Grade standards may also be accessed via the Internet at www.ams.usda.gov/standards/stanfrfv.htm.

f.o.b., we increase these percentages to allow for normal deterioration in transit. The amount of the increase depends upon the time in transit. The asparagus in question was in transit for approximately two days, in which case we allow 11% average defects, including 6% serious damage and 1% decay. The Canadian inspection, which was performed at 7:59 a.m. on September 19, 2005, or approximately two and half days after shipment, disclosed 17% average defects. Given that the inspection performed two and a half days after shipment disclosed defects that exceed the two-day allowance by 6%, we conclude that the inspection results establish that the asparagus was not in suitable shipping condition.

Complainant's failure to ship asparagus in suitable shipping condition constitutes a breach of warranty for which Respondent is entitled to recover provable damages. Before we determine Respondent's damages resulting from this breach, we must consider Respondent's allegation that Complainant authorized a consignment handling of the asparagus following the inspection.⁹ Complainant, in its Opening Statement, denies authorizing a consignment handling of the asparagus.¹⁰ Respondent did not submit any other evidence, aside from the sworn testimony which has been rebutted by Complainant, to substantiate its allegation that a consignment handling was authorized. Consequently, we find that Respondent has failed to sustain its burden to prove that the contract terms were changed to consignment.

Returning to our determination of Respondent's damages resulting from Complainant's breach, the general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. See 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 submitted an account of sales showing that its customer sold the asparagus between September 21 and 29, 2005, for prices ranging from \$1.00 to \$10.00 per box (CAD).¹¹ By comparison, the Agriculture and

⁹ See Respondent's Answering Statement Affidavit of Mark Krauter, Respondent's Sales Associate, page 2.

¹⁰ See Opening Statement, paragraph 7.

¹¹ CAD = Canadian Dollars. See Report of Investigation, Exhibit No. 4d.

Agri-Food Canada Daily Wholesale to Retail Market Price Report, of which we take official notice, shows that on Monday, September 19, 2005, the first date the asparagus in question was available for resale, green asparagus originating from Peru was selling for \$36.90 to \$39.75 per box (CAD). The sales prices reported by Respondent's customer are extremely low in comparison to the reported market prices. This discrepancy is particularly troubling given that the defects disclosed by the inspection do not exceed the suitable shipping condition allowance by a significant margin. In addition, we note that the inspection of the asparagus was completed at 9:59 a.m. on Monday, September 19, 2005, but that Respondent's customer did not effect its first sale until two days later, on Wednesday, September 21, 2005. There is no explanation in the record for this delay. Asparagus is a highly perishable commodity, so an additional two days in storage for product that was already damaged could have a significant impact on its marketability. Therefore, under the circumstances, we cannot accept the reported resales as the best available evidence of the value of the asparagus as accepted.

An alternative means of determining the value of the asparagus as accepted is to reduce the value the asparagus would have had if it had been as warranted by the percentage of condition defects disclosed by the inspection. See *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869 (1994). For the value the asparagus would have had if it had been as warranted, we refer once again to the Agriculture and Agri-Food Canada Daily Wholesale to Retail Market Price Report for September 19, 2005, which shows that green asparagus originating from Peru was selling for \$36.90 to \$39.75 per box, or an average of \$38.325 per box (CAD). See *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990). For the 1,200 boxes of asparagus in question, this amounts to a total of \$45,990.00 (CAD). When we reduce this amount by 17%, or \$7,818.30, to account for the condition defects disclosed by the Canadian inspection, we find that the asparagus had a value as accepted of \$38,171.70 (CAD).

As we mentioned, Respondent's damages are measured as the difference between the value the asparagus would have had if it had been as warranted, \$45,990.00, and its value as accepted, \$38,171.70, or \$7,818.30 (CAD). In addition, Respondent may recover the \$94.35 (CAD) Canadian inspection

fee as incidental damages. With this, Respondent's total damages amount to \$7,912.65 (CAD). As this amount is in Canadian Dollars, we must convert Respondent's damages to U.S. Dollars before we deduct them from the contract price of the asparagus. On Monday, September 19, 2005, one Canadian Dollar was equivalent to 0.855359 U.S. Dollars. Respondent's damages in U.S. Dollars therefore amount to \$6,768.16.¹² When we deduct Respondent's damages from the \$17,723.50 contract price of the asparagus, there remains an amount due Complainant for the asparagus of \$10,955.34. Respondent paid Complainant \$2,123.50 for the asparagus. Therefore, there remains a balance due Complainant from Respondent of \$8,831.84.

Respondent's failure to pay Complainant \$8,831.84 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

¹² \$7,912.65 (CAD) x 0.855359 = \$6,768.16.

SOUTHERN SPECIALTIES, INC. v. AMERIFRESH, INC. 925
66 Agric. Dec. 917

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$8,831.84, with interest thereon at the rate of 4.98 % per annum from October 1, 2005, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.
Done at Washington, DC.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: COOSEMANS SPECIALTIES, INC.

PACA Docket No. D-02-0024.

In re: EDDY C. CRECES.

PACA Docket No. APP-03-0002.

In re: DANIEL F. COOSEMANS.

PACA Docket No. APP-03-0003.

Stay Order.

Filed September 20, 2006.

PACA – Perishable agricultural commodities – Stay Order.

Reuben D. Rudolph, Jr., for the Agricultural Marketing Service and the Chief of the PACA Branch.

Stephen P. McCarron, Washington, DC, for Coosemans Specialties, Inc., and Eddy C. Creces.

Martin Schulman, Woodside, NY, for Daniel F. Coosemans.

Order issued by William G. Jenson, Judicial Officer.

On April 20, 2006, I issued a Decision and Order: (1) concluding Coosemans Specialties, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking Respondent's PACA license; (3) concluding Eddy C. Creces and Daniel F. Coosemans [hereinafter Petitioners] were responsibly connected with Coosemans Specialties, Inc.; and (4) subjecting Petitioners 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)).¹

On June 13, 2006, Respondent and Petitioners filed a petition for review of *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (Apr. 20, 2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006), with the United

¹*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (Apr. 20, 2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006).

States Court of Appeals for the District of Columbia Circuit. On September 20, 2006, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, and the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, filed a Motion for Stay requesting a stay of the order in *In re Coosemans Specialities, Inc.*, 65 Agric. Dec. 539 (2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006), pending the outcome of proceedings for judicial review. On September 20, 2006, Respondent and Petitioners informed the Office of the Judicial Officer, by telephone, that they have no objection to the Motion for Stay.

In accordance with 5 U.S.C. § 705, the Motion for Stay is granted.

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

ORDER

The order in *In re Coosemans Specialities, Inc.*, 65 Agric. Dec. 539 (2006), appeal docketed, No. 06-5010 (D.C. Cir. June 13, 2006), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

**In re: KLEIMAN & HOCHBERG, INC.
PACA Docket No. D-02-0021.**

**In re: MICHAEL H. HIRSCH.
PACA Docket No. APP-03-0005.**

**In re: BARRY J. HIRSCH.
PACA Docket No. APP-03-0006.**

Stay Order.

Filed September 22, 2006.

PACA – Perishable agricultural commodities – Stay order.

Charles L. Kendall and Christopher Young-Morales for the Agricultural Marketing Service and the Chief of the PACA Branch.

Mark C.H. Mandell, Annandale, NJ, for Respondent and Petitioners.

Order issued by William G. Jenson, Judicial Officer.

On April 5, 2006, I issued a Decision and Order: (1) concluding Kleiman & Hochberg, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking Respondent's PACA license; (3) concluding Michael H. Hirsch and Barry J. Hirsch [hereinafter Petitioners] were responsibly connected with Respondent; and (4) subjecting Petitioners 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)).¹ On April 24, 2006, Respondent and Petitioners filed a petition to reconsider *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), which I denied.²

On July 26, 2006, Respondent and Petitioners filed a petition for review of *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider), with the United States Court of Appeals for the District of Columbia Circuit. On August 2, 2006, Respondent and Petitioners filed a "Motion on Consent for Stay" requesting a stay of the orders in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman &*

¹*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006).

²*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider).

Hochberg, Inc., 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Respondent's and Petitioners' Motion on Consent for Stay is granted.

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

ORDER

The orders in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 720 (2006) (Order Denying Pet. to Reconsider), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0009.
Stay Order.
Filed November 6, 2006.

PACA-APP – Perishable agricultural commodities – Stay order.

Charles L. Kendall, for Respondent.
Effie F. Anastassiou and Paul Hart, Salinas, CA, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On September 28, 2006, I issued a Decision and Order: (1) concluding Donald R. Beucke [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner 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)).¹

¹*In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006).

930 PERISHABLE AGRICULTURAL COMMODITIES ACT

On November 3, 2006, Petitioner filed “Petitioner Donald Beucke’s Expedited Motion To Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review” and “Order Staying Imposition of Licensing and Employment Restrictions Pending Judicial Review” stating Petitioner intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006), and requesting a stay of the order in *In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Petitioner’s motion for stay is granted.

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

ORDER

The order in *In re Donald R. Beucke*, 65 Agric. Dec. 1341 (2006), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: KOAM PRODUCE, INC.
PACA Docket No. D-01-0032.
Stay Order.
Filed November 14, 2006.

PACA – Perishable agricultural commodities – Stay order.

Ann K. Parnes, Andrew Y. Stanton, and Christopher P. Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On June 2, 2006, I issued a Decision and Order concluding KOAM Produce, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Respondent’s violations.¹ On

¹*In re KOAM Produce, Inc.*, 65 Agric. Dec. 589, 620 (2006).

July 17, 2006, Respondent filed a “Petition to Reconsider,” which I denied.²

On October 19, 2006, Respondent filed a petition for review of *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider), with the United States Court of Appeals for the Second Circuit. On November 14, 2006, James R. Frazier, Acting Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a “Motion for a Stay Order as to Respondent Koam Produce, Inc.” [hereinafter Motion for Stay Order], requesting a stay of the orders in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider), pending the outcome of proceedings for judicial review. On November 14, 2006, Respondent informed the Office of the Judicial Officer, by telephone, that it has no objection to Complainant’s Motion for Stay Order.

In accordance with 5 U.S.C. § 705, Complainant’s Motion for Stay Order is granted.

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

ORDER

The orders in *In re KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

²*In re KOAM Produce, Inc.*, 65 Agric. Dec. 1470 (2006) (Order Denying Pet. to Reconsider).

**In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
In re: KEITH K. KEYESKI.
PACA-APP Docket No. 04-0020.
Stay Order as to Donald R. Beucke.
Filed November 28, 2006.**

PACA-APP – Perishable agricultural commodities – Stay order.

Charles L. Kendall, for Respondent.
Effie F. Anastassiou and Paul Hart, Salinas, CA, for Petitioner Beucke.
Order issued by William G. Jenson, Judicial Officer.

On November 8, 2006, I issued a Decision and Order: (1) concluding Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Beucke 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)).¹

On November 20, 2006, Petitioner Beucke filed “Petitioner Donald Beucke’s Expedited Motion to Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review” stating Petitioner Beucke intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), and requesting a stay of the order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Petitioner Beucke’s motion for stay is granted.

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

ORDER

The order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), is stayed pending the outcome of proceedings for judicial review. This Stay

¹*In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006).

Order as to Donald R. Beucke shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
In re: KEITH K. KEYESKI.
PACA-APP Docket No. 04-0020.
Stay Order as to Keith K. Keyeski.
Filed November 30, 2006.

PACA-APP – Perishable agricultural commodities – Stay order.

Charles L. Kendall, for Respondent.
Paul W. Moncrief, Salinas, CA, for Petitioner Keyeski.
Order issued by William G. Jenson, Judicial Officer.

On November 8, 2006, I issued a Decision and Order: (1) concluding Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Keyeski 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)).¹

On November 29, 2006, Petitioner Keyeski filed “Petitioner Keith K. Keyeski’s Expedited Motion to Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review” stating Petitioner Keyeski intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), and requesting a stay of the order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. §705, Petitioner Keyeski’s motion for stay is granted.

¹*In re Donald R. Beucke*, 65_Agric. Dec. 1372 (2006).

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

ORDER

The order in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Keith K. Keyeski shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

**In re: JUDITH'S FINE FOODS INTERNATIONAL, INC.
PACA Docket No. D-06-0012.
Order Denying Petition to Reconsider.
Filed March 19, 2007.**

PACA –Perishable agricultural commodities – Admissions in bankruptcy filing – Default– Due process – Failure to pay – Publication of facts and circumstances.

The Judicial Officer denied Respondent's petition to reconsider *In re Judith's Fine Foods International, Inc.*, __ Agric. Dec. __ (Jan. 31, 2007). The Judicial Officer rejected Respondent's contention that it was deprived of a right to a hearing, stating the application of the default provisions in the Rules of Practice (7 C.F.R. § 1.139), based on Respondent's admissions, did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.

Jonathan Gordy, for Complainant.
John M. Lohner, Santurce, PR, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on May 2, 2006. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt.

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

Complainant alleges: (1) during the period January 2005 through August 2005, Judith's Fine Foods International, Inc. [hereinafter Respondent], failed to make full payment promptly to eight sellers² of the agreed purchase prices in the total amount of \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce; (2) on October 10, 2005, Respondent filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, District of Puerto Rico; (3) Respondent admitted in a document filed in the United States Bankruptcy Court, District of Puerto Rico, that the eight produce sellers referred to in the Complaint hold unsecured claims for \$338,942.07; and (4) Respondent's failure 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 Respondent purchased, received, and accepted in the course of interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).³ On July 10, 2006, Respondent filed an answer in which Respondent denied it willfully violated the PACA, as alleged in the Complaint.⁴

On August 17, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a Decision Without Hearing by Reason of Admissions [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. On October 24, 2006, Respondent filed objections to Complainant's Motion for Default Decision

²Complainant identified these eight produce sellers as: (1) A & J Produce Corp., Bronx, New York; (2) Wada Farms Marketing Group, Idaho Falls, Idaho; (3) Herbs Unlimited, Inc., Miami, Florida; (4) K & R Farms Produce, Inc., Orlando, Florida; (5) Tristen's Brokerage Co., Inc., Los Angeles, California; (6) Mann Packing Co., Inc.; (7) Freedom Fresh, LLC; and (8) C.H. Robinson Co. (Compl. ¶ III).

³Compl. ¶¶ III-V.

⁴Response to Compl.

and Complainant's Proposed Default Decision.

On October 25, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision]: (1) finding, during the period 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 Respondent purchased, received, and accepted in the course of interstate and foreign commerce; (2) concluding Respondent willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) ordering publication of the facts and circumstances of Respondent's PACA violations.⁵

On December 12, 2006, Respondent appealed to the Judicial Officer.⁶ On January 11, 2007, Complainant filed a response to Respondent's appeal petition.⁷ On January 16, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 31, 2007, I issued a Decision and Order affirming the ALJ's Initial Decision.⁸ On February 28, 2007, Respondent filed a petition to reconsider *In re Judith's Fine Foods International, Inc.*, __ Agric. Dec. __ (Jan. 31, 2007).⁹ On March 9, 2007, Complainant filed a response to Respondent's Petition to Reconsider. On March 13, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider. Based upon a careful consideration of the record, I deny Respondent's Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

⁵Initial Decision at 4-5.

⁶Appeal of Decision Against Defendant.

⁷Response to Appeal of Respondent.

⁸*In re Judith's Fine Foods International, Inc.*, __ Agric. Dec. __ (Jan. 31, 2007).

⁹Petition for Reconsideration of Decision Against Defendant [hereinafter Petition to Reconsider].

Respondent contends it was deprived of a right to a hearing.

Complainant alleges, during the period 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 \$395,687.09 for 115 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.¹⁰ On October 10, 2005, Respondent filed a voluntary petition under chapter 7 of the Bankruptcy Code in *In re Judith's Fine Foods International, Inc.*, Case No. 05-10629-SEK7 (Bankr. D.P.R. Oct. 10, 2005). Respondent admitted in Schedule F - Creditors Holding Unsecured Nonpriority Claims filed in this bankruptcy proceeding that it owed \$338,942.07 to the eight produce sellers identified in the Complaint.¹¹

As Respondent admitted the material allegations of the Complaint, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and I conclude *In re Judith's Fine Foods International, Inc.*, ___ Agric. Dec. ___ (Jan. 31, 2007), was properly issued in accordance with the default provisions in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The application of the default provisions in the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹²

For the foregoing reasons and the reasons set forth in *In re Judith's Fine Foods International, Inc.*, ___ Agric. Dec. ___ (Jan. 31, 2007), Respondent's

¹⁰ Compl. ¶ III.

¹¹ A copy of Schedule F - Creditors Holding Unsecured Nonpriority Claims is attached to Complainant's Motion for Default Decision and marked Exhibit A.

¹² See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the 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).

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 Judith's Fine Foods International, Inc.*, __ Agric. Dec. __ (Jan. 31, 2007). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order *in In re Judith's Fine Foods International, Inc.*, __ Agric. Dec. __ (Jan. 31, 2007), 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 PACA violations shall be published. The publication of the facts and circumstances of Respondent's PACA 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 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 in this Order Denying Petition to Reconsider.¹ The date of entry of the Order in this Order Denying Petition to Reconsider is March 19, 2007.

**In re: TUNG WAN COMPANY, INC.
PACA Docket No. D-06-0019.
Order Denying Late Appeal.
Filed April 25, 2007.**

PACA – Perishable agricultural commodities – Late appeal.

The Judicial Officer denied Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing stating the Judicial Officer has no jurisdiction to hear Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing filed 41 days after Chief Administrative Law Judge Marc R. Hillson's decision had become final.

Jonathan Gordy, for Complainant.
John R. Solter, Jr., Baltimore, MD, for Respondent.
Decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a Complaint on July 26, 2006. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the

¹ See 28 U.S.C. § 2344.

regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Respondent violated the PACA.¹ The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 4, 2006.² Respondent failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated September 6, 2006, informing Respondent that an answer to the Complaint had not been filed within the time required in the Rules of Practice. Respondent did not respond to the Hearing Clerk's September 6, 2006, letter.

On October 12, 2006, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for a Decision Without Hearing by Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision Without Hearing by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on October 16, 2006.³ Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). The Hearing Clerk sent Respondent a letter dated December 7, 2006, informing Respondent that objections to Complainant's Motion for Default Decision had not been filed within the time required in the Rules of Practice and the Hearing Clerk would refer the proceeding to an administrative law judge for consideration and decision. Respondent did not respond to the Hearing Clerk's December 7, 2006, letter.

On January 9, 2007, pursuant to section 1.139 of the Rules of Practice

¹ Compl. ¶¶ III-VI.

² United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0004 4087 9344.

³ United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4346.

(7 C.F.R. § 1.139), Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] filed a Decision Without Hearing by Reason of Default [hereinafter Decision and Order] concluding Respondent violated the PACA as alleged in the Complaint and ordering publication of the facts and circumstances of Respondent's violations of the PACA.⁴

On January 10, 2007, the Hearing Clerk served Respondent with the Chief ALJ's Decision and Order and a service letter.⁵ Respondent failed to file an appeal petition within 30 days after service as required by section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)). On February 13, 2007, the Hearing Clerk served Respondent with a Notice of Effective Date of Decision Without Hearing by Reason of Default⁶ stating the Chief ALJ's Decision and Order became final February 13, 2007.

On March 27, 2007, Respondent filed a Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing. On April 3, 2007, Complainant filed a Reply to Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing. On April 4, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an administrative law judge's decision must be appealed to the Judicial Officer within 30 days after service; therefore, Respondent was required to file its appeal petition with the Hearing Clerk no later than February 9, 2007. The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes

⁴ Decision and Order at second and third unnumbered pages.

⁵ United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4797.

⁶ United States Postal Service Domestic Return Receipt for Article Number 7003 3110 0003 7112 4933.

final.⁷ Pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ's Decision and Order became final on February 14, 2007. Respondent filed its Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing with the Hearing Clerk on March 27, 2007, 41 days after the Chief ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Respondent's Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides, as follows:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a

⁷ See, e.g., In re *Tim Gray*, 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); In re *Jozset Mokos*, 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); In re *David Gilbert*, 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); In re *Vega Nunez*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final); In re *Ross Blackstock*, 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); In re *David McCauley*, 63 Agric. Dec. 639 (2004) (dismissing the respondent's appeal petition filed 1 month 26 days after the administrative law judge's decision became final).

mandatory and jurisdictional prerequisite which this court may neither waive nor extend. See, e.g., *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398.^[8]

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an administrative law judge's decision has become final. Under the Federal Rules of Appellate Procedure, the district court, upon a showing of excusable neglect or good cause, may extend the time to file a notice of appeal upon a motion filed no later than 30 days after the expiration of the time otherwise provided in the rules for the filing of a notice of appeal.⁹ The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after the Chief ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs

⁸*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (stating, since the court of appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely filed and the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 264 (1978) (stating, under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional), *rehearing denied*, 434 U.S. 1089 (1978); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (stating, under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing).

⁹Fed. R. App. P. 4(a)(5).

Act”). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act (“Hobbs Act”) requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.¹⁰

Accordingly, Respondent’s Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing must be denied, since it is too late for the matter to be further considered.

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

ORDER

Respondent’s Petition to Appeal Decision Without Hearing, Petition to Reopen the Proceeding, and Request for Hearing filed March 27, 2007, is denied. Chief Administrative Law Judge Marc R. Hillson’s Decision and Order, filed January 9, 2007, is the final decision in this proceeding.

In re: HUNTS POINT TOMATO CO., INC.
PACA Docket No. D-03-0014.

¹⁰ *Accord Jem Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court’s baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant’s petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied* sub nom. *Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

**Order Lifting Stay Order.
Filed June 1, 2007.**

PACA – Perishable agricultural commodities – Order lifting stay.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 2, 2005, I issued a Decision and Order concluding Hunts Point Tomato Co., Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s), and ordering publication of the facts and circumstances of Hunts Point Tomato Co., Inc.'s violations.¹ On December 13, 2005, Hunts Point Tomato Co., Inc., filed a petition to reconsider, which I denied.²

Hunts Point Tomato Co., Inc., filed a petition for review of *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 696 (2006), with the United States Court of Appeals for the Second Circuit. On May 31, 2006, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Associate Deputy Administrator], requested a stay of the Orders in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 696 (2006), pending the outcome of proceedings for judicial review. Hunts Point Tomato Co., Inc., informed the Office of the Judicial Officer that it had no objection to the Associate Deputy Administrator's motion for stay, and on June 2, 2006, I granted the Associate Deputy Administrator's motion.³

On November 13, 2006, the United States Court of Appeals for the

¹ *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005).

² *In re Hunts Point Tomato Co. (Order Denying Pet. to Reconsider)*, 65 Agric. Dec. 696 (2006).

³ *In re Hunts Point Tomato, Co. (Stay Order)*, 65 Agric. Dec. 696 (2006).

Second Circuit denied Hunts Point Tomato Co., Inc.'s petition for review.⁴ On April 25, 2007, the Associate Deputy Administrator requested that I lift the June 2, 2006, Stay Order and reinstate the November 2, 2005, and January 9, 2006, Orders. Hunts Point Tomato Co., Inc., failed to file a response to the Associate Deputy Administrator's motion to lift stay, and on May 30, 2007, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the Associate Deputy Administrator's motion.

Proceedings for judicial review are concluded, and Hunts Point Tomato Co., Inc., has filed no objection to the Associate Deputy Administrator's motion to lift stay. Therefore, the Associate Deputy Administrator's motion to lift stay is granted; the June 2, 2006, Stay Order is lifted; and the Orders in *In re Hunts Point Tomato Co.*, 64 Agric. Dec. 1914 (2005), and *In re Hunts Point Tomato Co.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 696 (2006), are effective, as follows:

ORDER

Hunts Point Tomato Co., Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Hunts Point Tomato Co., Inc.'s violations shall be published. The publication of the facts and circumstances of Hunts Point Tomato Co., Inc.'s violations shall be effective 7 days after service of this Order on Hunts Point Tomato Co., Inc.

⁴*Hunts Point Tomato Co. v. U.S. Dep't of Agric.*, 204 F. App'x 981 (2d Cir. 2006).

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: TUNG WAN COMPANY, INC.
PACA Docket No. D06-0019.
Default Decision.
Filed January 8, 2007.

PACA – Default.

Jonathan Gordy for AMS.
Respondent Pro se.

Default Decision by Chief Administrative Law Judge Marc R. Hillson.

**Decision without Hearing
by Reason of Default**

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, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of December 2003 through September 2005, Respondent Tung Wan Company, Inc. (“Respondent”) failed to make full payment promptly to 9 sellers of perishable agricultural commodities of the agreed purchase prices in the total amount of \$237,178.44 for 33 lots of perishable agricultural commodities that Respondent purchased, received and accepted in the course of interstate commerce. In addition, the Complaint alleged that Respondent, while acting as a dealer, made, for a fraudulent purpose, false and misleading statements when Respondent failed to account truly and correctly to a seller of perishable agricultural commodities by underreporting the sales price of 1,152 cartons of broccoli by \$8,039.81 to the seller. Finally, the Complaint also alleged that Respondent failed to maintain adequate records in violation of Section 9 of

the Act.

A copy of the Complaint was served upon Respondent by certified mail on August 4, 2006. 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 Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et. seq.*) (“Rules of Practice”).

Findings of Fact

Respondent was a corporation organized and existing under the laws of the State of Maryland. Respondent’s business address was 1201 67th Street, Baltimore, Maryland 21237.

1. At all times material to this order, Respondent was licensed or subject to the provisions of the PACA. License number 19990513 was issued on February 10, 1999. This license was renewed annually until February 10, 2005 when it terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499a) when Respondent failed to pay the required annual renewal fee. Respondent continued to operate subject to the PACA until license number 20050645 was issued to Respondent on April 14, 2005. License number 20050645 terminated on April 14, 2006, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499a) when Respondent failed to pay the required annual renewal fee.

2. During the period of December 25, 2003, through September 28, 2005, Respondent failed to make full payment promptly to nine sellers of the agreed purchase prices, or balances thereof, in the total amount of \$237,178.44 for 33 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

3. Respondent, on or about October 15, 2004 through November 29, 2004, while acting as a dealer, made, for a fraudulent purpose, false and misleading statements in connection with a transaction involving 1,152 cartons of broccoli, which is a perishable agricultural commodity, that Respondent received, accepted, and sold in interstate commerce on behalf of All-American Farms, Inc. of Boca

Raton Florida. Respondent failed to account truly and correctly to All American Farms, Inc. for the 1,152 cartons of broccoli when Respondent sold the 1,152 cartons of broccoli to buyers and under-reported the sales price by \$8,039.81.

4. During the period December 2003 through September 2005, Respondent failed to maintain adequate records that fully and correctly disclose all transactions involved in its business, in that Respondent failed to: 1) disclose all transactions in the business in sufficient detail as to be readily understood and audited; 2) keep an adequate receiving record; 3) provide sales tickets with printed serial numbers on cash tickets; 4) assign lot numbers to each shipment; 5) account for dumped produce; 6) provide evidence of dumping; and 7) maintain complete and detailed records of Respondent's commission sales as more fully described in 7 C.F.R. §46.29(a).

Conclusions

Respondent's failure to make full payment promptly regarding the 33 lots of produce, which is described 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)). Respondent's false and misleading statements in connection with a the sale of a perishable agricultural commodity, which is described in Finding of Fact No. 4 above, constitutes a willful, flagrant and repeated violation of Section 2(4) of the Act. Respondent's failures to keep adequate records, which is described in Finding of Fact No. 5 above, constitutes a willful, flagrant and repeated violation of Section 9 of the Act (7 U.S.C. § 499i). Therefore, Respondent has willfully, flagrantly and repeatedly violated Section 2(4) and Section 9 of the PACA (7 U.S.C. §§ 499b(4), 499i), and the facts and circumstances of those 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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Done at Washington, D.C.

In re: ORIENT FARMS, LLC.
PACA Docket No. D-05-0013.
Default Decision.
Filed January 10, 2007.

PACA – Default.

Christopher Young Morales for AMS.
F. DeArmond for Respondent.
Default Decision by Administrative Law Judge Peter M. Davenport.

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 May 31, 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 October 2003 through November 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 3 sellers, 173 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$566,256.30.

A copy of the Complaint was served upon Respondent; Respondent submitted an answer in which it generally denied the allegations of the Complaint pertaining to its failure to make payment promptly. On March 7, 2006, documents were sent by Respondent to Complainant which indicated that the 3 sellers listed in the Complaint were still owed \$166,256.30. Based on the documents provided by Respondent on March 7, 2006, 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. As the Respondent had requested an oral

hearing, a teleconference was conducted on November 29, 2006, at which time the Complainant was represented by Christopher Young-Morales, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. and the Respondent was represented by F. DeArmond Sharp, Esquire, Robison, Balaustegui, Sharp & Low of Reno, Nevada. During the course of the conference, counsel for the Respondent indicated that his client was not opposed to relief being granted and the parties were directed to submit an appropriate agreed order by December 8, 2006. As no Order has submitted, as directed, this Decision and Order is being issued at this time.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998),

"PACA requires full payment promptly, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times....In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked."

Id. at 548-549.

According to the Judicial Officer's policy set forth in Scamcorp, in this case, Respondent had 120 days from the date the complaint was served upon it, or until November 10, 2005, to come into full compliance with the PACA. The admissions contained in the documents submitted by Respondent indicate that \$ 166,256.30 remained unpaid to the 3 produce creditors listed in the PACA complaint over 120 days after service of the complaint. 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

952 PERISHABLE AGRICULTURAL COMMODITIES ACT

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 Nevada. Its business address was Mile Marker 60, State Route 447, Empire, Nevada 89405. Its mailing address is P.O. Box 40, Empire, Nevada 89405.

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 20010671 was issued to Respondent on February 6, 2001. On February 6, 2006, Respondent failed to renew its license by paying the required annual license renewal fee, thus its PACA license terminated on that date, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph III of the Complaint, during the period October 2003 through November 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 3 sellers, 173 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 \$566,256.30.

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 of Law

Respondent's failure to make full payment promptly with respect to the 173 transactions set forth in the above Findings of Fact, 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.

Done at Washington, D.C.

In re: FRESH AMERICA CORP.
PACA Docket No. D-06-0002.
Default Decision.
Filed January 19, 2007.

PACA – Default.

Charles Spicknall for AMS.
Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This matter is before the Administrative Law Judge upon the Motion of the Complainant for a Decision Without Hearing By Reason of Default. Opposition to the current Motion and a prior similar Motion has been filed by Cheryl A, Taylor, the Respondent's Executive Vice President, Chief Financial Officer and Secretary. In the two pleadings, Ms. Taylor through counsel, asserts that there are insufficient grounds to conclude that the Respondent has ever been served. Although the Motion for a Decision

Without Hearing By Reason of Default has been responded to by Ms. Taylor, no answer has been filed by the Respondent corporation.

This action is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.), (hereinafter referred to as the "Act"), instituted by a Complaint filed on October 25, 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 February 2002 through February 2003, Respondent Fresh America Corp., ("Respondent"), failed to make full payment promptly to eighty-two sellers in the amount of \$1,223,284.48 in 1,149 transactions for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce.

A copy of the Complaint was sent to Respondent Fresh America at its last known business address at 1049 Avenue H E, Arlington, Texas 76011 by certified mail on October 26, 2005. Because Fresh America was no longer operating at its former address, the Complaint was returned to the Hearing Clerk. The postal service had no forwarding address on file for Fresh America and was unable to forward the Complaint. On December 20, 2005, the Hearing Clerk sent the Complaint by regular mail to the same address. On December 29, 2005, the Hearing Clerk notified Complainant that its attempts to serve the Complaint had been unsuccessful with the mail being returned by the postal service as other than "unclaimed" or "refused."

On January 26, 2006, Complainant filed a "Response to Unsuccessful Service Notice" which informed the Hearing Clerk's Office that Fresh America was no longer operating and that its assets had been liquidated to satisfy creditors, including produce creditors, but that the corporation could be served via its registered agent, CT Corporation System ("CT System"), 350 N. St. Paul St., Dallas, Texas 75201. CT System is a company that provides registered agent services for corporations. Among the other benefits listed on its website, CT System notes that it helps its clients to avoid default judgments. See <http://ctadmin.stadvantage.com>.

On March 8, 2006, the Hearing Clerk served the Complaint on CT System via certified mail. CT System forwarded the Complaint to Fresh America's counsel at the law firm McCarron & Diess, which received the Complaint on March 14, 2006. By letter dated March 23, 2006, McCarron & Diess returned the Complaint to the Hearing Clerk stating that the firm

was not authorized to accept service of process on behalf of Fresh America. On August 9, 2006, Complainant moved for a default decision asserting that the time for an answer to the Complaint had expired. On September 5, 2006, Ms. Taylor filed her opposition to Complainant's motion for default decision arguing, *inter alia*, that service of the Complaint on the corporation's registered agent in the State of Texas had not been effective because Fresh America had failed to maintain its registered agent. She also argued that service of the Complaint on the corporation's former officers and directors was equally ineffective.

The argument that service has not been effectuated through the corporation's registered agent is without merit. At the time that the Hearing Clerk served Respondent's registered agent, and at least until October 12, 2006, Fresh America, which has not been granted dissolution by the State of Texas, continued to designate CT System as its registered agent with the Texas Secretary of State.¹ Texas corporations, like Fresh America, are required to maintain a registered agent for service of process. See Tex. Bus. Corp. Act, Articles 2.09(A)(2) and 2.11(A). "Registered agents exist to receive process; they are in the business of receiving legal correspondence." See *Barr v. Zurich Insurance Co.*, 985 F. Supp. 701, 703 (S.D. Tex. 1997).

A corporation's registered agent is a "representative of record" for purposes of service of process under the Rules of Practice which states that a complaint served via registered or certified mail "shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail to the . . . last known principal place of business of the . . . representative of record of such party. . . ." See 7 C.F.R. § 1.147(c)(1).² In this case, good service, via certified mail as required by the Rules of Practice, was made by the Hearing Clerk on CT System at its

¹ There is no indication that CT Corporation ever notified the Texas Secretary of State that it was no longer serving as the corporation's registered agent.

² See also, *e.g.*, *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Independent School Dist.*, 180 S.W.3d 903, 905 (Tex. App. Ct. 2005) (a Texas corporation may be served through registered agent); *Harold-Elliott Co., Inc. v K.P./Miller Realty Growth Fund I*, 853 S.W.2d 752, 754 (Tex. App. Ct. 1993) (same).

valid mailing address in the State of Texas on March 13, 2006. The Complaint was accepted by CT System and was not “returned marked by the postal service as unclaimed or refused,” which would have necessitated reservice by regular mail. See 7 C.F.R. § 1.147(c)(1). In fact, CT System forwarded the administrative Complaint to Respondent Fresh America’s counsel of record in several actions that are now pending against Respondent in the United States District Court for the Northern District of Texas thereby giving Respondent actual notice of this proceeding.

Even if service on Fresh America’s registered agent was in some way defective, in response to Respondent’s objections to service through the corporation’s registered agent, Complainant took the additional step of serving the Complaint on Fresh America through the Texas Secretary of State. When a Texas corporation like Fresh America fails to maintain a registered agent for service of process, the Texas Secretary of State becomes the corporation’s agent for purposes of service of process. See Tex. Bus. Corp. Act, Art. 2.11(B). Complainant served the administrative Complaint on Respondent’s substitute agent for process, the Texas Secretary of State, via certified mail, on or by October 31, 2006.³ The Texas Secretary of State is as a “representative of record” for purposes of service of an administrative complaint on a Texas corporation under section 1.147(c)(1) of the Rules of Practice. See 7 C.F.R. § 1.147(c)(1). Despite this additional service on the Secretary of State, Fresh America has still failed to file an answer to the Complaint.

Respondent’s objections to service of the Complaint through the corporation’s officers and directors are equally without merit. Service of the Complaint in this case was made through Fresh America’s last known individual representatives of record, including many of the corporation’s directors and officers in conformity with sections 1.147 (c)(1) and (c)(3) of the Rules of Practice. Under Texas law, where Fresh America is incorporated, “[t]he president and all vice presidents of the corporation . . . shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.” See Tex. Bus. Corp. Act, Art. 2.11(A). Any president or vice

³ The return receipt from the Texas Secretary of State was not dated. However, it was returned to Charles Spicknall, Attorney for Complainant, on October 31, 2006, showing that the Complaint was served on the Secretary of State at least by that date.

president of a Texas corporation is a proper “representative of record” for purposes of service of process under the Rules of Practice. The Rules of Practice expressly authorize service of an administrative complaint on corporate representatives of record, including officers and directors. See 7 C.F.R. § 1.147(c)(3).

The Complaint was successfully served by the Hearing Clerk, via certified mail, on Fresh America through the corporation’s Executive Vice President Cheryl Taylor. At least until October 12, 2006, Fresh America continued to report Cheryl Taylor as the corporation’s Executive Vice President in its filings with the Texas Secretary of State. The return receipts from the Hearing Clerk’s certified mailing to Cheryl Taylor show that she received the Complaint on June 5, 2006. The Complaint was also served on Fresh America, via Cheryl Taylor, a second time in accordance with section 1.147(c)(3)(i) and (ii), in her capacity as a representative of record and as an officer of Fresh America, by non-mail means, via Federal Express. The Complaint was also served on Ms. Taylor as an attachment to a letter notifying her of the PACA Branch’s initial determination that she was responsibly connected to Respondent Fresh America. Cheryl Taylor has proceeded to challenge her status as responsibly connected, proving that service of the Complaint via Federal Express was effective. After receiving Ms. Taylor’s opposition to Complainant’s motion for a default decision, Complainant served Ms. Taylor with the Complaint again, at the same address, via Federal Express, on October 26, 2006.

The Hearing Clerk also served the Complaint via certified mail on the Fresh America’s former chief executive officer, Mark Prowell, and a former member of the Fresh America’s board of directors, Arthur Hollingsworth. The return receipts from the certified mailings to Fresh America’s principals show that the Complaint was received by Mark Prowell on June 14, 2006, and received by Arthur Hollingsworth on June 8, 2006. Complainant also served the Complaint on Fresh America’s president of record with the Texas Secretary of State, Colon Washburn, and another corporate vice president, Steven Finberg, via Federal Express. As with Cheryl Taylor these individuals were served with the Complaint in November of 2005 and notified that they had been determined responsibly connected to the failed company. Like Cheryl Taylor, Steven Finberg proceeded to challenge his status as responsibly connected, proving that service of the Complaint via

Federal Express was effective.

Finally, in response to Respondent's opposition to Complainant's default motion, Complainant once again served the Complaint on Fresh America, via Steven Finberg, who continued to be reported as Fresh America's vice president of record to the Texas Secretary of State as of October 12, 2006. The Complaint was served by non-mail means, in accordance with section 1.147(c)(3)(i) and (ii) of the Rules of Practice, on November 2, 2006. Complainant also served the Complaint on Luke Sweetser, who was a member of Fresh America's last known board of directors by Federal Express on October 26, 2006. Luke Sweetser served on Fresh America's board of directors, which was comprised of five individual directors from October 15, 2001 until January 24, 2003, when Fresh America ceased operations.

Service of the Complaint in this case has been exhaustive. Service has been made on Fresh America's registered agent and substitute agent for process in the State of Texas pursuant to the requirements of section 1.147(c)(1) of the Rules of Practice. Service of the Complaint has also been made on Fresh America through numerous individual representatives, directors and officers in conformity with sections (c)(1) and (c)(3) of Rule 1.147. Given the foregoing, it is abundantly clear that Respondent Fresh America has received notice of the Complaint and been afforded an opportunity to answer and interpose a defense to the allegations of the Complaint. Contrary to practice in other forums, motions to dismiss or the interposing of other defenses do not toll the requirement to file an answer. The time for filing an answer has long since expired and the Respondent is in default. See 7 C.F.R. § 1.136(c). Accordingly, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice. See 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. Respondent Fresh America is a corporation organized and existing under the laws of the State of Texas.
2. Pursuant to the licensing provision of the PACA, license number 1990-0329 was issued to Respondent on December 12, 1989. This license terminated on December 12, 2003, when Respondent failed to pay the required annual fee pursuant to section 4(a) of the PACA (7 U.S.C. §

499d(a)).

3. As more fully set forth in paragraph III of the Complaint, incorporated by reference herein, during the period February 2002 through February 2003, Respondent failed to make full payment promptly to eighty-two sellers in the amount of \$1,223,284.48 in 1,149

transactions for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce.

CONCLUSIONS OF LAW

Respondent Fresh America's failure to make full payment promptly with respect to the 1,149 transactions described in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. A finding is made that the Respondent Fresh America Corp. has committed willful 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.

2. This Order shall take effect on the eleventh day after this Decision becomes final.

3. Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

**In re: BEST FRESH, LLC.
PACA Docket No. D-06-0020.
Default Decision.
Filed February 7, 2007.**

PACA – Default. PACA – Default.

Christopher Young Morales for AMS.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

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 an amended complaint filed on October 20, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The amended complaint alleges that during the period February 6, 2005 through May 23, 2005, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 7 sellers, 53 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$411,375.80.

A copy of the amended complaint¹ was mailed by the Hearing Clerk to Respondent by certified mail on October 24, 2006, and was signed for by Jackie Deane, Respondent's 100 percent shareholder, on November 7, 2006. Therefore, Respondent was served with a copy of the amended complaint pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (hereinafter "Rules of Practice") (7 C.F.R. § 1.147) as of November 7, 2006. Respondent did not file an answer to the amended complaint within the 20

¹ Prior to the filing of the amended complaint, a copy of the original complaint was served upon respondent in October 2006. Respondent did not answer that complaint.

day time period prescribed by Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136). The Complainant has 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 amended 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 proceedings pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

FINDINGS OF FACT

1. Best Fresh, LLC, (hereinafter "Respondent") is a corporation organized and existing under the laws of the state of Washington. Respondent ceased operating in May of 2005. Its last known business address was, and its current mailing address is, 334 Sunny Slope Heights Road, Wenatchee, Washington 98801-9664.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20031473 was issued to Respondent on September 8, 2003. This license terminated on September 8, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period February 6, 2005 through May 23, 2005, Respondent purchased, received, and accepted, in interstate and foreign commerce, from seven (7) sellers, 53 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of \$411,375.80.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. For the reasons set forth in the above Findings of Fact, the Respondent's failure to make full payment promptly to seven (7) sellers for 53 lots of perishable agricultural commodities in the total amount of \$411,375.80 constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

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.

Done at Washington, D.C.

In re: MCDONALD FARMS, INC.
PACA Docket No. D-06-0015.
Default Decision.
Filed March 12, 2007.

PACA – Default.

Christopher Young Morales for AMS.

Respondent Pro se.

Default Decision 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 CPACA or the "Act"), instituted by a complaint filed on June 5, 2006, 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 February 2004, Respondent McDonald Farms, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 16 sellers of the agreed purchase prices in the amount of \$608,877.66 for 568 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

A copy of the complaint, filed on June 5, 2006, was sent to Respondent at 2313 Middle Road, Winchester, Virginia 22601 by certified mail on June 5, 2006. The complaint was returned to the Hearing Clerk's office "unclaimed." The complaint was then mailed to Respondent at another address, 117 Clark Road, Stephens City, Virginia 22655, where it was served on July 17, 2006.

No answer to the complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondent McDonald Farms, Inc. is a corporation organized and existing under the laws of the state of Virginia. Its business mailing address was 2313 Middle Road, Winchester, VA 22601.

2. At all times material to the allegations of the complaint, Respondent was licensed under the provisions of PACA. License number 19940815 was issued to Respondent on March 15, 1994. This license terminated on March 15, 2004 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d (a)), when it was not renewed.

3. Respondent, during the period of November 2002 through February 2004, failed to make full payment promptly to 16 sellers of the agreed purchase prices in the amount of \$608,877.66 for 568 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce.

Conclusions

Respondent's failure to make full payment promptly with respect to the 568 lots of perishable agricultural commodities set forth in Finding of Fact No. 3 above, constitutes wilful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. c 499b(4)), for which the order below is issued.

Order

A finding is made that Respondent has committed wilful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139, 1.145).

Issued at Washington, D.C.

In re: CARIBE TROPICAL FOODS, INC.; ALBERTINO PINA and MARIA I. PINA, d/b/a CARIBE TROPICAL FOODS, INC.

PACA Docket No. D-07-0028.

Default Decision.

Filed May 11, 2007.

PACA – Default.

Jonathan Gordy for AMS.

Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act of 1930, as amended (7 U.S.C. § 499a, et seq.) ("PACA"), instituted by a Complaint filed by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing

CARIBE TROPICAL FOODS, INC.;
ALBERTINO PINA and MARIA I. PINA,
d/b/a CARIBE TROPICAL FOODS, INC.
66 Agric. Dec. 966

965

Service, United States Department of Agriculture. The Complaint alleges that during the period of March 2004 and October 2004, the Respondents failed to make full payment promptly to a seller of the agreed purchase prices in the total amount of \$614,945.83 for 139 invoices of perishable agricultural commodities which the Respondents purchased, received, and accepted in the course of interstate and foreign commerce.

Copies of the Complaint were sent to the Respondents by certified mail on November 21, 2006; however, the Post Office returned the mailings as "unclaimed" on December 20, 2006. In accordance with Rule 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.147(c)), the Hearing Clerk re-mailed copies of the Complaint to the Respondents by regular mail on December 20, 2006.

The Respondents failed to file an Answer as required by Rule 1.136 (7 C.F.R. § 1.136) within the time allotted. On February 7, 2007, the Hearing Clerk received a facsimile transmission from Russell D. Raskin, Esquire, Raskin & Berman, Providence, Rhode Island, indicating that the Complaint was contested as to both "defendants" and indicating that Maria Pina "has already been determined by the Federal District Court for the District of Rhode Island not to be responsibly connected with Caribe Tropical Foods, Inc. *Turbana Corporation vs. Caribe Tropical Foods, Inc., Albertino Pina and Maria I. Pina A/K/A Maria E. Pina*, C.A. No. 04-4631 (D.R.I. 2004)[.]"¹

Even assuming, pro arguendo, that the facsimile had been received within the time allotted for the filing of an answer, the letter received on February 7, 2007 is not denominated as an answer, it does not bear the docket number assigned to this action and fails to admit, deny, or explain the allegations set forth in the Complaint. See 7 C.F.R. § 1.136. It is well settled that entry of default is appropriate where, as in this case, the Respondent has failed to deny the material allegations of the Complaint. *In re: Barnesville Livestock Sales Co., et al.* 60 Agric. Dec. 804, 805 (2002);

¹ The facsimile transmission does not bear the docket number of this action and indicates that it was previously sent on December 18, "but inadvertently to the Department of Agricultural [sic] only.

In re Van Buren Fruit Exchange, Inc. 51 Agric. Dec. 744 (1992). As the Respondent's letter [Answer] failed to clearly deny the material allegations of the Complaint, it fails to meet with the specific requirements for an Answer under the Rules of Practice (See 7 C.F.R. § 1.136(b)). The material facts alleged in the complaint are accordingly admitted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. Respondent Caribe Tropical Foods, Inc. ("Caribe") was incorporated as a Rhode Island corporation on September 9, 1991, but whose corporate charter was revoked on or before June 30, 1993. Notwithstanding the revocation of its charter, Respondent Caribe continued to operate under the name Caribe Tropical Foods, Inc., having a business address at 53 Hawes Street, Central Falls, Rhode Island 02863, under the direction of its owners, the individual Respondents at all times material to this Decision.

2. By virtue of the revocation of its corporate charter, at all times material to this Decision, Respondent Caribe was an unincorporated partnership or general association, owned, operated, directed by, and under the control of the individual Respondents, Albertino Pina and Maria I. Pina, whose business and home address is 53 Hawes Street, Central Falls, Rhode Island 02863.

3. At all times material to this Decision, Respondent Caribe was licensed by PACA under PACA License No. 2000-0870. The said license was terminated on May 2, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)) for failure to pay the annual license renewal fee.

4. At all times material to this Decision, Respondent Caribe and the individual Respondents conducted business subject to the PACA.

5. During the period March 4, 2004 to October 3, 2004, the Respondents failed to make full payment to the Turbana Corporation of the agreed purchase prices for 139 lots of perishable agricultural commodities in the total amount of \$614,945.83, which the Respondents purchased, received, and accepted in interstate and foreign commerce.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. For the reasons set forth in the Findings of Fact, the Respondents willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. The Respondents, Caribe Tropical Foods, Inc., Albertino Pina, and Maria I. Pina committed willful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period March 4, 2004 through October 3, 2004, and the facts and circumstances shall be published.

2. This Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals 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 and Order shall be served on the parties.

Done at Washington, D.C.

In re: DAE WON NY, INC., d/b/a YONKERS PRODUCE.
PACA Docket No. D-06-0018.
Default Decision.
Filed June 6, 2007.

PACA – Default.

Gary F. Ball For AMS
Respondent Pro se.

Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

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 14, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of January through December 2004, Dae Won, NY, Inc. (hereinafter the “Respondent”), failed to make full payment promptly to ten sellers of the agreed purchase prices in the total amount of \$191,207.53 for fifty-three lots of perishable agricultural commodities that it purchased, received and accepted in interstate commerce.

A copy of the Complaint was sent to the Respondent’s president, director, and sole shareholder, Mr. Serk Hon Lee, at 441 Piermont Road, Cresskill, NJ 07626, by Federal Express overnight courier. The Complaint was received and signed for by the Respondent at the above addresses on January 27, 2007. No answer to the Complaint has been received. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a default decision, the following Decision and Order shall be issued without further procedure or hearing 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).

FINDINGS OF FACT

1. The Respondent is a corporation organized and existing under the laws of the State of New York. Respondent’s business address was 311 Manida Street, Bronx, NY 10474. 2.

At all times material herein, Respondent was licensed under the provisions of the PACA. License number 2003-1497 was issued to Respondent on September 12, 2003. This license terminated on September 12, 2005, when Respondent failed to pay the annual fee as required by section 4(a) of the Act (7 USC § 499d(a)).

3. During the period January through December 2004, Respondent purchased, received and accepted in interstate commerce, from ten sellers, fifty-three lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$191,207.53.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly with respect to the fifty-three transactions described in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The Respondent is found to have 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.
2. Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).
3. Copies hereof shall be served upon the parties.

Done at Washington, D.C.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

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AGRICULTURE DECISIONS

Volume 66

January - June 2007

Part Four

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

Consent decisions entered subsequent to December 31, 1986, are no longer published 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) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be 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.

A compilation of past volumes on Compact Disk (CD) and individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available for sale. Go to www.pay.gov and search for "AgricDec". Please complete the order form therein.

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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