# AGRICULTURE DECISIONS

**Volume 67**

**July – December 2008**


UNITED STATES DEPARTMENT
OF AGRICULTURE

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# AGRICULTURE DECISIONS

**Volume 67**

July - December 2008
Part One (General)
Pages 924- 1325


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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**DEFAULT DECISION**

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**HEIN HETTINGA and ELLEN HETTINGA, d/b/a SARAH FARMS.**
**AMA Docket No. M-08-0071.**
**Decision and Order.**
**Filed November 17, 2008.**

**AMMA – MMO – Producer-Handler – Arbitrary and Capricious – Rules not in compliance with law, whether.**

Sharlene Deskins for AMS.
Alfred Ricciardi for Respondent.
Charles English for United Dairymen of Arizona.
*Decision and order by Administrative Law Judge Peter M. Davenport.*

## DECISION AND ORDER

In this action the Petitioners, Hein and Ellen Hettinga, doing business as Sarah Farms, filed their Petition for Declaratory Relief [1] on March 7, 2008 pursuant to 7 U.S.C. § 608c(15)(A) seeking relief in the form of a determination that the Market Administrator misinterpreted and misapplied the Arizona-Las Vegas Marketing Order by imposing minimum price regulations upon them for the month of April of 2006; a determination that the imposition was not in accordance with law; a refund of the $324,211.60 which they paid under protest; pre and post-petition interest, attorney fees and costs; and for all other further relief to which they might be entitled.

The Administrator of the Agricultural Marketing Service, United States Department of Agriculture ("AMS" and "USDA" respectively) responded to the Petition by filing an Answer on April 7, 2008. A Motion for Leave to Participate was filed on behalf of United Dairymen of Arizona, Shamrock Foods, Shamrock Farms and Parker Farms on May 6, 2008. Leave for the additional parties to participate was granted by Order entered on August 27, 2008. An evidentiary hearing was held in the matter in Washington, D.C. on September 10, 2008 at which time testimony of James Daugherty, the Market Administrator for Federal Orders 124 and 131, and William Wise, the Assistant Market

[1] This action is one of three filed by the Petitioners brought under 7 U.S.C. § 608c(15)(A) challenging various acts of the Secretary related to changes made to the status of producer-handlers in Arizona.

Administrator for Federal Orders 124 and 131 was taken and 10 exhibits were introduced and received into evidence. Initial briefs were received from all parties. Following the filing of the initial briefs, the Petitioners sought leave to file a Reply Brief to address matters contained in the Amici Brief. Their Motion For Leave to File a Reply Brief was granted, the Reply Brief has been received and the matter is now ripe for disposition.

**Background**

The Petitioners, Hein and Ellen Hettinga, since 1994 have owned and operated Sarah Farms, a large dairy business in Arizona. Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers. To present, the Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas Milk Marketing area (now known as the Arizona Marketing Area, also known as the Order 131 area).

On February 24, 2006, USDA adopted a Final Rule which became effective April 1, 2006 that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest Milk Marketing areas to the pricing and pooling provisions of their respective Marketing Orders if the producer-handler produced and sold more than 3,000,000 pounds of Class I milk per month. 71 *Fed. Reg.* 9430 (Feb. 24, 2006). As a producer-handler of milk since 1994 and continuing until April 1, 2006, [2] Sarah Farms had been exempt from the minimum pricing and pooling provisions of Federal Milk Marketing Orders adopted by the Secretary under the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA"). Acting under the newly adopted Final Rule, the Market Administrator assessed a pool payment of $324,211.60 on Sarah Farms for milk processed in April of 2006.

Subsequent to the adoption of the Final Rule, Congress enacted the Milk Regulatory Equity Act (codified at 7 U.S.C. § 608c(5)(M)-(N)) ("MREA") which statutorily affirmed the Secretary's determination to limit the scope of the producer-handler exemption. Additionally, the

[2] Prior to the April 1, 2006 changes, there was no "producer-handler designation" and producer handlers self determined their status which was verified by audit of their operation. The record clearly indicates that the Petitioners operated as producer-handlers prior to April 1, 2006.

MREA required the Secretary to issue an order requiring dairy businesses within a milk marketing area that sell to states that are not subject to a federal milk marketing area to comply with the pricing and pooling requirements of the regional federal order. On May 1, 2006, the Secretary issued an order implementing the MREA.

In asserting that the Market Administrator wrongfully assessed a pool payment of $324,211.60 against the Petitioners for the month of April of 2006, the Hettingas argue that May of 2006 should have been the first month in which an assessment could properly be made and the assessment for April of 2006 was not in accordance with law as their status as a producer handler was not formally cancelled, invoking the language of 7 C.F.R. § 1131.10(c) which provides:

> …Cancellation of a producer handler's status pursuant to this paragraph shall be effective on the first day of the month following the month in which the requirements were no met or the conditions for cancellation occurred….

Further they argue, as they continuously held the status of a producer-handler for 12 years, notice of loss of that status was required, and the Market Administrator failed to provide that notice.

While it is clear that the Petitioners had indeed qualified as a producer-handler prior to April 1, 2006, the definition of a producer-handler was changed by the Final Rule which became effective on April 1, 2006. Included in the changes in the new definition was a requirement that in order to obtain status as a producer-handler a two step process is required: (a) the operator has to apply to be a producer-handler, and (b) the Market Administrator has to designate a qualified dairy operation as a producer-handler[3]. The cancellation provision relied upon by the Petitioners was another change that also became effective on April 1, 2006. The Respondent argues that as the cancellation provision did not exist prior to April 1, 2006, the now existent cancellation provision logically applies only to producer-handlers that have been designated as such by the Market Administrator after April 1, 2006. Moreover, as there is no evidence that Petitioners ever applied for the producer-handler designation[4] (even if they had been otherwise eligible, *which they are not,* as their production and sales exceed the 3,000,000 pound

[3] Prior to April 1, 2006, a producer-handler determined the scope of his or her operation and the Market Administrator audited the information to verify its accuracy. (T 23). The pre April 1, 2006 definition did not have any designation provision by the Market Administrator and contained no cancellation provision. (T 64). *See,* 7 C.F.R. § 1131.10, as effective September 1, 1999 through March 31, 2006. 64 *Fed. Reg.* 48010 (September 1, 1999).

[4] T 72

Class I route distribution threshold), *a priori*, they could not be producer-handlers within the post April 1, 2006 definition.

Although the parties differ as to whether the amendments to a milk marketing order merely amend the old order, or create a new order, as amended, determination of that question is unnecessary, as the inescapable effect of the amendments in this case, regardless of which terminology is used, changed the definition of producer-handler in such a way as to make the Petitioners no longer eligible for the regulatory exemption afforded producer-handlers. Similarly, imprecation concerning imprecision in the use of terminology by the Market Administrator and his staff in describing the "designation" or "status" of a producer-handler fails to provide any support for the Petitioners' position as in absence of a published definition of the terms, recourse falls upon the language of the regulatory language contained in the milk marketing order. Last, the misoneistic boot strap argument that a producer-handler who not only exceeds the volume threshold of 3,000,000 pounds of route distribution, but also has never either applied for or been designated as a producer-handler after April 1, 2006 somehow still requires cancellation under the new cancellation provisions effective April 1, 2006 is somewhat hard to follow.

Based upon the entire record, the testimony of the witnesses given at the evidentiary hearing, the exhibits, and having considered the arguments of counsel as expressed in the briefs, the following Findings of fact, Conclusions of Law and Order will be entered.

## Findings of Fact

1. The Petitioners, Hein and Ellen Hettinga, since 1994 have owned and operated Sarah Farms, a large dairy business in Arizona.

2 Sarah Farms is an integrated producer and handler that produces milk on farms owned by the Hettingas and processes that raw milk into bottled milk for sale directly to consumers, milk dealers, and retailers.

To present, the Hettingas own and control all aspects of milk production and milk processing of their Sarah Farms operation, processing and selling in excess of 3,000,000 pounds of their farm-produced milk monthly in what formerly was the Arizona-Las Vegas Milk Marketing area (now known as the Arizona Marketing Area, also known as the Order 131 area).

On February 24, 2006, USDA adopted a Final Rule which became effective April 1, 2006 that subjected producer-handlers operating in the Arizona-Las Vegas and Pacific Northwest Milk Marketing areas to the

pricing and pooling provisions of their respective Marketing Orders if the producer-handler produced and sold more than 3,000,000 pounds of Class I milk per month. 71 *Fed. Reg.* 9430 (Feb. 24, 2006).

From 1994 and continuing until April 1, 2006, Sarah Farms, as a producer-handler of milk, had been exempt from the minimum pricing and pooling provisions of Federal Milk Marketing Orders adopted by the Secretary under the Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA").

Following adoption of the Final Rule, the Market Administrator assessed a pool payment of $324,211.60 on Sarah Farms for milk processed in April of 2006.

The Hettingas paid the pool assessment of $324,211.60 under protest.

Subsequent to the adoption of the Final Rule, Congress enacted the Milk Regulatory Equity Act (codified at 7 U.S.C. § 608c(5)(M)-(N)) ("MREA") which statutorily affirmed the Secretary's determination to limit the scope of the producer-handler exemption. Additionally, the MREA required the Secretary to issue an order requiring dairy businesses within a milk marketing area that sell to states that are not subject to a federal milk marketing area to comply with the pricing and pooling requirements of the regional federal order. On May 1, 2006, the Secretary issued an order implementing the MREA.

Commencing April 1, 2006, the Petitioners ceased to be eligible for producer-handler exemption under the Arizona Milk Marketing Order because they failed to apply for a producer-handler designation and because their production and sales exceeded the Order's threshold of 3,000,000 pounds of Class I route distribution.

**Conclusions of Law**

The Secretary has jurisdiction over this action.

The Market Administrator's assessment of $324,211.60 against the Petitioners for the month of April of 2006 was appropriate and in accordance with law based upon the revisions to the Milk Marketing Order.

As of April 1, 2006, the definition of a producer-handler was changed by the Final Rule. Included in the changes to the new definition was a requirement that in order to obtain status as a producer-handler a two step process is required: (a) the operator has to apply to be a producer-handler, and (b) the Market Administrator has to designate a qualified dairy operation as a producer-handler.

Cancellation of the designation as a producer-handler was not required for an entity which had not applied for and been designated as

a producer-handler after April 1, 2006.

The Petitioners' production and sales of Class I milk exceeded 3,000,000 pounds and precluded them being eligible to be afforded the producer-handler designation even had they applied.

**Order**

The relief sought by the Petitioners is **DENIED** and the Petition is **DISMISSED,** with prejudice.

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

Done at Washington, D.C.

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## ANIMAL QUARANTINE ACT

## DEPARTMENTAL DECISIONS

**In re: BILLY E. ROWAN.**
**A.Q. Docket No. 06-0006.**
**Decision and Order.**
**Filed September 11, 2008.**

**AQ – Equines for Slaughter – Owner-shipper – Unnecessary discomfort during transit – Unable to stand – Records, lack of.**

Thomas Neil Bolick for APHIS.
Respondent, Pro se.
*Decision and Order by Administrative Law Judge Jill S. Clifton.*

### Decision Summary

1. I decide that Billy E. Rowan, Respondent, an owner/shipper of horses (9 C.F.R. § 88.1), failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq*.) when he commercially transported horses for slaughter to Dallas Crown, Inc. in Kaufman, Texas in November 2003 and in May 2004. For Billy E. Rowan's failures to comply, $12,650 in civil penalties (9 C.F.R. § 88.6) for remedial purposes is reasonable, appropriate, justified, necessary, proportionate, and not excessive.

### Complaint and Hearing

2. The Complaint, filed on December 16, 2005, alleged that during each of two slaughter horse shipments (one on or about November 12, 2003; the other on or about May 16, 2004), Respondent Billy E. Rowan (frequently herein "Respondent Rowan" or the "Respondent") violated the Commercial Transportation of Equines 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. The hearing was held on July 10, 2008, before U.S. Administrative Law Judge Jill S. Clifton, by audio-visual telecommunication[1] between the Oxford, Mississippi site and the Washington, D.C. site. The 342-page transcript (Tr.) was prepared by Neal R. Gross & Co., Inc., Court

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

Reporters. This Decision and Order is issued in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)), except that the decision was not issued orally from the bench, so that some of Respondent Rowan's photographs (RX 2), which needed to be transported from Mississippi to Washington, D.C., could be considered.

**Introduction**

4. The two most serious allegations involve a black mare that Respondent Rowen commercially transported for slaughter on or about November 12, 2003. One allegation regarding the black mare is that she was unable to bear weight on all four limbs and thus suffered unnecessary discomfort, stress, physical harm, or trauma during the commercial transportation, in violation of 9 C.F.R. § 88.4(c). The other allegation regarding the black mare is that, due to the black mare's inability to bear weight on all four limbs, she was in obvious physical distress at the time she was loaded onto a conveyance and commercially transported to slaughter; yet Respondent Rowan failed to obtain veterinary assistance for the black mare from an equine veterinarian as soon as possible, in violation of 9 C.F.R. § 88.4(b)(2). For each of these two alleged violations involving the black mare, the Slaughter Horse Transport Program recommended a $5,000 civil penalty (Tr. 259-61) [the maximum civil penalty allowable under 9 C.F.R. § 88.6(a) for a single violation], for a total of $10,000.

5. Respondent Rowan's Answer, filed on January 11, 2006, asserted that the horse (the black mare) with the crooked left hind leg had been that way since birth, that he had bought her in that condition, and that the horse was able to bear weight on all four limbs. Respondent Rowan denied that the commercial transportation of the black mare in November 2003 caused the horse undue stress, discomfort, or physical harm.

6. The next most serious allegation is that on or about May 16, 2004, Respondent Rowan commercially transported for slaughter three (3) stallions that were not segregated from each other and from other horses in the shipment, in violation of 9 C.F.R. § 88.3(a)(2). For each of the three unsegregated stallions, because there was no evidence of actual harm to any of the horses in that shipment, the Slaughter Horse Transport Program recommended an $800 civil penalty (Tr. 261-64), for a total of $2,400.

7. Respondent Rowen acknowledged in his Answer that he had transported three (3) stallions in the May 2004 shipment but asserted that the "3 stallions [were] hauled in 3 different compartments."

8. The last allegations are that Respondent Rowan omitted certain required information from the owner-shipper certificates, Veterinary Services (VS) Forms 10-13, that accompanied both shipments of horses being commercially transported for slaughter, in violation of 9 C.F.R. § 88.4(a)(3). For these paperwork violations, the Slaughter Horse Transport Program recommended (Tr. 264-65) a $50 civil penalty for failure to list the prefix and number of one horse (November 2003 shipment), and a $200 civil penalty for failure to check off the boxes indicating the fitness of the horses to travel at the time of loading (May 2004 shipment), for a total of $250.
9. Respondent Rowan acknowledged in his Answer that certain required information was missing from the VS 10-13 that accompanied his November 2003 shipment and asserted that the form was otherwise complete and correct. Respondent Rowan likewise acknowledged the omission of certain required information from the VS 10-13 that accompanied his May 2004 shipment.

**Parties, Counsel, Witnesses, and Exhibits**

10. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). 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.
11. The Respondent, Billy E. Rowan, appeared *pro se* at the hearing and testified. Also testifying on behalf of Respondent Rowan was Arylon R. Burney. Four APHIS employees testified: Joseph Thomas ("Joey") Astling, Compliance Specialist,[2] USDA APHIS Veterinary Services (VS); David B. Green, Sr. Investigator, USDA APHIS Investigative and Enforcement Services; Dr. Timothy ("Tim") Cordes (D.V.M.), the National Coordinator of Equine Programs within USDA APHIS Veterinary Services (VS); and Kevin A. Conner.
12. The following APHIS exhibits (Complainant's exhibits) were admitted into evidence: CX 1 through CX 24. Tr. 250-51.
13. The following Respondent Rowan exhibits (Respondent's exhibits) were admitted into evidence: RX 1 (sent to Mr. Bolick in the prehearing "Exchange" of exhibits, Tr. 288-290) and RX 2 (six photographs, given to Mr. Green during the hearing: four of the livestock trailer; and two

[2] formerly Animal Health Technician

of black mare and foal). Tr. 288, 290, 292-94.

**Discussion**

14. Respondent Billy Rowan testified that he has been in the horse business longer than 40 years, since he was 14 or 15 years old; that he loves and takes care of his animals. Respondent Rowan testified that he was doing Mr. Arylon Burney a favor, when he bought the black mare from him. [The black mare, approximately six years old, is shown in CX 11, bearing back tag no. USAU 0280.] Respondent Rowan testified that when he transported the black mare to slaughter, she could walk unassisted, and he regarded the black mare as weight-bearing on all four legs, despite her crooked left hind leg.

15. Respondent Rowan suggested that if the black mare was not weight-bearing at Dallas Crown on November 13, 2003, then standing on the concrete in the Dallas Crown pens had caused that; or she had been injured in some other way at Dallas Crown. Respondent Rowan pointed out that during the six years of the black mare's life with Arylon Burney, the black mare had coped with living in a pasture with other horses and had even given birth to a foal.

16. I have considered carefully the testimony of Arylon Burney, but I agree with Dr. Timothy Cordes (D.V.M.), that the black mare was ***not*** weight-bearing on all four legs, not when she was photographed and videotaped at Dallas Crown; not when Respondent Rowan loaded her for transport the day before; and not during the year or two or more, prior to that. Tr. 165-66. Dr. Cordes is a Doctor of Veterinary Medicine with post-graduate work in bone developmental disorders and orthopedics and ophthalmology. Tr. 146. Dr. Cordes' veterinary experience treating horses, after his residency, during 18 years of veterinary surgical referral practice, included a heavy emphasis working with lameness in horses and with orthopedic surgery on horses. Tr. 147-48, 158. He has been the veterinarian for the United States Equestrian Team. Tr. 148.

17. Mr. Burney testified: "I decided to sell her (the black mare), because no one would buy her in that condition with back legs like that. And so I decided to get rid of her, so I . . . sold her as a killer horse. I only got $65 for her. Probably was a good price." Tr. 116-17. Mr. Burney testified that the black mare was born with hind legs that were deformed at birth. Tr. 128. Mr. Burney testified that the right hind leg straightened up better than the left hind, and that the left hind straightened up somewhat so that she was able to walk without carrying the leg. Tr. 125. Mr. Burney testified that he decided to sell the black mare as a killing horse, though, because no one wanted to buy her. Mr.

Burney testified that potential buyers thought they couldn't ride the black mare, and they were afraid she was carrying a deficiency in her genes so her colts might be bad. Tr. 126.

18. The evidence persuades me that the black mare's condition when Joey Astling photographed her (CX 11) and videotaped her (CX 24) at Dallas Crown on November 13, 2003, was essentially the same as it had been the day before, when Respondent Rowan loaded her on November 12, 2003 (CX 1) to be transported to slaughter. There is no evidence that the black mare was injured during transport or at Dallas Crown. Dr. Cordes testified that standing on the concrete in the Dallas Crown pens did not affect the black mare. Tr. 166. Dr. Cordes was asked, "Could this horse's condition have occurred either during transportation, or after transportation on the morning of November 13th?" Dr. Cordes replied, "Absolutely not." Tr. 156.

19. The videotape of the black mare on November 13, 2003 is painful to watch. The black mare's left hind leg was turned inward at the ankle at an angle so sharp (about 60 degrees) that I describe it as grotesque. The left hind leg did not reach the ground, because the length of it from the ankle down did not reach down toward the ground, but rather reached across, toward the horse's right hind leg. If the black mare's left hind leg ***were*** to have reached the ground, it would have been the ***ankle*** touching the ground, not the hoof. Tr. 162, 155.

20. Dr. Cordes used the term "varus" to the describe the deformity of the horse's left hind leg whereby the limb turned inward. Dr. Cordes described the left hind leg deformity after we watched the videotape. Dr. Cordes explained that the left hind "leg is shorter by three bones because the bones come down, make a sharp right-hand turn, the hoof wall continues to grow because it's not opposed to (the) ground, it doesn't wear the way a hoof wall does. A hoof wall is just like your fingernail on your fingers. And so you have this limb that comes down, it's short by three bones because it makes a right-hand turn and moves inward. And I believe the radiographs and the photographs clearly demonstrate that right-hand turn, which has been fused over many years of time." Tr. 162-63.

21. The black mare's condition as observed November 13, 2003 was long-standing, having begun at birth and having worsened over time, as evidenced in the radiographs (x-rays, CX 12) of the left hind leg (severed after the horse was killed), showing the periosteal new bone growth at the ankle, the periosteum's attempt to bridge the ankle joint and to stabilize or to fuse the joint. Tr. 157. Dr. Cordes testified, "This

is severe, severe periosteal new bone growth. This much bone doesn't grow overnight. It doesn't grow in months. It takes years for it to build up this size of a callus, or this size of a bone formation to fuse the ankle over the joint." Tr. 157-58.

22. I asked Dr. Cordes about the "hop" in the black mare's movement we watched in the videotape (made into a DVD, CX 24, Tr. 136). Tr. 158-160.

Judge Clifton: Now, as you watch the horse move, there are times that the horse appears to be putting the left rear leg on the ground and using it momentarily while it hops. Is that - - first of all, is what I have described something accurate about what we saw? No?

Dr. Cordes: If that were the case, Your Honor, if a thousand pounds, this is a 450 kilogram at least, it's a small mare. She's about a thousand pounds. If she was regularly bearing weight on that left hind, which is the back of the ankle, that skin would have been completely worn away. We would have had exposed bone. It appears that she grazes the ground with the left hind by virtue of the fact that the right hind has become so stretched and has lowered itself so much to the ground that she will scrape - - she will scrape that left hind. But if she were in a moving conveyance, and she were to sway to the left and be asked to bear full weight on that, that mare would go down. She would fall down.

Tr. 158-160.

23. Dr. Cordes explained further. Tr. 160-61.

Judge Clifton: When a horse is weight bearing on all four limbs, does that mean roughly equally weight bearing on all four?

Dr. Cordes: There's never a time when they're bearing 100 percent weight on all four legs. As the horse shifts, there are varying percentages. It's like a four wheel drive vehicle. Horses don't think about that. This is something that happens automatically, whether they're jumping a fence or whether they're walking or whether they're even sleeping, or even if they're standing in a conveyance that's swaying, those legs are constantly compensating. And what you're seeing in this picture is a mare that's going through an incredible compensatory mechanism. She's pulling her front legs back to try to swing her weight forward. She's putting all of her weight as well on the right hind, and so, it's a compensatory process, which causes compensatory problems, the reason this mare could never be ridden.

Judge Clifton: Right hind doesn't look too good either.

Dr. Cordes: The point I was making was, that because she takes all the weight off the left and puts it on the right, those tendons and ligaments have stretched to the point that that ankle now is dropping to the ground. It's difficult for me to watch, Your Honor.

Tr. 160-61.

24. Dr. Cordes testified: "If Mr. Rowan tells us that this horse did well on pasture with other familiar horses, I would agree with that. If she could hobble around three legged, as a herd animal, that relates to other horses, in an environment that she was familiar with, with her friends, I would say that for that intended use, she could survive. I would not, under any circumstances say that her intended use, with her current condition would be to stand on a moving conveyance that was swaying and bumping and starting and stopping, let alone asking her to move up and down off of a ramp or onto a loading dock. And there, an equine practitioner, a veterinarian who specializes in equine medicine and surgery would assess the situation and say, under no circumstances should this horse be shipped. She is not only a danger to herself, if she falls down, she may injure other horses as she struggles. And therefore, the recommendation would either be euthanasia or send her back to the farm, but certainly not to get on a swinging, swaying, breaking, stopping conveyance." Tr. 163-64.

25. Dr. Cordes summarized: "I trust, Your Honor that the witness and medical testimony including radiographic, photographic and videographic evidence presented at this hearing today, prove that this mare was not transported to slaughter in the most humane way because of the varus or the deformity of the left hind ankle, and compensatory damage to the right hind ankle. Again, Your Honor, the intent was to avoid even the potential for harm. It's the Program's position, therefore, by definition of the CFR, this mare was unfit for commercial transportation to slaughter, and it was not possible to commercially transport her as carefully and expeditiously as possible in a manner that does not - - from the CFR, "does not cause horses unnecessary discomfort, stress, physical harm or trauma." Therefore Mr. Rowan did not meet the standards of the Code of Federal Regulations. It is also our position, Your Honor that this horse was in obvious physical distress prior to being loaded and I would submit that she needed the assistance of an equine veterinarian at that time, and yet, Mr. Rowan did not seek such assistance. For these reasons, the Program believes that these violations warrant the maximum civil penalty of $5,000 for each, for a total of $10,000. Tr. 259-61.

26. From Joey Astling's testimony, and from Joey Astling's videotape and still photographs of the black mare on November 13, 2003, and from Dr. Cordes' testimony including his observations from watching the videotape and evaluating the radiographs (x-rays), I find that the black

mare was not weight-bearing on all four legs on November 13, 2003, and she was not weight-bearing on all four legs the day before, when she was loaded and transported. Consequently, I find that Respondent Rowan is mistaken when he described the black mare as weight-bearing on all four legs. Further, although Mr. Burney testified he had observed improvement in the black mare's condition initially, I find that the black mare's condition had been worsening over the years prior to November 12, 2003, when she was shipped.

27. Regarding the three stallions that were not segregated when they arrived at Dallas Crown on May 16, 2004, there was evidence that the horses were part of a split load of cows and horses, the cows having gone to a kill plant in Waco before the conveyance went to Dallas Crown. Tr. 224-25, 229. Thus, it is possible that the three stallions began the journey properly segregated, and that when the cows (all but one downer cow) were off-loaded in Waco, the horses were rearranged to the positions Joey Astling observed them in upon arrival - - not properly segregated.

28. As a businessman, as an owner/shipper, Respondent Rowan is responsible to control the work being done in connection with transporting horses to slaughter. So, even if the three stallions were properly segregated when they left Mississippi, and even if Respondent Rowan had instructed his driver properly to keep the stallions segregated, Respondent Rowan is responsible for noncompliance that may have begun en route when others, while working on behalf of Respondent Rowan, failed to keep the stallions segregated. Respondent Rowan is responsible for the noncompliance of agents acting on his behalf.

**Findings of Fact and Conclusions**

29. Paragraphs 30 through 36 contain intertwined Findings of Fact and Conclusions.

30. The Secretary of Agriculture has jurisdiction over Respondent Billy E. Rowan and the subject matter involved herein.

31. Respondent Billy E. Rowan is an individual with a mailing address of P.O. Box 1242, New Albany, Mississippi 38652. Respondent Rowan is now and was at all times material herein a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter. He was and is an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1.

32. Respondent Rowan is responsible not only for what he himself did or failed to do in violation of the Commercial Transportation of Equine

for Slaughter Act and Regulations, but also for what others did or failed to do on his behalf in the commercial transportation of horses for slaughter, as his agents, in violation of the Act and Regulations. Respondent Rowan is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers.

33. Respondent Rowan shipped in commercial transportation two (2) shipments of horses for slaughter, one on or about November 12, 2003, and the other on or about May 16, 2004, and committed violations of 9 C.F.R. § 88 during both shipments.

34. On or about November 12, 2003, Respondent Rowan shipped 18 horses in commercial transportation to Dallas Crown, Inc., in Kaufman, Texas, for slaughter.

(a) One of the horses in the shipment, a black mare with back tag # USAU 0280, could not bear weight on all four legs. By transporting the black mare in this manner, Respondent Rowan failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause the black mare unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

(b) One of the horses in the shipment, a black mare with back tag # USAU 0280, could not bear weight on all four legs and was in obvious physical distress, but Respondent Rowan 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) Respondent Rowan did not properly complete the required owner-shipper certificate, VS Form 10-13, which had the following deficiencies: the prefix and number of one horse's USDA back tag were not properly recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

35. On or about May 16, 2004, Respondent Rowan shipped 10 horses in commercial transportation to Dallas Crown for slaughter.

(a) The shipment included three (3) stallions and Respondent Rowan did not transport 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).

(b) Respondent Rowan did not properly complete the required owner-shipper certificate, VS Form 10-13, which had the following deficiencies: the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii). 36. The civil penalty recommendation of the Slaughter

Horse Transport Program is persuasive.[3] I conclude that $12,650 (twelve thousand six hundred fifty dollars) in civil penalties for remedial purposes is reasonable, appropriate, justified, necessary, proportionate, and not excessive. 9 C.F.R. § 88.6.

**Order**

37. The **cease and desist** provisions of this Order (paragraph 38) shall be effective on the first day after this Decision and Order becomes final.[4] The remaining provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final.

38. Respondent Billy E. Rowan, and 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 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*.).

39. Respondent Billy Rowan is assessed a civil penalty of **$12,650** (twelve thousand six hundred fifty dollars), 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**."

40. Paragraph 41 offers Respondent Rowan an **opportunity to decrease by $5,000** the civil penalty he must pay, on certain conditions. 41.

Five thousand dollars (**$5,000**) of Respondent Rowan's civil penalty is **held in abeyance** on condition that Respondent Rowan pay **$7,650** of his civil penalty **in full, timely, as required**; and on condition that Respondent Rowan, during the **5 years** following the hearing, that is, **through July 9, 2013, commit no further violations** of the Act and the Regulations promulgated thereunder (9 C.F.R. § 88 et seq.). If Respondent Rowan fails to comply with either of these two conditions, the remaining balance of the full $12,650 civil penalty will become due and payable 60 days following APHIS's filing of an application herein, supported by Declaration. Respondent Rowan 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 Rowan at the address in paragraph 31.

42. Respondent Rowan shall reference **A.Q. Docket No. 06-0006** on his certified check(s), cashier's check(s), or money order(s). Payments of

[3] The Slaughter Horse Transport Program recommended a $12,650 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.

[4] *See* paragraph 43.

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.

within sixty (60) days from the effective date of this Order. [See paragraph 37 regarding effective dates of the Order.]

**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). [See paragraph 37 regarding effective dates of the Order.]

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, mailing Mr. Rowan's copy by certified mail to his post office box. [See paragraph 31.]

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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**In re: LEROY H. BAKER, JR., d/b/a SUGARCREEK LIVESTOCK AUCTION, INC.; LARRY L. ANDERSON; AND JAMES GADBERRY.**
**A.Q. Docket No. 08-0074.**
**Decision and Order as to Leroy H. Baker, Jr.**
**Filed November 17, 2008.**

**A.Q. – Commercial Transportation of Equine for Slaughter Act – Failure to file answer – Admission of allegations – Owner/shipper – Civil penalty – History of violations.**

Thomas N. Bolick, for the Acting Administrator, APHIS.
Respondent Leroy H. Baker, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Acting Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on March 11, 2008. The Acting 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].[1]

The Acting Administrator alleges that, during the period from on or about March 26, 2003, through on or about January 7, 2007, Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc.; Larry L. Anderson; and James Gadberry, shipped horses in commercial transportation from Sugarcreek Livestock Auction., Inc., Sugarcreek, Ohio, to Texas, for slaughter, in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations.[2]

The Hearing Clerk served Mr. Baker with the Complaint, the Rules

[1]The Acting Administrator states the Rules of Practice applicable to this proceeding are codified in 7 C.F.R. §§ 1.130-.151, 380.1-.10 (Compl. at 1). I do not find 7 C.F.R. §§ 380.1-.10 applicable to the instant proceeding.
[2]Compl. ¶¶ IV-XXXVIII.

of Practice, and a service letter on March 17, 2008.[3] Mr. Baker failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Mr. Baker a letter dated April 8, 2008, stating Mr. Baker had not filed a timely response to the Complaint. Mr. Baker failed to file a response to the Hearing Clerk's April 8, 2008, letter.

On July 2, 2008, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Acting Administrator filed a Motion for Adoption of Proposed Default Decision and Order [hereinafter Motion for Default Decision] and a Proposed Default Decision and Order. The Hearing Clerk served Mr. Baker with the Acting Administrator's Motion for Default Decision and the Acting Administrator's Proposed Default Decision and Order on July 5, 2008.[4] Mr. Baker failed to file objections to the Acting Administrator's Motion for Default Decision and the Acting Administrator'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). The Hearing Clerk sent Mr. Baker a letter dated July 28, 2008, stating Mr. Baker had not filed a timely objection to the Acting Administrator's Motion for Default Decision. Mr. Baker failed to file a response to the Hearing Clerk's July 28, 2008, letter.

On October 1, 2008, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ], in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), issued a Decision and Order as to Leroy H. Baker, Jr., by Reason of Default [hereinafter Initial Decision as to Leroy H. Baker, Jr.]: (1) concluding Mr. Baker violated the Commercial Transportation of Equine for Slaughter Act and the Regulations, as alleged in the Complaint; (2) ordering Mr. Baker to cease and desist from violating the Commercial Transportation of Equine for Slaughter Act and the Regulations; and (3) assessing Mr. Baker a $162,800 civil penalty.

On November 5, 2008, Mr. Baker filed a timely appeal petition. On November 7, 2008, the Acting Administrator filed a response to Mr. Baker's appeal petition. On November 10, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision as to Leroy H. Baker, Jr.; except that, for the reasons

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[3]United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7023 1197.

[4]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3858 7901.

discussed in this Decision and Order as to Leroy H. Baker, Jr., *infra*, I do not adopt the ALJ's cease and desist order.

## DECISION

### Statement of the Case

Mr. Baker failed to file an answer to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. I issue this Decision and Order as to Leroy H. Baker, Jr., pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact and Conclusions of Law

1. Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc., was, at all times material to this Decision and Order as to Leroy H. Baker, Jr., a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter.

2. Mr. Baker was, at all times material to this Decision and Order as to Leroy H. Baker, Jr., an "owner/shipper" of horses within the meaning of 9 C.F.R. § 88.1.

3. Mr. Baker has a business mailing address of P.O. Box 452, 102 Buckeye Street SW, Sugarcreek, Ohio 44681, and, at all times material to this Decision and Order as to Leroy H. Baker, Jr., Mr. Baker owned and operated Sugarcreek Livestock Auction, Inc., in the State of Ohio. Mr. Baker had been in the business of buying and selling horses since 1985 and regularly shipped over 1,000 horses per year to horse slaughter plants in Texas.

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

5. Mr. Baker is responsible not only for what he himself did or failed to do in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations, but also, for what others did or failed

to do on his behalf in the commercial transportation of horses for slaughter, as his agents, in violation of the Commercial Transportation of Equine for Slaughter Act and the Regulations. Mr. Baker is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers.

6. On or about March 26, 2003, Mr. Baker shipped 36 horses in commercial transportation from Sugarcreek Livestock Auction, Inc., in Sugarcreek, Ohio [hereinafter Sugarcreek], to BelTex Corporation in Fort Worth, Texas [hereinafter BelTex], for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the prefix for each horse's United States Department of Agriculture [hereinafter USDA] backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

7. On or about March 30, 2003, Mr. Baker shipped 70 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the prefix for each horse's USDA backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

8. On or about March 31, 2003, Mr. Baker shipped 85 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) One of the horses in the shipment, a dark bay/brown horse with no backtag, died while en route to the slaughter plant, yet Mr. Baker and/or his driver did not contact the nearest Animal and Plant Health Inspection Service [hereinafter APHIS] office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(b) One of the horses in the shipment, a dark bay horse with no backtag, was blind in both eyes, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his driver thus failed to handle the blind 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).

(c) Mr. Baker was responsible for maintaining a copy of the owner-shipper certificate, VS Form 10-13, for 1 year following the date of signature, but he threw it away less than 3 months after the date of signature, in violation of 9 C.F.R. § 88.4(f).

9. On or about July 16, 2003, Mr. Baker shipped 31 horses in

commercial transportation from Sugarcreek to Dallas Crown, Inc., in Kaufman, Texas [hereinafter Dallas Crown], for slaughter and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the form incorrectly listed a chestnut gelding draft horse, bearing USDA backtag number USAU 5539, as a draft mare, in violation of 9 C.F.R. § 88.4(a)(3)(v); (3) the prefix for each horse's USDA backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (4) the time when the horses were loaded onto the conveyance was not listed properly, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

10. On or about January 30, 2004, Mr. Baker shipped 34 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); (2) the form did not contain a description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay gelding, USDA backtag number USAH 7676, that was blind in both eyes, in violation of 9 C.F.R. § 88.4(a)(3)(viii); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a bay gelding, bearing USDA backtag number USAH 7676, was blind in both eyes, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his driver thus failed to handle the blind 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).

11. On or about March 17, 2004, Mr. Baker shipped 29 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the prefix for each horse's USDA backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

12. On or about July 26, 2004, Mr. Baker shipped 43 horses in

commercial transportation from Sugarcreek to BelTex for slaughter. Records obtained from BelTex indicate that two horses in the shipment died while en route to the slaughter plant, and Mr. Baker's driver acknowledged that at least one of the dead horses had been down during transit from Oklahoma City, Oklahoma, to Ft. Worth, Texas, yet Mr. Baker and/or his driver did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horses, in violation of 9 C.F.R. § 88.4(b)(2).

13. On or about September 10, 2004, Mr. Baker shipped 42 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (2) there was no statement that the horses had been rested, watered, and fed for at least 6 consecutive hours prior to being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

14. On or about September 29, 2004, Mr. Baker shipped 40 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3); and (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

15. On or about November 17, 2004, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (3) there was no statement that the horses had been rested, watered, and fed for at least 6 consecutive hours prior to being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

16. On or about November 27, 2004, Mr. Baker shipped 37 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the receiver's address

and telephone number were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

17. On or about January 15, 2005, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3); and (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

(b) Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours, at approximately 1:30 a.m., and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

18. On or about January 28, 2005, Mr. Baker shipped 28 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

19. On or about February 4, 2005, Mr. Baker shipped 42 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) Records obtained from Dallas Crown indicate that three horses in the shipment, two bearing USDA backtag numbers USBQ 7939 and 7942 and one bearing sale barn tag number 31HA3541, died while en route to the slaughter plant, yet Mr. Baker and/or his driver did not check the physical condition of the horses at least once every 6 hours or, in the alternative, did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horses, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

20. On or about March 20, 2005, Mr. Baker shipped 38 horses in

commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the owner/shipper's name, address, and telephone number were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(i).

21. On or about April 3, 2005, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the form did not indicate the breed and/or sex of several horses, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the prefix for each horse's USDA backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(b) Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

22. On or about May 2, 2005, Mr. Baker shipped 38 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Mr. Baker 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 backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(b) Mr. Baker and/or his driver delivered the horses outside of BelTex's normal business hours and left the slaughter facility, but did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

23. On or about May 22, 2005, Mr. Baker shipped 37 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a gelding with USDA backtag number USBQ 8786 that had a severe cut on its left rear leg, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) One of the horses in the shipment, a gelding with USDA

backtag number USBQ 8786, had a severe cut on its left rear leg such that it was unable to bear weight on all four limbs, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his driver thus 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).

24. On or about May 29, 2005, Mr. Baker shipped 44 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay gelding, bearing sale barn tag number 31HA0505, that was blind in both eyes, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) One of the horses in the shipment, a bay gelding, bearing sale barn tag number 31HA0505, was blind in both eyes, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his driver thus failed to handle the blind 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).

(c) Mr. Baker and/or his driver delivered the horses outside of BelTex's normal business hours and left the slaughter facility, but did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

25. On or about June 18, 2005, Mr. Baker shipped 7 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (2) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) Mr. Baker and/or his driver delivered the horses outside of BelTex's normal business hours and left the slaughter facility, but did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

26. On or about June 18, 2005, Mr. Baker shipped 28 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the form incorrectly listed a stallion in the shipment, USDA backtag number USBQ 8891, as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, backtag number USBQ 8898, died en route to the slaughter plant, yet Mr. Baker and/or his driver did not check the physical condition of the horse at least once every 6 hours or, in the alternative, did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

27. On or about July 16, 2005, Mr. Baker shipped 12 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay mare with USDA backtag number USBQ 5105 that had old, severe cuts on its left hind leg, in violation of 9 C.F.R. § 88.4(a)(3)(viii); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a bay mare with USDA backtag number USBQ 5105, had old, severe cuts on its left hind leg such that it could not bear weight on all four limbs, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his driver thus 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).

28. On or about July 22, 2005, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address and telephone number were not listed correctly, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the prefix for each horse's USDA backtag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); (3) the shipment contained two stallions, bearing USDA backtag numbers USBQ 5159 and 5169, that were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v); (4) one of the boxes indicating the fitness of the horses to travel at the time of loading was not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (5) the month in which the horses were loaded onto the conveyance was incorrectly listed as February, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a stallion with USDA backtag number USBQ 5169, went down at least three times during transportation, indicating that it was in obvious physical distress, and died en route to the slaughter plant, yet Mr. Baker and/or his driver neither obtained veterinary assistance as soon as possible from an equine veterinarian, nor contacted the nearest APHIS office as soon as possible to allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(c) One of the horses in the shipment, a stallion with USDA backtag number USBQ 5169, went down at least three times during transportation, indicating that it was in obvious physical distress. Mr. Baker and/or his driver thus failed to handle this 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).

29. On or about July 25, 2005, Mr. Baker shipped 41 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (3) the prefix for each horse's USDA backtag number was not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (4) the date and time when the horses

were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

30. On or about October 24, 2005, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: the date that the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a bay mare with USDA backtag number USBQ 5832, died en route to the slaughter plant, and Mr. Baker's driver stated that he had observed one or more horses in the shipment kicking the bay mare in the ribs 4 to 5 hours before the shipment arrived at Dallas Crown. The bay mare thus was in obvious physical distress, yet Mr. Baker and/or his driver neither obtained veterinary assistance as soon as possible from an equine veterinarian nor contacted the nearest APHIS office as soon as possible to allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

31. On or about November 6, 2005, Mr. Baker shipped 42 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: five stallions, bearing USDA backtag numbers USBQ 5940, 5938, 5937, 5908, and 5905, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained five stallions, bearing USDA backtag numbers USBQ 5940, 5938, 5937, 5908, and 5905, but Mr. Baker did not load the five stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

32. On or about November 9, 2005, Mr. Baker shipped 30 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper

certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the date and time when the horses were loaded onto the conveyance were not listed properly, in violation of 9 C.F.R. § 88.4(a)(3)(ix); and (3) there was no statement that the horses had been rested, watered, and fed for at least 6 consecutive hours prior to being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(b) Mr. Baker failed to maintain a copy of the owner-shipper certificate, VS Form 10-13, for 1 year following the date of signature, in violation of 9 C.F.R. § 88.4(f).

33. On or about May 3, 2006, Mr. Baker shipped 46 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (2) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

34. On or about May 4, 2006, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (2) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

35. On or about June 11, 2006, Mr. Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay mare with USDA backtag number USDB 6853 that had a severe, pre-existing cut on its right shoulder that was badly infected, in violation of 9 C.F.R. § 88.4(a)(3)(viii). (b) One of the horses in the shipment, a bay mare

with USDA backtag number USDB 6853, had a severe, pre-existing cut on its right shoulder that was badly infected, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his drivers thus 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).

(c) The USDA representative at Dallas Crown reported that Mr. Baker's drivers "began to get nervous upon my arrival and left quickly after the horses were unloaded." Mr. Baker and/or his drivers thus left the premises of the slaughtering facility before the horses had been examined by the USDA representative, in violation of 9 C.F.R. § 88.5(b).

36. On or about July 3, 2006, Mr. Baker shipped 24 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: at least six stallions, bearing USDA backtag numbers USDB 7052, 7045, 7061, 7063, 7065, and 7066, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained at least six stallions, bearing USDA backtag numbers USDB 7052, 7045, 7061, 7063, 7065, and 7066, but Mr. Baker did not load the six stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(c) The USDA representative at Dallas Crown reported that Mr. Baker's driver "seemed to become very uneasy when I arrived at the plant, he was in a hurry to finish unloading and did not waste much time leaving the plant." Mr. Baker and/or his driver thus left the premises of the slaughtering facility before the horses had been examined by the USDA representative, in violation of 9 C.F.R. § 88.5(b).

37. On or about July 16, 2006, Mr. Baker shipped 41 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker shipped the horses in a conveyance that had large holes in its roof. Mr. Baker thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in

violation of 9 C.F.R. § 88.3(a)(1).

(b) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) at least two stallions, one bearing USDA backtag number USBQ 7128 and another bearing no USDA backtag, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (2) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a chestnut mare with USDA backtag number USBQ 6643 that had a pre-existing injury to its left hind foot, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(c) The shipment contained at least two stallions, one bearing USDA backtag number USBQ 7128 and another bearing no USDA backtag, but Mr. Baker did not load the two stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(d) One of the horses in the shipment, a chestnut mare with USDA backtag number USBQ 6643, had a pre-existing injury to its left hind foot such that it could not bear weight on all four limbs, yet Mr. Baker shipped it with the other horses. Mr. Baker and/or his driver thus 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).

38. On or about August 7, 2006, Mr. Baker shipped 36 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter. Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

39. On or about December 23, 2006, Mr. Baker shipped 32 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: at least two stallions, bearing plant tag numbers 127985 and 128011, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained at least two stallions, bearing plant tag numbers 127985 and 128011, but Mr. Baker did not load the stallions on the conveyance so that they were completely segregated from the

other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(c) Mr. Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

40. On or about January 7, 2007, Mr. Baker shipped 31 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Mr. Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiency: at least one stallion bearing USDA backtag number USCU 6770 and plant tag number 128577 was incorrectly identified as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained at least one stallion, bearing USDA backtag number USCU 6770 and plant tag number 128577, but Mr. Baker did not load the stallion on the conveyance so that it 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).

(c) One horse in the shipment, a chestnut gelding bearing USDA backtag number USCU 6782 and white backtag number 31HA6205, went down near Little Rock, Arkansas, and died en route, but Mr. Baker and/or his driver did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(d) Two horses in the shipment, bearing USDA backtag numbers USCU 6782 and 6769, went down near Little Rock, Arkansas, and were not able to get up, such that one died en route and one had to be euthanized on the conveyance upon its arrival at Dallas Crown. The fact that these two horses became nonambulatory en route indicated that they were in obvious physical distress, yet Mr. Baker and/or his driver did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(e) Two horses in the shipment, bearing USDA backtag numbers USCU 6782 and 6769, went down near Little Rock, Arkansas, and were not able to get up, such that one died en route and one had to be euthanized on the conveyance upon its arrival at Dallas Crown. Mr. Baker and/or his driver thus failed to handle these two horses as expeditiously and carefully as possible in a manner that did not cause

them unnecessary discomfort, stress, physical harm, or trauma, in violation of 9 C.F.R. § 88.4(c).

41. On the numerous occasions detailed in paragraphs 6 through 40 of the Findings of Fact and Conclusions of Law, Mr. Baker failed to comply with the Commercial Transportation of Equine for Slaughter Act and the Regulations. Many of Mr. Baker's violations described in paragraphs 6 through 40 are so serious and Mr. Baker's culpability so great as to justify the $5,000 maximum civil penalty per violation. Consequently, in accordance with 9 C.F.R. § 88.6 and based on the Acting Administrator's sanction recommendation in the Motion for Default Decision, filed July 2, 2008, I assess Mr. Baker a $162,800 civil penalty.

**Mr. Baker's Appeal Petition**

The Acting Administrator asserts that the Hearing Clerk served Mr. Baker with the ALJ's Initial Decision as to Leroy H. Baker, Jr., on October 6, 2008, and that, consequently, Mr. Baker was required to file his appeal petition no later than November 5, 2008.[5] The Acting Administrator argues that Mr. Baker's appeal petition is late-filed because he did not file it until November 6, 2008.

I agree with the Acting Administrator's assertions that the Hearing Clerk served Mr. Baker with the ALJ's Initial Decision as to Leroy H. Baker, Jr., on October 6, 2008,[6] and that Mr. Baker's appeal petition was required to be filed no later than November 5, 2008. However, the record before me reveals that the Hearing Clerk first received Mr. Baker's appeal petition on November 5, 2008, at 12:04 p.m. Subsequently, the Hearing Clerk received a second copy of Mr. Baker's appeal petition on November 6, 2008, at 9:04 a.m. Under these circumstances, I find Mr. Baker timely filed his appeal petition, and I reject the Acting Administrator's argument that Mr. Baker's appeal petition was late-filed.

In his appeal petition, Mr. Baker responds to the allegations in the March 11, 2008, Complaint. The Hearing Clerk served Mr. Baker with the Complaint on March 17, 2008. Mr. Baker was required by section

[5]Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that a party who disagrees with an administrative law judge's written decision or any portion of that decision must file an appeal petition within 30 days after receiving service of the written decision.

[6]See Domestic Return Receipt for article number 7007 0710 0001 3858 8106; Track & Confirm search results for label/receipt number 7007 0710 0001 3858 8106.

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 of the Complaint; namely, no later than April 7, 2008. Mr. Baker's response to the allegations in the Complaint in his appeal petition, filed November 5, 2008, 6 months 29 days after Mr. Baker was required to file an answer comes far too late to be considered. As Mr. Baker failed to file a timely answer, Mr. Baker is deemed to have admitted the material allegations of the Complaint, and I reject his late-filed denial of the allegations in the Complaint.

**Modification of the ALJ's Order**

The ALJ assessed Mr. Baker a $162,800 civil penalty and ordered Mr. Baker to cease and desist from violating the Commercial Transportation of Equine for Slaughter Act and the Regulations (ALJ's Initial Decision as to Leroy H. Baker, Jr., at 23-24). Mr. Baker did not appeal the sanction imposed by the ALJ; nonetheless, I do not adopt the ALJ's cease and desist order.

The Commercial Transportation of Equine for Slaughter Act provides that the Secretary of Agriculture may "establish and enforce effective and appropriate civil penalties." (7 U.S.C. § 1901 note.) Pursuant to this authority, the Secretary of Agriculture established a maximum civil penalty of $5,000 for each violation of the Regulations (9 C.F.R. § 88.6(a)). The Secretary of Agriculture has made no provision for the imposition of a cease and desist order for a violation of the Commercial Transportation of Equine for Slaughter Act or the Regulations. Therefore, I do not adopt the ALJ's cease and desist order.

For the foregoing reasons, the following Order is issued.

**ORDER**

Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc., is assessed a $162,800 civil penalty. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Mr. Baker. Mr. Baker shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 08-0074.

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# ANIMAL WELFARE ACT

## DEPARTMENTAL DECISIONS

**In re: LOREON VIGNE, d/b/a ISIS SOCIETY FOR INSPIRATIONAL STUDIES, INC., a/k/a "TEMPLE OF ISIS" and "ISIS OASIS SANCTUARY."**
**AWA Docket No. 07-0174.**
**Decision and Order.**
**Filed July 7, 2008.**

**AWA – License termination – Show cause – Prior conviction.**

Bernadette Juarez For APHIS.
Respondent Pro se.
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

### MEMORANDUM OPINION AND ORDER

This proceeding was brought under the Animal Welfare Act (the "Act"), 7 U.S.C. § 2131, *et seq*. by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service ("APHIS") and seeks to terminate the Respondent's Animal Welfare License. It was initiated on August 21, 2007 with the filing of an Order to Show Cause Why Animal Welfare License Number 93-C-0611 Should Not Be Terminated. The Respondent filed her Answers to Allegations and Demonstration of Cause As to Why Animal Welfare Act License 93-C-0611 Should Not Be Terminated on September 14, 2008. On June 6, 2008, the Complainant filed its Motion for Summary Judgment. The motion was served by certified mail on the Respondent by the Hearing Clerk's Office together with a letter advising her that any response to the motion should be filed within 20 days. No response has been received and the matter is now before the Administrative Law Judge for disposition. As there are no genuine issues of any material fact, the Motion will be granted and an Order will be issued terminating the license.

### Discussion

7 U.S.C. § 2133 provides that "The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe…." Express authority for the suspension or revocation of licenses for violations of the Act or regulations is found in

7 U.S.C. § 2149. The implementing regulations make it clear that a license may be terminated at any time for any reason that an initial license application would be denied. 9 C.F.R. § 2.12 Included in the list of specified reasons for denial of the issuance of a license is:

> Has made any false or fraudulent statements or provided any false or fraudulent records to the department or other governmental agencies, or has plead *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws pertaining to the transportation, ownership, neglect or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act. 9 C.F.R. § 2.11(a)(6)

The record amply supports the existence of such a conviction by the Respondent. Her answer expressly admits pleading guilty to the offense and her belated attempts to excuse or recharacterize her conduct and the nature of the transactions underlying the conviction will not be entertained at this point. Accordingly, the following Findings of Fact, Conclusions of Law and order will be entered.

**Findings of Fact**

The Respondent Loreon Vigne is an individual whose mailing address is 2088 Geyser Avenue, Geyserville, California. She is the founder and "High Priestess" of, has served as a corporate officer and has managed, controlled and directed the business activities of Isis Society for Inspirational Studies, Inc. (Isis Society), a California domestic non-profit corporation, which is also known as "Temple Isis," "Isis Oasis Sanctuary" and "Isis Oasis."

In April of 2000, the Respondent applied for and received Animal Welfare Act License 93-C-0611 as an exhibitor which was issued in the name of "LOREON VIGNE DBA ISIS OASIS," and continuing through April 20, 2007, she submitted annual renewal applications. On or about August 1, 2006, Isis Society was indicted in the United States District Court for the District of Oregon for knowingly and intentionally conspiring with others to unlawfully sell and offer for sale in interstate commerce an endangered species (ocelots), in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(F) and 1540(b)(1).

On or about August 2, 2006, the United States Attorney for the District of Oregon and Isis Society filed a Plea Agreement containing the corporation's offer to plead guilty to the indicted offense, stipulated

facts as to the specifics of the unlawful sales of ocelots in interstate commerce between the period of August 1999 and November of 2004 and the United States Attorney's agreement to recommend a sentence of a fine and probation to the Court.

On or about January 4, 2007, before the United States District Court, Isis Society entered its plea of guilty to the violation of the Endangered Species Act, as charged. The guilty plea was found to be provident based upon the admission of sufficient facts establishing the elements of the crimes, to have been made voluntarily, and was accepted by United States District Judge Michael W. Mosman. Consistent with the Plea Agreement, Isis Society was sentenced to pay a fine of $60,000 and to serve a two year probationary period.

**Conclusions of Law**

The Respondent, as its founder, corporate officer and "High Priestess", controlled, managed and directed the business activities of Isis Society, including the transactions found to violate the Endangered Species Act.

The violation of the Endangered Species Act by Isis Society is a violation of a Federal law pertaining to the transportation, ownership, neglect or welfare of animals within the meaning of 9 C.F.R. § 2.11(a)(6) and constitutes sufficient basis to terminate the license of the Respondent.

The Respondent is estopped from attempting to recharacterize the nature of the transactions underlying the conviction as had been recited in Isis Society's Plea Agreement.

**Order**

Animal Welfare Act License 93-C-0611 issued in the name of "LOREON VIGNE DBA ISIS OASIS" is **REVOKED** and **TERMINATED**.

The Respondent Loreon Vigne, Isis Society for Inspirational Studies, Inc., any agent, assign or successor of the Respondent or her related business entity or in which she is an officer, agent or representative are **DISQUALIFIED** from obtaining an Animal Welfare Act License for a period of two (2) years.

This Order shall become effective and final 35 days from its service upon the parties who have a right to file an appeal with the Judicial Officer within 30 days after receiving service of this Memorandum Opinion and Order by the Hearing Clerk as provided in the Rules of

Practice. 7 C.F.R. § 1.145.

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

Done at Washington, D.C.

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**In re: SAM MAZZOLA d/b/a WORLD ANIMAL STUDIOS, INC., WILDLIFE ADVENTURES OF OHIO, INC.**
**AWA Docket No.-06-0010**
**and**
**In re: SAM MAZZOLA.**
**AWA Docket No D-07-0064.**
**Filed July 31, 2008.**

**AWA – Exhibition – Public contact with animal – Photo sessions without barrier.**

Sam Mazzola, Pro Se.
Babak A. Rastgoufard and Bernadette Juarez for APHIS.
*Oral Decision and Order by Administrative Law Judge Jill S. Clifton.*

[EDITOR's Note - See Miscellaneous Order and Amended Complaint of same date in this volume.]

## DECISION

(Oral Decision as transcribed)

What I have to say now is my decision and throughout consists of mixed findings of fact and conclusions, plus my discussion, analysis, and eventually my order.

I'd like to begin with what is APHIS policy with regard to no direct contact, that means no touching, between the public and juvenile and adult felines. I find this policy very clearly stated in CX-179. I'm going to read it into the record. "Public contact with certain dangerous animals may not be done safely under any conditions. In particular, direct public contact with juvenile and adult felines (e.g., lions, tigers, jaguars, leopards, cougars) does not conform to the handling regulations, because it cannot reasonably be conducted without a significant risk of harm to the animal or the public. The handling regulations do not appear to specifically prohibit direct public contact with infant animals, so long as it is not rough or excessive, and so long as there is minimal risk of harm

to the animal and to the public. If you intend to exhibit juvenile or adult large felines" [and adult has a footnote that indicates basically that juvenile or adult refers to over 3 months of age] - - after the word "felines" "(e.g., lions, tigers, jaguars, leopards, cougars), and would like Animal Care to review your proposed exhibition to determine whether it will comply with the handling regulations, please include with your application a description of the intended exhibition, including the number, species, and age of animals involved and the expected public interaction."

This CX-179 is what I call the "Dear Applicant" letter and it was provided in packets for new applicants for Animal Welfare Act licenses beginning in approximately January 2003. During the following year, it was provided to licensees who already had their Animal Welfare Act licenses with their renewal packets which were sent to them roughly a month before their expiration dates.

Now I do not have any direct evidence that Mr. Mazzola's "Dear Applicant" letter reached him or that he ever saw it. But that is not really crucial to the allegations in this case and I'll explain why as I go through them.

What is so important about CX-179 is that it so clearly states that no touching will be permitted between the public and these big cats that are three months and older. APHIS has determined that that interpretation of the handling regulations is necessary for the safety of the animals and the public. It is APHIS' right to interpret its regulations in that regard. It is APHIS' responsibility, initially, to make these interpretations.

We in the United States are very aware of how quickly businesses and business practices change and that includes the business of exhibiting animals. It is reasonable that APHIS would continue to adapt. It is required that APHIS' licensees be adaptable and cooperative and that they exercise good judgment.

I was very impressed in both Dr. Antle's testimony and Jay Riggs' testimony that they could see APHIS' viewpoint. An example of that: when Jay Riggs was testifying that working with the older big cats is actually easier, he also commented that he can see that there's greater risk because, of course, the animals are bigger, stronger, faster, more powerful, and so on.

When Dr. Antle testified, he explained that these changes in interpretation were devastating to his ability to collect money, for example, making photographs, because people loved being photographed with the big cats, money that would further his conservation efforts. And yet, he acknowledged being able to see APHIS' viewpoint because so many unqualified people who had no

right acting as if they were trainers were putting the public at risk. When he testified that it takes ten years of good experience to make a trainer of a handler and he explained that that experience would involve going to places that are off-site, seeing how animals react in circumstances that they're not expecting, that was very telling evidence indeed.

Now I find that when Mr. Mazzola stays in his role as a trainer, he is extremely capable. But what he has done here is made APHIS his adversary, his enemy. He has viewed APHIS as the partner of PETA. Mr. Mazzola testified that he did not want APHIS to have his Social Security Number. Now he really didn't have a corporate number to give APHIS, not the corporation's federal identification number. So really the only suitable number to have given APHIS would have been his Social Security Number which he purposely did not do.

Mr. Mazzola purposely did not keep APHIS apprised of his itinerary and it was partly because he didn't want PETA to know where he was going to be, but it was partly because he did not want APHIS to know where he was going to be. He did enjoy operating independently. His attitude throughout, beginning in 2003 is I want the license. I don't want the regulation.

Now Mr. Mazzola is proud of his integrity in being brave and courageous enough to come test whether APHIS was correct or whether he was correct in this setting. It is unfortunate that he felt that was his best option because the other alternative would have been to cooperate with APHIS and get half a loaf.

Now let me explain what half a loaf would be. Half a loaf would be still being a licensee and being able to have qualified handlers wrestle bears for public exhibition, handlers who are employed by the licensee. That would be half a loaf. The half that would have been lost would be letting members of the public wrestle the bears.

Let's talk about photo opportunities. Dr. Antle has confined himself to exhibiting the smaller, younger, less trained cats and that's half a loaf. The public likes better the big ones. Dr. Antle has not yet figured out how to get the photos with a glass barrier that would be as attractive to the public and he has not figured out a way to interest them in the plight of animals whose -- well, whose conservation, along with the conservation of the habitat, is at risk.

When Mr. Mazzola decided the only way he could get a test case was to stop cooperating with APHIS, he doomed his ability to remain licensed. The refusal to provide the itineraries would in itself be grounds to revoke the license and permanently disqualify the individual

from being licensed. The refusal to allow inspection would in itself be grounds to revoke the license and permanently disqualify the individual from being licensed.

It is not adequate to say Dr. Harlan can inspect, but Mr. Coleman, you may not. It is APHIS that determined to send two inspectors, both inspectors at the same time, because of the difficulties that Mr. Mazzola had presented. So that was a refusal to allow inspection.

Now I am going to go through and talk about the individual paragraphs of the complaint before I go further, but there are two other items of testimony from our previous session that I want to comment on. They come from both Dr. Gibbens' and Dr. Goldentyer's testimony. And I'm very grateful that both of them took the time to come here and present APHIS' viewpoint because I didn't understand it until this hearing. And in trying to apply what I consider statutory construction, I looked at the phrase "public" as it is contained in Section 2.131(c)(1) of Title 9 of the Code of Federal Regulations; and the other phrase, "general viewing public," and I assumed that because they were different, that they were meant to refer to different subsets. I now know otherwise. I know now that APHIS uses them interchangeably and with good reason.

Dr. Goldentyer's explanation was the most clear to me and it is summarized also in the brief that Ms. Juarez had presented today, and the gist of it is the animal needs protection which means the person that's going to be near the animal needs protection, and it makes no sense that a member of the general viewing public would lose his protection by going closer to the animal. In other words, if I take a member -- if I thought the general viewing public was outside the secondary barrier, which I did, if a person in that subset then goes into the enclosure with the animal, then that person is in more need of protection than ever. And so yes, there must be minimal risk of harm for that person as there is for any member of the public, but there must also be adequate barriers or distance.

Now the reason I struggled so with trying to interpret that regulation was that contact with some dangerous animals is permitted. For example, a tiger that is two months old is still a dangerous animal. An elephant is still a dangerous animal. They can be touched. So can lots of other animals that can be dangerous under certain circumstances. Under certain circumstances, a child could be damaged by a puppy. So I realize when Dr. Gibbens explained that all the circumstances have to be taken into account, yes, that makes sense to me, but I realize that for some animals, there can be adequate safeguards, even though adequate barriers or distance need to be there, that can be, with some animals, no

distance and no barrier. But with other animals, there has to be an absolute barrier or distance such that no touching could possibly occur.

So I understand that now, and their testimony was essential in this case so that I could realize that I had misunderstood. But because I misunderstood, I'm sympathetic to Mr. Mazzola because he also thought the secondary barrier is what kept out the general viewing public.

Now when Mr. Coleman began to inspect him and talk about the barriers and distance not being adequate with regard to the bear being photographed and with regard to the tigers being photographed, I need to look at those one at a time.

So now I go to the Second Amended Complaint. Now I'm going to give the court reporter a copy of the Second Amended Complaint to take to the typist in case the typist finds it useful in preparing this portion of the transcript. And is the one that Dr. Goldentyer used still here?

DR. GOLDENTYER: It should be.

JUDGE CLIFTON: Yes, it is. That document is just for the use of the court reporter and the typist and then it can be discarded. It is not an exhibit and it is not needed for our record. It's already in the record file.

All right, I'm going to do this the easy way. I'm going to start at the back because these are the easiest allegations to deal with.

All right, I'd like everyone to look with me at paragraph 47. Paragraph 47 does not allege a violation. It is a paragraph to indicate that notice has been provided to the Respondent.

Paragraph 48, again sets up the following paragraphs as alleged violations. Looking now at paragraph 49, the testimony that's important to me here is that -- well, first of all, Mr. Mazzola misunderstood the word "housed". The enclosure that is referred to in paragraph 49 is the enclosure in which the tigers' photo opportunities took place. The tigers that were being exhibited in those enclosures were housed there for the purpose of those photo opportunities.

The open top nature of them is said by Mr. Mazzola to present no problem given the fact that the tiger is chained to a table that he couldn't possibly pull with him over the six-foot high panel to escape. But the testimony that's important here is the testimony about the human error that is always the concern. The reason you have redundant safety measures whenever possible is to anticipate that something could go wrong. Even though in most cases the handlers, Mr. Mazzola and Mr. Palmer, were very experienced and had done the bringing of the tigers into the photo opportunity enclosure thousands of times without incident, nevertheless during the taking in and taking out of the tigers, what controls the tigers are trainer or handler who are possibly subject

to failure. What could go wrong? Well, perhaps in clipping the chain to the -- I'll call it an eye bolt, that it not get clipped properly, that something startled the tiger at exactly the wrong moment when vulnerability is greatest. Dr. Gage's testimony was extremely helpful in this regard as well. The ability for a tiger to leap out over that six-foot barrier was quite great.

When Mr. Mazzola first said why putting a lid on that enclosure would be so difficult, he talked about it as if structurally it was hard to do, but then later in his testimony he testified how quickly it could be done in the event of the need, in the event of an emergency, how in just a matter of a couple of minutes, the two six-foot panels that would constitute the ceiling could be brought out, placed on top and affixed.

What I find is that Mr. Mazzola's concern was the six-foot height which would be shortened by putting the lid on it, by a few inches, would bump some people's heads and that is a problem. Because you either have to get taller panels or you have to have a top that goes up higher before it becomes horizontal to the ground. It's expensive. But I think this was a suggestion that was well warranted, for, I'll call it, redundant safety. It's a precaution in case something goes wrong.

And so when Mr. Mazzola, after having been warned to put a lid on those enclosures, failed to do so, that did constitute a violation as alleged in paragraph 49, and with regard to the tigers in paragraph 50, and with regard to the tiger in paragraph 51.

Now let's talk about the bear. With regard to the bear Mr. Mazzola said that if the bear really wanted out of that cage, that enclosure, those six-foot panels weren't going to hold him. He'd just walk through them. Well, it was other measures that were relied on to keep the bear from wanting to do that, to keep him from becoming bored, to keep him company and so forth, and of course, many times he was changed out and taken away from that enclosure and put back into the trailer where he had more comfortable quarters. But another reason to put a lid on, is that it adds structural integrity to the walls of the enclosure. It's one more anchoring point for those walls. And for that reason I think a lid would have been helpful.

It could well be that Lakota, who weighs so much and is so mature, would not be climbing. It could be that he would not be climbing out, but as a redundant safety measure, I think putting a lid on would help keep the walls intact. That would be true also as to the tiger photo opportunity enclosure.

So with regard to these particular violations that are alleged here in paragraph 50, I find that they are proved with regard to the adult black bear and also in 51 with regard to the adult black bear.

Now with regard to the penalty that's appropriate for those, I'll come back to that after I've gone through everything.

All right, let's go to Posh Nightclub. Please look at the paragraphs 43, 44, and 46.

I'm very glad that I had the opportunity to hear about this bear wrestling which I didn't know anything about, and as Mr. Mazzola described it, he just thought of it as normal. It's been done for years and years. It was interesting to hear the testimony of the two young men that had wrestled the bear. They were very excited to have had the opportunity, even though they were both scratched. I think they were both scratched, at least one was.

It's interesting and it is exciting and it's entertaining, and Mr. Mazzola was very successful as a promoter and an entertainer in this regard. But this is a method of entertainment and a way of life that's a thing of the past. I certainly can understand why APHIS could not permit its licensees to put on such an exhibition and invite members of the public to come in and wrestle the bear.

So many exhibitors would not have the bears that Mr. Mazzola had identified as good for this activity. So many exhibitors would not have the years of experience and the knowledge that Mr. Mazzola had in permitting this activity. It's just far too dangerous an activity to allow everybody who has access to a bear and an exhibitor's license to participate in. And I understand perfectly why APHIS had to shut down that activity. The testimony is that Mr. Mazzola did it after being aware that APHIS would permit the bears to wrestle only the exhibitor's employees, not members of the public, and yet these three exhibitions were done in spite of that. And so these are violations that are proved. That's paragraph 43, 44, and 46.

All right, now let me go to paragraph 45. I want to go off record to do this. We'll go off record at 5:15.

(Off the record.)

JUDGE CLIFTON: All right. We're back on record at 5:18.

With regard to Paragraph 45, I am looking at CX-36, pages 45, 46, 47, and 48. At least these are all adults, which is less frightening to me than with children, but again, the problem here, even though -- and this is, no doubt, Lakota -- even though this bear has been through so many photo shoots without incident and seems to have a marvelous temperament for this sort of thing and seems to be handled so capably by Dwayne Palmer, who's pictured here, and Mr. Mazzola, nevertheless, I understand that allowing a bear this large, even a black bear, even a very well suited black bear, to be basically side by side with people

hanging onto his back and enjoying just being right there hanging with him, next to him; I know it was a thrill for them, and I know nothing happened and they were not injured. Nevertheless, I understand that APHIS needs to require that there be distance or barriers between a bear and the public.

And I have to reject Mr. Mazzola's theory that these are not the public, that this is a private opportunity; that these people have chosen to come in, and they are now invited in, and they are no longer the public. What is so true about the testimony here about the public is the public thinks that if it's being allowed, it must be safe. They see a line and they get in it, and they don't understand what dangers there could be.

And so although I can appreciate why Mr. Mazzola hates to see freedoms disappear and people's opportunity to do these things dry up and disappear, I'm afraid that's the world we're in, and so I do find a violation in Paragraph 45 of allowing these adults to have their pictures taken without any distance or barriers between the bear and themselves.

All right. Now I'm going to Paragraph 42, and I want to turn to CX-21, pages 8 and 9. I've read the APHIS brief with regard to this, and I do not have that same viewpoint. I feel that with regard to the juvenile lion that is depicted in CX-21, pages 8 and 9, the two people in the same enclosure with that juvenile lion are the exhibitor's employees, and the juvenile lion is not being exhibited to the public.

I realize from the brief that there is an argument there, that based on the female employee's testimony, she was not involved as an employee with regard to the juvenile lion, but rather worked mostly in the pet store, but I find that she was an employee with regard to being permitted to be in contact with the juvenile lion as shown here without adequate barriers or distance.

If it matters how much the lion weighs, I find that the lion weighs somewhere between 80 and 100 pounds.

All right. Now, with regard to the bear and the tiger in Paragraph 42, Mr. Coleman's citation here -- let me find that. This inspection report is CX-20, and the allegation contained in the inspection report -- and I realize we're no longer working off of the inspection report. We're working off the complaint, but just to see what the problem was with regard to the enclosures that had the public and the bear in them at the same time, I want to refresh myself.

All right. I had read CX-20, page 2, and it's basically the same situation as Paragraph 45, and so I incorporate the comments I made with regard to 45. I also add the observation that the bear is reported by the exhibitor to be a 700 pound black bear in Paragraph 42.

Mr. Mazzola has argued that the trained handler is able to direct the position of the head of the bear and, in addition, the bear is chained to this box, which -- let me see the picture here. Picture CX-21, page 4 shows the chain, and CX-21, page 5 is another picture, but really just showing the patrons either -- probably leaving -- after their photo has been made.

Again, this is an extraordinary bear and extraordinary trainer, but I understand why APHIS cannot permit the public to be placed next to a 700 pound black bear with no barrier between the public and the animal. So I do find a violation of Paragraph 42 with regard to the bear.

Now, the tiger, I'm looking at CX-21, page 6 and CX-21, page 7. These are good pictures that we've spent a lot of time on . . . and I wanted to look at what Mr. Coleman is concerned about here. At this point he's mostly concerned that the panels, that go up to the table that prevent the tiger from turning his head and reaching the patrons, are not permanently fixed, maybe not permanently; are not fixed, that they are movable. Let me see exactly what that concern is in the inspection report.

Okay. I'm reading from the inspection report, CX-20, page 2. "During the photo shoots with an adult tiger, two fence panels are used as a barrier between the viewing public and the animal."

Now, viewing public, what we're talking about here are the people who are getting their photos made. So we can call them the public, but we know now that APHIS also calls them the viewing public.

"These fence panels are not secured to the box on which the animal sits and could be moved by the tiger. These fence panels must be secured in place to create an adequate barrier between the viewing public and the animal."

All right. Mr. Mazzola testified as to why he wanted them to be movable, so that the trainer or the handler could quickly get from the back of the cat to the front of the cat and vice versa without a problem because there might be an instance in which the cat needed to be released or in some other way dealt with, and so Mr. Mazzola did not feel it would be safer to fix these fence panels.

That may be. It may be there needed to be some other solution, some other barrier. Mr. Mazzola said, well, there's just no way the tiger can turn around to where the people are because of the chain set-up we have. We've got not only his chain that's around his neck, which starts out being -- it starts out being eight feet and gets to be six feet as I recall, but he's got two other chains that chain his head, the eye bolt on one side into the eye bolt on the other side, which prevent him from turning his

head around to reach the people.

Well, once again, something might go wrong. What the inspector is asking for here is a redundant safety measure, a safeguard, a protection that in case something does go wrong, there is a barrier so that in any case the public would not be contacted by the tiger's front parts.

At this point there is not a concern expressed about the back feet and the concern, for example, that Dr. Gage expressed about the tiger begin able to use his back feet in a way that could cause injury to the patrons. At this point the only concern is that those panels are not secured to the box.

This is a very close question for me. When in doubt, err on the side of safety. I don't know; I don't know if there was a mechanism, carabiner or something by which these panels could be affixed to the box in such a way that they could be released by the trainer if it was necessary to get to the head of the cat and the trainer was at the rear of the cat. I don't know.

I'm sorry that this couldn't have been worked out. It seems like such a small thing now that we look back over all of this, but particularly since I now know that APHIS' position is that there should not be any contact at all with any part of the tiger by the public, I'm going to find that there is a violation here.

All right. Now let's look at Paragraph 41. I'm looking at CX-18. I'm also looking at CX-17. The complaint about the bear is the same, and I incorporate the comments I've already made. The complaint about the tiger is the same, that the two fence panels -- I'm going to read this about the tiger.

I realize I'm working backwards in time. So in a way that's a little awkward. It was just easier for me to do, but on August 16th, 2005, the inspection report says this about the photo shoots with the adult tiger. It says, "During the photo shoots with an adult tiger, two fence panels are used as a barrier between the viewing public and the animal. These fence panels are not secured to the box on which the tiger sits and could be moved by the tiger. The licensee has stated he feels it is safer for these fence panels to be movable in case of an emergency or if the animal becomes agitated. These fence panels must be secured in place to create an adequate barrier between the viewing public and the animal."

So I incorporate the same comments that I made with regard to Paragraph 42 and previously, and I do find violations with regard to both the adult bear and the adult tiger as indicated in Paragraph 41.

Now, with regard to Paragraph 40, I'm looking at CX-16 and CX-15. Once again, the only complaint with regard to the adult tiger's photo

shoots was that two fence panels are used as a barrier between the viewing public and the animal. These fence panels are not secured to the box on which the tiger sits and could be moved by the tiger. The fences must be secured in place to correct this.

And, again, the concern for the bear is the same as previously, and I incorporate the comments that I have made with regard to both the adult black bear and the two adult tigers in previous paragraphs.

Now, Paragraph 39, we get so spoiled when we have pictures. I'm looking at CX-14, the comments with regard to the tigers, and I'm reading from this inspection report dated August 19, 2004, are, "During the photo shoots using adult tigers, two fence panels are used as a barrier between the viewing public and the animals. These fence panels are placed on each side of the tiger table, but are not secured in place to stop the animal from potentially moving the fencing. These fences must be secured in place to correct this."

And with regard to the bear, the description of the bear's situation in the photo shoots is essentially the same. It references an adult 720 pound bear, and I incorporate the comments I have made in previous paragraphs, and I do find a violation with regard to --

MS. JUAREZ: Your Honor, there are photos that accompany that inspection report found at CX-53.

JUDGE CLIFTON: Where are they found?

MS. JUAREZ: CX-53.

JUDGE CLIFTON: Thank you.

Okay. Now, I'm looking at [paragraph] 39, and I'm reading about the black bear, and I'm not finding any allegations about the tigers; is that -

MS. JUAREZ: That's correct, Your Honor.

JUDGE CLIFTON: That is correct

MS. JUAREZ: It was a notice.

JUDGE CLIFTON: Okay. So this is the notice. Okay. Paragraph 39 is not an alleged violation with regard to the tigers, but provides notice of a subsequent one.

The only violation that could be remedied by some sort of a civil penalty or otherwise would refer to the black bear.

All right. Let me look also at the photos in CX-53. All right. I'm looking at CX-53, page 3. These are children. That's even more of a concern to me and to APHIS.

All right. I do find a violation for the same reason with regard to the adult black bear and incorporate the comments I've made on other paragraphs.

All right. Paragraph 38 just sets up these handling violations. So there's not a particular alleged violation there.

All right. Thirty-seven is the notice that the photo opportunities with the bear required adequate distance or barriers and is not a direct allegation.

In addition, I wanted to comment. I have Dr. Carter-Corker's letter in which she notified Mr. Mazzola that she agreed with Drs. Kirsten, Coleman, and -- or Drs. Kirsten and Markin and Mr. Coleman -- that the bear photo shoots required barriers or adequate distance, and I want that to be referenced with regard to my findings here, and I think I need help as to identifying the exhibit numbers.

MS. JUAREZ: CX-162, Your Honor.

JUDGE CLIFTON: CX-162. Thank you.

Okay. Now, with regard to Paragraph 36, let me deal with all of these together. We're starting with the Paragraph 33, 34, 35, and 36. They all have to do with whether the veterinary care plan was available for inspection or whether it even existed, whether it was even being maintained, and whether it was violated by failing to employ an attending veterinarian.

You know, this is difficult for me. When I look at Mr. Mazzola's book, which I didn't actually examine fully -- I just compared some of the pages with some of the pages -- I couldn't really comprehend what was in there. It was a gathering of information that was too difficult for me to analyze.

I understand Mr. Mazzola's problem. Do I keep my book home in case I'm being inspected there? Do I take it on the road in case I'm being inspected there? I realize it's difficult.

I would think that an exhibitor who travels would always have his plan with him when he travels, and if a traveling exhibition is going on at the same time as inspections at the home operation, which I don't think would happen very often because I don't think there are enough inspectors to be at both places on the same day, but if that were to happen, I think it would be better to have your plan at your traveling exhibit or at least photocopies out of it of the current information, current inventory of animals, all of the vet information that's current, what your plan is with regard to any kind of escape or need for euthanasia or anything that would be a disaster. I would think you would have to have that with you at all times when traveling.

All right. Paragraph 33 is just the notification. So I don't have to concern myself with that.

And then Paragraph 34 also sets up the following paragraphs. So I don't need to make any specific finding until I get to Paragraphs 35 and

36, and these allegations are just that the plan was not available for inspection. So I don't have to understand whether the plan was incomplete, whether it was inadequate, what was in it or what was not. I can make the finding that it was not available for inspection.

So I do find a violation of Paragraphs 35 and 36.

All right. Paragraph 32, this is the situation in which Mr. Mazzola was happy to have Dr. Harlan inspect, but not Randy Coleman, and Mr. Mazzola says it's because of what Randy Coleman said to him when approaching him at his exhibition, something about the lion looking like he had been beaten by a baseball bat.

I cannot make sense of Mr. Mazzola coming so uncorked even if that comment was made. I know he loves his animals. I know that it would be very irritating to him to have somebody think he had done that to an animal, but if any of my acquaintances had come up to said that to me, I would know they were not serious. I have a hard time believing that Mr. Mazzola was so upset at Mr. Coleman over something like that.

I think Mr. Mazzola did not want to be inspected or he was so angry at Mr. Coleman that he just didn't want Mr. Coleman inspecting him. That's what I think happened.

The testimony of Dr. Goldentyer that APHIS licensees cannot be the ones who choose how to run the program -- my words, not hers -- is so true. I mean, the idea that you would choose your inspector or choose when they inspect you is ludicrous.

I do find that it was a refusal to allow inspection when Mr. Mazzola told Mr. Coleman he could not inspect on August 3, 2006. So I do find a violation.

All right. Thirty-one, the reason I do not think Mr. Coleman extorted Mr. Mazzola on August 8th, 2006, is that it would be so out of character with everything that I know about Mr. Coleman.

I know that Mr. Coleman enjoys his work as an APHIS animal care inspector. I can tell that by the way he operates here in the courtroom. I can tell by the meticulous care with which he addressed each of these situations and the infinite patience he exhibited. I can tell that this would be the last thing that would occur to him, to try to extort money from an exhibitor.

So I believe that when Mr. Mazzola said that he had done that, Mr. Mazzola was just trying to get rid of him as an inspector. The confirmation that I have that Mr. Coleman would not engage in any kind of extortion or accepting a bribe comes when Mr. Mazzola makes a telephone call to him. I don't remember the date. Let's see. Let's get that pinned down.

What exhibit is that telephone call reported by -

MS. JUAREZ: CX-54, Your Honor.

JUDGE CLIFTON: CX-54

MS. JUAREZ: I think it's specifically referenced on page 5 of that exhibit.

JUDGE CLIFTON: Yes. Okay. I've got it marked here.

Okay, but what I want is Mr. Coleman's -- yes, that's right

MS. JUAREZ: Page 12 of the statement.

JUDGE CLIFTON: Where is it?

MS. JUAREZ: Page 12.

JUDGE CLIFTON: Page 12. Okay. Right, right. When I read CX-54, I find that Mr. Coleman received the telephone call from Mr. Mazzola, and during the call -- I'm reading Mr. Coleman's report of one of the things that happened during the call -- Mr. Mazzola said, "I realize it would be cheaper to pay you than to pay my stupid attorney and go through this trial. So when can we get together to talk about that?"

What Mr. Coleman reports here is that he quickly got extracted from that conversation, and I'll read that in a moment, then ended the call, called his supervisor and the regional office, was advised to go to the Office of the Inspector General to report it, and he did that.

Then CX-54, page 5, includes the synopsis of that report confirming that, in fact, Mr. Coleman did on January 5, 2007, refuse the bribe and immediately reported to his supervisor.

Now, this says, CX-54, page 5, says that that telephone call was recorded. So I don't have to rely just on what Mr. Coleman said about the call. It was recorded. We know that's what he said in the call.

So this is how that recording goes. I'm going to read it again. Mr. Mazzola said, "I realize it would be cheaper to pay you than to pay my stupid attorney and go through this trial. So when can we get together to talk about that?"

Mr. Coleman then asked, "Sam, are you trying to bribe me?"

Mr. Mazzola replied, "Well, you remember when we were at the fair and I refused you to inspect the animals."

Mr. Coleman said, "Yes, I do."

Mr. Mazzola said, "Remember I showed you my checkbook when we were standing between the two barns and I asked you how much it would cost to stop these stupid inspections."

Mr. Coleman said, "No, Sam, I don't. That never happened. I think we need to end this call now until the hearing is over. I will try to get you something about the letter by the end of the day."

And that's in reference to getting for Mr. Mazzola a copy of the denial of his license application.

So all of this persuades me that Mr. Mazzola's allegation that Randy Coleman had attempted to extort from him money was false. I, therefore, find it absolutely incomprehensible that Mr. Mazzola would go on air on a radio station and say something to the effect of he had gotten Randy Coleman busted for accepting bribes.

I think of all of the evidence in this case, that is what offends me the most.

I do find that the action that Mr. Mazzola took with regard to making a false report with the Office of the Inspector General, saying that Randy Coleman had solicited a bribe, I do find that that absolutely is threatening, intimidating, harassing, and abusing an inspection official, and that it's the worst kind of threatening and harassing and abusing.

I further find it of great concern to me that in his testimony -- I think it was just yesterday -- Mr. Mazzola confirmed that what he really wanted was, both Dr. Kirsten and Mr. Coleman on different occasions, was for them to throw a punch at him. He really wanted to goad them into fighting him so that he could basically beat them, beat up on them. He really did regard APHIS as his enemy throughout this. He had no concept that things can change and that the activities that he had enjoyed as an exhibitor without being stopped from doing in the past, could be stopped.

All right. Paragraph 30, Mr. Mazzola admits the allegations in Paragraph 30. It's clearly abusive. It's clearly harassing, and it clearly should not be tolerated in a licensee. The allegations of Paragraph 30 are proved.

All right. Paragraph 29 is an introduction basically to the paragraphs I've just been through.

And Paragraph 28 is pretty much a notice provision, not that you'd have to give notice to a licensee that such behavior was unacceptable, but it was done very well. The Office of Inspector General counseled Mr. Mazzola.

Mr. Mazzola started out well. When he first appealed to Dr. Carter-Corker, he wrote a very thorough, long letter. It took him a lot of time, and I appreciate that he tried to do it that way.

Then whatever happened, he then wrote his other letter which was to apologize to say he'd like to work with -- basically with his inspectors, his inspector and his supervisor -- to try to work it out, and you know, he was looking forward to resolving any problems.

Then everything just went on as it had been. I don't understand it. I don't understand why Mr. Mazzola gave up on the process of trying to achieve some compromise that might have worked.

Now, had he done so, had Mr. Mazzola agreed to make the fence panels stationary, fixed to the platform, had he agreed to put a lid on the photo shoot enclosure, that would not have been enough in the long run because in the long run, he still would have had to have a barrier between the tiger and the public getting their pictures made. So there would have constantly been more requirements on him, and I understand that. But he would still be an exhibitor. He would still be able to do things with his employees in contact with his animals. He'd still be able to arrange certain types of photos with the public so long as that barrier was between the juvenile or adult cats and the bear and the patrons. So I don't know how it all came to this.

All right. Now, I think I need a break, and then I'll go into the remainder of the allegations. So let's take -- I know it's kind of late. I hope you're all able to stay. Let's come back if you will at 6:15.

(Whereupon, the foregoing matter went off the record at 6:05 p.m. and went back on the record at 6:14 p.m.)

JUDGE CLIFTON: All right. We're back on record at 6:14.

I have a question. Ms. Juarez, with regard to Paragraph 17

MS. JUAREZ: Yes.

JUDGE CLIFTON: Is the reason that APHIS is not asking for any remedy except a cease and desist order for Paragraph 17 because those allegations are going to be litigated in some other venue or at least they're being investigated in some other venue?

MS. JUAREZ: No, Your Honor. The reason that APHIS has taken the approach that it has is because it wanted to be fair in terms of providing Mr. Mazzola with notice of the fact that the license was invalid. It brought to the Department's attention in connection with the investigation, but before that time we had no knowledge of that in part because of the false information that had been provided.

But nevertheless, in an abundance of fairness to Mr. Mazzola, the agency believed that a cease and desist order would be appropriate.

JUDGE CLIFTON: I see. So you're also not asking me to make a finding with regard to Mr. Mazzola operating without a license during those dates, August 13, 2003 through on or about August 3, 2006, because you have other allegations which the operating without a license can be dealt with in cease and desist orders?

MS. JUAREZ: Your Honor, we were sort of thinking of a finding in connection with that issue.

JUDGE CLIFTON: Well, you know, no notice is no notice with regard to findings as well as remedies. So I don't think that's a consistent position

MS. JUAREZ: Well, I guess I believe it is to the extent that when

the agency is answering by the fact that it's been provided with misinformation and once that information comes to light, it certainly brings it to the attention of the person who is involved. I can see where a civil penalty may not be appropriate, but in any event, I certainly don't want to debate this issue in risk of upsetting any thoughts that you had in this regard.

JUDGE CLIFTON: You're afraid I'm going to get cranky, are you

MS. JUAREZ: Yes.

JUDGE CLIFTON: Yeah, I would. I'd get cranky over it.

My thought is Mr. Mazzola was sending in his application forms for renewal, sending in his money. He was getting a license back. Now, it may have been a license to a corporation that wasn't valid, but I don't think I want to make a finding on that. MS. JUAREZ: Okay.

JUDGE CLIFTON: Are you willing to abandon it?

MS. JUAREZ: Yes, Your Honor.

JUDGE CLIFTON: Thank you.

All right. I do not need to make any findings with regard to Paragraph 17 because I have just twisted APHIS' arm and APHIS is willing to abandon it.

All right. Now, I'm going to go in the right order. After 17 I'm actually going to go to 18, and with regard to Paragraph 18, Mr. Mazzola said he didn't have written notice. Well, he did have Randy Coleman's phone call. He also had mailings that he had refused to pick up.

Now, Mr. Mazzola said, "I was out of town." Well, I can't believe he was out of town on all those dates. APHIS certainly tried to tell Mr. Mazzola that his application for license had been denied, and I think Mr. Mazzola knew it from Mr. Coleman's phone call or that exhibit that we just talked about. What is it, 54?

MS. JUAREZ: Yes, Your Honor.

JUDGE CLIFTON: CX-54, page 12, confirms that on January 5, 2007, Mr. Mazzola was notified by Mr. Coleman that the Eastern Regional Office denied the application and had notified Mr. Mazzola by mail.

I understand why Mr. Mazzola went ahead and appeared, to keep on with business as usual at the Ohio Fair Managers Convention. Number one, he had a theory all along that his license was wrongfully denied, was wrongfully not renewed, and then the application process not followed through for a new one, and that he could get reinstatement.

Now, when I got involved in the case and was involved with Mr. Mazzola in telephone conferences, I told him that that would not be my

view; that my view would be if APHIS denied his license renewal and did not issue him a new license based on a new application and was wrong, he still didn't have a license. He would still be engaging in unlicensed activity.

But I also understand from a businessman's point of view that it's difficult to cancel engagements when you're already scheduled to be there, and of course, he was hoping to get more engagements. He was hoping to remain in business.

Nevertheless, I do find that Mr. Mazzola committed the violation described in Paragraph 18.

Now, with regard to the Paragraph 19, I need some help here. I don't think there's proof of this if the animals weren't there at the Cleveland Sport Travel and Outdoor Show. If what was there was the set-up to bring the animals, and I don't recall whether the evidence showed the animals were outside in their truck or whether the evidence failed to show that the animals were brought to this place of exhibition on March 14, 2007.

So I'm going to go off record and ask that if the Complainant has evidence of this that they help me find where it is in the record.

We'll go off record now at 6:23.

(Whereupon, the foregoing matter went off the record at 6:23 p.m. and went back on the record at 6:30 p.m.)

JUDGE CLIFTON: All right. We're back on record. It's 6:30.

MS. JUAREZ: Okay. We have two pieces of evidence that we discussed in this case in connection with the transportation of animals to the IX Center. And the first one is CX-111, which is one eleven. And it's a memorandum prepared by Randy Coleman to Rick Kirsten. And in the second full paragraph the third sentence ACI Coleman documents he had showed up at the event with one bear, but was not allowed to unload.

JUDGE CLIFTON: Okay. Good. Thank you.

MS. JUAREZ: Okay. And then beyond that, Complainant sought to introduce what was marked as CX-165. It was a video clip from a local news channel, WKYC. And although you allowed Mr. Coleman to testify concerning what he observed in the video clip, you rejected our video based on Mr. Mazzola's objections, I guess. And in any event, Mr. Coleman discussed what he observed in the video on pages 3296 through 3297. And specifically at the top of 3297, or at the very bottom of 3296 and the top of 3297 Mr. Coleman testified additionally they showed Mr. Mazzola's trailer after he was asked to leave the IX Center, they showed Mr. Mazzola's trailer pulling out of the IX Center, which concerns me because he actually did transport animals in his trailer with

the intention of exhibiting at the IX Center.

"Mr. Coleman, you indicated that the newscast dealt with the bear wrestling event at the IX Center."

"Yes."

"Did that bear wrestling event take place in March 2007 at the IX Center?"

"No, not to my -- I don't know. I don't know."

"Okay. Did the newscast identify the name of the bear that was intended to be exhibits as a wrestling bear?"

"They did."

"What was the name of that bear?"

"Caesar."

"Did the newscast contain an interview with Caesar's owner?"

"Yes, it did."

JUDGE CLIFTON: Thank you. I appreciate that reference to the evidence.

All right. I do find --

MR. MAZZOLA: Before you, I can I get a chance to respond?

JUDGE CLIFTON: Mr. Mazzola?

MR. MAZZOLA: All right. The trailer that we use to move bears is also the trailer that we use to move our equipment in.

The news clip contained footage from the year before of us wrestling the bear. The bear was never at the IX Center. Nobody-- nobody's quote here by Bob Petersen, the guy that's the owner of the IX Center saying we saw the bear and told him to put it away, or maybe -- but the bear was never there. The trailer -- the bear trailer was there. It's the only evidence that anybody saw. And that's the same trailer that, you know, we have our equipment in. The bear was never there.

Just because they saw the bear trailer leaving doesn't mean the bear was in it.

JUDGE CLIFTON: Well, do you know who Mr. Dominic Bramante is, Mr. Mazzola?

MR. MAZZOLA: He's a security guard.

JUDGE CLIFTON: All right. And I believe it is he who told Mr. Coleman that you showed up with one bear and were not allowed to unload.

MR. MAZZOLA: Yes. And he probably assumed that there was a bear in the trailer. I mean, because that's what we do. But we never were even allowed to open the trailer or anything to -- he wouldn't know. Yes, we had to park in the back of the building.

You know, to be guilty of something, I mean that's one thing we

didn't do.

I mean Dominic wasn't brought in here to be able to dispute -- and this is actually third party, too. I mean -- I mean Dominic wasn't brought in here to see did you see a bear, was there a bear there. We don't have his notes. This is a third party's notes. So there could have been it was a bear trailer, was a bear -- you know.

And the footage was definitely a year before, they showed wrestling the bear. That's what happened.

So believe me, I didn't -- the bear wasn't there.

Now I wouldn't show up with one bear. I mean, I'd show up with a slew of animals that all would have fit in them cages. The trailer held a lot more than one bear.

MS. JUAREZ: Your Honor, I would like to also direct your attention to CX-59. And this is the schedule of events.

According to the Sport Show website, and this CX-59 page 3 the bear was scheduled to perform at 1:30 p.m. that day and again at 4:30 p.m., and again at 7:00 p.m. that day.

MR. MAZZOLA: All the animals go in. They only let you bring the trailer into the IX Center the day of the event. All that stuff would have been done before. So there was nothing there.

You can't prove it by theory what you think.

JUDGE CLIFTON: Okay. It's not going to make that much difference in the main scheme of things, but I'm going to find that that particular paragraph has not been proved. That is paragraph 19.

My reason for finding it not proved is that we have not had an opportunity to test the observations of Mr. Dominic, the--we have not had the opportunity to test the observations of Mr. Dominic, spelled D-O-M-I-N-I-C Bramante, B-R-A-M-A-N-T-E, Chief of IX Center Security. It is he that reported to Mr. Coleman that Mr. Mazzola had showed up at the event with one bear, but was not allowed to unload.

MS. JUAREZ: Your Honor, just so the record is clear in this case, I'd also point out that this afternoon when Mr. Mazzola was essentially providing a response to Dr. Goldentyer's recommendation was the first time that Mr. Mazzola ever stated that there were no animals at the IX Center throughout this entire proceeding.

JUDGE CLIFTON: Well, I did write down a while back, and I don't know when I did this, that Mr. Mazzola's position on paragraph 19 was that he got thrown out and that his equipment was set out. And I believe he also indicated that Larry Wallach was the exhibitor, but I see that Larry Wallach was definitely not really perceived as the exhibitor of Mr. Mazzola's exhibit.

All right. I don't find paragraph 19 proved.

Okay. With regard to the Vito's Pizza incident that is referenced in paragraph 20, I do understand why Mr. Mazzola might have thought that Steve Clark's license was adequate for the act or the exhibition to go on. But I also understand, particularly from Dr. Goldentyer's testimony why when it is Mr. Mazzola's animals, and I remember the photograph showing Mr. Mazzola's truck with Mr. Mazzola's company names and the like, that the use of Mr. Clark's privilege to exhibit was merely a cover, I'll call it, for Mr. Mazzola to exhibit.

So I do find that the violation contained in item 20 has been proved, but with some sympathy for Mr. Mazzola thinking he could do it.

I also find that the adverse inference from failing to supply the documents in response to the subpoenas or subpoena is particularly important here. We had some printouts from a bank or something in regard to this, as I recall. I didn't find it was persuasive because we didn't have the full documents. So the failure of Mr. Mazzola to bring his documents is even more problematic.

So for a number of reasons, and especially the adverse inference I draw from Mr. Mazzola's failure to produce the documents responsive to the subpoena, show me that the violation in paragraph 20 has been proved.

Now with regard to paragraph 21, paragraph 21 and 22 Mr. Mazzola's comments were "I did it." Those paragraphs have been proved, 21 and 22.

With regard to the skunks. And they are referenced in paragraphs 23 and 24, two skunks in paragraph 23, one skunk in paragraph 24. I find the violations have been proved. They're proved even without the adverse inferences, but I also apply those.

I understand Mr. Mazzola's thinking he could do this and that these were Bill Coburn's skunks and he was a licensee. And Mr. Mazzola did have the permit of some kind, I've forgotten what it's called, and the skunks were consigned to him. So Mr. Mazzola had some valid mitigating circumstances, but these are violations nevertheless.

All right. With regard to paragraph 25 this is one of those where you're not asking for any remedy except a cease and desist order. And what is the reason for that with regard to paragraph 25?

MS. JUAREZ: We had a limited amount of testimony in connection with that particular provision, Your Honor.

JUDGE CLIFTON: All right. You can get the cease and desist order from the other like violations. Would you be willing to abandon this allegation?

MS. JUAREZ: Yes.

JUDGE CLIFTON: Thank you. All right.

I make no finding with regard to paragraph 25. All right.

Paragraph 26. I have forgotten what was going to happen. Was this that there was going to be Mr. Mazzola there to take photos, according to the store employee?

MS. JUAREZ: That's my recollection, Your Honor. Also, there were photographs inviting the public to have their photos taken with the animals.

JUDGE CLIFTON: I remember now. It was a baby tiger.

MS. JUAREZ: Yes.

JUDGE CLIFTON: Okay. Paragraph 26 has been proved, and that is that there was an intention to operate. Now let me think about that. An intention to operate. I'm not sure that an intention is adequate. We have proof of an intention.

MS. JUAREZ: Your Honor, section 2.1(a)(1) of the Animal Welfare Act regulations states: "Any person operating or intending to operate as a dealer, exhibitor or operator of an auction, sale except persons who are exempt from the licensing requirement under paragraph (a)(3) of this section must have a valid license."

Your Honor, I also believe there's a case involving, I think it's *Peterson.* It's a zoo. And they had advertisements on the road billboards, if you will, for exhibition of animals. And they were found to be exhibitors.

JUDGE CLIFTON: But I'll bet they actually had the zoo.

MS. JUAREZ: They did have the zoo. But I think there's a substantial amount of evidence in this case to show that Mr. Mazzola had animals to exhibit.

JUDGE CLIFTON: Yes, but that's a little different. The way paragraph 26 is worded "and/or operating as an exhibitor." Do we have evidence that Mr. Mazzola actually did appear for the purpose of offering photos with baby tigers?

MS. JUAREZ: Your Honor, with regard to the inspection report, CX-138, ACI Coleman documented a telephone conversation with Mr. Mazzola in the fourth full paragraph. And the citation is: "Today the white skunk remains for sale in the front window. Signs, advertising photos with the baby tiger are also on display. Mr. Mazzola was contacted by phone and stated that the tigers used for the photo shoots are owned by his 'front man Billy West' who is not USDA licensed. He also said that Mr. West had been told by Mazzola that photos using these animals required USDA license."

JUDGE CLIFTON: This one's difficult in that I said I would draw the adverse inferences, that I would be likely to draw the adverse

inferences and this is a perfect example of why you need the response to the subpoena. Because it would show whether there was any expense or income or the like with regard to what actually did happen on the dates that the tigers were advertised that they would be available for photo opportunities in the store.

MR. MAZZOLA: I think I remember with this inspection where Randy said that he confirmed who purchased the tigers from -- that Billy purchased the tigers, that they were really his. We were reading that he confirmed that the tigers were purchased by him.

JUDGE CLIFTON: Yes, but Billy doesn't have a license.

MR. MAZZOLA: He don't need one to own them. And I stated that I told him he needs a permit, and I told him don't do it and it wasn't done. Randy sent him a package after that to be licensed -- to get a license. I told him don't do it, you're going to jeopardize yourself from getting a license. So he didn't do it.

I know that -- and he sent them back.

JUDGE CLIFTON: I think we had your testimony about this, but it was so long ago I don't remember it very well.

MR. MAZZOLA: Yes. I told -- I told him that he needed a license. I told him don't do the event, especially after Randy talked to me. And he sent Billy a package to be licensed or to try to get licensed.

JUDGE CLIFTON: Ms. Juarez, anything further?

MS. JUAREZ: Your Honor, the exhibition was going on at Mr. Mazzola's store. And to the extent that Mr. Mazzola refused to answer any questions regarding the personal or professional relationship that he had with Mr. West, I believe that an adverse inference is appropriate in that regard as well.

JUDGE CLIFTON: And you say the exhibition was going on his store. Did he know as a matter of fact that it happened or just that it was being promoted?

MS. JUAREZ: That it was being promoted, and Mr. Mazzola certainly didn't indicate that it would not occur with he spoke with Mr. Coleman on the phone.

MR. MAZZOLA: By December I didn't really own the store.

JUDGE CLIFTON: Well, see, there I have to draw adverse inferences with that. But I think this was a save. In other words, Mr. Coleman prevented the exhibition from happening by intervening so it didn't happen is what I think happened. Which means even though you read that, if you intend to exhibit, you have to have a license? So that means you're prohibited from promoting an exhibition which would be in violation even though you don't actually go through with it?

MS. JUAREZ: I don't know that.

JUDGE CLIFTON: I guess part of my problem is what we typically find actionable: activities not thoughts. But the promotion is more than just a thought, more than just an intention to exhibit.

MS. JUAREZ: But, Your Honor, you know if you look at page 3341, and this was particularly relating to the December 8, 2007 allegation that you are not going to make findings on, but Mr. Coleman explains that we were informed by another USDA official that Mr. Mazzola was in fact taking photos with a baby tiger and the public approximately a week before the inspection. And the inspection to which he refers is the December 18, 2007 inspection.

So there -- it was certainly USDA officials had observed animals in the store shortly before the December 18th inspection.

JUDGE CLIFTON: So are the animals in the store being exhibited in the photo shoot?

MS. JUAREZ: Yes, Your Honor. If they're baby tigers?

JUDGE CLIFTON: Yes.

MS. JUAREZ: Yes. In fact, I think the skunk is on exhibit.

MR. MAZZOLA: Your Honor, I know he brought them in and out of the store bottle feeding them and stuff like that. But nobody was doing any photos. And we did prevent that. I told him I didn't need any more trouble.

JUDGE CLIFTON: Okay. I am going to find a violation of paragraph 26 in this regard: The baby tigers were on display in the store. I don't have evidence that there were photo opportunities with the baby tigers once Mr. Coleman warned against that. Photograph opportunities with the baby tigers were being promoted by the sign in the window at the store. The adverse inferences that I draw lead me to conclude that it is Mr. Mazzola who is involved with the baby tigers being there to be seen because I don't have the evidence that would show that it isn't him. But that's just as well because at this stage I don't want to get Billy West in trouble either.

All right. Let's move on. 27. Now we have the skunks. Paragraphs 27 and 28. No, this is a different skunk. I already did the other skunks. Okay. Now why do I have this skunk here? This is more skunks in December? Okay.

All right. So the only defense here is that it's not my store.

MR. MAZZOLA: It's not my store.

JUDGE CLIFTON: Okay. What you told me, Mr. Mazzola, in your testimony about the remedies is that you did not legally own the store?

MR. MAZZOLA: Right. But also the skunk wasn't ever sold.

JUDGE CLIFTON: Oh, that's true. This just says offering to sell.

MR. MAZZOLA: Yes.

JUDGE CLIFTON: Okay. All right. Well because I'm drawing the adverse inference, I'm going to find that it is your responsibility for having offered the skunk at the store. To the extent that you may have no longer been the owner of the store, I don't have the response to the subpoena that would prove that. So it's on you, Mr. Mazzola.

All right. Now I want to deal with the licensing issues and then I want to deal with credibility of witnesses, then I want to enter my order.

It's already 7:00. I'm willing to keep going if you all are.

Ms. Juarez, how do your people feel with that?

MS. JUAREZ: We're prepared to move forward.

JUDGE CLIFTON: All right. Mr. Mazzola?

MR. MAZZOLA: Go ahead.

JUDGE CLIFTON: Splendid. All right. The licensing issues.

When Mr. Mazzola sent in his renewal application, he waited until the very last minute. I think the termination date was October 12, and I think that's the date APHIS got the package.

The documents were not regular in that the "Inc" which indicates corporation had been blacked out by Mr. Mazzola. So in the renewal block instead of it saying "World Animal Studios, Inc." was the licensee, it said "World Animal Studios." Well, if World Animal Studios is not an Inc. anymore, then what is it? Is it an individual, or is it a partnership? If it's an individual, then the proper way to apply would have been Sam Mazzola doing business as World Animal Studios. If it's an individual, you've got to have the individual's Social Security number.

The APHIS office had already figured out that the number was not Mr. Mazzola's Social Security number in a telephone conference with him at some point. I may be getting the timing of this mixed up. But Mr. Mazzola had intentionally all these years withheld his Social Security number from APHIS. And I think that showed very poor judgment on his part, a little paranoia and the thwarting of APHIS' ability to proceed.

So when APHIS decided not to renew that license, it was not some sort of pretext, it was not some sort of an agenda, it was not some sort of arbitrary and capricious singling out Mr. Mazzola for unfair treatment. It was a genuine recognition of the fact that the corporation had not been valid for years, that it had been a mistake to issue the corporation a license. That now what essentially was involved was an individual who had not provided his Social Security number.

Now given all of those circumstances, it was proper to deny the

renewal.

Then when Mr. Mazzola applied to be a licensee, it was necessary for APHIS to exercise its judgment on whether Mr. Mazzola was fit to be licensed. And although Mr. Mazzola believes that APHIS should not, until it had some sort of a review by a court or an administrative law judge or something, have made the decision on its own, it has to. With every licensee application, it has to evaluate whether the applicant is fit to be licensed.

Now Mr. Mazzola brought out in this hearing the evidence that there are times when the Judicial Officer, for example, has at least one time we know about where the Judicial Officer has instructed APHIS that its reason for having denied the application was not sufficient reason to deny it and to take another look. And subsequently, APHIS did license that business. But, of course, a lot of things may have happened to make that licensee more fit by the time APHIS did issue the license. And there may have been more information available. So that is not to say just because the Judicial Officer found that the particular reason given was not sufficient, that is not to say that APHIS was wrong in denying the application.

The Judicial Officer said what he did because there was a hearing with lots of evidence, a lot more information than had been provided by the applicant at the time that it applied for its license.

Now in this case we also have a lot more information, I think, than Dr. Goldentyer had at her fingertips when the license application was denied. I'm sure when Mr. Mazzola saw those words about unfit, he was thinking of who better cares for his animals than I do. I love my animals. How dare they say I'm unfit. But I find there's another whole story here.

The story is about Mr. Mazzola's refusal to be regulated, refusal to be controlled by APHIS. Now APHIS has a job to do that Congress gave the Secretary of Agriculture. And APHIS must regulate. APHIS must evaluate. And based on the information that APHIS had at the time it denied the application, it was entirely justified.

I further find that knowing all I know now know, no Animal Welfare Act license should be issued to Sam Mazzola or businesses that he controls. And it's because he:

Number one, rejects APHIS' supervision as incompetent;

Number two, regards the majority of the people that he comes in contact with who work for APHIS as liars in different aspects, and;

Number three, fails to have an appreciation of APHIS operations or the legal ramifications of Congress enacting an Act, delegating to the Secretary of Agriculture the authority to promulgate regulations,

delegating to the Secretary of Agriculture the authority to enforce those regulations and to interpret them. And for all those reasons Mr. Mazzola has gotten crosswise with APHIS in such a destructive and damaging way that that relationship is irretrievably damaged, irretrievably broken.

I know Mr. Mazzola wanted so much to be back the way it was, but it just -- it just cannot occur. Throughout the entire four weeks of testimony I have seen exhibited over and over again Mr. Mazzola's continuing contempt for APHIS and its employees. Nothing would change if Mr. Mazzola was licensed in any capacity.

I know he blames all of the conflict on APHIS' enforcement. But that's not what it stems from.

If APHIS was wrong; let's say -- let's start out with whether the panels on either side of the tiger's platform during photo opportunities should have been fixed to the platform. Let's assume APHIS was wrong with that, that you didn't need one more safety measure or that that wouldn't make it safer.

A licensee's obligation is to cooperate with APHIS nevertheless, even if APHIS has made a mistake. Because the trust that is formed when there's cooperation and the working together for the benefit of the animals is assured. And there's no trust. Mr. Mazzola doesn't trust APHIS; APHIS can't trust Mr. Mazzola. And so any continued licensing relationship between the two would be disastrous in my opinion.

I'm so sorry it came to this because I believe Mr. Mazzola is a very talented animal trainer. And without having an Animal Welfare Act license his opportunities in this country are extremely limited. What basically happens is his animals are pets. There're very severe limits on what he can do with them. I don't even know if he can sell them. With regard to exotic species like tigers and bears, I especially don't know if he can sell them.

I just think this result that we have arrived at is a sad, sad situation and yet the appropriate one, the right one given all the circumstances.

And I want to talk a little about the credibility of witnesses in my reaching this decision. Mr. Mazzola characterized himself as honest and he characterized himself as being willing to risk the outcome of this hearing because at least he'd have his integrity.

Now when I evaluate the credibility of witnesses, honesty is of course an important part of it. But more than that, I have to evaluate whether the person understands things, whether he has the ability to perceive things, whether he has the ability to remember things.

Well let me give you an example. I found Dwayne Palmer very

credible. I found him very spontaneous. I found him willing to tell it like it is as he understood. Now, does that mean that I rely on his viewpoint in everything I made a decision on? No. But I found him to be a credible witness.

When Mr. Mazzola would testify I felt throughout this proceeding he was trying to be honest. But I also felt there were a number of circumstances that he had failed to understand, that he didn't perceive properly. And part of it, I think, was his impatience with anything having to do with APHIS. He just didn't care and he did not want to tune in to what APHIS was trying to communicate to him.

It hadn't always been that way. I know he spoke very admiringly of how his relationship with APHIS had been prior to 2003, prior to December of 2003. One of the problems is that, for example, when Dr. Markin inspected the bear photo shoots as a result of a complaint about whether the bear was drugged, she wrote a no noncompliance inspection report. She allowed Mr. Mazzola to think that everything he was doing was all right because he never heard the rest of what she said on the telephone.

Now I don't know whether she said to him "I'm really concerned about the bear being so close to the photo patrons" or not. She believed she did. Mr. Mazzola believes she did not. But regardless, the signal that was sent to Mr. Mazzola was one in which he had a successful inspection.

Then Dr. -- what's the name of the -- Finney, Dr. Finney, made an observation about his concern about the safety. But he didn't write it as a violation so Mr. Mazzola didn't tune in.

Finally in the December 2003 report we have a firm finding of noncompliance, and only then did Mr. Mazzola start to pay attention to what should have been signals to him that the requirements were other than what he thought they were.

Now when I evaluate the credibility of witnesses, I found that Dr. Markin was credible, but didn't have a very good recollection or memory of what had happened so very long ago. As she began to try to remember other things, I still found her credible. Mr. Mazzola regarded her as a liar.

With regard to Mr. Coleman's testimony, I found it very credible. It's actually understated. He's actually careful not to exaggerate.

With regard to Mr. LaLonde, I did not find his testimony credible. I did not find that he could be so unaware of Mr. Mazzola's activities. I found it not credible that he had so many things he could not recall.

With regard to Dr. Goldentyer's testimony, Dr. Goldentyer is so careful and so responsive to each question and answers it thoroughly,

and it all makes total sense when she has explained it. And Mr. Mazzola called her evasive, which is probably the opposite word of what I would have chosen to describe her testimony.

She is one of the most constructive witnesses for getting to the issues and answering directly the tough questions that I have ever encountered.

With regard to Dr. Gibbens' testimony, he's the first one that educated me as to APHIS' position. I differ with him in his viewpoint. From where he sits, he may think nothing has changed from 1989, but I think a lot changed. I think it truly has been an evolving process. I think that's one reason why Mr. Mazzola wanted it to stay like it had been. Because he enjoyed fewer restrictions.

Dr. Gibbens explained that there was more manpower to inspections, and certainly that's part of it. But I think as APHIS began to see what different exhibitors were doing with big cats and began to see how administrative law judges were interpreting their regulations in a way they considered wrong, and I'm taking blame for that myself, things began to change, to be more clear, to tighten up.

I don't believe Mr. Mazzola got the same notice in 2003, the same awareness in 2003 that Dr. Antle had when his inspector gave him the "Dear Applicant" letter. There is no evidence that Mr. Coleman gave Mr. Mazzola the "Dear Applicant" letter. And as Mr. Coleman wrote up the problems with the exhibits, he didn't apply the "Dear Applicant" letter. That is he didn't insist on no touching of the rear end of the tiger. But now I think we all are aware there can be no touching of even the rear end of the tiger.

I found Dr. Gage's testimony very credible. And I am particularly concerned that even with all the chains at the tiger's neck, that indeed there could be a circumstance whereby someone could be injured by the rear feet. Now it might take the tiger rolling over so that the tiger's on his back to strike out with those feet, but there is enough leeway in those chains for the tiger to do that, as Mr. Mazzola testified.

Okay. I'm not going to go through every witness. Well, I guess I will. Not every witness, but with respect to a few more.

With respect to Mr. Haynes, the Pennsylvania Game Commission person who was trying to identify whether it was Mr. Mazzola or some other person who had been, as I recall his testimony, the most abusive he'd ever encountered in his entire law enforcement career, it was a long time back. I am not able to conclude that he positively identified Mr. Mazzola. I don't think he did. I think he was a very credible witness, and therefore he had that reservation. He did not positively identify Mr. Mazzola. But looking at his report the kind of behavior that was shown

there is certainly reprehensible, but it was so long ago. And because I don't have it clear in my mind that it was Mr. Mazzola, I don't utilize any of that testimony against Mr. Mazzola here.

It was fun to have the cameo witnesses, like the two wrestlers, Mr. Morgan and Mr. Martin.

MS. JUAREZ: Riese.

JUDGE CLIFTON: Riese?

MS. JUAREZ: Yes. Cody Riese.

JUDGE CLIFTON: Mr. Riese, right. Cody Riese. Thank you. R-I-E-S-E. Totally credible young men.

It is always wonderful to have the experts, the experts like Mr. Watson for example. His testimony was particularly persuasive when he would describe what he would subject himself to as the trainer: very dangerous situations, particularly with regard to a grizzly bear because he took full responsibility if he got hurt himself. But he would never subject a member of the public to risks by bringing him in proximity to a large bear.

Now he made it quite clear. The bear he deals with is a brown bear and much more ferocious and aggressive than the black bear that Mr. Mazzola uses. But nevertheless, just the size of the black bear and just the nature of his teeth and his claws present risk, as far as I'm concerned.

The testimony of Dr. Tilson was intriguing. I remember Mr. Mazzola was delighted to hear him speak, too. The most significant part of his testimony that influences me here is that he regretted that the public would see the magnificent tiger in the posture he was in on the table where the chain has him down in the position where he's not in a natural posture. And Dr. Tilson expressed the desire that people could see the tigers as they are in the wild. And that's, I think, why so many of us love the film clips we see where these magnificent beasts are running and leaping or sleeping, or whatever they're doing more in the natural state.

I thought Mr. Kovach was a credible witness. And I recall even he had some safety concerns way back when. He didn't write noncompliances, though.

I found Jay Riggs quite credible. I did when he was before me in a hearing, and I found him also credible here.

I also found him, as I've already said, quite respectful when it comes to referring to APHIS, what APHIS does, what APHIS' job is. He has a difference of opinion than APHIS, and so did I with regard to interpretation of the regulations.

I found Crystal Calhoun credible. I found her testimony persuasive.

The biggest problem I had with Mr. Mazzola's testimony is one

where I believe he comes away from situations with an incomplete perception or understanding of what happened. And he says he gets passionate rather than angry. But while I recognize that the emotion that he's feeling is because he is very passionate about what he loves, and that is his life as an exhibitor of these magnificent wild animals, when he even here in the hearing room or courtroom becomes loud and says things that I hope he regrets after he says them, it looks like anger to me.

It's a situation where what made Mr. Mazzola unfit to be licensed has much more to do with the business end of being an APHIS licensee than the husbandry end of it. If it were the husbandry end of it only, I believe Mr. Mazzola would continue to enjoy the status of Animal Welfare Act licensing.

All right. My orders. Mr. Mazzola, I do order you to cease and desist from violating the Animal Protection Act and the regulations and standards promulgated thereunder.

MS. JUAREZ: Your Honor, you said the Animal Protection Act.

JUDGE CLIFTON: Oh, Animal Welfare Act. Thank you. I think they should call it the Animal Protection Act.

In particular, let me get some notes here. All right.

First of all, I want to give to Mr. Mazzola, before I forget, the copy of the rules that govern appeal to the Judicial Officer. And I'm going to approach Mr. Mazzola to do that at this time.

All right. That particular order that I just made, I need to expand on just a bit. My order is that respondent Sam Mazzola and 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.

So, Mr. Mazzola, this applies not only to you, but to people who could arguably be called your agents or employees, successor and assigns and it involves either direct or indirect violating of the Act through corporate or any other device or person, as well as through yourself. So the key issue here is control. If you are in anyway controlling the operation, then this could be regarded as your violation.

Further, you and/or 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.

Now, in addition I specifically order you, your agents and employees, successors and assigns, directly or through any corporate or other device to cease and desist from engaging in those activities that I have found to

be violations in my findings and conclusions. And that includes violations of 7 United States Code Section 2134 and 2132(h) and Title 9 of the Code of Federal Regulations sections 1.1 and 2.1(a) such as are found in paragraphs 18, 19, 20 and 21, 22, 23, 24, 26 and 27 of the Second Amended Complaint filed on January 8, 2008.

Further, I order you your agents and employees, successors and assigns, directly or through any corporate or other device to cease and desist from engaging in violations of Title 9 of the Code of Federal Regulations, Section 2.4 as found in paragraphs 30, 31 of the Second Amended Complaint.

Likewise, I order you and your agents and employees, successors and assigns, directly or through any corporate or other device to cease and desist from violations of Title 9 of the Code of Federal Regulations, Section 2.126 as it is found in paragraph 32 of the Second Amended Complaint.

Likewise, with regard to -- and I'm not going to repeat all the preliminary language now. I think I've made my point. With regard to paragraphs 35 and 36 you shall cease and desist from violating Title 9 of the Code of Federal Regulations, Section 2.40(a)(1) and 2.126(a)(2).

Likewise, I order you, your agents and employees and so forth to cease and desist from violating the handling regulations, specifically Title 9 Code of Federal Regulations, Section 2.131(c)(1) including but not limited to APHIS' interpretation of that regulation with regard to juvenile and adult tigers as is found in the "Dear Applicant" letter.

Further, I order you, your agents and employees and so forth to cease and desist from violating Title 9 of the Code of Federal Regulation, Sections 2.100(a) and 3.125(a) such are found in paragraphs 49 50 and 51.

In complying with the requirement that you not exhibit without a license, you must take extreme care if you seek employment of a licensed exhibitor to clear your activity with APHIS and to abide by any restrictions that APHIS suggests:

Such as refraining to do so if you own the animals that are being exhibited;

Such as participating in the promotional or public face of that exhibit in such a way that it would lead people to believe that it is your exhibit.

You must exercise caution even as to the equipment that's used in exhibitions of a licensed exhibitor. And that would include your trucks, the trailers, the caging, the mats; all of that. You're going to have to be very cautious that you do not find yourself in the position of being the exhibitor when you're not licensed to do so.

Now, with regard to the license itself, and this is the most important

part of my decision. And, as I've said, I'm sad to do this but I find no option other than to do this.

I begin by revoking the license that you had. I realize that the license renewal application was denied. But nevertheless, I revoke that license, which - - I want to read its number into the record - - is Animal Welfare Act License No. 31-C-0065.

I do uphold APHIS' denial of your application to be licensed, as I've indicated. I order that you are 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.

Now all of these orders, revocation is permanent, the permanent disqualification is permanent. All of those are effective on the day after this decision becomes final. If no one appeals, that will be today's the day that you are given this decision, you have 30 days to appeal. If you fail to appeal, then this decision will become final on the 35th day, and the very next day all of these prohibitions are effected.

If there is an appeal to the Judicial Officer, timely appeal to the Judicial Officer, then this decision does not become final until the Judicial Officer rules.

Now with regard to civil penalties. I am painfully aware that your ability to do what you have done for a living most of your adult career is gone. It is for that reason that I am not going to impose much of a civil penalty in the case. But there are a few of the violations that require it. And I want to turn, first of all, to the violations of 2.4 found in paragraphs 30 and 31.

With regard to the violation in 31, the maximum penalty is appropriate. The date of that was August of 2006. Ms. Juarez, was the maximum at that time three thousand and something?

MS. JUAREZ: Thirty-seven fifty, Your Honor.

JUDGE CLIFTON: $3,750?

MS. JUAREZ: Yes.

JUDGE CLIFTON: All right. I impose the civil money penalty of $3,750 for the violation of paragraph 31.

With regard to paragraph 30 I impose a $1500 civil penalty for that violation of paragraph 30.

With regard to the violations after you no longer had a valid license, I would like to start with paragraph 18. And I impose a $1,000 civil penalty for the violation of paragraph 18.

With regard to paragraph 19, I found that it was not proved.

With regard to paragraph 20, I impose a $500 civil penalty.

With regard to paragraphs 21 and 22 I impose for each of those a $2500 penalty.

With regard to the skunks in paragraph 23 I impose a $50 penalty for each skunk for $100.

With regard to the skunk in paragraph 24 I impose a $50 civil penalty for the one skunk.

I do not impose a penalty with regard to paragraph 26.

With regard to paragraph 27 I impose a $50 penalty for another skunk.

With regard to paragraph 32 I impose a $2,000 civil penalty. Paragraph 32 had to do with refusing to allow Mr. Coleman to inspect.

I do not impose civil penalties with regard to the other violations.

All right. I think I'm done.

I would invite both sides to ask for clarification at this time or expanded findings, or anything that should be addressed so that this case is properly postured for the Judicial Officer.

Let's go off the record while you have an opportunity to consider that. It's now 7:49.

(Whereupon, at 7:49 p.m. off the record until 7:50 p.m.)

JUDGE CLIFTON: All right. We're back on record as of 7:50.

Ms. Juarez?

MS. JUAREZ: I don't have anything, Your Honor.

JUDGE CLIFTON: All right. Thank you.

Mr. Mazzola?

MR. MAZZOLA: No.

JUDGE CLIFTON: All right. Thank you.

This concludes our record at 7:50.

(Whereupon, at 7:50 p.m. the hearing was adjourned.)

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**In re: MARTINE COLETTE, WILDLIFE WAYSTATION, and ROBERT H. LORSCH.**
**AWA Docket No. 03-0034.**
**Decision and Order.**
**Filed August 4, 2008.**

**AWA – Exhibiting – Fund raising, non-profit – Orientation tours.**

Colleen Carroll for APHIS.
David S. Krantz for Martine Colette.
Robart M. Yaspan for Wildlife Station.
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

## Decision

In this consolidated decision I find that Martine Colette did not exhibit during the period that the alleged violations that are the subject of the Second Amended Complaint occurred, and thus would not be liable for civil penalties. I further find that Robert H. Lorsch, while an agent of a regulated party for limited purposes, did not commit, on his own behalf, or as an agent, any violations of the Animal Welfare Act.

## Procedural History

On August 15, 2003, Peter Fernandez, Administrator, United States Plant and Health Inspection Service (APHIS), issued a complaint charging Martine Colette and Wildlife Waystation (WWS) with numerous violations of the Animal Welfare Act. On September 22, 2003, a First Amended Complaint was issued under the signature of Colleen A. Carroll, Counsel for Complainant, alleging additional allegations against Martine Colette and Wildlife Waystation and additionally naming Robert H. Lorsch as a respondent as an agent for the other two parties. On March 15, 2004, after the parties had each filed their answers to the First Amended Complaint, Complainant filed a Second Amended Complaint which each Respondent timely answered.

I conducted a hearing in these cases in Los Angeles, California on February 5-9, February 12-16, June 11-15, and June 25-28, 2007. Complainant was represented by Colleen A. Carroll, Esq., Respondent Lorsch was represented by Robert M. Yaspan, Esq., Respondent Martine Colette was represented by Rosemary Lewis, Esq., and Respondent Wildlife Waystation was represented by Sara Pikofsky, Esq. The parties called a total of 29 witnesses, and over 75 exhibits were admitted. On September 14, 2007, I signed a Consent Decision and Order resolving all claims with regard to Respondent Wildlife Waystation. Following the hearing, Complainant submitted separate opening briefs, proposed findings of fact and conclusions of law regarding the other two Respondents; each Respondent filed a brief with their own proposed findings of fact and conclusions of law; Complainant submitted separate reply briefs with regard to each Respondent. The final reply brief was received on March 3, 2008.

## 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 a "person" as including ". . . any individual, partnership, firm, joint stock company, corporation, association trust, estate, or other legal entity. . ." An "exhibitor" is ". . . any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether for profit or not."

The Act further extends liability to the agents of an exhibitor. "[T]he act, omission, or failure of any person acting for or employed by . . . exhibitor or a person licensed as . . . an exhibitor . . . shall be deemed the act, omission, or failure of such . . . exhibitor . . . as well as of such person." 7 U.S.C. § 2139.

The Act also requires the Secretary to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by . . . exhibitors." 7 U.S.C. § 2143(a). Compliance with the Act and the underlying regulations is accomplished by an enforcement program which includes inspections and investigations by APHIS personnel. 7 U.S.C. § 2146(a). Where violations are discovered, the Secretary may impose civil penalties of up to $2750 for each day of each violation, and suspend or revoke an exhibitor's license, depending on a variety of factors including good faith, gravity of the violation and size of business. Parties cited by the Secretary have the right to a hearing. 7 U.S.C. § 2149.

The Secretary has promulgated extensive regulations spelling out the obligations of exhibitors toward their animals.

**Facts**

Respondent Martine Colette has a long history of caring and providing for animals. While not formally trained in animal care, she was exposed to and cared for exotic animals from her youth as the daughter of a diplomat. Tr. 4187, 4194. After moving to the United States, she began caring for unwanted animals when she was living in Hollywood and eventually set up the Wildlife Waystation on property she purchased in the foothills of the San Fernando Valley outside Los Angeles. Tr. 4197. The Waystation has tended to the needs of many

thousands of animals since it was created in the mid-1970's, having as many as 1200 animals on the premises at a time. Tr. 4212. They have been a resource for the government, both state and federal, when there has been a need to provide for animals where another facility is being closed down or wild animals are otherwise in need of rescue. Tr. 4191, 4215-4216. At the time of this hearing, there were 250-300 animals on the premises. Tr. 4219.

Respondent Colette has held the exhibitor's license for the Waystation in her name since the license was first issued in 1976. She has held various positions with the Waystation since its inception. Tr. 4183-4185. Her personal residence is on property adjacent to the Waystation, and typically visitors must pass through portions of the Waystation's property to gain access to Ms. Colette's residence. Tr. 4205. The WWS is supported through "memberships, animal sponsor programs, donations, fundraising activities, bequests, donations." Tr. 4207.

Respondent Lorsch is a successful businessman and philanthropist. Tr. 2164-2180. He has been a contributor to the WWS for a number of years, and became more deeply involved with the WWS in an attempt to resolve some complicated intergovernmental compliance issues which will be discussed below. Tr. 2181-2202. He has never been an employee of the WWS, but has served at various times as "best friend," board member, advocate, and in other positions.

While this decision of necessity is confined to whether Respondents committed violations, or are liable for violations, as alleged in the Second Amended Complaint, it is impossible to discuss this matter without looking at some events that preceded the inspections that are the subject of the Second Amended Complaint. Of particular relevance is the Consent Decision as to Wildlife Waystation and Martine Colette, CX 2, signed by Administrative Law Judge Jill S. Clifton on October 31, 2002. This 68 page document resolved numerous charges against the Martine Colette and the Wildlife Waystation for violations of the Animal Welfare Act generally occurring between 1998 and 2002.[1] The Respondents in that matter admitted hundreds (299) of willful violations of the Act and regulations. The Order did not impose any civil penalties. The Order did further suspend the license issued under the name "Martine Colette d/b/a Wildlife Waystation" for thirty days, with the suspension to continue until APHIS determined that Respondents were in compliance. The Order directed that Respondents "shall cease

[1] The complaint was issued in fiscal 2000 but the Consent Decision resolved matters that occurred after the filing of the complaint.

and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required." [2]

The inspections and other activities that are the subject of this hearing all occurred during the period before the exhibitor's license was reinstated. Since, during the times that the alleged violations occurred, Respondents would only be regulated parties under the AWA if they were exhibiting without a license (or, more accurately, while under a suspended license), the issue of whether exhibiting was in fact going on is a pivotal underlying issue to whether there is even a basis to examine many of the alleged violations.

The suspension of the exhibitor's license could not, by the terms of the Consent Decision, be lifted until APHIS made a determination that Martine Colette and the WWS were in compliance with the Act and underlying regulations and standards. Thus, the licensee requested, during the summer of 2003, but not before mid-August, that APHIS visit the facility for the purpose of inspection, so that the suspension of the exhibitor's license could be lifted. Tr. 308-309. This was not a traditional compliance inspection, for which advance notice is not given, but was in conjunction with the Consent Decision. In fact, the computer tracking system used by APHIS did not even have a category for such an inspection. Thus, although the inspection forms indicated that each inspection was a "routine inspection," none of the inspections that are the subject of this decision were in fact "routine" unannounced inspections. Tr. 3535-3536.

Apparently unbeknownst to the facility at the time the request for an inspection was made, APHIS had issued, on August 15, 2003, a new complaint alleging that on numerous unspecified instances between the date the Consent Decision was approved and the date the complaint was issued, Martine Colette and the WWS had exhibited animals without a valid exhibitor's license. The complaint was mailed by USDA's Office of the Hearing Clerk on August 18, 2003, and the certified receipts, on behalf of the WWS and Martine Colette, were each signed on August 23, 2003.

The initial inspection occurred approximately a week after requested, and lasted from August 19-21, 2003. The inspection team, led by Jeanne Lorang and Dr. Kathleen Garland, and including Sylvia Taylor

[2] The Order also provided that stipulated penalties of $50,000 be paid if, after reinstatement of the license, violations occurred within a two-year probation period. However, since the alleged violations that are the subject of the action before me all occurred before the license was reinstated, that stipulated penalty clause was not triggered.

and Dr. Alexandra Andricos, informed WWS personnel that the WWS was not fully compliant with a variety of regulations and standards, particularly concerning the adequacy of veterinary care, sufficiency of trained personnel, and humane handling of animals. CX 3. Complainant conducted an exit interview with WWS personnel, including Respondent Colette, where the alleged deficiencies were discussed. Tr. 201-202. Also participating in the exit interview, via telephone, was Respondent Lorsch. CX 36, Tr. 3252-3253.

A follow-up inspection was conducted on September 16, 2003. At this inspection, Ms. Lorang and Dr. Garland were generally accompanied by A.J. Durtschi, the facility's operations manager (who signed the inspection report as "operations foreman"). At the close of the inspection, Durtschi insisted that the exit conference include, via telephone, Respondent Lorsch. CX 36, Tr. 250. When Lorang began to explain areas where she and Garland thought there were problems, Lorsch apparently became upset. Tr. 252-253. In particular, when Lorang discussed the condition of a chimpanzee named Sammy, a long-time resident with a long history of self-mutilation whose condition had never been previously mentioned as a basis for finding violations, and which was not mentioned at the prior inspection, Lorsch frequently interrupted, referred to the findings of the inspectors as "stupid," and made a number of sarcastic comments including whether it was necessary to hire a psychiatrist to take care of Sammy. *Id.* Lorang testified that she never felt intimidated by Lorsch's conduct, but that she considered it abusive anyway. Tr. 676, 681. Garland, who had not spoken during the exit interview, testified that she was most troubled by the condescending tone of Lorsch. Tr. 3592-3593. Making no headway, the inspectors apparently decided to terminate the exit interview.

There is no indication on the September 16 inspection report, CX 4, that the inspectors had any problems with Lorsch. The inspectors testified that they each felt Lorsch was acting in an abusive manner, but neither of them told that to Lorsch or Durtschi. Tr. 680-681, 2627-2628. Lorang testified that she and Garland, on returning to their car, mentioned to each other that they had thought of abruptly stopping the exit interview and leaving the premises. They testified that Durtschi apologized to them and that Lorsch called Ms. Lorang back the next day and apologized to her over the phone. Tr. 251-253. While they testified they discussed Lorsch's conduct at the exit interview with APHIS management personnel (probably Dr. Gibbens), no formal memorandum was written concerning this issue until many months after the event allegedly took place, even though agency guidance required that such a

memo be written within 24 hours of alleged abuse.[3]

The following day, September 17, 2003, Counsel for Complainant signed a First Amended Complaint, which was filed with the Hearing Clerk on September 22. In addition to the exhibiting violations that were the subject of the initial complaint, the amended complaint added Lorsch as a Respondent, and included numerous additional allegations based on the inspections of August and September.

Inspector Lorang returned to the facility on October 14 with Dr. Alexandra Andricos. They were accompanied on the inspection by Durtschi. In the inspection report presented to Durtschi, violations were again cited for environmental enhancement, and for lack of sufficient numbers of experienced employees, particularly with regard to the "special needs" of Sammy. Alleged violations found during this inspection were included in the Second Amended Complaint, which is the operative complaint for this case. A reinspection on November 3, 2003 revealed no new violations and the suspension of the license was subsequently lifted.

**Exhibiting** – With respect to the overarching question of whether Respondents were exhibiting without a license in violation of the conditions imposed in the 2002 Consent Decision, there was no ambiguity in APHIS's interpretation of the prohibition against exhibiting as expressed by Complainant, particularly through its counsel, Ms. Carroll. The record is replete with documentary and testimonial evidence that Complainant's position was that, in essence, the Consent Decision prohibited press events, most visitors and fund raising events at the facility, as well as the bringing of animals to fund raising events at other sites. At the hearing, Ms. Carroll stated that even the exhibition of animals owned and handled by other exhibitors who had valid licenses, at sites outside the facility, constituted violations by Respondents, as long as the Respondents were the beneficiaries of the fund raising. She also stated that "persons who were not bona fide employees or personnel of the Waystation or legitimate contractors" were not supposed to be on premises to have the animals displayed to them. Tr. 882.

**Visitors to the facility**—While the prohibition against exhibiting did not bar employees and volunteers from entering on the premises of the WWS (and the majority of people working with the animals at the WWS were volunteers), the Consent Decision is unclear on what the facility

[3] Research Facilities Inspection Guide, p. 2.1.1; Exhibitor Inspection Guide, p.2.1.1. These guides appear to define verbal abuse as a form of workplace violence, which must be documented expeditiously.

could do to encourage volunteers or potential donors of money to support the facility. Several witnesses who had been volunteers at the facility testified that they observed tours of the facility during the time of the suspension. While they were unable to identify who at the WWS was participating in the tours, or who were the people who were being shown around the premises, they testified that the tours were a pretense to circumvent the Consent Decision. Thus, Rose Bertozzi testified, both through an affidavit and at the hearing, that she led several tours, which she classified as "monthly orientation tours." CX 13. She stated that people who were taking these tours filled out volunteer applications, but that several people on the tours asked her to throw away their volunteer applications after the tour. Tr. 90-91. She did not state how the facility was supposed to realize, before the tour was conducted, which participants were there to seriously consider volunteering, or whether these participants took the tour with the intention of volunteering and decided otherwise after seeing what was required, nor did she state how the facility was supposed to otherwise obtain needed volunteers. She did point out that it was made clear that after the issuance of the Consent Decision the facility informed volunteers and employees that WWS was barred from leading public tours or exhibiting animals to the public. She also stated that "on countless occasions" she had seen Durtschi and Respondent Colette lead tours around the compound, and that volunteers were told to use the term "walk-throughs" rather than "tours" to describe these events. CX 13, p. 2; Tr. 137-139. She was not able to state who these people were or whether she could tell whether these were potential donors or volunteers.

Lari Sheehan, a Los Angeles County employee also testified that potential donors were visiting the premises of WWS, indicating in particular that a company that produced pet food was interesting in seeing the WWS to consider being a donor. Tr. 872. Former employee Angela Adams also reported seeing some tours led during the suspension period. CX 12, p. 2; Tr. 1091-1092. Jennifer Conrad, a veterinarian who worked there, assumed the visitors were personal friends of Colette who were exempt from the USDA mandate against exhibiting. Tr. 1182. Dr. Conrad indicated that she saw at least three such tours before she left WWS in March, 2003, and that they consisted of between five and eight people. Tr. 1189.

It is clear that numerous people visited the facility during the time the license was suspended. There was even a protocol involving State and county officials under which certain visits were approved as long as they were not for traditional exhibitions. Thus, when the WWS was holding

an onsite gathering of prospective donors, they would communicate, usually by email, with Johnny Jee, an assistant fire chief with Los Angeles. CX 17. Because of issues pending with the county, a fire department representative was always supposed to be present for these events, which included dinner parties and other fund-raising and media events. The USDA was not a party to this protocol, and consistently maintained that these visits were inconsistent with the license suspension.

**Off-site events**--It is also clear that numerous events designed to benefit the WWS were held at other sites, and that animals were frequently exhibited at these events. Events such as the Safari Brunch, an annual event held at the Playboy Mansion and the Safari for Life, held at the Sportsman's Lodge, were designed as fund raisers for the WWS. Witnesses testified that while there were animals, including regulated animals, at these events, the regulated animals did not belong to the WWS. Tr. 1523-1524, 1530-1532. Generally, no specific evidence was adduced that would indicate that regulated animals owned or under the control of the WWS were present at these events, nor is there evidence that any WWS personnel handled any regulated animals. However, at one event, on November 3, 2002, the WWS did bring llamas to a fund raiser. Tr. 1529-1530.

**Background of regulatory problems** – Over the years, the WWS had evolved into an important last resort for a variety of animals that would otherwise likely have been euthanized. There was undisputed testimony that the USDA and other state agencies frequently asked Ms. Colette for assistance. Thus, in September, 1995, the USDA requested that Respondent Colette assist in the retrieval of animals from a closed facility—Liger Town—after a number of animals had escaped that facility and been shot. Tr. 2121-2123. Although the facility was located in Idaho, Ms. Colette acceded to the USDA request to bring equipment and staff to fetch the animals, a number of whom still live at the WWS. *Id.*, 4215-4217. She described receiving other animals from Wyoming Fish and Game, Tr. 2124, the LA County animal control agency, the Michigan Humane Society, and numerous other organizations, both public and private.

In the mid-1990's, when the dismantling of a biomedical lab in New York necessitated the placement of many primates in other facilities, Respondent Colette eventually agreed to have the WWS house approximately 50 chimpanzees. 4039-4042. Dr. Conrad Mahoney, who was the head of the lab that was closing down, initiated the contact with Ms. Colette, and has returned to the facility approximately twice a year since then to conduct physical examinations of the chimps. Tr. 4047-

4050. It was evident at the time the chimps were arriving that WWS did not have the proper facilities to take care of them, and they were originally installed in Q1, the original quarantine facility located at WWS, and Q2, an old barn, became the temporary home for 32 or 33 of the chimps. The intention was that the chimps, many of which were not fully grown, would stay in these two structures until a new suitable building could be constructed. Tr. 4109-4121.

Also in the mid 1990's, Respondent Colette and the WWS accepted, from another source, a self-mutilating chimp known as Sammy. Tr. 4897-4900. Ms. Colette accepted Sammy knowing he was self-mutilating because she thought she would be able to provide him proper care and because she felt sorry for him. Tr. 4902-4903. Dr. Mahoney saw Sammy regularly beginning in 1996, and stated that he was the worst self-mutilating chimp he had ever seen. He testified on the difficulty of determining what triggers the self-mutilating behavior; how even finding a trigger does not mean than another trigger will not turn up; that medications, which frequently have to be adjusted, are a critical part of treatment; and that a self-mutilating chimp can never be assumed to be fully cured. Tr. 4070-4073. He felt that the attempts by Colette and the WWS to find the proper therapeutic treatment for Sammy were "robust." Tr. 4089.

The attempts to get the appropriate permits to construct proper housing for the chimps led to a multi-year imbroglio with federal, state, county and city officials. Extensive testimony demonstrated that, for example, the State Fish and Game Commission would not issue certain permits; the county would not consent to building the new enclosure due to zoning issues; and there were issues with water regulations and more. E.g., Tr. 2190-2195. A task force was created in response to a motion of the County Board of Supervisors to find ways to assist the WWS to come into compliance with a variety of county ordinances and regulations, but some meetings of the task force included representatives from other government agencies. Tr. 1372-1374. Finally, Respondent Lorsch offered, after being contacted by Respondent Colette, to try to take a more active role (other than being a donor of funds) in helping the WWS deal with the various government agencies with whose rules the WWS was attempting to comply. Tr. 2186-2191.

**Respondent Lorsch's Involvement –** Respondent Robert H. Lorsch unquestionably devoted significant time and expense to the WWS. He performed a number of functions as the "best friend" of the facility. He intended to use his connections and negotiations expertise to attempt to resolve the issues that were plaguing the WWS. Tr. 2181-2202. In his

efforts to resolve the regulatory problems of the WWS he liaised with a number of high level city and county officials. He spoke and met at various times with the District Attorney for Los Angeles, the County Sheriff, the County Supervisor, the Fire Chief and others. Tr. 2196-2200. With respect to these officials, he was clearly working as an unpaid representative of the WWS. He devoted many hours to getting officials to work together to create a process where the WWS could take the steps that would get it back into compliance with all the government entities involved.

Lorsch was also involved in fund-raising for the facility. He was a donor for a number of years before he became involved in helping the WWS in ways other than writing checks. He participated in fund raisers, including sending invitations in his name to be a guest/donor at functions. For example, he sent personal invitations to attend the 2003 Safari Brunch.[4] He brought the WWS to the attention of friends, acquaintances and colleagues. He invited potential donors to the WWS to brunches or other events at Martine Colette's house, located on the edge of the WWS property. He occasionally wrote columns in the WWS magazine, where he referred to himself and was referred to as the WWS "best friend."

One of Respondent Lorsch's columns was referenced a number of times in this proceeding. In his "best friend" letter in the spring 2003 Wildlife Waystation Magazine Lorsch announced the WWS's institution of "Operation Mole." CX 19, pp. 2-3. Lorsch testified that he was concerned that several present and former WWS employees and volunteers were spreading unfounded stories to a variety of government officials and were slandering the WWS, even though non-disclosure agreements were signed by employees and volunteers. Believing that people who discover problems and go to authorities instead of management are "in the gutter," Tr. 3180, and reacting to what he believed were threats and harassment, he announced in his letter that " a Waystation 'best friend'" would provide a $100 reward or a $250 charitable organization for anyone who could identify those who were providing "regulators" "inaccurate information" with the award to be doubled if the individual identified was a current volunteer or employee of the WWS. Apparently there were no takers for this program.

Testimony was overwhelming that Lorsch did not have a role in the day to day operations of the WWS. (e.g., Tr. 2240-2250, 3821-3873). While the figurative altitude varied, Lorsch was described, by himself and others, as someone who operates at 50,000 feet, rather than at

[4] Interestingly, the invitation in evidence at CX 49 is the one extended to by Respondent Lorsch to Counsel for Complainant Colleen Carroll.

ground level, as a "big picture" person, rather than someone who is concerned with details. Tr. 3896-3897. It is clear that he knew very little, if anything, about how to care for animals, what type of staff was necessary to properly operate the facility, how the cages should be constructed, etc. It is clear that he did not know much about the animals at the facility, only that he wanted to help the WWS work out its differences with the USDA, the State of California, the County of Los Angeles and any other government entities that the WWS was dealing with.

On the other hand, it was made clear that the exit interviews for the August and September inspections could not be conducted unless Lorsch was present via telephone. Tr. 3253. Even though, on the occasions most relevant to this proceeding, Lorsch was not a member of the WWS Board of Directors, and had no official title other than that of "best friend" he played a significant role in some aspects of WWS operations. Inspector Lorang testified that Martine Colette told her during the August inspection that she was only in charge of the animals and that Robert Lorsch was in charge of the facility and its employees, and that was why he had to be present, via telephone at the exit conferences. Tr. 232. Dr. Garland confirmed Inspector Lorang's observations, noting that she had never seen Ms. Colette defer to anyone in an exit interview to the extent she deferred to Mr. Lorsch. (Tr. 3253-3256).

Other witnesses testified as to their understanding of Respondent Lorsch's role vis-à-vis the WWS. Dr. Jennifer Conrad testified that over time he changed from being a donor to "being almost a CEO." Tr. 1186. Roberta Fesler, Senior Assistant Counsel, Los Angeles County, testified that Mr. Lorsch said he was committed to seeing the WWS through resolving its regulatory issues, and that "he was going to personally see to installing a new management at the Wildlife Waystation." Tr. 931.

Lorsch himself seemed to portray himself as someone in charge, even in his interactions with USDA. Thus, in a letter to Dr. Robert Gibbens, the Western Director of APHIS, Mr. Lorsch represented that the WWS license should be provisionally reinstated. RLX 4. He stated that "Because of all the actions taken by the WayStation under my guidance," that most of the violations that led to the license suspension were corrected. *Id*. (emphasis supplied). He signed the letter as "Volunteer & Best Friend to The Animals." The WWS web site referred to him in July 2003 as their "'Best Friend' or unofficial CEO since early 2002," CX 40, p. 6, and in December 2003 referred to him as "Chairman of the WayStation. *Id*., at p. 8.

Although not a member of the WWS board, Lorsch clearly had a

significant influence over actions taken by the board. Thus, as an invited guest at a board meeting on June 28, 2002, before the issuance of the Consent Decision, Lorsch suggested that the regulatory issues could be better resolved if the board of directors and the CEO (Ms. Colette) resign and that new appointments be made. During that meeting, a motion was unanimously passed which committed each board member to offer his or her resignation. "Robert Lorsch indicated he would utilize best efforts to secure interested qualified people to serve as directors and further that he would act as chairman. RLX 60, pp. 16-17. In November, 2002, the WWS board agreed to enter into a consulting agreement with Mr. Lorsch and/or RHL Group (his company), and in January, 2003 the board resolved to add Mr. Lorsch as an additional insured under their liability policy. The Operations Manager, A. J. Durtschi, was hired after being recommended by Mr. Lorsch, as were the new operator of the website and the new purveyor of long-distance telephone service.

**Facts regarding conditions at the WWS during the three inspections** – Complainant contends that both Respondents are liable for alleged violations discovered during the course of the three inspections (although Lorsch is only charged with violations from the September and October inspections). Most of these allegations hinge on whether the facility was exhibiting during the suspension period, since if I find that the facility was not exhibiting, those allegations concerned with how the facility was operating are no longer viable.

**Personnel issues**—Several of the allegations concerned whether the WWS met the regulatory requirements concerning adequacy of veterinary staff and adequacy of trained personnel in general. Inspector Lorang testified that she wrote Respondents up for failure to have a sufficiently experienced attending veterinarian on duty, stating that the full-time veterinarian at the facility, Adam Gerstein, was newly licensed and did not have the requisite expertise in dealing with exotic animals. Tr. 314-316. The inspection team agreed that while Dr. Rebecca Yates, the WWS's former attending veterinarian was fully qualified, she could not be considered an attending veterinarian because there was not a written "formal arrangement," as required by the regulations. Dr. Yates apparently agreed that Dr. Gerstein was relatively inexperienced, stating that she did not let him work by himself on any complicated matters, but she also stated that he had more experience than she did when she started working at WWS. Tr. 1983, 4757-4758. She worked part-time for the WWS during the time period the inspections at issue took place. Tr. 1926, 1983. In fact, she testified that she believed that she was the veterinarian of record, and that she was always on call during this time.

Tr. 1983. In addition, the staff included Silvio Santinello, who was a licensed veterinarian in Mexico, but did not have a U.S. license to practice veterinary medicine. Dr. Yates stated that the facility was well equipped, and that she had the authority to order any drug, that it had outside specialists available, Tr. 4748-4749, and that it provided 24/7 veterinary care. Tr. 4747.

Likewise, Dr. James Mahoney, testified that he believed Yates, Gerstein and Santinello were well-qualified to handle the WWS animals, and that the care provided at the facility was "effective and met "the needs of its animals." Tr. 4058.

**Environmental enhancement**—Several violations were alleged concerning whether there was sufficient environmental enhancement for the animals at the WWS. While these allegations concerned the lack of proper environmental enhancement in general, they were focused on whether the chimps were receiving adequate enhancement, whether there was a written up-to-date plan, and whether the records of engaging in environmental enhancement activities were too "sketchy." The September and October inspection reports particularly emphasized, as an alleged violation, the treatment of Sammy, the self-mutilating chimp. During the September inspection, Inspectors Lorang and Garland viewed, and videotaped, Sammy behaving normally, Tr. 752-753 (in fact he was eating a popsicle), but displaying some wounds that were undisputedly the result of self-mutilation. CX 34, 35. They also observed flies around the wounds.

Sammy was self-mutilating on arrival at the facility and the WWS consulted with a specialist as to how to get him to stop this behavior. Throughout his stay at WWS, a variety of medications and therapies were tried, with varying results. Dr. Mahoney thought that the environmental enhancement was adequate. After the inspection, the inspection team recommended that an outside consultant be hired to work with Sammy and establish a more formal environmental enhancement program. As a result, Jennie McNary, the curator at the Los Angeles Zoo, was hired to consult with the WWS and its employees on the handling of the chimp colony. CX 37, Tr. 5034-5036. When she arrived to begin her six-months of consulting, she observed that the chimps appeared to be in good health overall, both physically and socially. Tr. 5038. However, she felt there was a need for a working plan involving more environmental enhancement. She particularly focused on Sammy in an attempt to find the cause of his self-mutilating episodes. Tr. 5039-5042. Sammy was the most severe self-mutilator she had ever encountered. Tr. 5090. A combination of medication and

operant conditioning techniques resulted in significant improvement in Sammy's behavior, to the extent that, when she went back on a follow-up visit a year later, she was "markedly pleased" with Sammy's behavior and condition. Tr. 5043. She also instituted a practice of logging and charting chimp behavior, particularly Sammy's, during the period of her consultancy. Tr. 5044-5046. She never figured out exactly what was triggering Sammy's self-mutilating behavior, Tr. 5058. She stated that an observation of Sammy of from 20-30 minutes would not suffice for a total assessment. Tr. 5088-5089.

**Discussion**

While my ultimate rulings in these consolidated cases are based on relatively limited findings of fact, I am making several additional findings of fact, and several additional conclusions of law, in the interests of overall judicial economy in the event that my initial decision is overruled—either by the Judicial Officer or by the federal courts. Thus, even though I dismiss most of the violations alleged to have been discovered during the course of the three inspections on the basis that Respondents were not exhibitors, I make additional factual findings, and include some discussion, in the event that it is determined on appeal that exhibiting did take place as alleged.

**1. The instances alleged to constitute exhibiting without a license were not violations of the Consent Decision.**

Since I find that Respondents Colette and Lorsch were not operating as exhibitors, most of the violations alleged in the Second Amended Complaint cannot survive, as the regulations generally apply to exhibitors. The Complainant alleges that on at least 16 different occasions Respondents acted as exhibitors, either by holding fundraisers on or off-site, by allowing potential volunteers to participate in a tour of the facility, or by having potential donors attend a brunch and presentation at Respondent Colette's house. I find that these types of events were not exhibitions as would be prohibited by the Consent Decision, since I hold that the Consent Decision was not intended to bar such basic and necessary activities, essential to the existence of the WWS, as fund-raising and volunteer assistance to care for the animals in its charge. Since Complainant failed to demonstrate, or Respondents successfully refuted, that any of the cited "exhibitions" constituted exhibiting such as would be regulated by the Act, I conclude that there was no exhibiting and that most of the actions for which Respondents have been cited should be dismissed.

As a general rule, it is a serious violation of the Act to exhibit

animals without a license. The suspension of a license would appear to prevent any exhibition at a facility. However, it was clearly recognized by the parties at all times, that bringing the WWS into compliance was going to be a costly and time-consuming endeavor. With nearly 300 violations to be corrected, including substantial construction or reconstruction, the Consent Decision provided that the license would be suspended until APHIS determined that the facility was in compliance. It appeared to be the parties understanding that when the WWS believed it was in full compliance, it would call APHIS and request an inspection so that APHIS could determine whether it was in compliance. Dr. Gibbens testified that when APHIS is conducting a licensing inspection for a facility whose license has been suspended, that normally any violations they find would not be the subject of an enforcement action, and that Respondents were only cited here because they were conducting regulated activities, i.e., exhibitions. Tr. 5215-5216. Interestingly, Complainant apparently issued its initial complaint in this matter, which only contained counts relating to exhibiting without a license, on August 15, 2003. The complaint was mailed out by the Hearing Clerk on August 18 and was not received by the then Respondents (the WWS and Ms. Colette) until after the conclusion of the requested inspection. Thus, while this was a requested inspection, it is safe to assume that the WWS and Ms. Colette were expecting that the only issues the inspection was to resolve was whether the suspension of the exhibitor's license should be lifted. [5]

Constraints against exhibiting were also imposed by California Fish and Game and Los Angeles County. To make sure that they could bring certain visitors, such as potential volunteers and donors, and occasionally members of the media, to the facility, the WWS worked out a protocol with the state and local entities allowing such visits subject to certain constraints. No such agreement was entered into with APHIS, however, and APHIS, through Dr. Gibbens and Colleen Carroll, made it clear that they did not consider the federal government bound by the agreement with the state and county governments. They jointly

[5] Although it is not a factor in my decision, I am struck by the somewhat disingenuous conduct of APHIS with regard to the conduct of these inspections. While the inspections were clearly not routine inspections, for which no notice is given, the WWS and Ms. Colette were unquestionably under the impression, at the time of the August inspections, that this was merely an inspection to determine if they were eligible to have their license renewed, and that they would not be subject to sanctions. It was not until they received the original complaint, several days after the conclusion of the inspection, that they would have had any notion that this was the type of inspection that could lead to civil penalties.

participated in at least one phone call with Mr. Lorsch to discuss possible ways for the WWS to generate donors or media attention in order to attract funds for the facility. Tr. 5196-5198. Emails were exchanged as well. In one, Ms. Carroll responded to an inquiry by David Krantz, counsel to the WWS, on whether the ban on exhibiting included the media, that it was APHIS's position that reporters were considered members of the public in that context. CX 45, p. 2. Responding to a follow-up email from Mr. Lorsch, Ms. Carroll stated "I am not comfortable responding to inquiries about whether a certain scenario would or would not constitute a violation of the AWA or the regulations" and that the WWS should seek legal advice from its own counsel. *Id.*, at p. 1. It is fair to conclude that APHIS clearly did not approve any of the actions taken by Respondents that resulted in media events, bus tours of potential volunteers, meetings on site with potential donors, and off-site events where animals were displayed, even when those animals were not owned or handled by Respondents or their employees.

However, the fact that APHIS disapproved of these activities and was of the opinion they were a violation of the Consent Decision does not make it so. I find that the cited activities did not violate the terms of the Consent Decision as they did not constitute exhibitions under the Act and the regulations.

The testimony concerning violations allegedly committed by conducting tours of potential volunteers was particularly vague and noncompelling. It is undisputed that the WWS needed significant numbers of volunteers to function properly. APHIS has not demonstrated that a ban on exhibiting precludes the normal recruitment of volunteers for an operation where volunteers are essential. The fact that some of the individuals who signed up for a volunteer tour decide, after the tour, that they are not interested in doing the work of a volunteer is totally expected, as was people tearing up their applications after seeing the facility and the type of work expected from a volunteer. [6]

I also find that bringing potential donors to visit Ms. Colette, even if seeing the animals was included, is in the same category as bringing potential volunteers on site, and is not a violation of the ban on exhibiting. In order to attempt to garner significant donations necessary to complete repairs and continue to run the facility, it was reasonable for

[6] The 2002 Consent Decision contained numerous findings concerning the insufficient number and inadequate training of employees and volunteers. This recognition of the need for volunteers is inconsistent with any contention that a legitimate volunteer recruitment program is a violation of the Consent Decision.

the WWS to expect that they would not receive sizeable contributions without showing the facility to potential donors. These extremely limited groups who were there to meet with Ms. Colette and discuss the operations of the WWS were hardly within the realm of public exhibitions contemplated by the regulations. Even if the WWS was not complying with the protocol with the State and county governments, which did not bind the USDA in any event, I hold that these visits did not constitute exhibiting without a license. That potential donors were on the premises at least fifteen times, according to Complainant's brief, for these purposes, is totally consistent with the universal understanding that donations—substantial donations—would be needed to effectuate the repairs necessary to achieve compliance with the Consent Decision as well as to maintain the organization's normal operations.

Likewise, the holding of off-site fundraisers, where WWS animals were not displayed, did not constitute a violation of the ban on exhibiting without a license. The Safari for Life, held at the Sportsmen's Lodge in Studio City, was clearly for the benefit of the WWS. While regulated animals were present at this function, they were not from the WWS.[7] Rather, other holders of exhibitors' licenses brought animals and handled them at the benefit. Complainant raised the theory, both at the hearing and in its brief, that if a fundraiser is held for the benefit of the WWS, that the WWS is responsible for the exhibiting of animals even where the license to exhibit is held by the organization bringing the animals to the fundraiser, and even though WWS did not handle the animals in any way; that as long as the fundraiser was held under the auspices of the WWS, then the WWS was responsible for the animals. Tr. 1545.

Complainant's argument in this area is unconvincing. APHIS has not shown any provision in the 2002 Consent Decision nor any statutory, regulatory or case law holdings that would cause the lawful acts of other persons or organizations to somehow be a basis for finding a violation against Respondents. I find it a real stretch of the Act and regulations to require that a person or organization for which a benefit is being held can be deemed to be responsible, as an exhibitor, for regulated animals that other licensees bring to the benefit, where the animals are not being handled in any way by the beneficiary of the event. This theory would seem to lead to potentially absurd results—could a parent who hired a performer with an animal act at a children's birthday party be liable for

[7] Ms. Colette apparently brought a few animals that were not considered regulated, including a snake, an eagle and some llamas. While Dr. Gibbens stated that llamas were regulated, no evidence in support of this statement was presented.

exhibiting without a license? Would the beneficiary of any fund raiser be potentially liable as an exhibitor if regulated animals were used in some aspect of the fund raiser? Such results seem beyond the purview of the Act.

The case law likewise does not support Complainant's argument. No case has been cited that would support a finding that an entity could be found to be exhibiting because it was the beneficiary of a fund raiser where animals owned and handled by licensed exhibitors were exhibited. *In re Bill Lozier*, 60 Agric. Dec. 28 (2000), cited by Complainant, offers no support for this position, as in that case there was no question that bears were exhibited by that respondent to the public for his benefit. *In re. Lang,* 57 Agric. Dec. 59 (1998), also cited by Complainant, sheds no light, and does not stand for any of the propositions cited in the brief.

With respect to the llamas that were admittedly brought to this event, there was no evidence presented that these llamas were regulated animals. Dr. Gibbens testified that animals could be regulated in some contexts while being unregulated in others, a statement that is reflected in *In re Joseph A. Woltering, d/b/a Buckeye Llama Ranch,* 46 Agric. Dec. 768, 772, 776 (1987), but there is no testimony which would indicate that the llamas Ms. Colette brought to this function were regulated. Since the burden of proof is on Complainant, I find that they did not demonstrate, by a preponderance of the evidence, that any regulated animals in the control of WWS were exhibited at the Safari for Life function.

I also find that "Chimp Liberation Day" was a newsworthy event that did not constitute exhibiting as defined in the Act and regulations. The opening of the new chimp facilities, after years of effort, did not even involve the exhibition of any animals, as the new chimp house was not actually occupied at the time of the event. The event was held in the form of a press conference, and no witnesses testified that any animals were exhibited.[8] Tr. 1497-1499. Respondent Lorsch characterized the event as "a media conference to show to the news media the progress that the Waystation had made in complying with the construction of new cages for the chimpanzees." Tr. 4265. Lorsch and others had participated in a conversation with Colleen Carroll and Dr. Gibbens, as well as with their own counsel, and were basically advised that whether conducting a media event was banned by the Consent Decision was something they should

[8] One witness, Jerry Brown, WWS's publicist, stated that animals were present in the sanctuary in that they were in their cages and were some may have been visible to some of the attendees at the event, but did not specify what the animals were and how proximate they were to the attendees.

talk to their own attorneys about. Tr. 4268-4270. After consulting with an unspecified number of attorneys, they came to a consensus that holding the press conference would not be a violation[9], and that the Los Angeles County legal staff found that the WWS had a constitutional right to hold such a press conference. [0]1

Rather than treat this as a first amendment issue involving freedom of the press, I find that the viewing of the new chimp **facilities** was not an exhibition of the type that would be prohibited by the Consent Decision. The purpose of the event was to highlight the efforts and accomplishments of the WWS in finally being able to construct a facility suitable for the large number of chimps it had received over the years, particularly the laboratory chimps received via Dr. Mahoney. At this event, only media, government employees and WWS personnel were admitted to the facility. While animals were visible, there is no evidence that there was any exhibit, and there was no evidence that the chimps themselves were even in the new facility at the time of their media unveiling.[11]

Accordingly, I find that the WWS did not exhibit in violation of the 2002 Consent Decision.

2. **I also find that Respondent Robert Lorsch should not be held liable for cited violations for acting as the agent of Martine Colette and the WWS.** In many ways, the government's case against Lorsch illustrates the maxim that "no good deed goes unpunished[12]." Although he played a significant role at the WWS, as a "best friend", a donor, advocate and fundraiser, and as an intermediary with respect to getting the WWS and the various government entities that the WWS was trying to resolve issues with to reach agreements to allow the WWS to achieve compliance with the various government regulations, his role was not such that he should be required to obtain his own exhibitor's license, in addition to the one Martine Colette had already obtained for the WWS. By offering to use his connections and high-powered negotiating skills in an

[9] Since Ms. Carroll suggested that Respondents seek the advice of counsel, and since Respondents did in fact act according to their counsels' advice, it is difficult to conjure up a situation that could be any less "willful," yet Respondents are charged with a willful violation of the regulations.

[10] In actuality, the county's sympathetic position was a result of a settlement of a lawsuit filed by the WWS seeking, among many other things, to open the WWS to the media for some purposes. Tr. 4334-4337.

[11] Likewise, I do not find that the private "fact-finding" tour arranged for Senator Brownback was an exhibition of the type for which an exhibitor's license was required. While an elected official may be considered a member of the public, under these circumstances the tour was within the Senator's official duties.

[12] Generally attributed to Claire Boothe Luce.

attempt to get the WWS through a morass of overlapping and conflicting government regulations, he was trying to help an organization he had supported for some years to be able to continue its worthwhile function of serving as a sanctuary for animals who generally had no other places to go.

There is no question that Lorsch was more than a mere donor, and had an authority in some areas that was well beyond that of a typical philanthropist. It has been well established that employees of the WWS knew that Lorsch's participation in the exit conference was mandatory for the August inspections to determine if the WWS license suspension would be lifted, as well as the subsequent inspections. As the "best friend" of the WWS, Lorsch had a higher profile than other donors, to the extent that he even had his own column in the WWS newsletter, attended and participated in board meetings even before he was a member of the board, made recommendations to the board concerning the hiring of a webmaster and choosing WWS's phone service provider, informed Durtschi of the operations manager vacancy and suggested that he apply for the job, and had a lead role in managing WWS's attempts to get the suspension of its license lifted. He was the individual most-engaged in communications with APHIS and Ms. Carroll, including asking for the provisional reinstatement of the exhibitor's license. He was clearly the lead orchestrator of the WWS attempts to meet with various government entities to resolve WWS' problems, and represented himself as being in charge of getting the WWS back into operating as a licensed exhibitor. He was added by the WWS Board of Directors "as an additional insured under the directors' and officers' liability policy of insurance". Tr. 2841, RLX 60.

On the other hand, Lorsch basically knew nothing about the day-to-day operations of the WWS, and was not involved in them to any measurable extent. He had no knowledge of animal husbandry and care, did not know the first thing about proper construction of chimp facilities, veterinarian qualifications, environmental enrichment and enhancement, was not involved in the hiring or firing of employees (other than recommending that Durtschi apply for the operations manager vacancy), and did not have an office or a phone on the premises. Tr. 2237-2242. During the suspension period, Respondent Colette was the Director of Animal Services, responsible for "ensur[ing] that animal care happened, that the introduction of different animals, the creation of families, groups, troops, that the animals under our care were treated as needed by veterinarians, by good food, by enrichment, by ensuring that the grounds, the areas they lived in, that type of thing." Tr. 4953. Her duties included overseeing "the facilities of feeding, cleaning, watering,

enrichment, consulting with veterinarians about the variety of different animal issues that arise on a daily basis, creating groups, troops, packs, prides and assortment introductions of animals, doing our outreach, oversight on an outreach program and education, working with a certain amount of volunteers . . ." Tr. 4185. It is overwhelmingly clear to me that Lorsch was utterly unknowledgeable about the day-to-day workings of the WWS—indeed there is no specific testimony to refute this notion. The only testimony the government had regarding Lorsch's role in the actual operations of the WWS was a series of witnesses who relayed general remarks that they had heard Lorsch was in charge. It is abundantly clear from the specific testimony of numerous witnesses that while Lorsch had a significant role vis-à-vis fundraising and as coordinator of WWS efforts to comply with government regulations, he did not attempt and was woefully under qualified to act in any capacity towards the realities of operating the facility.

The evidence establishes that Lorsch's principal roles at the WWS were essentially two fold: He was one of the principal financial benefactors of and fund raisers for the facility and, with respect to resolving the compliance issues plaguing the WWS, he volunteered to take the lead in interacting with the various government agencies involved. While he used his connections to get the state and county agencies working with WWS, and clearly represented the WWS in negotiations with government entities, that in itself would not put him in the position of someone who is responsible for alleged violations committed by WWS. While Complainant argues that Lorsch was in control of the facility, that simply was not the case. Since Lorsch was coordinating the WWS's efforts to resolve their regulatory dilemmas, he would naturally attend the exit conferences for any inspections that were an essential component of the lifting of the license suspension. For me to hold that someone involved in such a representational capacity could be held liable for the violations that WWS allegedly had committed during at the time of these inspections would be a drastic extension of the coverage of the act, exposing board members, attorneys, or other representatives of an exhibitor to potential liability. Such an all-encompassing reach is not supported by the cases cited by Complainant.

Since Martine Colette (d/b/a WWS) was the exhibitor whose license was suspended, Lorsch is only potentially liable for violations for which he is an agent of the exhibitor. Thus, Dr. Gibbens testified that the Agency's case against Lorsch was predicated on his acting as an agent under 7 U.S.C. § 2139, which deems the actions of any person "acting for or employed by" an exhibitor as actions of the exhibitor "as well as of

such person." In determining liability based on this statutory agency provision, it is necessary to look at how the alleged agent exercised his actual or apparent authority and what areas it appears that the agent had authority.

Stated simply, it appears to me that, to the extent Lorsch was acting as an agent for the WWS, it was in the area of the two roles described above. To hold that Lorsch was WWS's agent in the area of employee hiring, animal enrichment, veterinarian qualifications, and most of the other areas that were the subject of the Second Amended Complaint would require me to ignore the overwhelming evidence, including the testimony of Lorsch, Martine Colette, A.J. Durtschi, Byron Countryman and numerous others, that Lorsch's primarily roles with the WWS were as a financial benefactor and as a representative or intermediary with government regulators. He had no role in the operational activities of the facility that were supervised by A.J. Durtschi, Martine Colette and others. While he was unquestionably an individual of great influence in the WWS the only areas where he had any authority as an agent, whether actual or apparent, were in those two general areas. Thus, there is little doubt that he had authority in the area of setting up fund raisers, including issuing personal invitations to events, but I have already concluded that those events did not constitute exhibiting under the Act or regulations. His actions in representing WWS during and after the course of APHIS inspections, particularly including the exit conference in September, 2003, and his participation in Operation Mole, will be discussed in more detail later in this decision.

3. **The fact that the WWS signed a Consent Decision does not resolve the action against either Lorsch or Colette.**

The one-satisfaction rule does not apply here. One of the arguments advanced by both Respondents is that the fact that APHIS and the WWS entered into a Consent Decision, signed by me, that resolved all pending claims by APHIS against the WWS, acts to prevent APHIS from recovering against any other party for the same violations. In a related argument, Lorsch contends that a settlement of a matter with the principal prevents the pursuit of an action against the alleged agent.

The one-satisfaction rule is essentially a rule of common law developed to assure that a party would not be enriched as a result of achieving damage recoveries against multiple other parties in excess of the damages actually incurred. It is an equitable doctrine. However, it has no place in actions under the Animal Welfare Act or other remedial statutes where it is routine for a statute or regulations to allow for multiple

responsibility for violations.[13]

While Dr. Gibbens admitted, and the Second Amended Complaint confirms, that Lorsch is only potentially liable for alleged violations because of the agency liability provision in the statute, the statute makes the agent liable for his or her own actions on behalf of the principal, as well as making the principal liable for the actions of its agent. Thus, while there is no longer an issue concerning WWS liability for actions of Lorsch, the Consent Decision does not in itself dispose of issues where the statute deems Lorsch responsible on his own for violations he may have committed as an agent of the WWS.

Lorsch also contends that an adverse decision in this case will subject the WWS to additional financial liability since Lorsch will have an indemnification claim against the WWS. I agree with Complainant that any private arrangement between the parties is not material to my consideration of this case, and find that allowing such a defense would run counter to the notion that multiple parties can be held liable for violations.

The issue of multiple party liability is a little less clear given the relationship between Respondent Colette and the WWS. In a case decided subsequent to the filing of briefs in this case, the Judicial Officer dismissed the complaint against an individual cited for failure to obtain an exhibitor's license, while sustaining a finding that the corporate entity of which the individual was president was required to obtain a license. *In re. Daniel J. Hill and Montrose Orchards, Inc.*, 67 Agric. Dec. (May 18, 2008). That case presented a situation somewhat the opposite of the instant case, since here it is undisputedly the individual who holds the license, while the corporate entity does not. Further, the exhibitor's license is issued to Martine Colette d/b/a Wildlife Waystation, so it appears that APHIS is treating Ms. Colette and the WWS as one entity for the purpose of issuing the exhibitor's license, and two entities for the purpose of pursuing these violations. While it does seem that Complainant is seeking to recover twice from what is essentially the same entity, as opposed to seeking recovery from Respondent Lorsch as an agent, there is no USDA case law that would bar such recovery. Thus, I reluctantly conclude that the Consent Decision I issued with respect to the WWS does not flatly bar the continuing pursuit of the action against Ms. Colette. [4]1

[13] See, e.g., *In re Hank Post,* 47 Agric. Dec. 542, 547 (1988). Also, see, e.g., EPA fuels regulations, where multiple parties, including refiners, distributors, resellers, and retail service stations could be held responsible for violations of unleaded gasoline and other regulations. 40 C.F.R. Part 80.

[14] The point is somewhat moot anyway, as I am finding no violations committed by Ms. Colette, other than those I provisionally find if my initial ruling on the issue of whether exhibiting took place is overturned.

4. **The conduct of Robert Lorsch at the September 16, 2003 exit conference was not a violation of the regulations.** Since I have concluded that there was no exhibiting and that therefore the large majority of violations alleged in the Second Amended Complaint (although I will be making provisional findings in the event this conclusion is reversed on appeal to reduce or eliminate the need for a remand) cannot be sustained, the allegations concerning the conduct of Mr. Lorsch at the September exit conference, and the significance of Lorsch's involvement in Operation Mole are not eliminated by the failure of Complainant to prove that unlawful exhibiting was taking place. However, with respect to Mr. Lorsch, his conduct at the exit conference and his sponsorship of Operation Mole are not offered as counts in the complaint against him, but are instead offered as illustrations of bad faith, a factor that is required to be weighed in the penalty assessment process assuming violations are found. Mr. Lorsch's conduct at the exit interview does, however, constitute one of the counts against Ms. Colette.

There is no doubt that Mr. Lorsch was acting as a representative of the WWS during the exit interview. He was considered to have authority to deal with the USDA on issues relative to the WWS, and was acting in that role when he attended the exit conferences with Ms. Lorang and Dr. Garland via telephone. Evidence concerning whether Lorsch was acting as Martine Colette's agent in this matter is not very specific—Ms. Colette clearly deferred to Mr. Lorsch in terms of the exit interviews, but whether she was deferring to him as her agent rather than the agent of the WWS has not been clearly established. In fact, Ms. Colette contended in her brief that it was the WWS board of directors that delegated its authority to participate in the exit interviews to Mr. Lorsch (Br., p. 23), and that he was there as the WWS agent, rather than as the agent of Ms. Colette. Further, Inspector Lorang testified that A.J. Durtschi was attending the September 16 exit interview as Ms. Colette's representative. Tr. 711. However, since Colette was the exhibitor's license holder, and the purpose of the inspections, at least from Respondents' point of view, was to get the suspension of the license lifted, Ms. Colette's acquiescence in Lorsch's lead role in negotiations with the various government entities, and in particular with the inspectors, is tantamount to approving his agency in that somewhat limited realm.

Mr. Lorsch's conduct over the telephone at the September exit interview was far from ideal, but I do not find it is "abusive" as that term is used in the regulations. The regulations make it illegal for a licensee to ". . . interfere with, threaten, abuse (including verbally abusing) or harass any APHIS official in the course of carrying out his or her duties." 9 C.F.R. § 2.4. There is no question that Lorsch frequently interrupted

Inspector Lorang (apparently Dr. Garland remained silent throughout the exit interview and Lorsch was unaware of her presence at that time) and that his conduct can objectively be categorized as "rude[15]." Dr, Garland principally categorized Lorsch as being "condescending," Inspector Lorang categorized Lorsch's conduct as being "over the top abuse," stating that Lorsch indicated they were "stupid," "ignorant," were conspiring against the WWS, and that maybe the WWS should just kill Sammy, the self-mutilating chimp. Tr. 255.

On the other hand, Inspector Lorang testified that Lorsch was interrupting everybody (although it appears that only Lorang and Durtschi were doing any of the talking) and that he was "nondiscriminatory" in terms of who he was interrupting. Tr. 632-633. And Dr. Garland testified that none of the negative adjectives—stupid, ignorant—were directed at the inspectors **personally**, but were rather directed at their **findings**. Tr. 3260. Indeed, Dr. Garland testified that the entire basis for her conclusion that she and Inspector Lorang were being subject to verbal abuse was the fact that Lorsch spoke in a condescending tone of voice. Tr. 3592-3593.

Inspector Lorang testified that she was not intimidated by Lorsch, but did feel she was being harassed, notwithstanding the fact that Lorsch was participating only by telephone. She and Dr. Garland never told Lorsch that his comments and interruptions could constitute verbal abuse. Although Inspector Lorang did write a memorandum on Lorsch's behavior, this memo was written many months after the fact. There were no contemporaneous notes offered in evidence by either inspector, nor does the inspection report contain any mention of Lorsch's conduct. Inspector Lorang testified that, after discussing Lorsch's conduct she wrote the memo describing the incident. CX 36. She apparently did not even write the first draft of the memo until December 2003, and indicated that she "didn't get back to it until May." CX 36, p. 2. The actual memo submitted was dated January 25, 2007 but was apparently the May 2004 document that Inspector Lorang is alluding to—although there is no version of the document with that date in the record.

Mr. Lorsch's conduct at the September 16 exit conference did not rise to the level of verbal abuse such as to trigger sanctions under the regulation. It is critical to the working of the Animal Welfare Act, as well as the numerous other acts that rely on inspections to carry out USDA mandates, that inspectors or other agents of the USDA are not subject to harassment, abuse or physical threats. On the other hand, exit interviews are considered to be an exercise in give and take, where a dialogue is not

[15] A.J. Durtschi apologized to the inspectors for Lorsch's conduct, and Lorsch called Inspector Lorang the next day to apologize.

unexpected, and where the parties being informed of possible violations are not required to sit back and accept without question the findings of the inspectors. Undoubtedly, Mr. Lorsch was angered, peeved, and rude during the course of the September 16 interview, but it takes more than that to trigger a violation of the regulations. Some venting is not equivalent to verbal abuse. If the inspectors thought Mr. Lorsch's conduct was verging on abusive, they should have told him that, rather than wait and issue an allegation of violation the following week. Further, as Dr. Gibbens testified when urging that "very severe sanctions" be imposed for this alleged violation, interfering with inspectors impedes the enforcement of the Act because inspectors are prevented from conducting a thorough, detailed inspection, and would be equivalent to denial of inspection access. Tr. 5331-5335. Since the inspectors had completed an extremely thorough inspection, without any hint of interference, until the unpleasantries at the exit conference, it is very difficult for me to comprehend how a "severe sanction" could possibly be warranted.

Lorsch's conduct was far less troublesome than that which occurred in *S.S. Farms Linn County,* 50 Agric. Dec. 476 (1991), cited by Complainant, where an owner of the facility stood within inches of the inspecting veterinarian's face screaming at him and threatening him. As Judge Palmer found, and the Judicial Officer affirmed, "No government official attempting to perform his duties should ever be subjected to this kind of abuse." *Id.*, at 491. In affirming, the Court of Appeals also attributed the conduct of the owner's mother, who screamed and cursed at the same official a few days later, to the owner. *Hickey v. USDA,* 991 F. 2d 803, 52 Agric. Dec. 121, 125 (1993). In *SEMA, Inc.*, 49 Agric. Dec. 176 (1990), the inspectors were prevented by the respondent from conducting a full inspection, including denying access to some records, preventing the taking of photographs, and were physically prevented from leaving the facility and threatened with arrest. In *Frank and Jean Craig d/b/a Frank's Meats*, 66 Agric. Dec. (February, 2007), inspectors were screamed at, threatened, charged at, and interfered with over many occasions, and the owner repeatedly compared his situation with another owner who had earlier murdered two inspectors. Interrupting, speaking in a condescending manner and threatening to talk to supervisory personnel just do not fit into the category of "over the top" verbal abuse that would expose Ms. Colette to a finding of a violation and a possible civil penalty.

5. **Allegations of selective enforcement and the frequent failure of APHIS to follow their own written procedures are not a basis for dismissing the allegations against Respondent Lorsch**. I find that there was no evidence, other than conjecture, of any selective enforcement, and

that while APHIS has an alarming tendency to disregard its own guidance documents, that would not in itself be grounds for dismissing an action.

With respect to selective enforcement against Respondent Lorsch, the heart of Lorsch's argument is that the actions of APHIS in issuing an amended complaint six days after the September exit conference (a time period which is inarguably out of the ordinary for the APHIS complaint process[16]), and in not following a variety of other procedures normally associated with a complete investigation, acted to deprive Lorsch of his First Amendment rights—i.e., that he was punished for strongly expressing his disagreement with the findings of the inspectors and his dissatisfaction with the agency in general. He also contended that the fact that he was singled out when numerous other persons could have been named as parties, such as Byron Countryman and A. J. Durtschi, is further evidence of selective enforcement. He also alleges 14th Amendment violations by the Agency.

If an agency had to demonstrate, in order to successfully conduct an enforcement action, why it did or did not elect to pursue enforcement actions against any other individual or entity, that would constitute an incredibly difficult burden of proof to overcome. The very nature of enforcement of remedial statutes by government agencies requires an agency to frequently choose who to enforce against in order to best effectuate the statute's remedial purposes. Just as a police officer may stop someone going 80 in a 55 zone, and not stop someone going at 65, so may an agency decide that, with limited resources, it will prosecute one alleged violator over another. Selective enforcement, and possible constitutional violations, only come into play where there is some type of invidious selectivity in terms of the factors utilized in enforcing against a person. *In re Jerome Schmidt d/b/a Top of the Ozark Auction,* 66 Agric. Dec. 159 (2007). Here, other than the fact that Lorsch was named as a Respondent remarkably soon after APHIS learned information that led them to conclude that Lorsch was a responsible party, no such showing has been made.

With respect to APHIS not following its own procedures, it is not a basis for dismissal,[17] although it is one of concern. While APHIS inspectors are required to conduct inspections according to protocols

[16] Even more impressively, the 24 page First Amended Complaint was signed by counsel on September 17, the day after the exit conference.

[17] Thus, *e.g.,* in *In re. John F. Cuneo*, 64 Agric. Dec. 1318, 1343 (2005), *aff'd* 65 Agric. Dec. 87 (2006) (decision as to James G. Zajicek), APHIS "failed to comply with its own rules and guidelines when it failed to provide Mr. Zajicek with a copy of any inspection report at the close of the inspection."

established in various inspection guides, it appears that APHIS inspectors generally feel the guides are not applicable to them if they are "experienced." Inspector Lorang testified that she felt her years of experience were a sufficient guide for her in the conduct of the inspection. "So I believe I've opened the guide one time. And that was kind of because my dog chewed the box of it, and so -- it's simply these were written for new people. For -- I'm sorry, that's the way I've always looked at it. These are written to assist new people to get the experience that people that have been doing it for 15 years already have. It's to help them." Tr. 2337-2338. Her supervisor, Dr. Garland, testified that reading the guides was not a requirement of the job, and that she did not—indeed could not--direct her inspectors to read the inspection guide. Tr. 3611. And Dr. Gibbens testified that the guides were designed for new inspectors even though the guides indicate that they are to be used by all inspectors.

The fact is, however, that there was no real prejudice to either Respondent by the failure of the inspectors to literally follow each step in the inspection guides. The guides do not indicate that each of their procedures was mandatory—they were intended for use as "guides." In any event, the failure to follow the procedures as alleged by Lorsch would not alter the fact that violations either were or were not committed. The fact that a correction date was not given when it should have been, or that the inspectors may have mischaracterized the inspections as "routine" when they were in fact not routine, would not alter the existence of the violations.

6. **Provisional findings on alleged violations**—In the event that my finding that no exhibiting occurred, and that therefore most of the alleged violations (other than those concerning the actions of Lorsch at the September inspection) were thus inappropriately cited, is reversed, I include the following provisional findings:

Many of the animals at the WWS were both regulated and in "commerce" or "affecting commerce" as these terms have been interpreted in the context of Animal Welfare Act coverage. Although both Respondents contend that the APHIS did not generally meet their burden of showing coverage, I find that, given the clearly liberal interpretation to which these terms have subjected by the Secretary, that, if there were exhibitions of animals by the WWS, then the regulated and commerce aspects of the statute would have been met by the Complainant.[18]

[18] "The 'in commerce' requirements of the Animal Welfare Act are interpreted liberally. . . Congress indicated that it wanted to extend the application of the Animal Welfare Act broadly to cover any activity that 'affects commerce ( 7 U.S.C. § 2131)." *In re Daniel J. Hill and Montrose Orchards, Inc.* 67 Agric. Dec. 196, 203 (2008). The

On the other hand, even if the fundraisers, volunteer and donor tours, and press events were exhibitions, which I have ruled they were not, the question of which animals are covered by the regulations is not that simple. As Complainant vigorously argues in its brief, an animal can be considered subject to the regulations even if it is not exhibited, as long as it is "intended for use … for ... exhibition." (Compl. Reply to Lorsch Br., p. 5, quoting 7 U.S.C. § 2132(g); 9 C.F.R. § 1.1. Conversely, if an animal has never been either exhibited or intended for use in an exhibition, it would appear not to be regulatable under the Act or the regulations. Thus, it would appear that Sammy, the self-mutilating chimp, who was clearly never exhibited and who at the time of the inspections, and perhaps to this day, was never intended to be exhibited, would be outside the parameters of the regulations. There is a legitimate question as to whether, at the time of the inspections, the chimps that were contained in Q1 and Q2 were regulated animals under APHIS's own analysis, since there was no evidence showing that the two quarantined areas were ever open to the public.

If the WWS was in fact exhibiting, it did appear to commit several veterinary care violations at the time of the inspections, which Respondent Colette would be responsible for as the license holder. First, the facility did not fully comply with the requirement regarding the establishment of a program for veterinary care. While there was a full-time veterinarian, Adam Gerstein, he did not appear to have "received training or experience in the care and management of the species being attended" nor did he have "direct or delegated authority for activities involving animals at [the] facility" that would allow him to qualify as "attending veterinarian" as required under the definition at 7 C.F.R. §1.1. The regulations require that an attending veterinarian be designated through "formal arrangements," which presumably means in writing, and that there be a written program of veterinary care. 7 C.F.R. § 2.40(1). The attending veterinarian needs to have "appropriate authority to ensure the provision of adequate veterinary care." 7 C.F.R. § 2.40(2). However, the testimony demonstrated that it was not Dr. Gerstein, but rather Dr. Rebecca Yates, who wielded this authority, but in an informal manner.

That is not to say that the WWS's veterinary affairs were not in competent hands, as it is also clear that Dr. Rebecca Yates, while not being officially designated as the part-time attending veterinarian, had previously served in that position, was totally competent in that position,

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WWS' use of the internet, their occasional purchase of animals, and their self-described trips over state lines to rescue animals would be factors mitigating in favor of coverage.

and was on call for any matters where Dr. Gerstein needed assistance or advice. While she was not formally designated in the position of attending veterinarian, she was to a large degree serving in that position, and her testimony was quite clear that Dr. Gerstein was required to call her "and go over anything that was complicated." Tr. 4757-4760. Thus, while there is a violation, the seriousness is greatly mitigated by the competent veterinary assistance at hand. [19]

With respect to the allegation that the WWS employed inadequate personnel, Complainant's brief contains little more than a naked statement that having a single person with the title "Animal Manager" for over 200 animals "is inadequate." The September 16 inspection reports cites the fact that two employees were caring for 10 chimps, concluding "This may not be an adequate number of trained employees to carry out the level of husbandry practiced and care required." CX 4, p. 3. However, there was no testimony that would allow me to make a conclusion as to the number of employees that would be adequate for a place such as the WWS, and the inspectors' conclusion of inadequacy is halfhearted at best. There is no specific requirement establishing the number of supervisory positions required for a particular animal population, and given that the facility employed somewhere between 35-40 full-time staff and were assisted by hundreds of volunteers, [20] Complainant has failed to meet its burden of proof on this count.

Complainant's contention that there was insufficient documentation concerning the adequacy of written records to support the frequency of observations and opportunities for environmental enrichment with respect to Sammy specifically and other animals generally is supported by a preponderance of the evidence. Daily observation of all animals is required by the regulations, while non-human primates require "an appropriate plan for environmental enhancement adequate to promote the[ir] psychological well-being." Documentation in this area was generally sparse, even with regards to Sammy, for whom only four notations concerning environmental enhancement were noted over a four month long period. While there is no specific requirement for daily entries concerning environmental enhancement, and there was ample testimony that the WWS provided such enhancement regularly, the paucity of the documentation, particularly for an obviously problematic case like Sammy, does not appear to be in compliance with the

[19] In addition, the WWS staff included Silvio Santinello, who was licensed to practice as a veterinarian in Mexico, but was never so licensed in the United States. Dr. Mahoney considered him a fellow veterinarian, and a "Highly experienced and a good person to work with." Tr. 4052-4053.

[20] Testimony of Martine Colette, Tr. 4209-4210.

regulations. Likewise, the fact that after the hiring of Jennie McNary, and the carrying out of her recommendations, the condition of Sammy markedly improved to the point that he is now better than he has ever been is an indication that the previous attempts to treat his self-mutilation were, while reasonably diligent, not the best. Thus, while Dr. Mahoney opined that while Sammy was the worst case of self-mutilation that he had ever witnessed, Tr. 4070; that determining the triggers for self-mutilation is very difficult, Tr. 4071-4072; that continued self-mutilation was not a sign that Sammy was not getting adequate environmental enhancement, Tr. 4082; and that the WWS was doing all it reasonably could to treat his condition, Tr. 4089; the changes that had taken place after Jennie McNary's intervention were "thrilling" and "unbelievable." Tr. 4089-4090. Dr. Mahoney agreed that Sammy's condition improved "dramatically" once McNary became involved. Tr. 4136. This would support a conclusion that the diagnoses of McNary related to environmental enhancement and other factors were an indication that the measures provided by the WWS fell short of the regulatory standard. Thus, I conclude that there is a violation of the documentation and implementation of the environmental enhancement provisions, with the understanding that this finding would apply only if my earlier findings as to the lack of exhibiting generally, and my specific findings that the chimps, and particularly Sammy, were never exhibited before or during the periods covered by the inspections, were reversed.

There also was testimony on the violation cited for the failure to have proper equipment to immobilize and/or anesthetize chimps for medical treatment. The alleged violation was for having den boxes in the chimp enclosures that were not suitable for use in sedating or anesthetizing non-human primates. Ms. Colette testified that the den boxes were never used for those purposes, because it was impossible to see adequately into the boxes to enable darting a chimp, and that the boxes were only used by the chimps as a shelter. Tr. 4877-4848. Rather they used catch cages "since the inception of the Wildlife Waystation." Tr. 4879. Dr. Yates also testified as to the use of portable catch cages. Since it seems to be undisputed that the den boxes were not adequate for immobilization or anesthetization, and it is equally undisputed that the den boxes were not used for those purposes, and that other adequate methods were used, this allegation was not proved by Complainant.

Numerous other relatively minor violations were established at the hearing. A pot of uncooked rice was exposed in the kitchen, although there was no documentation as to how long this incident lasted. There

were flies on Sammy's open wounds, although there was no indication as to what preventative measures could have prevented the presence of flies, and there is no total ban on insects appearing in a facility. There was some issue concerning the presence of adequate hand washing facilities at portable rest room facilities. A tree branch was growing through a part of an enclosure. At most, these were minor violations.

**Findings of Fact**

1. Respondent Martine Colette is an individual whose mailing address is 14831 Little Tujunga Canyon Road, Los Angeles, California. During the time period relevant to this proceeding, she was involved in the operation of a zoo, as that term is defined in the Regulations, known as Wildlife Waystation, located at the same address. Respondent Colette holds Animal Welfare Act license number 93-C-0295, issued to "Martine Colette d/b/a Wildlife Waystation."
2. On October 31, 2002, a Consent Decision and Order were issued by Administrative Law Judge Jill S. Clifton in In re Martine Colette and Wildlife Waystation, AWA Docket No. 00-0013. In that decision, Martine Colette as an individual, and the Wildlife Waystation, admitted to the commission of several hundred violations of the Animal Welfare Act. The decision imposed a suspension of the exhibitor's license issued to Martine Colette d/b/a Wildlife Waystation until an APHIS inspection supported the lifting of the suspension.
3. Robert H. Lorsch is a businessman and philanthropist who has been closely involved with the Wildlife Waystation. He has been a substantial financial contributor to the WWS, to the extent that he was recognized as the "best friend" of the WWS. He has held various positions with the WWS, but has never been involved in any aspect of the day-to-day management of the facility. While he had been described as the "unofficial CEO" of the WWS, and unquestionably had some influence in WWS decision making, he was not an official of the WWS during the time period relevant to this decision. He was not a member of the WWS board of directors during the relevant time period.
4. Respondent Lorsch volunteered to act as a representative and advocate for the WWS in their dealings with the federal, state and local governments. This involved utilizing some of his numerous contacts to bring people together to resolve the problems with government agencies plaguing the WWS. In this capacity, Lorsch attended numerous meetings, presented and negotiated various positions to resolve the numerous pending issues, and acted as an agent for those purposes for the WWS.

5. Lorsch also took actions to increase donations to the WWS. In particular, he invited potential donors to a variety of fundraisers, both off-site and at Ms. Colette's home, which was located at the same address as the WWS.
6. On several off-site fundraisers, regulated animals not owned by the WWS were exhibited by others for the benefit of the WWS. On at least one occasion, the WWS brought an eagle, a snake and a llama to a fundraiser. While under some circumstances a llama may be considered a regulated animal, there was no evidence presented that this llama was regulated.
7. On numerous occasions, potential volunteers were invited to the WWS and taken on bus tours. After the tour, some volunteers withdrew their applications. There is no credible evidence that these volunteer tours were conducted for any other reason than to introduce volunteers to the variety of duties they might undertake. Withdrawal of some applications after the tour would be totally expected and does not indicate any other motivation for the conduct of the tours.
8. In early August, 2003, the WWS requested that APHIS conduct an inspection of their facility to determine whether the license suspension should be lifted. Although such an inspection is not considered routine, and regulatory violations are not customarily cited during an inspection to lift a license suspension, in fact on August 15, apparently a short while after the inspection was requested but before it was actually conducted, a complaint was issued against Martine Colette and the WWS charging that it had violated the Act by exhibiting without a license.
9. Even though Respondents presumed the inspection was simply to determine whether APHIS would lift the license suspension, it appears that APHIS inspectors had already determined that Respondents were exhibiting improperly, and thus, even though the inspection was invitational rather than announced, APHIS inspectors were prepared to cite Ms. Colette and the WWS for any violations they believed existed.
10. At the inspection conducted August 19-21, 2003, the APHIS inspectors found several areas where they believed the facility was not in compliance. The August 15 complaint had not been served on the then Respondents Martine Colette and Wildlife Waystation at the time of this three day inspection. The inspectors discussed the alleged non-compliance areas in an exit conference on August 21. Mr. Lorsch attended the exit conference via telephone. The inspectors did not inform the WWS, Ms. Colette and Mr. Lorsch that the areas of non-compliance presented the possibility of complaint issuance.

11. A follow-up inspection was conducted on September 16, 2003. At this inspection the inspectors found that a number of the alleged non-compliant areas discussed after the first inspection were still in non-compliance. They also cited a number of alleged non-compliances involving the condition of Sammy, a chimp that had been self-mutilating since before he was moved to the WWS nearly a decade earlier.
12. At the September 16 exit conference, Respondent Lorsch, who was again participating by telephone, became quite angry, was rude, spoke condescendingly and disparagingly about many of the observations of the inspectors, and questioned whether they wanted Sammy to be euthanized. The inspectors did not advise Lorsch that he was being abusive, and Inspector Lorang stated that she did not feel intimidated. Following the exit conference, A.J. Durtschi, the Manager of the facility who attended the exit conference in person, apologized for the conduct of Lorsch. The following day, Lorsch telephoned Inspector Lorang and likewise apologized.
13. Less than a week after the September 16 exit conference, an amended complaint was issued, alleging many violations from the August and September inspections, and for the first time naming Lorsch as a Respondent.
14. On October 14, 2003, an additional follow-up inspection was conducted by APHIS, and additional alleged violations were documented.
15. On November 3, 2003, APHIS reinspected the facility and found no further violations. As a result of this inspection, the suspension of the license issued to Martine Colette d/b/a Wildlife Waystation was lifted.
16. At the August-October inspections, the facility did not meet the regulatory requirements for having an attending veterinarian.
17. At the September inspection, the inspectors observed that the chimp Sammy, who had been a self-mutilator since at least the time he had come to the facility, exhibited a number of open wounds that were the result of self-mutilation. Sammy had never been exhibited nor was there any indication that Sammy would ever be exhibited as defined in the regulations. The facility had undertaken significant efforts to rehabilitate Sammy, but during a four month period prior to the inspection there were only four entries in a log book documenting environmental enhancement methods. Shortly after the September inspection, the facility hired a consultant who worked with Sammy with dramatic positive results.
18. Portable catch cages were used for anesthetizing and/or immobilizing chimps. There was no evidence presented that would support a finding that inadequate den boxes were used for these

purposes.

19. There was no meaningful evidence introduced to support an allegation that the facility had an inadequate number of employees to tend to the animals.

## Conclusions of Law

1. The various on and off-site activities cited by Complainant, including fund raising, recruitment of volunteers, and invitations to prospective donors to visit the Wildlife Waystation did not constitute "exhibiting" as that term is defined in the Act or the regulations. Accordingly, Complainant failed to demonstrate by a preponderance of the evidence that Respondents Martine Colette and Robert Lorsch exhibited while Ms. Colette's license was suspended pursuant to the 2002 Consent Decision.

2. Since no unlawful exhibiting took place during the period for which violations were alleged, there are no violations for conditions at the Wildlife Waystation as alleged in the Second Amended Complaint.

3. While Respondent Lorsch was rude, condescending and angry towards Inspector Lorang and Dr. Garland during the September 16, 2003 exit conference, his conduct during the telephone call did not rise to the level which would constitute "abusive" conduct under the Act and the regulations.

4. Robert Lorsch was a limited agent for both the Wildlife Waystation and Martine Colette. His agency extended to the areas of recruiting wealthy donors and hosting fundraising activities, and acting in a representational capacity to take advantage of his connections and liaise with the federal, state and county governments to resolve the numerous regulatory difficulties plaguing the WWS and Ms. Colette. His agency did not extend to day-to-day operations of the WWS or any aspect of animal care and management.

5. If it is found that unlawful exhibiting took place at the facility, I would find that the Complainant did demonstrate violations by Respondent Colette for noncompliance with the attending veterinarian regulations, for adequacy and appropriate documentation of environmental enhancement, and for minor violations involving exposed food, control of insects, structural integrity (a branch growing through a chimp cage), and the presence of hand washing facilities.

## CONCLUSION AND ORDER

Complainant has failed to prove that Respondents Martine Colette and Robert Lorsch committed any of the alleged violations of the Animal Welfare Act that were the subject of the Second Amended Complaint. Accordingly, I rule in favor of Respondents, and order that the case against them be dismissed.

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.

Done at Washington, D.C.

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**ANIMALS OF MONTANA, INC.**
**AWA Docket No. D-05-0005.**
**Decision and Order.**
**Filed August 29, 2008.**

**AWA– E.S.A. – Conviction, prior – License denial.**

Colleen A. Carrol and Bernadette R. Juarez for APHIS.
Respondent, Pro se.
*Decision and Order by Administrative Law Judge Jill S. Clifton.*

1. The Petitioner, Animals of Montana, Inc. (Animals of Montana), is represented by Michael L. Humiston, Esq. The Respondent, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), was previously represented by Colleen A. Carroll, Esq., and is now represented by Bernadette R. Juarez, Esq.

2. The Animal Welfare Act authorized the Secretary of Agriculture "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. § 2151.

3. Animals of Montana's request for hearing, filed in June 2005, concerns APHIS' termination of Animals of Montana's Animal Welfare Act license. *See* 9 C.F.R. §§ 2.11, 2.12.

4. APHIS' Motion for Summary Judgment, filed March 8, 2006, and thereafter supplemented, is GRANTED, as follows.

5. APHIS' "Supplemental Briefing and Motion for Reconsideration," filed April 4, 2008, has been carefully considered, together with Animals of Montana's "Memorandum Re: Retroactive Application" (unsigned), emailed April 4, 2008. Also carefully considered was Dr. Gibbens' Supplemental Declaration filed August 13, 2008.

6. APHIS has persuaded me that termination pursuant to 9 C.F.R. § 2.12 need not be a permanent remedy and that APHIS does not seek permanent disqualification here. The portion of 9 C.F.R. § 2.11 applicable here provides:

> . . . A license **will not be issued** (emphasis added) to any applicant who:
>
> > . . . . Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, (and) ownership . . . of animals . . . and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11

7. Key, of course, is the Administrator's determination whether the issuance of a license would be contrary to the purposes of the Act. To express APHIS' policy and the Administrator's determinations in this case, APHIS relied on Dr. Gibbens' four-page declaration attached to Respondent's Motion for Summary Judgment. Troy Hyde's misdemeanor convictions of a Lacey Act violation and an Endangered Species Act violation, accompanied by the false and/or fraudulent information on the APHIS Forms 7020 used in the transactions, do require, according to Dr. Gibbens, termination of Animals of Montana, Inc.'s Animal Welfare Act license and a two-year period of disqualification, minimum, but not permanent disqualification. After the period of disqualification, a license **could be issued**.

8. APHIS' policy and the Administrator's determinations are further expressed by Dr. Gibbens' five-page Supplemental Declaration filed August 13, 2008. Dr. Gibbens therein affirmed and further explained the necessity of, at minimum, a two-year period of disqualification from

licensure (a one-year period disqualification for each of Troy Hyde's two criminal convictions, served consecutively).

9. No objections have been filed to the following Conclusion, which is supported and reached as a matter of summary judgment.

**Conclusion**

Troy Allen Hyde, also known as Troy A. Hyde and as Troy Hyde, an individual (frequently herein, "Mr. Hyde"), on March 8, 2005, pled guilty to and was found to have committed[1] the two below-described misdemeanor violations:

> (a) In May 1999, Mr. Hyde committed a misdemeanor trafficking violation of the Lacey Act, by arranging the transport of a tiger cub, an endangered species, from Minnesota to Montana. Mr. Hyde had bought the tiger cub for $750 from individuals who had no permit or license to engage in interstate commercial activity with endangered species. Thus, the tiger cub was sold[2] in violation of the Endangered Species Act, and Mr. Hyde's subsequent knowing transport to Montana was a violation of the Lacey Act.
> (b) In May 2000, Mr. Hyde committed a misdemeanor violation of the Endangered Species Act, by arranging the transport of a tiger, an endangered species, from Minnesota to Montana in the course of commercial activity. Mr. Hyde had bought[3] the tiger ("Keeno") for $1,000 from the same individuals referenced above who had no permit or license to engage in interstate commercial activity with endangered species.

**Order**

This Order is effective on the day after this Decision becomes final (*see* following section regarding finality). The Animal Welfare Act license of Animals of Montana, Inc. is terminated, in accordance with 9 C.F.R. § 2.12, because the above-described misdemeanor violations

[1] Attachment C and Attachment B to Motion for Summary Judgment.
[2] The individuals in Minnesota who sold the tiger cub wrote that the transaction was a "permanent breeding loan" rather than the sale that it was. Mr. Hyde did not intend to breed the tiger.
[3] The individuals in Minnesota who sold the tiger wrote that the transaction was a "donation" rather than the sale that it was.

were committed by an owner, responsible corporate officer, trainer, and agent of Animals of Montana, Inc. Animals of Montana, Inc., and its officers and agents (including but not limited to Troy Allen Hyde, also known as Troy A. Hyde and as Troy Hyde), and any legal entity in which Animals of Montana, Inc., has a substantial interest, (a) are disqualified for 2 years 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; and (b) may apply for an Animal Welfare Act license 60 days prior to the end of the 2 years of disqualification, with the understanding that no license will issue until disqualification has ended.

**Finality**

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 enclosed 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.

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**ROBERT AND LOU ANN HURD d/b/a HURD'S KENNEL.**
**AWA Docket No. 07-0114.**
**Decision and Order.**
**Filed August 30, 2008.**

**AWA – "Rescue" animals – Veterinary certificate, lack of.**

Sharlene Deskins for APHIS.
Respondent, Pro se.
*Decision and Order by Administrative Law Judge Victor W. Palmer.*

**DECISION AND ORDER**

This is an administrative disciplinary proceeding initiated by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"), that alleges Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; "the Act"), and the regulations and standards issued under the Act (9 C.F.R. §§ 1.1-3.142; "regulations and standards"). On May 20, 2008, a transcribed hearing was conducted by telephone at which evidence was received. APHIS was represented by its attorney, Sharlene Deskins, Office of the General Counsel, Washington D.C. Respondents participated *pro se*. At the conclusion of the hearing, the parties were given until June 20, 2008 to file briefs, arguments, or written explanatory statements. The time for filing briefs was subsequently extended until July 11, 2008. Upon consideration of the record evidence, the arguments and explanations of the parties, and controlling law, it is found for the reasons that follow, Respondents have violated the Act and the regulations and standards, and should be made subject to a cease and desist order and assessed a civil penalty of $ 10,000.00.

**Findings**

1. Respondents, Robert and Lou Hurd breed and sell dogs in their own names and under the business names of Hurd Kennels and Precious Pets. Respondents and both of their businesses are located at the same address, 5465 170th Avenue, Carlyle, Iowa 50047, where the records for each businees are kept. Neither "Hurd Kennels" nor "Precious Pets" have been registered by Respondents as business names.
2. Robert and Lou Hurd were dealers licensed under the Animal Welfare Act for approximately eight years. They voluntarily surrendered their license on June 10, 2004, and APHIS terminated it on July 2, 2004. The license application Respondents filed for 2004 indicated that, in 2003, they derived $98,000.00 in income from activities regulated by the Act. Respondents have also reported the income from their businesses on their income tax returns. While Respondents were still licensed, they annually received copies of the Act and the regulations and standards, and agreed in writing to comply with them.
3. (a) Respondents have stipulated that APHIS inspected their premises on June 10, 2004, and found that health certificates had not been provided for 42 dogs they shipped in interstate commerce on February 19, 2004.

(b) APHIS conducted the inspection in response to a complaint from a dog rescue group which had received most of these dogs shipped without health certificates, that some of the dogs tested positive for canine brucellosis. (Tr.51). (Dog rescue groups believe dogs are mistreated at kennels and purchase dogs of breeds for which they have a particular affection to keep those dogs from being used for breeding at kennels, and then give the "rescued dogs" to people who will keep them as pets (Tr.40-41)).
4. On February 17, 2004, Robert Hurd sold 4 dogs to Bobby Warden who owns and operates a dog breeding kennel in Grove, Oklahoma. Mr. Warden testified he had no independent recollection of the facts of the transaction. He stated in an affidavit (CX-10) given to an APHIS investigator: "I do not recall receiving health papers with these dogs."
5. On March 17, 2004, Respondents transported 3 puppies that were less than 8 weeks of age. (CX-2 p.12)
6. On March 25, 2004, Respondents transported 4 puppies that were less than 8 weeks of age. (CX-2 p.13)
7. The APHIS review of records obtained from Respondents at or prior to the June 10, 2004 inspection revealed that records for dogs purchased by Precious Pets had not been fully completed and there were missing

entries for the delivery method used, breed type, date of birth, signature of the person who received animals, identification number of animals and the license number of the dealer who sold the dogs. (CX-2, pp.4, 9, 10, 11, 12).
8. On September 3, 2004, Respondents sold 10 dogs through a consignment auction held at the Southwest Auction Service in Wheaton, Missouri for a total of $3,025.00 that netted them, after the deduction of commissions, $2,722.50. Seven of the dogs were purchased by dealers holding AWA licenses. (CX-16, CX-17 pp.2 and 6).
9. On October 9, 2004, Respondents sold 4 dogs, 2 of which were sold to dealers with AWA licenses, at the Diamond T. Auction Service in Rocky Comfort, Missouri for a total of $430.50. Two other dogs were given away free by the Respondents at the sale that day; they were probably old and were taken for pets. (Tr. 28-45, Tr. 101, CX-16, CX-17 and CX-18).

**Conclusions**

1. Respondents violated the regulations and standards issued pursuant to the Act in that, on February 19, 2004, Respondents in violation of 9 C.F.R. § 2.78 (a), failed to provide health certificates for 42 dogs they caused to be transported in commerce.
2. Respondents violated the regulations and standards issued pursuant to the Act in that Respondents in violation of C.F.R. § 2.130, transported in commerce, 7 puppies under eight weeks of age.
3. Respondents violated the regulations and standards issued pursuant to the Act in that, on September 3, 2004, Respondents in violation of 9 C.F.R. § 2.1(a)(1), sold 10 dogs at the Southwest Auction Service in Wheaton, Missouri, in circumstances requiring a dealer's license, when they no longer had a valid dealer's license.
4. Respondents violated the regulations and standards issued pursuant to the Act in that, on October 9, 2004, Respondents in violation of 9 C.F.R. § 2.1(a)(1), sold 4 dogs at the Diamond T. Auction Service in Rocky Comfort, Missouri, in circumstances requiring a dealer's license, when they no longer had a valid dealer's license.
5. In accordance with the Act's provisions at 7 U.S.C. § 2149 (b), a civil penalty of $10,000.00 should be assessed against Respondents for these violations, and an order requiring them to cease and desist from continuing these violations should be entered.

**Discussion**

Robert Hurd admitted at the hearing he violated the regulations, on

February 19, 2004, when he shipped 42 dogs in commerce without health certificates. He explained that because he delivered the dogs directly to a veterinarian he mistakenly believed he was excused from procuring health certificates for them (Tr. 128).

He denies any other violation of the Act or the regulations and standards.

He contends that he and his wife may not be held liable for failure to keep proper records because the records pertained to dogs purchased and owned by Precious Pets which is a separate business entity from Hurd's Kennels. Though both Hurd's Kennels and Precious Pets are wholly owned by Robert and Lou Ann Hurd, Mr. Hurd argues that dogs purchased and sold by Precious Pets may not be regulated by USDA because it is licensed as a retail pet store by the State of Iowa and comes within the Act's exemption of pet stores from licensing.

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

7 U.S.C. § 2133.

The Act's definition of a "dealer" also contains this retail pet store exemption:

> 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 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….

7 U.S.C. § 2132(f).

The regulations further define "dealer" and "retail pet store":

> *Dealer* means 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…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....

Retail pet store means any outlet where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats.... Such definition excludes-

> (1) Establishments or persons who deal in dogs used for hunting, security or breeding purposes;
> (4) Any establishment wholesaling any animals (except birds, rats and mice).

9 C.F.R. § 1.1.

Inasmuch as the pertinent regulation (9 C.F.R. § 2.75) places its requirements for keeping full and correct records only on dealers and exhibitors and not on pet stores receiving dogs from dealers, there is merit to Respondents' argument if indeed the incomplete records noted by APHIS concerned purchases by an exempt retail pet store. The evidence received at the hearing did not fully preclude this possibility and inasmuch as each identified record shows "Precious Pets" as the buyer, I am dismissing the inadequate recordkeeping charges.

I am also dismissing charges against Respondents for failing to provide health certificates when they sold dogs to Bobby Warden since his testimony did not prove that he did not receive them; only that he did not recall receiving them.

Respondents, however, came within the regulation (9 C.F.R. § 2.130) that prohibits any person from transporting a dog that is less than 8 weeks of age in commerce in that they transported at least 7 puppies that were underage (CX-2 pp. 3 and 8).

Respondents also sold dogs to others after they were no longer licensed in circumstances that required them to hold a valid dealer's license. Again they assert that they were exempt as a retail pet store. But many of the sales were to dealers and all were wholesale rather than retail in nature. Accordingly, they violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) in respect to their sale of 14 dogs. However, I have dismissed charges relating to their disposition of two dogs that they apparently gave away rather than sold.

Violations of the Act subject the violator to a cease and desist order and a civil penalty of up to $3,750 for each violation (7 U.S.C. §

2149(b), as amended by 28 U.S.C. § 2462 and implemented by 7 C.F.R. §3.91(b)(2)(ii)). In assessing the penalty, the Act requires that due consideration be given to its appropriateness with respect to the size of the business, the gravity of the violation, good faith and the history of previous violations.

The size of Respondents business is demonstrated by their $98,000 in sales for their last full year of operations as a licensed dealer.
Causing dogs to be transported without health certificates is a serious violation. The obvious point of the regulation is to prevent sick animals with possibly contagious diseases from being shipped in commerce. The potential for this happening is illustrated by the fact that the June 10, 2004, APHIS inspection of Respondents' records was prompted by a complaint that some of dogs shipped had canine brucellosis. Transporting puppies less than eight weeks of age is also a serious violation that can cause the puppies undue stress and harm. And, of course, continuing to sell dogs wholesale to dealers, breeders and persons other than individuals buying dogs for their own pets, demonstrates lack of good faith and willful disregard for the licensing requirements of the Act and the regulations. During the eight years they were licensed, Respondents received one warning notice for a violation in 2003.

APHIS has requested that a cease and desist order be entered against Respondents and the assessment of a civil penalty of $17,500.00. Inasmuch as I have not found Respondents to have committed several of the violations alleged, I consider the recommended civil penalty to be excessive. Instead I am entering an order that imposes in addition to a cease and desist order, a civil penalty of $10,000.00. I believe that is the amount that best complies with the requirements of the Act.

## 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 pursuant to the Act, and in particular, shall cease and desist from:
(a) Failing to provide health certificates for animals moving in commerce;
(b) Transporting in commerce dogs or cats under eight weeks of age;
(c) Selling animals without a valid USDA license in circumstances requiring a USDA license; and
(d) Engaging in any activity that requires a license under the Act.

2. Respondents are jointly and severally assessed a civil penalty of $10,000.00, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and shall be sent to Sharlene Deskins, Office of the General Counsel, Marketing Division, United States Department of Agriculture, Mail Stop 1417, South Building, Washington, D.C. 20250-1417.
This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service.
Copies shall be served by the Hearing Clerk upon the parties.

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**In re: AMELIA RASMUSSEN.**
**AWA Docket No. 08-0073.**
**Decision and Order.**
**Filed September 24, 2008.**

**AWA – Transporting of endangered species.**

Bernadatte R. Juarez for APHIS.
Petitioner, Pro se.
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

## MEMORANDUM OPINION AND ORDER

This proceeding was brought under the Animal Welfare Act (the "Act"), 7 U.S.C. § 2131, *et seq.* by Kevin Shea, the Acting Administrator of the Animal and Plant Health Inspection Service ("APHIS") and seeks to terminate the Respondent's Animal Welfare License. It was initiated on March 10, 2008 with the filing of an Order to Show Cause Why Animal Welfare License Number 74-C-0537 Should Not Be Terminated. The Respondent's Answer was filed on May 9, 2008.[1] On July 1, 2008, the Acting Administrator filed a Motion for Summary Judgment. The motion was served by certified mail on the Respondent by the Hearing Clerk's Office together with a letter advising that any response to the motion should be filed within 20 days. On July 7, 2008, the Administrator filed a Supplement to Complainant's Motion for Summary Judgment. No response to either pleading has been received and the matter is now before the Administrative Law Judge for disposition. As there are no genuine issues of any material fact, the

[1] The Respondent's Answer was filed by facsimile on May 2, 2008 and the original was filed May 9, 2008.

Motion will be granted and an Order will be issued terminating the license.

**Discussion**

7 U.S.C. § 2133 provides that "The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe…." Express authority for the suspension or revocation of licenses for violations of the Act or regulations is found in 7 U.S.C. § 2149. The implementing regulations make it clear that a license may be terminated at any time for any reason that an initial license application would be denied. 9 C.F.R. § 2.12 Included in the list of specified reasons for denial of the issuance of a license is:

> A license will not be issued to any applicant who:
> ……
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department or other governmental agencies, or has plead *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws pertaining to the transportation, ownership, neglect or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act. 9 C.F.R. § 2.11(a)(6)

The record amply supports the existence of such a conviction[2] by the Respondent. Initially, it will be noted that as the Respondent's Answer failed to directly address the factual allegation of the conviction as set forth in the Order to Show Cause with a denial or other response, she will be is deemed to have admitted the allegation. 7 C.F.R. § 1.136(c). The defenses invoked by the Respondent have little merit. Even assuming *pro arguendo* that a statute of limitations governs this action, it was brought within the five year period set forth in 28 U.S.C. § 2462 for bringing enforcement action involving any civil fine, penalty, or forfeiture, pecuniary or otherwise. It is also well established that *laches,* a defense based upon undue delay in asserting a legal right or privilege, is inapplicable to actions of the government. *United States v. Kirkpatrick,* 22 U.S. (9 Wheat) 720 (1824); *See also*, *Gaussen v. United States,* 97 U.S. 584, 590 (1878); *German Bank v. United States,* 148 U.S. 573, 579 (1893); *United States v. Verdier,* 164 U.S. 213, 219 and

[2] See Plea Agreement dated March 20, 2007 and the Judgment in a Criminal Case dated March 20, 2007 in *United States v. Amelia Rasmussen,* Case No. SA-07-CR-80-JWP, United States District Court for the Western District of Texas, attached as exhibits to Petitioner's Motion for Summary Judgment.

*United States v. Mack,* 295 U.S. 480, 489 (1935).

The defense raised concerning retrospective application of the regulation also lacks merit as it was the conviction of the Respondent in 2007, well after the effective date of the regulation that provides the legal basis for the termination of the Respondent's Animal Welfare Act license. *See, Khan v. Ashcroft,* 352 F.3d 521 (2nd Cir. 2003).

Given the nature of the Respondent's violations of the Endangered Species Act by illegally purchasing and transporting endangered animals, thereby commercializing endangered species, and promoting both the black market for the animals and the incentives to illegally take endangered species from their habitat while acting as a "dealer" as defined by the Act and using her AWA license and USDA records to illegally purchase and transport endangered animals, as set forth in the Declaration of Robert M. Gibbens, D.V.M., a two year period of disqualification is both appropriate and warranted.

Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

1. The Secretary has jurisdiction under the Animal Welfare Act over the Respondent who has acted as a "dealer" within the meaning of the Act.
2. At all relevant times, the Respondent held Animal Welfare Act License 74-C-0537 as an exhibitor and dealer which was issued in the name of "AMY RASMUSSEN."
3. On or about August 1, 2006, the United States Attorney filed a Misdemeanor Information in the United States District Court for the District of Oregon alleging that the Respondent knowingly, intentionally and unlawfully received, transported and shipped in interstate commerce an endangered species, namely two ocelots she purchased from the "Temple of Isis," in the course of commercial activity, in violation of the Endangered Species Act, 16 U.S.C. § 1538(1)(E) and 1540(b)(1). It was further alleged that in furtherance of the crime, an APHIS Form 7020 was falsified to conceal the illegal nature of the transaction.
4. On or about August 2, 2006, the United States Attorney for the District of Oregon and the Respondent jointly filed a Plea Agreement containing admissions to the offenses contained in the Misdemeanor Information and which stipulated facts as to the specifics of the unlawful transactions concerning the sales of ocelots in interstate commerce.
5. On or about March 20, 2007, before the United States District Court, the Respondent entered a plea of guilty to the violations of the Endangered Species Act, as charged. The guilty plea was found to be

provident based upon the admission of sufficient facts establishing the elements of the crimes, to have been made voluntarily, and was accepted by United States Magistrate Judge John W. Primomo. Consistent with the Plea Agreement, the Respondent was sentenced to serve a term of probation of twelve months and to pay $15,000 as a "Community Service Payment" to the Oregon Zoo.

**Conclusions of Law**

1. The Respondent engaged in the transactions found to violate the Endangered Species Act.
2. The violation of the Endangered Species Act by the Respondent is a violation of a Federal law pertaining to the transportation, ownership, neglect or welfare of animals within the meaning of 9 C.F.R. § 2.11(a)(6) and constitutes sufficient basis to terminate the license of the Respondent.

**Order**

1. Animal Welfare Act License 74-C-0537 issued in the name of "AMY RASMUSSEN" is **TERMINATED**.
2. The Respondent, any agent, assign or successor of the Respondent or any related business entity or in which she is an officer, agent or representative are **DISQUALIFIED** from obtaining an Animal Welfare Act License for a period of two (2) years.
3. This Order shall become effective and final 35 days from its service upon the parties who have a right to file an appeal with the Judicial Officer within 30 days after receiving service of this Memorandum Opinion and Order by the Hearing Clerk as provided in the Rules of Practice. 7 C.F.R. § 1.145.

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

Done at Washington, D.C.

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**ZOOCATS, INC., MARCUS COOK, a/k/a MARCUSCLINE-HINES COOK, and MELISSA COODY, a/k/a MISTY COODY, d/b/a ZOO DYNAMICS andZOOCATS ZOOLOGICAL SYSTEMS.**
**AWA Docket No. 03-0035.**
**Decision and Order.**
**Filed September 24, 2008.**

**AWA – Research facilities, when not – Public contact – Exhibiting.**

Colleen A. Carroll for APHIS.
Bryan Sample for Respondent.
Brian T. Pope for Six Flags over Texas.
*Decision and Order by Administrative Law Judge Victor W. Palmer.*

## Decision and Order

This is an administrative proceeding initiated by the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"), by a complaint filed on September 30, 2003 and amended on May 8, 2007. The amended complaint alleges that on various occasions during July 2002 through February 2007, the named respondents violated the Animal Welfare Act (7 U.S.C. §§ 2131-2159; "the Act") and regulations and standards under the Act (9 C.F.R. §§ 1.1-4.11; "the regulations and standards" or "the regulations"), by the methods they used to exhibit tigers and other animals to the public, and for failing to provide animals in their custody with proper care and treatment. Two respondents named in the amended complaint, Six Flags Over Texas, Inc. and Marian Buehler, agreed to the disposition of the allegations against them by a consent decree entered on February 5, 2007. In respect to the remaining respondents, APHIS seeks a finding that ZooCats does not meet the definition of a "research facility" as that term is used in the Act and the regulations; a cease and desist order; and the revocation of the exhibitor's license it issued to ZooCats, Inc., or alternatively, the assessment of civil penalties of $100,000.00.

APHIS is represented by its attorney, Colleen A. Carroll, Office of the General Counsel, USDA, Washington, DC. Respondents are represented by their attorney, Bryan L. Sample, Dallas, Texas. A transcribed hearing was held in this proceeding in Dallas, Texas, on January 28 through February 1, 2008, at which various documents were received in evidence and testimony subject to cross-examination was given. References to the transcript shall be indicated by the prefix "Tr."

followed by the page number. Exhibits are marked numerically with the prefix "Cx" for those sponsored by Complainant, and with the prefix "Rx" for those sponsored by Respondents. Post hearing briefs and proposed findings of facts, conclusions and written arguments were filed by both parties in accordance with a schedule set at the close of the hearing that was later extended at the request of the parties, and that ended on August 29, 2008.

After fully considering the record evidence, the arguments of the parties and applicable law, I am entering an order that, for the reasons hereinafter stated, finds that ZooCats does not meet the definition of a "research facility" as that term is used in the Act and the regulations; subjects Respondents to a cease and desist order that prohibits the continuation of practices that have allowed members of the public, and children in particular, to be in dangerous, physical contact with lions, tigers and other predatory animals in violation of the Act and the regulations and standards; and revokes exhibitor license number 74-C-0426 issued to ZooCats, Inc.

## Findings

1.Respondents Marcus Cline-Hines Cook, Janice Cook and Melissa ("Misty") Coody are the directors of ZooCats, Inc., a Texas non-profit corporation that does business as ZooCats, Zoo Dynamics and ZooCats Zoological Systems. The corporation's registered agent for service of process is Bryan L. Sample, 25 Highland Park Village, Suite 100, Dallas, Texas 75205-2726. At all relevant times, ZooCats, Inc. operated as an exhibitor as that term is defined in the Act (7 U.S.C. § 2132(h)) and the regulations (7 C.F.R. §1.1), and held a Class "C" Animal Welfare Act exhibitor license (number 74-C-0426) that is required by the regulations for all persons showing or displaying animals to the public.

2. Respondents have a moderately-large business exhibiting wild and exotic animals for profit notwithstanding the registration of ZooCats as a Texas non-profit corporation.

3. ZooCats, Inc. was also registered as a research facility, and held registration number 74-R-0172. However, from approximately April 15, 2004 to the date the amended complaint was filed, ZooCats was not a school, institution, or organization that uses or intends to use live animals in research, tests, or experiments; did not purchase or transport live animals for such purposes; and did not receive funds under a grant, award, loan, or contract from a department, agency, or instrumentality

of the United States for the purpose of carrying out research, tests, or experiments.

4. In addition to being a corporate director of ZooCats, Inc., Marcus Cline-Hines Cook, at all relevant times, was the operations director of ZooCats, Inc, and was the primary person involved in its day-to-day operations.

5. Janice Cook is Marcus Cook's mother and did not directly participate in the exhibition of animals by her son or ZooCats, Inc.

6. Melissa (Misty) Coody is a police officer with whom Marcus Cook testified he has a romantic relationship, and who has "… contributed quite a bit of money, a loan, quite a bit of money as I did as well to ZooCats to help it get on its feet." He further testified that in addition to being one of the top three directors of ZooCats, Inc., she has a long history of working with the big cats after being trained by him. (Tr. 1280-1282).

7. On May 23, 2002, Marcus Cook exhibited a tiger at a photographer's studios without a physical barrier separating the tiger from the photographer. While the tiger was being posed and photographed, Mr. Cook and other trainers employed cattle prods to control it. It is uncertain whether the cattle prods were ever activated, or actually used to stun the tiger during the photo shoot.

8. Respondents exhibited tigers and other animals, from June 8 to July 19, 2002, at Six Flags, Arlington, Texas where children were allowed to handle and pose with tiger cubs, and have their pictures taken with them for a fee. On June 22, 2002, many children were observed being photographed while holding tiger cubs as they bottle-fed them milk. The children were following instructions from teenage handlers employed by Respondents, and the purpose of the bottle-feeding was to distract the tiger cubs and keep them calm. The technique was risky at best and some people, including a child, were scratched by tiger cubs during these exhibitions. (Cx 19).

9. On approximately 64 occasions between February 10 and February 14, 2003, Respondents posed a small tiger with groups of children for class photographs that included kindergarten and first grade classes, at Prestonwood Christian Academy, 6801 West Park Boulevard, Plano, Texas. During these photo shoots, children including kindergarteners, were allowed to touch the tiger which was being held by a handler who was bottle-feeding it. (Cx 24).

10. On February 21, 2003, Respondents exhibited adult tigers at the Westin Galleria Hotel, Dallas, Texas, and photographed spectators for a fee while they fed a tiger raw meat that they pressed through the upper, metal bars of its cage to induce the tiger to stand on its hind legs and

take the meat from their hands. (Cx 24).

11. On November 4, 2003, a juvenile, 16 to 20 week old, male lion cub, owned by Respondents, was observed by an APHIS Veterinary Medical Officer, being exhibited in the retail area of a pet store at Animal Jungle, 4218 Holland Road, Virginia Beach, Virginia. The lion was in a room with a large viewing window on two sides from which it was periodically taken out on a leash by a handler who would distract it with a toy while spectators petted it. Numerous children surrounded the lion without any kind of crowd control or any physical barriers to prevent them from coming in contact with the lion. (Cx 27).

12. On June 20 through June 27, 2004, Respondents exhibited two tigers at the Red River Valley Fair in Fargo, North Dakota and photographed spectators for a fee while they fed one of the tigers raw meat on a stick that they pressed through the metal bars of the tiger's cage to induce it to stand on its hind legs and eat the meat off the stick. The evidence received at the hearing includes a photograph of a young boy standing next to Marcus Cook as the boy pressed raw meat on a stick into the open mouth of a caged tiger. (Cx 28, page 3).

13. On February 12, 2005, Respondents exhibited a 15 week old tiger cub at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida where it was photographed with spectators. There were no barriers between the tiger and the spectators and the only control in place was that the tiger cub was on a leash held by a handler. A spectator tried to pet the tiger cub's head and it nipped her with its teeth. The Florida Fish and Wildlife officer who investigated the incident would have had the tiger tested for rabies if the spectator who had been bitten had not signed a waiver. (Cx 35, page 15).

14. On various occasions during the period of December 5, 2000 through February 23, 2007, APHIS inspected facilities where Respondents exhibited or housed animals they exhibited, and found instances of noncompliance with the regulations and standards. Many noncompliant items concerned inadequate records or minor infractions that Respondents remedied and were no longer found upon return visits by APHIS. However, the following were serious forms of noncompliance:

a) On June 22, 2002, July 5, 2002, February 10 through February 14, 2003, February 21, 2003, November 4, 2003, June 20 through June 27, 2004 and June 20 through June 27, 2004, contrary to 7 C.F.R. §2.131, tigers were being handled and exhibited in a manner that caused them trauma and behavioral stress with excessive risk of harm to the tigers and the public due to the lack of barriers and sufficient distance

between the tigers and the viewing public, and without the presence, control and supervision of a knowledgeable and experienced animal trainer. In addition, on July 5, 2002, contrary to 7 C.F.R. §3.131 and §3.132, sanitation and employee standards were not being followed in that cages containing prairie dogs and a bear were unclean with excessive fecal material and urine, and there was only one, unsupervised employee untrained in animal husbandry practices, caring for 3 wolves, 2 cougars, a bear and a tiger. (Cx 19).

b) On June 12, 2003, contrary to housing standards set forth in 7 C.F.R. §3.127, tigers were being housed outdoors at the Respondents'Kaufman, Texas facility in primary enclosures that were not adequately drained. There were pools of water in the enclosures and five tigers were observed to be soiled, wet and standing in mud. On February 9, 2006, some tigers were still being housed in enclosures with clay surfaces to which some large rocks had been added for better drainage, but though it had not rained for a week, all but one of those tigers had dried mud caked to their hair on their legs and abdomens. One tiger had chewed off its hair to rid itself of the caked mud. On February 23, 2007, the enclosure housing a lion and two tigers still had visible signs of drainage problems. (Cx 25, Cx 36 and Cx 38).

c) On July 30, 2004, contrary to feeding standards set forth in 7 C.F.R. § 3.129, Respondents were feeding animals every other day rather than daily, and the appearance of a number of young tigers indicated that their diet was insufficient and required evaluation by a veterinarian. On August 30, 2004, APHIS determined that though Respondents were now feeding the animals daily, a veterinarian had still not been contacted to evaluate the diet plan and the amount of food each animal needed and its need to be fed supplements. At an inspection of the Kaufman facility on October 22, 2004, the dietary plan for the animals appeared insufficient to the APHIS inspector who ascertained that a plan of approved diet for the animals had still not been developed by an attending veterinarian even though Respondents were previously instructed that it was required. On February 9, 2006, a veterinarian employed by APHIS, with expertise in the care and feeding of lions, tigers and other big cats, accompanied an inspector and visited the Kaufman facility where she found tiger cubs with misshapen rear legs indicative of metabolic bone disease caused by a poor diet having been fed either to them or the cubs' mother. On the basis of the types of food found at the facility and admissions by Mr. Cook and an attendant at the facility, the veterinarian concluded that Respondents were not following the prescribed dietary recommendations of the attending veterinarian they employed. (Cx 29, p1, Cx 30, p 2, Cx 31, p 2, Cx 36 pp 1-9, Tr 84-

126).

d) On June 12, 2003, contrary to veterinarian care standards set forth in 7 C.F.R. § 2.40, two tiger cubs suffering from alopecia (hair loss) were not being treated for this condition and were not taken to the attending veterinarian for diagnosis and treatment; instead, Marcus Cook was erroneously treating them with a medication for ringworm based on his own incorrect, uninformed diagnosis. On August 27, 2004, an APHIS inspector determined that a veterinarian had last visited Respondents' Kaufman facility on June 30, 2003, contrary to this standard's requirement for annual veterinarian visits. Moreover, at the time of the August 27, 2004 inspection, two of the youngest tigers and the smallest lion displayed protruding hip bones, dull coats of hair and less vigor than other animals at the facility. Respondents had not undertaken to have the cause of their condition evaluated by a veterinarian as instructed by APHIS inspectors at a prior inspection when these problems were first observed. On February 9, 2006 Respondents had not obtained veterinary care for a tiger that had re-injured a leg a couple of days earlier. (Rx 6, p 35). On February 23, 2007, a tiger requiring veterinarian evaluation due to its excessive hair loss and weight loss was observed by an APHIS inspector who determined from the records maintained by Respondents at the Kaufman facility, that the tiger had last been seen by a veterinarian on July 6, 2006. (Rx 6, p. 6).

**Conclusions**

1. The Secretary of Agriculture has jurisdiction under the Animal Welfare Act over Respondents who have acted as "exhibitors" of animals within the meaning of 7 U.S.C. § 2132(h). (Respondents' brief).

2. Respondent, ZooCats, Inc., presently registered as a research facility holding registration 74-R-0172, is not a research facility within the meaning of the Act (7 U.S.C. § 2132(e)) and the regulations (7 C.F.R. §1.1), in that it is not a school, institution, or organization that uses or intends to use live animals in research, tests, or experiments; does not purchase or transport live animals for such purposes; and does not receive funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments. (Finding 3, *supra*).

3. Respondents violated the Act and the regulations and standards

on the dates and by their acts and omissions set forth in findings 8-14, *supra*. The entry of a cease and desist order should be entered with both general and specific provisions to deter future violations. Specific provisions are needed to eliminate any assertion of confusion about the requirements of the regulations and standards that prohibit exhibitors such as Respondents from exhibiting dangerous animals in the absence of a knowledgeable, experienced, adult trainer, or without sufficient barriers and distance separating the animals from the public in order to prevent members of the public, particularly children, from holding, touching or otherwise being in dangerous contact with these animals.

4. Exhibitor's license number 74-C-0426 issued to ZooCats, Inc. should be revoked.

**Discussion**

In 1984, Marcus Cline-Hines Cook began his training as an animal handler when he was 19 years old. He worked for a company in South Texas, L&W Exotics, which was an exhibitor/breeder of lions, tigers, leopards, cougars, servals, bobcats and lynx. He continued working for the company on weekends through 1992 or 1993, and handled its animals at promotions for corporations conducting television photo shoots and conventions. In 1989, he purchased a black leopard that he still owns. In the early 1990's, he became an animal control officer for the City of the Colony, a Dallas suburb, and held that position for several years. In 1993, he became a police officer for the City of Lake Dallas. He held that position until December 11, 1998 when his license as a peace officer was revoked by the Texas Commission on Law Enforcement Officer Standards and Education after a hearing which found that Mr. Cook had falsified his police officer application by representing himself to be a high school graduate when in fact he had not completed high school. As part of his application for the police officer position, he filed a fake high school diploma and a fake educational transcript. In 1994 or 1995, while still a police officer, he obtained a USDA license to exhibit animals and, with his parents, purchased property in Kaufman County for an animal facility. He then started to exhibit animals to school children and did photography shoots with film studios. He later became employed by the Dallas World Aquarium supervising divers who worked with marine animals. In the late 1990's, while still employed by the Aquarium, Mr. Cook obtained a purported Bachelor of Zoology degree from "Wexford University", a diploma mill, that issued the degree upon his payment of $1,800.00

without requiring, or giving him, any training or course instruction. He would later cite this degree as part of his qualifications as an expert witness when testifying in a case brought by APHIS against a colleague. (*In re: Bridgeport Nature Center Inc., et al.,* AWA Docket No. 00-0032, transcript at 686).

As an animal exhibitor, Mr. Cook has operated under various firm names. Before operating as ZooCats, he operated as Leopard One Zoological Center and published an "Operations Policy" that forbade any physical contact between animals and the public (Cx 11 at 8), and also stated:

> The Center does not approve of the use of exotic animals in off-site circumstances….it is our belief that naturalistic habitats are created for the educational benefit of exhibiting exotic animals to the public. When an animal is removed from that naturalistic habitat, that educational benefit is lost and cannot be replaced.

(Cx 11 at 17-18).

On June 18, 2001, he filed a complaint with APHIS against another animal exhibitor for photographing children for a fee with baby tigers. He made the complaint on the letterhead of the "American Association of Zoological Facilities", which he signed as its President, stating:

> This organization was providing baby Tigers, on display, for a fee, and allowing small children to have there (sic) photo (sic) taken with these animals. As you know, this type of activity is a very dangerous one, as evidenced by past attacks and injuries to these small children placed in such close proximity to these cats. Once this was reported to us, we found several sections of violations and non-compliant issues we wish to report.
>
> Our main concerns were that these children were allowed so close to these cats, which had no control or restraint devices on them, (the cats), no physical barrier or trained barrier or trained personal (sic) between the animal and the child, and the children were allowed unrestricted access to the cat(s) while on the photo stage.

(Cx 42 at 1). Attached to the complaint was the affidavit of the member of the Association who reported the event, Misty Coody. (Cx 42, at 3).

In 2002, despite his protestations against exotic animals being exhibited at off-site locations with physical contact between the animals and children, Mr. Cook started doing just that. That year he accepted an arrangement with Six Flags Over Texas for ZooCats to exhibit animals

at the Six Flags site from June 8 to July 19, 2002. As part of the animal exhibition, Mr. Cook employed teenage handlers who posed and photographed children holding tiger cubs that the children bottle-fed. One child is known to have been scratched by one of the cubs. In 2003, at the Prestonwood Christian Academy, he posed groups of children for class photographs with a small tiger that the children were allowed to touch while the only control over the tiger was a handler holding a bottle of milk. Also in 2003, for a fee he photographed spectators feeding his adult tigers by pressing raw meat into their cages. That year he also lent a male lion cub to a pet store in Virginia Beach, Virginia that anyone including children, could pet as it was walked about on a leash. In 2004, again for a fee, he photographed spectators feeding raw meat through the bars of a cage to one of his tigers while it was standing on its hind legs. In 2005, he exhibited a 15 week old tiger cub at an auto mall in Tampa, Florida where a spectator was nipped when she petted the animal while its handler walked it on a leash through the spectators.

The regulation governing the handling of animals specifically prohibits these practices:

> (c)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.
>
> (d)(3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

7 C.F.R. § 2.131.

The need to enforce these requirements even when the tiger is a cub rather than an adult animal was explained by Dr. James M. Jensen, a professor of veterinarian medicine and an expert zoologist:

> …I feel like the intensive handling of these animals, with teeth and claws, that are starting to develop their rough and tumble nature, in the wild they would be mock fighting with their siblings at this age, and developing their early hunting skills, as, you know, its going to mature over many months.

But that kind of behavior, sitting next to a five-year old kindergartener is a little dangerous, particularly when the whole priming event here is a bottle feeding, and that's when these youngsters become voracious, and aggressive, and get impatient when they're sucking air out of the bottle.

So, I, my thinking is that that should really should be stopped as soon as possible. Tr. 339-340.

An affidavit by Dr. Jensen explains the risk of disease being transmitted by these animals to people, particularly children, who come in close contact with them:

> 16. ….(D)isease transmission is an equally problematic issue. Large felines are significant carriers of salmonella bacteria species and intestinal roundworms. These organisms are found on the fur, the claws and in the feces of large felines, including juveniles.
>
> 17. Large felines are latent carriers of Salmonella. In fact, they carry this bacterial pathogen in their intestines and without showing signs of illness. In susceptible large felids (i.e. young animals), stress may induce them to shed large amounts of this organism as they become ill. Humans are susceptible to Salmonella and often experience severe, and occasionally life-threatening enteritis. This organism poses its greatest threat to children. Strict sanitation of surroundings and disinfection must be maintained to avoid Salmonella infection. People should also wash their hands or use a hand antiseptic product after handling suspect animals. Large felines that are in contact with the public should have frequent fecal bacterial cultures or PCR (polymerase chain reaction) exams for Salmonella.
>
> 18. Large felid species also have intestinal roundworms that are a threat to the public health. Toxocara cati and toxocaris leonina are capable of causing larval migration in humans. The infection larva can exist on a cat's fur or in the environment. When the organism invades the humans body it migrates until the body "walls off" the parasite. Children are more susceptible to this parasite than adults. These two roundworms are difficult to eradicate from a contaminated environment because of their ability to shed large numbers of eggs and because of the hardness of their eggs….

Cx 39, pp 4-5

And just as there are numerous cases of humans being terrorized or injured by dangerous animals when there is insufficient distance and

barriers between them,[3] there are cases demonstrating that the safety of the animals themselves that the Act was enacted to protect, is also endangered. [4]

In addition to the astonishing lack of precaution taken by Respondents to protect the public and the animals from harm, Respondents also often failed to feed their animals properly or provide them with veterinary and other requisite kinds of care.

The entry of a cease and desist order by itself would probably not deter future violations by Respondents. Nor, in my opinion, would the imposition of civil penalties, even in combination with a cease and desist order, be sufficient. I have concluded that the revocation of the exhibitor's license that Respondents hold in the name of ZooCats, Inc., together with the entry of a cease and desist order with both general and specific provisions, as authorized by 7 U.S.C. §2149(a) and (b), is required.

Respondents have repeatedly endangered the lives of their customers and employees, as well as the lives of their animals. Marcus Cook has a history of deceiving the public, APHIS, and other law enforcement agencies.[5] He has represented himself to have expertise and credentials that he does not possess to mislead government authorities.[6] To allow Marcus Cook or Melissa Coody to have an exhibitor's license in either of their names, or through a corporation or other entity that either of them controls, would subject both the public and the animals Respondents would exhibit, to an unacceptable level of risk of harm. The present license that they operate under is therefore being revoked.
The issuance of a cease and desist order is also being entered containing, in addition to general provisions, specific provisions for the elimination of any future, professed confusion by Respondents, or other exhibitors, about the safeguards they must take under the regulations and standards

[3] Complainant's brief, p. 21, fn 60, lists some dozen cases of this type that include the following final decisions by the Secretary of Agriculture: *In re Reginald Dwight Parr*, 59 Agric. Dec. 601(2000) (tigers); *In re Bobby F. Steele d/b/a Bob Steele Animal Promotions*, 46 Agric. Dec. 563 (1987) (cougar); and *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (tiger).

[4] The Complainants brief, p. 21, fn 61, lists cases where close contact with the public resulted in animals being treated violently and sometimes killed.

[5] The evidence in this proceeding shows instances of Respondents' customers being scratched by their tiger cubs at the Six Flags exhibition in 2002, yet on February 15, 2005, Marcus Cook told a Florida law enforcement officer that "in his fifteen years of experience with adult and juvenile tigers this is the first time he has ever had a customer injured." Cx 35 p 15.

[6] See Cx 1 and Cx 2.

when they exhibit dangerous animals to the public, and particularly to children. The requirement set forth in 7 C.F.R. § 2.131 (d)(3), that during public exhibition, dangerous animals such as lions and tigers must be under the direct control and supervision of a knowledgeable and experienced animal handler, is not met when the trainer is a teenager regardless of how much natural talent the teenager might appear to possess. So too, the regulation's requirement (7 C.F.R. § 2.131 (c)(1)) that there be sufficient distance and/or barriers between an animal and the public is not met when members of the public are allowed to hold or come close to a dangerous animal's teeth and claws, or, in the case of children, are so close that they also become susceptible to the transmission of diseases or parasites.

The following Order is therefore being issued.

## ORDER

It is hereby ORDERED that ZooCats, Inc., Marcus Cook, also known as Marcus Cline-Hines Cook, and Melissa Coody, also known as Misty Coody, jointly doing business as Zoo Dynamics and ZooCats Zoological Systems, their agents, employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued under the Animal Welfare Act.

It is specifically ORDERED that the above-named respondents shall cease and desist from publicly exhibiting lions and tigers or other dangerous animals that are not under the direct control and supervision of a knowledgeable, experienced handler who must be at least twenty-one years of age.

It is also specifically ORDERED that the above-named respondents shall cease and desist from publicly exhibiting any lion or tiger, including a cub or a juvenile, unless the animal is contained inside a suitable primary enclosure with any needed secondary barrier such as a perimeter fence sufficiently distanced from the primary enclosure in conformity with the requirements of 7 C.F.R. § 3.127(d) that may be varied only when appropriate alternative security measures are approved in writing by the Administrator of APHIS, so as to completely preclude any member of the public from touching or coming in contact with any part of the animal. To fully effectuate this provision, special attention shall be given to the safety of children to eliminate any contact between them and the animals, their teeth, claws, fur or feces.

It is further ORDERED that Animal Welfare Act license number 74-

C-0426 issued to ZooCats, Inc., is permanently revoked.
This decision and order shall become effective and final 35 days from its service upon the parties who shall 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: LOREON VIGNE, AN INDIVIDUAL, d/b/a ISIS SOCIETY FOR INSPIRATIONAL STUDIES, INC., A CALIFORNIA DOMESTIC NON-PROFIT CORPORATION, a/k/a TEMPLE OF ISIS AND ISIS OASIS SANCTUARY.**
**AWA Docket No. 07-0174.**
**Decision and Order.**
**Filed November 18, 2008.**

**AWA – Endangered Species Act – Exhibitor – Disqualification – Termination of license.**

Bernadette Juarez, for the Acting Administrator, APHIS.
Respondent, Pro se.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Kevin Shea, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Acting Administrator], instituted this proceeding by filing an "Order To Show Cause As To Why Animal Welfare Act License 93-C-0611 Should Not Be Terminated" [hereinafter Order to Show Cause] on August 21, 2007. The Acting 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 Acting Administrator alleges that: (1) on or about January 4, 2007, Isis Society for Inspirational Studies, Inc. [hereinafter the Isis Society], a corporation through which Loreon Vigne operates as an exhibitor under the Animal Welfare Act, was found to have violated the

Endangered Species Act by selling and offering for sale in commerce an endangered species, namely, ocelots; (2) in or around November 1999 through June 2006, Ms. Vigne made false or fraudulent statements or provided false or fraudulent records to the United States Department of Agriculture and other government agencies; and (3) Ms. Vigne interfered with a federal investigation involving the Endangered Species Act (Order to Show Cause ¶¶ 20-21, 25). The Acting Administrator seeks an order terminating Ms. Vigne's Animal Welfare Act license and disqualifying Ms. Vigne from obtaining an Animal Welfare Act license for 2 years (Order to Show Cause at 8). On September 14, 2007, Ms. Vigne filed "Answers To Allegations And Demonstration Of Cause As To Why Animal Welfare Act License 93-C-0611 Should Not Be Terminated" [hereinafter Answer].

On June 6, 2008, the Acting Administrator filed "Complainant's Motion For Summary Judgment." On June 11, 2008, the Hearing Clerk served Loreon Vigne with Complainant's Motion For Summary Judgment together with a service letter advising Ms. Vigne that any response to the motion must be filed within 20 days after service.[1] Ms. Vigne failed to file a response to Complainant's Motion For Summary Judgment, and on July 7, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order [hereinafter Initial Decision]: (1) finding there are no genuine issues of material fact; (2) granting Complainant's Motion For Summary Judgment; (3) revoking Animal Welfare Act license number 93-C-0611; (4) terminating Animal Welfare Act license number 93-C-0611; and (5) disqualifying Ms. Vigne from obtaining an Animal Welfare Act license for 2 years.

On August 6, 2008, Loreon Vigne appealed the ALJ's Initial Decision to the Judicial Officer, and on September 26, 2008, the Acting Administrator filed "Complainant's Response To Respondent's Appeal Petition." Based upon a careful consideration of the record, I affirm the ALJ's July 7, 2008, Initial Decision, terminating Loreon Vigne's Animal Welfare Act license and disqualifying Loreon Vigne from obtaining an Animal Welfare Act license for 2 years. For the reasons articulated in this Decision and Order, *infra*, I do not adopt the ALJ's order revoking Ms. Vigne's Animal Welfare Act license.

## DECISION

### Discussion

[1]Domestic Return Receipt for article number 7007 0710 0001 3858 9073.

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application for a license in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133). The power to require and issue licenses under the Animal Welfare Act includes the power to deny a license, to suspend or revoke a license, to disqualify a person from becoming licensed, and to withdraw a license.[2] The Regulations and Standards specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). Section 2.11(a)(6) of the Regulations and Standards provides that an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines that the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

**§ 2.11 Denial of initial license application.**

> (a) A license will not be issued to any applicant who:
> . . . .
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

**§ 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

[2] *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

> 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 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.

7 U.S.C. § 2131.

The Acting Administrator has determined that allowing Loreon Vigne to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act (Order to Show Cause ¶ 26; Complainant's Mot. for Summary Judgment, Memorandum of Points and Authorities at 9-11). The record supports the conclusions that: (1) Loreon Vigne is unfit to retain her Animal Welfare Act license, and (2) the Acting Administrator's determination that allowing Loreon Vigne to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.

## Findings of Fact

1. Loreon Vigne is an individual whose mailing address is 20889 Geyser Avenue, Geyserville, California 95441 (Answer Letter Head).
2. Loreon Vigne is the founder of the Isis Society, which she first established in 1982 (Answer ¶¶ 1, 3).
3. Loreon Vigne has been the secretary and treasurer of the Isis Society since its inception in 1982 (Answer ¶¶ 1, 4).
4. Loreon Vigne has held the position of high priestess of the Isis Society since 1996 (Answer ¶ 2).

5. At all times material to this proceeding, Loreon Vigne managed, controlled, and directed the business activities of the Isis Society (Answer ¶¶ 2-4, 6, 11).

6. At all times material to this proceeding, Loreon Vigne acted as the organizational leader of the Isis Society (Answer ¶ 11).

7. Loreon Vigne owns the land on which the Isis Society is located. On this land, known as Isis Oasis, Ms. Vigne maintains ocelots, wildlife, a lodge, a theater, and the Temple of Isis. (Answer ¶¶ 12(a)-(c).)

8. Loreon Vigne currently maintains and breeds, and at all times material to this proceeding maintained and bred, ocelots on the premises referred to as Isis Oasis (Answer ¶¶ 9, 11, 12(c), 18).

9. Loreon Vigne has sold ocelots to people in California and throughout the United States (Answer ¶ 12(d)).

10. Loreon Vigne currently holds, and at all times material to this proceeding held, Animal Welfare Act license 93-C-0611. Ms. Vigne submits annual renewal applications for Animal Welfare Act license 93-C-0611 to the United States Department of Agriculture. (Answer ¶¶ 5, 7-8.)

11. On or about August 1, 2006, the Isis Society, a/k/a "Temple of Isis" and "Isis Oasis Sanctuary," was indicted in the United States District Court for the District of Oregon for knowingly and intentionally conspiring with others to unlawfully sell and offer for sale in interstate commerce an endangered species (ocelots), in violation of the Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(F), 1540(b)(1) (Misdemeanor Information ¶ 1, filed in *United States v. Isis Society for Inspirational Studies, Inc.*, CR-06-313-01-MO (D. Or. Jan. 5, 2007).

12. Loreon Vigne was given a plea agreement to resolve *United States v. Isis Society for Inspirational Studies, Inc.*, which Ms. Vigne entered into "in her professional capacity as organizational leadership" (Answer ¶¶ 10-11).

13. On or about August 2, 2006, the United States Attorney for the District of Oregon and the Isis Society filed a plea agreement containing the Isis Society's offer to plead guilty to the indicted offenses, stipulated facts as to the specifics of the unlawful sales of ocelots in interstate commerce during the period August 1999 through November 2004, and the United States Attorney's agreement to recommend a sentence of a fine and probation to the Court. Loreon Vigne signed the Plea Agreement on behalf of the Isis Society. (Plea Agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*).

14. In the stipulated facts in the Plea Agreement referenced in Finding of Fact number 13, the Isis Society admits that: (a) during the period August 1999 through November 2004, the Isis Society sold at least 10

ocelots to various buyers, some in California and others located throughout the United States; (b) in an effort to conceal the illegal nature of its interstate ocelot sales, employees and agents of the Isis Society conspired with others, including those purchasing ocelots, to mischaracterize the sales as "donations" rather than *quid pro quo* sales; (c) the Isis Society and others agreed to mischaracterize interstate transfers of ocelots to purchasers as "donations" and to mischaracterize payments from the purchasers of ocelots as "contributions" to tax deductible organizations associated with the Isis Society, namely, the Temple of Isis and the Isis Oasis Sanctuary; and (d) the Isis Society, through Loreon Vigne, was not initially forthcoming with, and did not fully cooperate with, United States Fish and Wildlife Service agents regarding the nature of the ocelot transfers at the heart of the investigation which resulted in the filing of the Misdemeanor Information in *United States v. Isis Society for Inspirational Studies, Inc.* (Plea Agreement ¶ IV.7.(d)-(h) filed in *United States v. Isis Society for Inspirational Studies, Inc.*).

15. A letter, dated June 23, 2006, from Loreon Vigne to Assistant United States Attorney Dwight Holton, which sets forth the details of the Isis Society's sales of ocelots between August 1999 and November 2004, is attached to, and incorporated by reference in, the Plea Agreement referenced in Finding of Fact number 13 (Plea Agreement ¶ IV.7.(d) n.2 filed in *United States v. Isis Society for Inspirational Studies, Inc.*).

16. Loreon Vigne agreed with various ocelot recipients to mischaracterize the transfers of ocelots as donations to organizations, including Temple of Isis and Isis Oasis Sanctuary, instead of sales (Letter, dated June 23, 2006, from Loreon Vigne to Assistant United States Attorney Dwight Holton at 1, referenced in Finding of Fact number 15).

17. Loreon Vigne was not initially forthcoming with, and did not fully cooperate with, United States Fish and Wildlife Service agents regarding the nature of the ocelot transfers (Letter, dated June 23, 2006, from Loreon Vigne to Assistant United States Attorney Dwight Holton at 1, referenced in Finding of Fact number 15).

18. The United States agreed to seek no further criminal charges against Loreon Vigne regarding the disclosed sales and offers for sale of ocelots in violation of the Endangered Species Act (Plea Agreement ¶ VII.10.(b) filed in *United States v. Isis Society for Inspirational Studies, Inc.*).

19. The United States stated it did not object to Loreon Vigne's

continuing to possess and breed endangered animals at her facilities in Geyserville, California, so long as: (a) the Isis Society and Ms. Vigne remain in full compliance with all applicable state and federal laws, including, but not limited to, the Endangered Species Act and the Lacey Act; (b) the Isis Society and Ms. Vigne are always absolutely truthful and forthcoming in all dealings with any official involved in the regulation of endangered species; and (c) the Isis Society and Ms. Vigne remain in compliance with the terms of the Plea Agreement (Plea Agreement ¶ VII.11. filed in *United States v. Isis Society for Inspirational Studies, Inc.*).

20. On or about January 4, 2007, before the United States District Court for the District of Oregon, the Isis Society entered its plea of guilty to the violations of the Endangered Species Act, as charged. United States District Court Judge Michael W. Mosman found the Isis Society's guilty plea to be made freely and found that the Isis Society had admitted facts that proved the necessary elements of the crimes to which the Isis Society pled guilty. Based on these findings, United States District Court Judge Michael W. Mosman accepted the Isis Society's guilty plea. (Petition to Enter Plea of Guilty, Certificate of Counsel, and Order Entering Plea filed in *United States v. Isis Society for Inspirational Studies, Inc.*)

21. On or about January 5, 2007, United States District Court Judge Michael W. Mosman adjudicated the Isis Society guilty of conspiracy to violate the Endangered Species Act (18 U.S.C. § 371) and violating the Endangered Species Act (16 U.S.C. §§ 1538(a)(1)(F), 1540(b)(1)), and sentenced the Isis Society to pay a $60,000 fine and to serve a 2-year probationary period. Special conditions of probation require Loreon Vigne: (a) to notify a designee of the United States Fish and Wildlife Service upon the birth of any endangered species born by any animal owned, controlled, or boarded within the Isis Oasis Sanctuary for a period of 5 years; (b) to remain in full compliance with all state and federal laws, including but not limited to the Endangered Species Act and the Lacey Act; and (c) to be truthful and forthcoming in all dealings with any official involved in regulation of endangered species. (Judgment filed in *United States v. Isis Society for Inspirational Studies, Inc.*)

**Conclusions of Law**

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

2. Based on the Findings of Fact, I conclude the Acting Administrator's determination that Loreon Vigne's retention of an

Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.

3. Based on the Findings of Fact, I conclude Loreon Vigne is unfit to be licensed under the Animal Welfare Act, within the meaning of 9 C.F.R. § 2.11(a)(6).

**Loreon Vigne's Appeal Petition**

Loreon Vigne raises seven issues in her "Appeal Statement" [hereinafter Appeal Petition]. First, Ms. Vigne asserts 9 C.F.R. § 2.11(a)(6) is "faulty" (Appeal Pet. at 1).

I am uncertain as to the meaning of Ms. Vigne's characterization of 9 C.F.R. § 2.11(a)(6) as "faulty." However, I note the Secretary of Agriculture is authorized to promulgate regulations that the Secretary deems necessary to effectuate the purposes of the Animal Welfare Act (7 U.S.C. § 2151) and 9 C.F.R. § 2.11(a)(6) is clearly a regulation which the Secretary of Agriculture is authorized by 7 U.S.C. § 2151 to promulgate. Moreover, I find there is a rational connection between 9 C.F.R. § 2.11(a)(6) and its purpose. The purpose of 9 C.F.R. § 2.11(a)(6) is to deny Animal Welfare Act licenses to persons who are not fit to have Animal Welfare Act licenses, and I find 9 C.F.R. § 2.11(a)(6) accomplishes its purpose. Finally, I find 9 C.F.R. § 2.11(a)(6) was promulgated in accordance with the Administrative Procedure Act.[3] Therefore, I reject Ms. Vigne's contention that 9 C.F.R. § 2.11(a)(6) is "faulty."

Second, Loreon Vigne asserts 9 C.F.R. § 2.11(a)(6) contains no "statute of limitations" (Appeal Pet. at 1).

While Ms. Vigne is correct that 9 C.F.R. § 2.11(a)(6) does not contain a statute of limitations, she cites no authority for her assertion that 9 C.F.R. § 2.11(a)(6) must contain a statute of limitations and I can find no such authority. The United States Code does contain a general statute of limitations that applies to the commencement of certain actions, as follows:

**§ 2462. Time for commencing proceedings**

[3]See the following rulemaking documents related to the promulgation of 9 C.F.R. § 2.11(a)(6): (1) the proposed rule, 65 Fed. Reg. 47,908-18 (Aug. 4, 2000), soliciting public comment for 60 days; (2) a notice of reopening and extension of comment period, 65 Fed. Reg. 62,650 (Oct. 19, 2000), to November 20, 2000; and (3) the final rule, 69 Fed. Reg. 42,089-102 (July 14, 2004), which became effective August 13, 2004.

> Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. However, a "penalty," as that term is used in 28 U.S.C. § 2462, is a form of punishment imposed by the government for unlawful or proscribed conduct which goes beyond remedying the damage caused to the harmed parties by the respondent's actions.[4] The Acting Administrator seeks to terminate Ms. Vigne's Animal Welfare Act license, not to punish her for her actions, but because Ms. Vigne's actions reflect on her fitness to be licensed under the Animal Welfare Act.[5] Thus, I conclude the statute of limitations in 28 U.S.C. § 2462 is not applicable to an action by the Secretary of Agriculture to terminate an existing Animal Welfare Act license pursuant to 9 C.F.R. § 2.12, based upon a licensee's unfitness to continue to be licensed under the Animal Welfare Act. Termination of an Animal Welfare Act license pursuant to 9 C.F.R. § 2.12 is remedial in nature and thus outside the scope of the statute of limitations in 28 U.S.C. § 2462.

Third, Loreon Vigne asserts the Acting Administrator's Order to Show Cause did not cite 9 C.F.R. § 2.11(a)(6). Ms. Vigne objects to the addition of 9 C.F.R. § 2.11(a)(6) "by the [ALJ] at a later date with no opportunity . . . to respond." (Appeal Pet. at 1.)

The Order to Show Cause is replete with citations to 9 C.F.R. §§ 2.11(a)(6), .12 (Order to Show Cause ¶¶ 19-26 and at 7). Moreover, the record does not show that the ALJ added the citation to 9 C.F.R. § 2.11(a)(6) "at a later date" or that Ms. Vigne was denied the opportunity to respond to any of the Acting Administrator's filings.

Fourth, Loreon Vigne asserts "[t]here are 2 types of license removal 'termination' and 'revocation'" and "there is some confusion as to which penalty [she is] being subjugated to" (Appeal Pet. at 1).

As an initial matter, the sanction issued in this proceeding is not a penalty, but instead remedial in nature. In each of his filings, the Acting Administrator has consistently sought termination of Ms. Vigne's Animal Welfare Act license pursuant to 9 C.F.R. § 2.12 and a 2-year disqualification from obtaining an Animal Welfare Act license. The

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[4] *Coghlan v. NTSB*, 470 F.3d 1300, 1305 (11th Cir. 2006) (per curiam); *Johnson v. SEC*, 87 F.3d 484, 487-88 (D.C. Cir. 1996).

[5] Complainant's Mot. for Summary Judgment at 9-11.

Acting Administrator has not sought revocation of Ms. Vigne's Animal Welfare Act license pursuant to 7 U.S.C. § 2149. The only reference to revocation of Ms. Vigne's Animal Welfare Act license is in the ALJ's July 7, 2008, Initial Decision, in which, without explanation, the ALJ both revoked and terminated Ms. Vigne's Animal Welfare Act license. Under these circumstances, I do not order revocation of Ms. Vigne's Animal Welfare Act license. Instead, I only terminate Ms. Vigne's Animal Welfare Act license and disqualify Ms. Vigne from obtaining an Animal Welfare Act license for 2 years.

Fifth, Loreon Vigne asserts the ALJ erroneously failed to find the State of California does not allow her to possess ocelots unless, in addition to holding a California fish and game permit, she holds an Animal Welfare Act license. Ms. Vigne asserts the termination of her Animal Welfare Act license may result in the State of California removing the ocelots from her facility. (Appeal Pet. at 1-2.)

State of California requirements for possession of ocelots are not relevant to this proceeding which solely concerns Ms. Vigne's fitness to be licensed under the Animal Welfare Act. Moreover, collateral effects of the termination of an Animal Welfare Act license are not relevant to the determination whether a respondent is unfit to be licensed. The adverse impact of Animal Welfare Act license termination on Ms. Vigne's ability to retain possession of and breed ocelots is unfortunate, but it is not relevant to the instant proceeding. Therefore, I reject Ms. Vigne's assertion that the ALJ erroneously failed to find the State of California does not allow her to possess ocelots unless, in addition to holding a California fish and game permit, she holds an Animal Welfare Act license.

Sixth, Loreon Vigne asserts the ALJ erroneously ignored the plea agreement entered in *United States v. Isis Society for Inspirational Studies, Inc.*, CR 06-313-01-MO (D. Or. Jan. 5, 2007), in which the parties agreed that Ms. Vigne's Animal Welfare Act license "to have and exhibit the cats should not be affected" (Appeal Pet. at 2).

I have carefully read the plea agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.* I cannot locate any provision indicating Ms. Vigne's Animal Welfare Act license should not be affected, as Ms. Vigne asserts. Therefore, I reject Ms. Vigne's assertion that the ALJ erroneously ignored the plea agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*

Seventh, Loreon Vigne asserts the ALJ erroneously relied on *In re Amarillo Wildlife Refuge, Inc.*, 67 Agric. Dec. 175 (2008) (Appeal Pet. at 2).

The ALJ makes no reference to *In re Amarillo Wildlife Refuge, Inc.*, 67 Agric. Dec. 175 (2008), in the Initial Decision, and I cannot find any indication that the ALJ in any way relied on *In re Amarillo Wildlife Refuge, Inc.* Therefore, I reject Ms. Vigne's assertion that the ALJ erroneously relied on *In re Amarillo Wildlife Refuge, Inc.*

**Termination Of License After Hearing**

The Regulations and Standards provide that an Animal Welfare Act license may be terminated after a hearing, as follows:

> **§ 2.12 Termination of a license.**
>
> A license may be terminated during the license renewal process or at any time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.

9 C.F.R. § 2.12.

The proposed rulemaking document applicable to the promulgation of 9 C.F.R. § 2.12 emphasizes the need for a hearing in license termination proceedings, as follows:

> **Termination of a License**
>
> We are proposing to add a new § 2.12 to the regulations to prescribe conditions that could result in APHIS terminating a license. Although § 2.5 refers to termination of license, the regulations do not list the circumstances that would result in the termination of a license. New § 2.12 would state that a license may be terminated for any of the same reasons that an initial licence application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice. A hearing would provide an opportunity for the applicant to present his or her case as to why the license should not be terminated.

65 Fed. Reg. 47,908, 47,911 (Aug. 4, 2000).

While no hearing has been conducted in the instant proceeding, section 1.141(a) of the Rules of Practice (7 C.F.R. § 1.141(a)) provides that the failure to request a hearing within the time allowed for filing an

answer constitutes a waiver of hearing. Loreon Vigne's answer was required to be filed no later than September 19, 2007. Ms. Vigne failed to request a hearing within the time allowed for filing her answer. Therefore, I conclude that Ms. Vigne waived her right to a hearing.

For the foregoing reasons the following Order is issued.

## ORDER

1. Animal Welfare Act license 93-C-0611 is terminated.
2. Loreon Vigne is disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

This Order shall become effective on the 60th day after service of this Order on Loreon Vigne.

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**In re: WYOMING DEPARTMENT OF PARKS AND CULTURAL RESOURCES; KEVIN SKATES, IN HIS OFFICIAL CAPACITY AS PARK SUPERINTENDENT, HOT SPRINGS STATE PARK; AND WADE HENDERSON, IN HIS OFFICIAL CAPACITY AS PARK SUPERINTENDENT, BEAR RIVER STATE PARK.**
**AWA Docket No. 07-0022.**
**Decision and Order.**
**Filed November 24, 2008.**

**AWA – Cease and desist order – Dismissal – Exhibitor's license.**

Babak A. Rastgoufard, for the Acting Administrator, APHIS.
Ryan T. Schelhaas, Cheyenne, WY, for Respondents.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Acting Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 15, 2006. The Acting 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 Acting Administrator alleges that, since on or about April 11, 2002, the Wyoming Department of Parks and Cultural Resources; Kevin Skates, the Park Superintendent of Hot Springs State Park; and Wade Henderson, the Park Superintendent of Bear River State Park [hereinafter Respondents], operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and Standards, without being licensed, in willful violation of section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)) (Compl. ¶¶ 15-17). The Acting Administrator contends two of Wyoming's 31 parks, Hot Springs State Park and Bear River State Park, require an exhibitor's license under the Animal Welfare Act and the Regulations and Standards in that Respondents maintain bison and elk at those parks for public viewing. The Acting Administrator requests issuance of an order assessing Respondents a civil penalty and requiring Respondents to cease and desist from operating as an exhibitor without an Animal Welfare Act license (Compl. at 4-5).

On December 5, 2006, Respondents filed "Respondents' Answer" in which Respondents admitted many of the factual allegations of the Complaint, including the maintenance of bison and elk for public viewing at Hot Springs State Park and Bear River State Park, but deny that the Secretary of Agriculture has jurisdiction over the State of Wyoming and its agencies and employees. Respondents assert: (1) the remedies the Acting Administrator seeks against Respondents are barred under sovereign immunity; (2) the Complaint fails to state a claim against Respondents; and (3) the relief sought is inappropriate, improper, and contrary to law. Respondents request dismissal of the Complaint.

On February 15, 2007, the Acting Administrator filed "Complainant's Motion For Judgment On The Pleadings" asserting the material facts are not in dispute and a judgment on the merits should be issued by relying on the pleadings, matters incorporated by reference in the pleadings, and facts of which the administrative law judge may take official notice. On April 9, 2007, Respondents filed "Respondents' Response To Complainant's Motion For Judgment On The Pleadings And Cross-Motion For Judgment On The Pleadings." On April 27, 2007, the Acting Administrator filed "Complainant's Response To Respondents' Cross-Motion For Judgment On The Pleadings."

On May 16, 2007, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] requested that the parties answer questions

respecting the differences in the amount of oversight the Secretary of Agriculture seeks to exercise in respect to Hot Springs State Park and Bear River State Park in comparison to the oversight the Secretary of Agriculture exercises in respect to national parks, such as Yellowstone National Park. The Acting Administrator filed his response to the questions on June 12, 2007, and Respondents filed their response on July 19, 2007.

On August 23, 2007, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the Secretary of Agriculture has jurisdiction, under the Animal Welfare Act, to require the Wyoming Department of Parks and Cultural Resources [hereinafter Wyoming Department of Parks] to be licensed and to comply with the Animal Welfare Act and the Regulations and Standards, when the Wyoming Department of Parks engages in the activities of an "exhibitor," as that term is defined in the Animal Welfare Act; (2) concluding the Wyoming Department of Parks operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and Standards, without being licensed, in willful violation of section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)); (3) dismissing the Complaint as to Kevin Skates and Wade Henderson; and (4) ordering the Wyoming Department of Parks to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and from operating as an "exhibitor," as that term is defined in the Animal Welfare Act, without being licensed.

On September 24, 2007, the Wyoming Department of Parks filed "Respondent's Appeal Petition From The Administrative Law Judge's Decision And Order" [hereinafter Wyoming's Appeal Petition]. On October 15, 2007, the Acting Administrator filed "Complainant's Reply Brief In Opposition To Respondents' Appeal Petition And Cross-Appeal" [hereinafter Acting Administrator's Appeal Petition]. On November 5, 2007, the Wyoming Department of Parks filed "Respondents' Response To Complainant's Cross-Appeal."

The parties jointly requested that I stay the proceeding in order to provide the parties time to settle. I granted the parties' request; however, on November 10, 2008, I conducted a conference call in which the parties informed me they had been unable to settle and requested that I issue a decision based on the limited record before me. After careful consideration of that record, I affirm the ALJ's August 23, 2007, Initial Decision.

## DECISION

## Decision Summary

I conclude the Secretary of Agriculture has jurisdiction, under the Animal Welfare Act, to require the Wyoming Department of Parks to obtain an Animal Welfare Act exhibitor's license and to comply with the Regulations and Standards, when the Wyoming Department of Parks engages in the activities of an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and Standards. Further, I order the Wyoming Department of Parks to cease and desist from operating as an exhibitor without an Animal Welfare Act license and from failing to comply with the Regulations and Standards; however, I do not assess the Wyoming Department of Parks a civil penalty. Finally, I dismiss the Complaint against Kevin Skates, the Park Superintendent of Hot Springs State Park, and Wade Henderson, the Park Superintendent of Bear River State Park.

## Findings of Fact

1. The Wyoming Department of Parks is an agency of the State of Wyoming (Answer ¶ 1).

2. The Wyoming Department of Parks' primary business address is 2301 Central Avenue, Cheyenne, Wyoming 82002 (Answer ¶ 1).

3. The Wyoming Department of Parks operates no fewer than 31 state parks and historic sites within the State of Wyoming, including Hot Springs State Park, a Wyoming state park located at 220 Park Street, Thermopolis, Wyoming 82443, and Bear River State Park, a Wyoming state park located at 601 Bear River Drive, Evanston, Wyoming 82930 (Answer ¶ 1).

4. Kevin Skates is the Park Superintendent of Hot Springs State Park (Answer ¶ 1).

5. Wade Henderson is the Park Superintendent of Bear River State Park (Answer ¶ 1).

6. A herd of adult and yearling bison is maintained at Hot Springs State Park for public viewing. Hot Springs State Park has overnight lodging (Holiday Inn and Plaza Hotel), aquatic recreation (Star Plunge Water Park), and a rehabilitation hospital (Gottsche Rehabilitation Center) (Answer ¶¶ 3-4; Complainant's Motion For Judgment On The Pleadings Ex. A).

7. Captive bison and elk are kept at Bear River State Park for public viewing. Bear River State Park is located along Interstate 80 and contains a rest stop for travelers on Interstate 80 with a Travel Information Center that acts as, in the words of a Wyoming State

brochure, "a distribution point for information about Wyoming's many aspects and events, that make our state a splendid place to visit." (Answer ¶¶ 5-6, 8; Complainant's Motion For Judgment On The Pleadings Ex. B.)

8. On April 11, 2002, the Regional Director-Animal Care, Western Region, Animal and Plant Health Inspection Service, wrote to the Park Superintendent of Hot Springs State Park stating he may be conducting activities that would require an Animal Welfare Act license and enclosing materials related to the Animal Welfare Act, including a copy of the Regulations and Standards, for the Park Superintendent's review (Complainant's Motion For Judgment On The Pleadings Ex. C).

9. On June 4, 2003, in response to a request from the Park Superintendent of Hot Springs State Park, the Regional Director-Animal Care, Western Region, Animal and Plant Health Inspection Service, sent him forms and information for obtaining an Animal Welfare Act license (Complainant's Motion For Judgment On The Pleadings Ex. D).

10. On May 29, 2004, the Park Superintendent of Hot Springs State Park completed an application for an Animal Welfare Act exhibitor's license (Complainant's Motion For Judgment On The Pleadings Ex. E).

11. On September 29, 2004, a pre-license inspection of Hot Springs State Park was conducted by an Animal and Plant Health Inspection Service animal care inspector who reported that the facility was inadequate for licensing because a written program of veterinary care had not been completed, there were no barriers between the animals and the public, no employee/attendant was present during times the public has access to the animals, and the facility only had a buck rail styled fence and lacked a secondary perimeter fence (Complainant's Motion For Judgment On The Pleadings Ex. F).

12. On October 18, 2004, a pre-license inspection of Bear River State Park was conducted by an Animal and Plant Health Inspection Service veterinary medical officer who reported that the facility was inadequate for licensing because a written program of veterinary care had not been completed (Complainant's Motion For Judgment On The Pleadings Ex. G).

13. In a telephone conference conducted on November 10, 2008, counsel for the parties informed me that the Wyoming Department of Parks currently holds a valid Animal Welfare Act exhibitor's license.

**Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The Wyoming Department of Parks is an "exhibitor," as that term

is defined in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations and Standards (9 C.F.R. § 1.1).

3. The Wyoming Department of Parks is a "person (public or private)," as that term is used in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations and Standards (9 C.F.R. § 1.1 (definition of the term "exhibitor")).

4. The Wyoming Department of Parks exhibits animals to the public at Hot Springs State Park and Bear River State Park for "compensation," as that term is used in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations and Standards (9 C.F.R. § 1.1 (definition of the term "exhibitor")).

5. Hot Springs State Park is a "zoo," as that term is defined in the Regulations and Standards (9 C.F.R. § 1.1).

6. Bear River State Park is a "zoo," as that term is defined in the Regulations and Standards (9 C.F.R. § 1.1).

7. The Wyoming Department of Parks is not a "person," as that term is defined in the Animal Welfare Act (7 U.S.C. § 2132(a)) and the Regulations and Standards (9 C.F.R. § 1.1).

8. As an exhibitor, the Wyoming Department of Parks is required to have an Animal Welfare Act exhibitor's license and to comply with the Animal Welfare Act and the Regulations and Standards.

9. The Complaint against Kevin Skates, in his official capacity as Park Superintendent of Hot Springs State Park, and Wade Henderson, in his official capacity as Park Superintendent of Bear River State Park, is dismissed.

## Discussion

### *I. The Eleventh Amendment*

Respondents contend that this proceeding should be dismissed because the Secretary of Agriculture lacks jurisdiction over state agencies and state employees acting on a state's behalf. Respondents assert they are protected from being sued under the doctrine of sovereign immunity that generally applies under the United States Constitution and because the language of the Animal Welfare Act does not include a state as a "person" that the Secretary of Agriculture may require to be licensed.

The Eleventh Amendment to the Constitution of the United States provides:

### Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Under the Eleventh Amendment, a state may not be sued by private persons without its consent, but "nothing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Therefore, the controlling issue in this proceeding is whether the language of the Animal Welfare Act authorizes the regulation of a state agency that maintains animals for public viewing.

*II. The Wyoming Department Of Parks Is An Exhibitor Under 7 U.S.C. § 2132(h), But Not A Person Under 7 U.S.C. § 2132(a)*

The Animal Welfare Act requires animal "exhibitors" to be licensed by the Secretary of Agriculture. An "exhibitor" is defined, as follows:

**§ 2132. Definitions**

> When used in this chapter—
> . . . .
> (h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

7 U.S.C. § 2132(h). The definition of the term "exhibitor" was added to the Animal Welfare Act by amendment in 1970. When Congress amended the Animal Welfare Act in 1970, the Animal Welfare Act employed the term "person" as part of the definition of "exhibitor," but left the definition of the term "person" unchanged from the way it was originally defined in 1966, and the Animal Welfare Act continues to

define "person" in the identical language used in 1966, as follows:

> **§ 2132. Definitions**
>
> When used in this chapter—
>
> (a) The term "person" includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity[.]

7 U.S.C. § 2132(a).

The Acting Administrator and Respondents debate whether the Animal Welfare Act's definition of the term "exhibitor" that incorporates this definition of "person," is intended to bring a state agency or its employees within the Secretary of Agriculture's jurisdiction. Both cite *Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765 (2000), as authority for their opposing positions.

The controlling issue in *Vermont* was whether the word "person," as used in the statute being considered by the Court, permitted a cause of action on behalf of the United States to be asserted against a state. The Court explained how this statutory question should be decided:

> We must apply to this text our longstanding interpretive presumption that "person" does not include the sovereign. See *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S.Ct. 742, 85 L.Ed. 1071 (1941); *United States v. Mine Workers*, 330 U.S. 258, 275, 67 S.Ct. 677, 91 L.Ed. 884 (1947) [footnote reference omitted]. The presumption is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). The presumption is, of course, not a "hard and fast rule of exclusion," *Cooper Corp.*, *supra*, at 604-605, 61 S.Ct. 742, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary. See *International Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 83, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991).

*Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 780-81 (2000).

The full statement of the referenced opinion in *United States v.*

*Cooper Corp.* is:

> Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

*United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941) (footnotes omitted).

As both *Vermont* and *Cooper* make clear, the intent of Congress is controlling in deciding this statutory question, and the legislative history of the Animal Welfare Act must be reviewed. This review shows that when originally enacted in 1966, state and municipal governments were not intended to come within the Animal Welfare Act's definition of "person."

The Senate Report applicable to H.R. 13,881, which was enacted into law in 1966, states:

SECTION-BY-SECTION ANALYSIS

> . . . .
> **Section 2**.—This section contains definitions of eight terms used in the bill.
>
> (a) The term "person" is limited to various private forms of business organizations. It is, however, intended to include nonprofit or charitable institutions which handle dogs, cats, monkeys, guinea pigs, hamsters, or rabbits. It is *not* intended to include public agencies or political subdivisions of State or municipal governments.

S. Rep. No. 1281 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2635, 2637. The section-by-section analysis of the Conference report applicable to H.R. 13,881 similarly states:

SECTION BY SECTION ANALYSIS

> . . . .

> Section 2.—This section contains definitions of eight terms used in the bill:
>
> (a) The term "person" is limited to various private forms of business organizations. It is, however, intended to include nonprofit or charitable institutions which handle dogs and cats. It is *not* intended to include public agencies or political subdivisions of State or municipal governments or their duly authorized agents. It is the intent of the conferees that local or municipal dog pounds or animal shelters shall not be required to obtain a license since these public agencies are not a "person" within the meaning of section 2(a). Accordingly, research facilities would not (under sec. 3) be prohibited from purchasing or acquiring dogs and cats from city dog pounds or similar institutions or their duly authorized agents because these institutions are not "persons" within the meaning of section 2(a). Section 2(a) is identical to section 2(a) of the House bill which is broader in scope than the comparable provision in section 2(a) of the Senate amendment.

Conf. Rep. No. 1848 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2635, 2652.

In 1970, when the Animal Welfare Act was amended to give the Secretary of Agriculture jurisdiction over exhibitors, the definition of "person" was left unchanged while the definition of "exhibitor" was set forth as meaning ". . . any person (public or private) exhibiting any animals. . . ." 7 U.S.C. § 2132(h). The House report, which was not accompanied by a Senate report or a Conference report, applicable to the 1970 amendments to the Animal Welfare Act does address the new definition of "exhibitor," but is silent in respect to whether it was intended to apply to state governments and state agencies (H.R. Rep. No. 91-1651 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5103, 5108-09).

However, the fact that the phrase "public or private" is used in the "exhibitor" definition as a modifier of the term "person," has led the author of a treatise on the Animal Welfare Act published in Agricultural Law, Vol. 11 (Matthew Bender, 2004 edition), to conclude, at 87-8:

> The term "person," as used in the Act, includes individuals, partnerships, corporations, associations, and other legal entities. It does not cover public persons, such as state and local governments. State and local governmental bodies, however, are included in the definition of an "exhibitor" under the Act.

(Footnote omitted.)

The author explains his rationale for this conclusion as part of footnote 7 appearing at the bottom of page 87-8:

> *Rationale*: If the term "person" were construed to include public persons such as state and local governments, it would mean that the statutory definition of "exhibitor" to mean "any person (public or private)" would be redundant and serve no useful purpose.

The Wyoming Department of Parks argues that the use of "public or private" to modify "person" in the definition of the term "exhibitor" should be interpreted as modifying only those individuals, partnerships, firms, joint stock companies, corporations, associations, trusts, estates, or other legal entities who are "persons" as specified in 7 U.S.C. § 2132(a) (Wyoming Appeal Pet. at 3-6). The Wyoming Department of Parks' interpretation is contrary to the conclusion reached in the quoted treatise published in Agricultural Law, Vol. 11 at 87-8 (Matthew Bender, 2004 edition), and, more importantly, is inconsistent with the interpretation given it for over 30 years by the officials who administer the Animal Welfare Act: namely, that a state is just as capable of acting as an exhibitor as a private individual. Indeed, no fewer than 21 states and state agencies are currently listed as exhibitors under the Animal Welfare Act (Complainant's Motion For Judgment On The Pleadings at 10).

After the 1970 amendment of the Animal Welfare Act to extend its coverage to exhibitors, the Animal Welfare Act was amended eight times. Ostensibly, whenever the Animal Welfare Act came before Congress for consideration and amendment during the past 30 years, Congress accepted the United States Department of Agriculture's interpretation that the "exhibitor" definition properly includes state agencies, and, for that reason, that definition together with the definition of the term "person" was not altered.[1]

In the instant proceeding, there is even more reason to defer to the interpretation of the pertinent statutory language by the officials who

[1] When Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. *CFTC v. Schor*, 478 U.S. 833, 846 (1986); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Doris Day Animal League v. Veneman*, 315 F.3d 297, 298 (D.C. Cir.), *cert. denied*, 504 U.S. 822 (2003).

administer the Animal Welfare Act. Their interpretation is not only a permissible one of long standing; it is consistent with an identical interpretation expressed in the treatise published in Agricultural Law, Vol. 11 at 87-8 (Matthew Bender, 2004 edition). For these reasons, I conclude the Secretary of Agriculture does have jurisdiction over the Wyoming Department of Parks.

The Acting Administrator asserts the ALJ impliedly found that the Wyoming Department of Parks is a "person," as that term is defined under the Animal Welfare Act (7 U.S.C. § 2132(a)), and the ALJ erroneously failed to make his implicit finding explicit (Acting Administrator's Appeal Pet. at 13-14). The Wyoming Department of Parks disagrees with the Acting Administrator's reading of the ALJ's Initial Decision, stating the ALJ held the term "person," as defined in the Animal Welfare Act, does not include state agencies, such as the Wyoming Department of Parks.

I agree with the Wyoming Department of Parks' reading of the ALJ's Initial Decision and find the ALJ did not impliedly find the Wyoming Department of Parks is a "person," as that term is defined under the Animal Welfare Act (7 U.S.C. § 2132(a)). The ALJ specifically found that state agencies, such as the Wyoming Department of Parks, are covered in the definition of "exhibitor" in 7 U.S.C. § 2132(h), but are not "persons," as that term is defined in 7 U.S.C. § 2132(a).

*III. The Wyoming Department Of Parks Receives Compensation*

Respondents argue that, because the public view the bison and elk at Hot Springs State Park and Bear River State Park without charge, the Respondents are outside the ambit of that part of the "exhibitor" definition which limits its application to exhibiting animals to the public "for compensation." The ALJ found Respondents' argument unavailing in light of controlling United States Department of Agriculture decisions. In *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 163-64 (1990), the Judicial Officer held that, where an animal is exhibited to the public with the expectation of economic benefit to a resort, the exhibition is "for compensation," even though no fee is charged for viewing the animal's performance. Similarly, in a more recent case, *In re Daniel J. Hill*, 67 Agric. Dec.196, 204 (2008), I held that, even though no fee is charged to view animals, the display of animals for economic benefit is sufficient to meet the compensation requirement in 7 U.S.C. § 2132(h).

The Wyoming Department of Parks asserts it receives no economic benefit and does not expect to receive economic benefit from its

exhibition of animals at Hot Springs State Park and Bear River State Park; therefore, the Wyoming Department of Parks is not an "exhibitor" as that term is defined in the Animal Welfare Act (Wyoming's Appeal Pet. at 6-7).

I disagree with the Wyoming Department of Parks' contention that it receives no economic benefit from its exhibition of animals at Hot Springs State Park and Bear River State Park. The Wyoming Department of Parks' argument is belied by Wyoming statutes and regulations that govern Wyoming Department of Parks' facilities and by Wyoming's own publications. While it is true that the Wyoming Department of Parks does not charge the public a fee to view the animals at Hot Springs State Park or Bear River State Park, nor own or operate the facilities at the resort complex located at Hot Springs State Park, Wyoming enjoys an economic benefit from Hot Springs State Park and Bear River State Park. For instance, the undisputed facts indicate that the facilities at Hot Springs State Park are located within the park, on state land (Answer ¶ 3; Complainant's Motion For Judgment On The Pleadings Ex. A) and thus, by statute, such facilities operate pursuant to a lease or rental agreement in which the money received for the lease or rental is paid into the state treasury (Wyo. Stat. Ann. § 36-8-303 (2008)). Additionally, the Wyoming Division of State Parks and Historic Sites[2] is required to charge concessionaires fair and reasonable contract fees based upon a percentage of gross revenue (024-380-004 Wyo. Code. R. § 2(b) (Weil 2007)).

The animals are clearly used to attract visitors, as evidenced by Complainant's Motion For Judgment On The Pleadings Ex. A-B, and the economic benefit that comes from operating the facilities at Hot Springs State Park are passed directly to Respondents by way of lease or rental agreements. This form of concrete economic benefit is greater than the economic benefit that the Judicial Officer has held to constitute "compensation" in previous cases.[3] Thus, in so far as the animals are

[2]The Wyoming Division of State Parks and Historic Sites is an agency within the Wyoming Department of Parks and Cultural Resources (Wyo. Stat. Ann. § 9-2-2017(c)(i) (2008)), and both Bear River State Park and Hot Springs State Park are administered by the Division of State Parks and Historic Sites, Wyoming Department of State Parks and Cultural Resources (Complainant's Motion For Judgment On The Pleadings Ex. A-B).

[3]See *In re Ronnie Faircloth*. 52 Agric. Dec. 171, 173-74 (1993) (finding animals are exhibited "for compensation" where there is some indication that the respondent might receive economic benefit and it is conceivable that the presence of the animals might influence some customers to go to respondent's establishment); *In re Lloyd A. Good, Jr*., 49 Agric. Dec. 156, 163-64 (1990) (finding an animal is exhibited "for compensation" where the animal is an unitemized service which the resort provides to its patrons, as well as an advertised attraction to draw patrons to the resort).

used to attract customers to the various facilities at Hot Springs State Park in which Respondents have an economic stake, Respondents exhibit animals to the public "for compensation." The Wyoming Department of Parks' argument on appeal that it receives no economic benefit by maintaining the animals at Bear River State Park and Hot Springs State Park (Wyoming's Appeal Pet. at 6) are contradicted by the Wyoming statutes and regulations that govern Respondents' facilities and by Respondents' own publications.

*IV. Hot Springs State Park And Bear River State Park Are Zoos*

The ALJ held, even if the Wyoming Department of Parks did not exhibit animals to the public for *compensation*, the Wyoming Department of Parks would be an "exhibitor," as that term is defined in the Animal Welfare Act because Hot Springs State Park and Bear River State Park are "zoos" (Initial Decision at 14). The Wyoming Department of Parks appealed the ALJ's holding that Hot Springs State Park and Bear River State Park are "zoos" (Wyoming's Appeal Pet. at 7-8).

The Animal Welfare Act defines the term "exhibitor" to include zoos, as follows:

> **§ 2132. Definitions**
>
> When used in this chapter—
>
> . . . .
>
> (h) The term "exhibitor" means any person (public or private) exhibiting any animals . . . to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and *zoos* exhibiting . . . animals whether operated for profit or not[.]

7 U.S.C. § 2132(h) (emphasis added).

The Regulations and Standards define the term "zoo," as follows:

> **§ 1.1 Definitions.**
>
> . . . .
>
> *Zoo* means any park, building, cage, enclosure, or other structure or premise in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation.

9 C.F.R. § 1.1. Hot Springs State Park and Bear River State Park are clearly parks in which animals are kept for public exhibition or viewing; thus Hot Springs State Park and Bear River State Park are zoos, as that term is used in 7 U.S.C. § 2132(h) and defined in 9 C.F.R. § 1.1. Therefore, the Wyoming Department of Parks, by virtue of exhibiting animals to the public in two zoos comes within the "exhibitor" definition regardless of whether the exhibition of the animals in Hot Springs State Park and Bear River State Park is for compensation.[4]

*V. Dismissal Of Kevin Skates And Wade Henderson*

The Acting Administrator contends the ALJ erroneously dismissed the Complaint as to the two park superintendents, Kevin Skates and Wade Henderson, based on the ALJ's determination that the inclusion of Messrs. Skates and Henderson in the cease and desist order is "superfluous and unnecessary" (Acting Administrator's Appeal Pet. at 14-15).

The Animal Welfare Act defines the term "exhibitor" as "any person . . . exhibiting any animals . . . to the public for compensation, as determined by the Secretary" (7 U.S.C. § 2132(h)) and provides that the Secretary of Agriculture shall issue licenses to exhibitors (7 U.S.C. § 2133). Similarly, the Regulations and Standards requires any person operating as an exhibitor to obtain a valid Animal Welfare Act license (9 C.F.R. § 2.1(a)(1)). I conclude the Wyoming Department of Parks is an exhibitor and must have a valid Animal Welfare Act license in order to exhibit animals. The record does not clearly establish that Kevin Skates and Wade Henderson, by virtue of their employment by the Wyoming Department of Parks, are also exhibitors. Moreover, even if I were to infer that Messrs. Skates and Henderson are exhibitors (which I do not so infer), I would not find that they, in addition to their employer, the Wyoming Department of Parks, must obtain Animal Welfare Act licenses.

In numerous Animal Welfare Act cases that have come before me, persons who have been employed by an Animal Welfare Act licensee have not also been required to be licensed, even though these employees actually participate in the exhibition of animals. While the Animal Welfare Act authorizes the Secretary of Agriculture to require all employees of a licensed exhibitor, who themselves fall within the definition of "exhibitor" to also obtain Animal Welfare Act licenses, such a requirement would be a departure from current policy and, without more explanation from the Acting Administrator, I decline to

[4] *In re James Petersen*, 53 Agric. Dec. 83, 90-91 (1994).

require all employees of licensed exhibitors to obtain a license, even in those situations in which the employees are themselves exhibitors. Therefore, I reject the Acting Administrator's contention that Messrs. Skates and Henderson, as well as the Wyoming Department of Parks must obtain Animal Welfare Act licenses,[5] and I affirm the ALJ's dismissal of the Complaint against Messrs. Skates and Henderson.

*VI. The Sanction*

The Acting Administrator sought the imposition of an order requiring the Wyoming Department of Parks to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and the assessment of a civil penalty against the Wyoming Department of Parks (Compl. at 4-5). The ALJ issued an order requiring the Wyoming Department of Parks to cease and desist from: (1) exhibiting animals at its state parks without holding a valid Animal Welfare Act exhibitor's license; and (2) failing to comply with the Regulations and Standards (Initial Decision at 15). The ALJ further found, in light of the Wyoming Department of Parks' legitimate belief that it was not subject to the Secretary of Agriculture's jurisdiction under the Animal Welfare Act, the assessment of a civil penalty against the Wyoming Department of Parks would be inappropriate (Initial Decision at 14).

The Wyoming Department of Parks appeals the ALJ's conclusion that the Secretary of Agriculture has jurisdiction over this matter, but does not specifically appeal either the ALJ's imposition of a cease and desist order or the ALJ's determination that the assessment of a civil penalty is not appropriate. Moreover, the Acting Administrator appeals neither the cease and desist order issued by the ALJ nor the ALJ's determination that the assessment of a civil penalty is not appropriate. Finally, in a teleconference conducted on November 10, 2008, the parties informed me that the Wyoming Department of Parks currently holds a valid Animal Welfare Act exhibitor's license.

I agree with the ALJ's imposition of a cease and desist order and the ALJ's determination that the assessment of a civil penalty against the Wyoming Department of Parks would be inappropriate. The Wyoming Department of Parks' current compliance with the Animal Welfare Act and the Regulations and Standards is not relevant to the issuance of a cease and desist order. The purpose of a cease and desist order is to

[5]*See In re Daniel J. Hill*, 67 Agric. Dec. 196, 203(2008) (holding that Montrose Orchards, Inc., was an exhibitor required to obtain an Animal Welfare Act license, but that Montrose Orchard, Inc.'s president was not also required to obtain an Animal Welfare Act license).

deter future violations of the Animal Welfare Act and the Regulations and Standards by the violator and other potential violators.[6] Therefore, except for minor non-substantive changes, I adopt the cease and desist order imposed by the ALJ against the Wyoming Department of Parks.

For the foregoing reasons, the following Order is issued.

## ORDER

1. The Wyoming Department of Parks, its agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and, in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act and the Regulations and Standards without being licensed, as required.

2. The Complaint against Kevin Skates, in his official capacity as Park Superintendent of Hot Springs State Park, and Wade Henderson, in his official capacity as Park Superintendent of Bear River State Park, is dismissed.

This Order shall become effective on the day after service of this Order on the Wyoming Department of Parks, Kevin Skates, and Wade Henderson.

## RIGHT TO JUDICIAL REVIEW

The Wyoming Department of Parks 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. 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. The Wyoming Department of Parks must seek judicial review within 60 days after entry of the Order in this Decision and Order.[7] The date of entry of the Order in this Decision and Order is November 24, 2008.

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[6] *In re Fred Hodgins* (Decision on Remand), 60 Agric. Dec. 73, 86 (2001), *aff'd*, 33 F. App'x 784 (6th Cir. 2002).

[7] 7 U.S.C. § 2149(c).

**In re: D & H PET FARMS, INC.**
**AWA Docket No. 07-0083.**
**Decision and Order.**
**Filed November 26, 2008.**

**AWA – Chronically non-compliant – Sanitation violations – Willful.**

Frank Martin, Jr. for APHIS.
Respondent, Pro se.
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

## Decision

In this decision, I find that Respondent D & H Pet Farms, Inc. committed numerous violations of the Animal Welfare Act, 7 U.S.C. § 2131 et seq. I am imposing a civil penalty of $10,000 and a license suspension of 3 months, with the provision that if certain corrective actions are undertaken by Respondent, portions of the civil penalty and the entire license suspension will be mitigated.

## Procedural Background

On March 15, 2007, Kevin Shea, Acting Administrator of USDA's Animal and Plant Health Inspection Service (APHIS), issued a complaint alleging that on seven different occasions between October 12, 2005 and January 25, 2007 Respondent had violated the Animal Welfare Act and its regulations. The complaint sought civil penalties, the issuance of an order that Respondent cease and desist from committing future violations, and suspension or revocation of Respondent's license under the Act. Respondent filed a timely answer denying that it willfully had violated any of the regulations under the Act.

I conducted an oral hearing in Tampa, Florida on December 4, 2007. Complainant was represented at the hearing by Frank Martin, Jr., Esq., and Heather M. Pichelman, Esq. Respondent appeared pro se, with co-owner Susan A. Tippie acting as spokesperson. Complainant called three witnesses, while Ms. Tippie was the only witness for Respondent. I received into evidence Complainant's exhibits CX-1 through CX-97, and Respondent's exhibits RX 1 through RX 82.

Complainant filed a brief on February 7, 2008, and Respondent filed its brief on April 2, 2008.

## Statutory and Regulatory Background

The Animal Welfare Act includes among its purposes "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." 7 U.S.C. § 2131(1). The Act also provides for the Secretary to license dealers of regulated animals, and gives the secretary the authority to issue regulations. The Secretary can deny a license if a dealer does not demonstrate that its facilities comply with the Secretary's standards. 7 U.S.C. § 2133. Subpart B of 9 CFR Part 3 contains regulations specifying rules applicable to dealers raising hamsters and guinea pigs for use as pets. Failure to comply with these regulations may lead to suspension or loss of a dealer's license, and the imposition of civil penalties in the amount of up to $3,750 per violation.

## Factual Background

D & H Pet Farms is a Florida corporation located in Plant City, Florida. D & H is a licensed dealer under the Animal Welfare Act, and breeds and sells regulated animals—guinea pigs and hamsters—for use as pets. CX 1-CX3. The facility is run by Susin A. Tippie and her husband, Gaynor L. Tippie. Ms. Tippie had served as manager of D & H from 1998 until she purchased the facility with her husband in January 2003. Tr. 150. She testified that there had been numerous pre-existing violations that the previous owner did not want to correct. *Id*. The facility was over 35 years old at the time of the hearing, and is a family run enterprise with between ten and seventeen employees. Tr. 160-162. Ms. Tippie indicated that due to the age of the building housing the regulated animals and the high cost of coming fully into compliance with the regulations, that some aspects of the regulations would never be fully complied with, but that at the same time they were taking care of the regulated animals as well as they could.

Carol Porter, an animal care inspector for APHIS, testified with respect to seven inspections of Respondent that she conducted between November 2005 and January 2007. She had conducted approximately 600 inspections by the date of the hearing, including 12 involving Respondent, four of which occurred after the time period that is the subject of this decision. She characterized the Respondent as "chronically noncompliant." Tr. 22-25. However, she also testified as to the many corrections Respondent made after violations were cited, and of their attempts to take corrective action with respect to other violations. *e.g.*, Tr. 77-79, 88, 92-93.

During the October 12, 2005 inspection, Inspector Porter observed a variety of violations. In her Inspection Report (CX 5) she cited Respondent for repeat noncompliances in the areas of veterinary care, storage of supplies, construction of interior surfaces and sanitation[1]. The veterinary care citation was triggered by the finding of a guinea pig that was quite sickly; the storage of supplies citation was triggered by an open bag of food which had split open and spilled onto the floor, and leaking brake fluid from a tractor near the stacked bags of animal feed. In addition, the citation indicated that paint was peeling away from the floors in the main building, preventing the floors from being impervious to moisture and preventing proper cleaning and sanitation of the floors. Finally, the report cited numerous problems with pest control.

During the February 13, 2006 inspection, Inspector Porter found approximately 200-250 dead hamsters in buckets in the main building, many of which were cannibalized (apparently hamsters tend to devour their first litters). The inspection took place on a Monday and employees told the inspector the practice of the facility was only to check water bottles over the weekend and that the buckets where the hamsters reside did not get checked. Inspector Porter stated in her Inspection Report (CX 17) that the facility needed to have daily observations of the animals, and that the failure to check for dead and dying hamsters, and the high number of dead found during the inspection, were evidence of a lack of veterinary care. The inspector also documented a number of holes in various parts of the facility, the use of soiled bedding, a repeat failure to comply with the regulation concerning impervious surfaces (the paint was peeling off the floors), a violation of the feeding guidelines as evidenced by wet and moldy food pellets, a variety of sanitation violations, and an inadequate pest control program.

At the next inspection, on April 5, 2006, Inspector Porter again observed peeling paint on the floors, and an ineffective pest control program, with numerous stray cats "wandering in and around the facility." CX 41.

At the June 21, 2006 inspection, Inspector Porter again cited Respondent for the peeling paint on the floors, and for pest control issues (particularly rodents[2], house flies and roaches), as well as for

[1] The record contains two prior Consent Decisions where Respondent admitted committing certain violations and agreed to pay a civil penalty and to comply with the regulations in the future. CX 97 was issued by Judge Dorothea Baker in July 2001 and was signed on behalf of Respondent by former owner Chris A. Vorderburg. CX 4 was issued by Judge Victor Palmer in May 2005 and was signed by Ms. Tippie.

[2] Other than the guinea pigs and hamsters, which are themselves rodents.

having an open bag of feed, and for oats spilled on the feed room floor. CX 43.

Inspector Porter returned again on November 14, 2006, and cited Respondent for additional violations. CX 51. She found two guinea pigs that appeared to be sick or injured and concluded that this meant that animals should be observed more frequently. She also once again cited Respondents for failing to have floors impervious to moisture as evidenced by the paint peeling away from the concrete, for an inadequate pest control program as evidenced by cobwebs, fruit flies and rodent droppings, and for not providing food consistent with the regulations since numerous hamster enclosures contained wet and moldy food. She also observed black mold on the inside of numerous water bottles in the main hamster building. She also observed that buckets containing hamsters were being stacked one inside another which she felt could cause crushing, impaired ventilation, or restricted movement of the hamsters.

On December 19, 2006, Inspector Porter observed a disoriented guinea pig and determined once again that there was insufficient frequency of observation of animals and inadequate veterinary care. CX 72. Once again she observed pest control violations, including substantial rodent droppings, cobwebs, and living and dead rodents, and once again she observed that the floors in the main building had areas where the paint had peeled away from the concrete, rendering it not impervious to moisture. She also observed mold growing on the inside of numerous water bottles, the stacking of occupied hamster cages, and out of place tubes of antibiotic ointment and suntan lotion.

The final inspection that is the subject of this hearing occurred on January 25, 2007. Inspector Porter once again observed peeling paint on the floor of the main building, wet and moldy hamster food, and rodent droppings and a large concentration of fruit flies. CX 90.

Inspector Porter testified that with respect to many of the violations Respondent took prompt corrective action, including frequently repainting the floor, which everyone seems to recognize was rather a futile gesture. She also indicated that whenever she discovered a hole in the ceiling, the ceiling was repaired by the time of her next inspection. Tr. 88. With respect to the high number of dead hamsters during the February 2006 inspection, Inspector Porter indicated that even though she had been told by Ms. Tippie that hamsters frequently eat their first litters, she believed that the mortality rate was still unusually high. Tr. 86-88. She also had observed workers sanitizing the water bottles, and believes the situation with respect to that violation had improved considerably, but she was still finding problems. Tr. 104-106.

Dr. Elizabeth Goldentyer, a veterinarian who is Eastern Regional Director for APHIS, testified as Complainant's sanctions witness. She classified the case against Respondent as a "serious" one, pointing out that Complainant viewed Respondent as a "chronic" non-complier, with two previous Consent Decisions that were not fully complied with. Tr. 129-132. She testified that many animals were impacted by Respondent's continued non-compliance.[3] *Id.* Accordingly, she recommended that I impose a $10,000 civil penalty, issue a cease and desist order, and suspend Respondent's dealer's license for three years. Tr. 134. Dr. Goldentyer testified that APHIS factored in the size of Respondent's business, the seriousness of the violations, Respondent's good faith (or lack thereof) and history of compliance.

Ms. Tippie testified that the facility was already old when she purchased it and that the previous owner had not been willing to commit to repairs. Tr. 150. She described several unfortunate personal circumstances, including the need to have surgery, being involved in an automobile accident and being "out of it" for the year after the car accident due to medications, and insisted that she was trying to be compliant, and that her actions, or inactions, would not substantiate a finding of "willful." Tr. 150-155.

There was little dispute as to the existence of the allegations regarding impervious surfaces and pest control. With respect to the floors, Respondent testified that it was impossible to repair the floors without essentially tearing down the facility. Ms. Tippie stated that by repeatedly bleaching the floors—they use between 150 and 350 gallons of bleach per month, that the floors would be as clean as if they were impervious to moisture. Tr. 189-191, RX 75. She cited a letter from a veterinarian, who was not available to testify, as support that bleaching would suffice, and that painting the floors would not matter as long as the floors were vigorously scrubbed on a regular basis. Tr. 174-179, RX 71. However, Dr. Goldentyer testified on rebuttal that it would be impossible to disinfect a facility with peeling paint over concrete, and that bleach will not do the job. Tr. 250. Dr. Goldentyer emphasized that the regulations were minimum standards for all dealers regardless of location. *Id.*

Respondent also submitted a large number of receipts, dated both before and after the dates of the inspections at issue, indicating that Respondent had been involved in an ongoing effort to comply with the regulations. Besides the receipts for bleach, Respondent submitted

[3] Inspector Porter had indicated that at the time of the November 2006 inspection, Respondent's inventory included 6975 hamsters and 109 guinea pigs, as well as over 1000 non-regulated gerbils. *CX51.*

evidence of expenditures for paint, rodent doors, a water pump with chlorination system, water bottles, and other materials used for repairs. RX 72, 73, 75, 78.

Respondent also submitted an unsigned study conducted by Dr. William White, a recognized expert in husbandry and health who consulted with Respondent at APHIS's request as a courtesy to APHIS[4]. RX 77, Tr. 251. While the report is quite detailed, it contains little that is pertinent to my findings, other than recognizing that small animals occasionally do escape from their cages. It also illustrates APHIS going out of its way to help Respondent's facility attempt to come into compliance.

**Discussion**

Many of the violations alleged by Complainant have been admitted by Respondent, except that Respondent denies that any of the violations were willful. Tr. 231-232. However, although Respondent provided a number of definitions of "willful" that would tend to support their claim, RX 82, the governing law defining "willful" as it applies in cases under the Animal Welfare Act supports Complainant's interpretation that the proven violations of the Act were in fact "willful." As Complainant points out in its brief, the Judicial Officer has long construed "willful" to mean the violator "(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 292 (1978), *aff'd sub nom. Arab Stock Yard v. United States*, 582 F.2d 39 (5th Cir. 1978).

With respect to the repeated citations for failing to provide impervious surfaces as evidenced by the peeling paint on the floor of the main building, Respondent concedes the facts of the violation, but contends that their practice of bleaching and scrubbing the floor provides equivalent sanitation and cleanliness to meeting the specific requirements of the regulation. They also contend that compliance with this regulation would result in substantial expense and possible temporary closing of the facility. I am persuaded by the testimony of Dr. Goldentyer that the actions of Respondent do not comply with the regulation. There is no provision in this regulation for an exemption for older facilities or because the cost of compliance would be excessive. It is clear to me Respondent considers this aspect of compliance as impossible and is proceeding as if it had an exemption to complying

[4] Although the study was unsigned, the provenance of this report was ultimately undisputed.

with this particular regulation. However, compliance is mandatory if Respondent wants to keep its license, and the fact that Respondent's building is old and it would be costly to comply is not grounds for allowing the violation to continue. Respondent must modify its facilities or lose its license. Complainant has demonstrated that Respondent has violated 9 CFR § 3.26(d), which requires that "interior building surfaces of indoor housing facilities shall be constructed and maintained so that they are substantially impervious to moisture and may be readily sanitized" on each of the seven occasions cited in the complaint.

Each of the seven inspections also resulted in a citation for violation of various aspects of the pest control regulations. Respondents were cited under § 3.31(b) and (c) for the presence of rat and mice droppings, and general pest infestation (CX 5), as well as spiders, fruit flies and cobwebs (CX 17), large numbers of feral cats (CX 41), excessive numbers of houseflies and large concentration of roaches (CX 43), etc. There was no dispute that these situations occurred, but Respondent offered evidence, substantially concurred with by Complainant, that they have been making continual efforts in this area, including hiring a professional pest control company, and that the surrounding environment made pest control extremely difficult. However, compliance was not achieved and Complainant has demonstrated that Respondent violated 9 CFR§ 3.31 on each of the seven inspections.

With regards to the contentions that on several occasions Respondent failed to provide adequate veterinary care, I find that APHIS's case is not quite so cut and dried. With respect to the February 13, 2006 [5] inspection where Inspector Porter discovered approximately 200-250 dead hamsters, Complainant has established that, in the absence of specific evidence that such a high mortality count is normal in the business, Respondent was not providing adequate veterinary care, in that there was a lack of daily observations as to animal health and well being. While Ms. Tippie testified as to the propensity of adults to devour their first litters, the evidence indicates that in many cases there were dead adults in the buckets with still living young hamsters. CX 17, p. 1. The fact that this inspection occurred on a Monday, and that daily observations were not performed over the weekend, support APHIS's contention that daily observations were not conducted. APHIS has met its burden of proof with respect to this count.

However, I do not find sufficient evidence to support the existence of violations of the adequate veterinary care standard on the October 12, 2005, November 14, 2006 or December 19, 2006 inspections. The fact

[5] The Inspection Report is signed and dated on February 14 but indicates that the inspection took place on February 13.

that there was one sickly guinea pig on October 12, two on November 14 and one on December 19 does not in itself establish that there was an inadequacy of veterinary care, or that there were insufficient observations of animals under the care of Respondent. Complainant put on no evidence which would indicate how the presence of a sick guinea pig at the time of the inspection was the result of inadequate care, particularly considering the large number of guinea pigs at the facility. The fact that a guinea pig was blind in one eye is not evidence of inadequate care, nor does the fact that a guinea pig was unwilling or unable to move presume a violation, absent testimony about the cause and duration of the condition.

There were also several instances where animals were observed with food pellets that were wet or moldy, as well as several occasions where water bottles were observed with black mold on the inside. While Ms. Tippie indicated that hamsters like to moisten their food, there was little in the way of evidence to corroborate this fact, nor would it be consistent with the finding of Inspector Porter that many of the pellets she saw were moldy. With respect to the black mold on the inside of the water bottles, Respondent has taken substantial steps to correct this problem, including the purchase of a water pump with chlorination system, and establishing a regular program of cleaning water bottles, the fact that the violations were corrected does not nullify the existence of the violations, although it may be a factor in any sanctions imposed.

Respondent was also cited in several instances for stacking hamster containers in a manner that could cause the hamsters to be crushed or to be exposed to the possibility of suffocation. I am not persuaded that such temporary stacking, in the absence of any evidence that the containers actually did put physical pressure on the hamsters or that there was any sort of real danger of suffocation, establishes a violation. The cited regulation merely requires that primary enclosures be constructed so as to be structurally sound and maintained in good repair. In the absence of more specific evidence as to the likelihood of harm to the hamsters from such stacking, I find that Complainant has not met its burden of proof with respect to the stacking citations.

The various other violations, holes in the ceiling which were repaired, open bags of food, an aquarium being used as a litter box, contaminated bedding, etc., were generally all admitted and corrected, and none appeared to be serious or repetitive in nature.

In imposing appropriate sanctions, I must factor in a number of variables. One is the size of business. The regulated aspects of Respondent's business appear to have generated gross income of over $386,000 in 2003, over $420,000 in 2004, and over $443, 000 in 2005,

as stated in Respondent's applications for renewal of their dealer's license. CX 1, CX 2, CX 3. In 2005, they sold over 211,000 animals, although that figure appears to include all animals they sold rather than just regulated animals.[6] Ms. Tippie stressed that the dollar amounts just cited were for gross income, and that after paying ten to seventeen employees, and subtracting the costs of doing business, her income from the business was such that she made $2,000 per month, and that Mr. Tippie only received $700 every other week. Tr. 243-244. She stated that her employees made more money than she did. *Id*. Thus, while the business is fairly large from a sales point of view, it does not generate much in the way of income for its owners.

Another factor to be considered is the gravity of the violations. I am persuaded that the violations concerning the failure to render the floor in the main building impervious to moisture so that adequate levels of sanitation and cleanliness could be achieved is a serious violation. Likewise, the continuing series of violations related to pest control also is quite serious. These two violations also call attention to another of the statutory penalty assessment factors— the history of previous violations. Each of these two violations was cited on seven separate occasions by Inspector Porter, while several of the other violations also occurred on multiple occasions. The fact that Respondent was aware of, and admitted, the continued existence of these violations establishes a history of violations to be factored into my sanctions decision.

Even though APHIS seeks a three year suspension of Respondent's license, Complainant has given me a strong impression that they would much rather see Respondent comply than go out of business. Complainant has continued to renew Respondent's license each year, and has gone out of its way to get expert advice for Respondent by asking Dr. William White to advise Respondent. Nevertheless, Complainant seeks a three year suspension of Respondent's dealer's license, which would clearly have the practical effect of putting Respondent out of the guinea pig and hamster business, and would likely result in the euthanization of all or a significant portion of Respondent's regulated animals. Complainant states that it would help seek to find a home for these animals in the event of a suspension, but can make no promises in that regard.

While any suspension of more than a few weeks will likely result in the demise of the regulated portion of Respondent's business, I find that a ninety day suspension is appropriate in this matter. A significant suspension is warranted because continued non-compliance with the

[6] Respondent raises and sells unregulated animals including gerbils, rats, mice, lizards and snakes. RX 77, p. 1.

regulatory requirements, combined with Respondent's insistence that the cost of compliance would be too high and that they should essentially be given an exemption due to the age of their facility, is simply not tenable.

I agree with Complainant that a significant civil penalty is also appropriate. While I did not find in favor of Complainant on every allegation, the fact of the continuing nature of several of the violations warrants severe sanctions. Given that I find that over 20 violations occurred, including a number of serious and repeat violations, and factoring in Respondent's size of business and Respondent's documented good faith attempts to comply, the $10,000 penalty request by Complainant is quite reasonable.

Similarly, an order to cease and desist from committing additional violations and to correct the existing violations is reasonable under the circumstances of this case.

While penalties are payable and other sanctions normally take effect within 35 days after a decision is issued, I will stay the effective date of the civil money penalty and the license suspension for 60 days, with the proviso that if Respondent comes into full compliance with the regulations within the stay period, as determined by APHIS, the license suspension will not be implemented, and the civil penalty will be reduced to $2,500.

## Findings of Fact and Conclusions of Law

1. Respondent D & H Pet Farms, Inc., is a Florida corporation whose mailing address is 3103 S. Sapp Road, Plant City, Florida 33567.

2. During the time period material to this matter, Respondent has been licensed as a dealer under the Animal Welfare Act. Respondent raises and sells guinea pigs and hamsters, which are regulated animals under the Act, as well as several types of non-regulated animals.

3. Respondent has been operating for upwards of 35 years. Since 2003, Respondent has been owned by Susin and Gaynor Tippie. Ms. Tippie had been manager of the facility under its previous owner from 1998 until she and her husband purchased the facility.

4. On seven occasions between October 12, 2005 and January 25, 2007, Inspector Carol Porter inspected Respondent. At the conclusion of each of these seven inspections Inspector Porter issued an Inspection Report stating that Respondent had violated the regulations issued under the Act.

5. On each of the seven inspections, Respondent was in violation of the sanitation standards at 9 CFR §3.26 (d) in that the floor of the main building was not impervious to moisture, preventing proper cleaning and

sanitation. On each of these occasions, peeling paint was observed on the floor.

6. On each of the seven inspections, Respondent was in violation of the pest control standards at 9 CFR §3.31 (b) and (c) in that numerous observations of rodents, animal waste, excessive fruit flies, and cobwebs were observed.

7. On February 13, 2006, there were between 200-250 dead hamsters in their containers. Many had been cannibalized. In some containers, there were live baby hamsters with dead adults; in other containers there were cannibalized newborns. This constitutes a violation of 9 CFR § 2.40 (a) (3) in that it indicated a lack of proper veterinary care, and in particular a lack of daily observation of all animals to assess their health and well-being.

8. The fact that Inspector Porter observed a single sickly guinea pig on her October 27, 2005 inspection, two sickly guinea pigs on November 14, 2006 and one disoriented guinea pig on December 19, 2006 does not constitute sufficient proof that the proper veterinary care and daily observation regulations were not complied with on those two occasions.

9. On February 14, 2006, November 14, 2006 and January 25, 2007, wet and moldy food pellets and a buildup of fruit flies were observed in numerous hamster enclosures. This constitutes three violations of 9 CFR § 3.29(a) which requires that food should be free from contamination.

10. On November 14, 2006 and December 19, 2006 numerous water bottles had black mold growing inside. This constitutes two violations of 9 C.F.R. § 3.30.

11. On several occasions, containers with live hamsters were temporarily stacked for cleaning purposes. I find that Complainant did not meet its burden of proof to demonstrate such temporary stacking presented a risk of crushing or suffocation.

12. On various occasions, Respondent committed violations by having open food bags, contaminated bedding, and several holes in ceilings or walls.

13. Each of the violations committed by Respondent was "willful" as that term is used in the Animal Welfare Act and underlying regulations.

**Order**

1. Respondent is assessed a civil penalty of $10,000.
2. Respondent's dealer's license is suspended for three months and

continuing until Respondent demonstrates that it is in full compliance with the Act and the regulations issued thereunder.

3. Respondent is ordered to cease and desist from violating the Act and the regulations thereunder.

4. The effective date of the license suspension and civil penalty imposed by this Order is stayed for sixty days from the date this decision is served on Respondent. If Respondent demonstrates to Complainant within 60 days of the date this decision that it has come into full compliance with the Act and the regulations thereunder, particularly with respect to the violations concerning impervious surfaces and pest control, then the civil penalty will be reduced to $2,500 and the suspension order will be not be implemented.

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.

Done at Washington, D.C.

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## ADMINISTRATIVE WAGE GARNISHMENT

## DEPARTMENTAL DECISIONS

**In re: LORETTA EVANS.**
**AWG Docket No. 08-0162.**
**Decision and Order.**
**Filed December 3, 2008.**

**AWG – Disposable pay.**

Petitioner, Pro se.
Mary Kimball for RD
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

### DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of the Petitioner, Loretta Evans, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On August 13, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. Ms. Evans failed to file anything further with the Hearing Clerk and repeated efforts to reach her by telephone were unsuccessful. Although the Petitioner claimed to have received a letter informing her that the debt has been paid off,[1] it was never produced and the only evidence in the file reflects an outstanding deficiency balance remaining after the residence was sold. In a further effort to afford the Petitioner the hearing that she requested, an Order was entered on November 19, 2008 allowing her an additional opportunity to file a list of witnesses or exhibits and directing her to contact the Secretary to the Administrative Law Judge on or before November 26, 2008 to provide a telephone number at which she might be reached and a list of dates that she would be available for the hearing. The Petitioner also failed to respond to that Order which indicated

[1] Ms. Evans did receive a letter indicating that the account was being "charged off;" however, as noted in the Narrative filed on August 27, 2008, that referred to a change of accounting classification rather than cancellation of the debt.

"Failure to comply with this Order will be considered a waiver of the request for hearing and the case will be submitted on the record." Paragraph 3, Order of November 19, 2008.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

1. The Petitioner, Loretta Evans, applied for and received a United States Department of Agriculture (USDA) Rural Development (RD) loan for property located at 625 Rohrsburg Road, Orangeville, Pennsylvania 17859, executing a Promissory Note on October 27, 1992 in the amount of $66,500. RX-1. This debt was established in the Mort Serv system as account number 0005982504. RX-2.
2. In 2004, the Petitioner defaulted on the mortgage loan and a Notice of Acceleration, Demand for Repayment and Notice of Intent to Foreclose was sent to the property address on July 24, 2004. RX-3. The Notice indicated that the balance of the account as of July 20, 2004 was unpaid principal in the amount of $58,596.58, unpaid interest in the amount of $1,604.61, plus additional interest accruing at the rate of $12.4417 per day thereafter. RX-3.[2]

The Account Activity record (RX-4) reflects the following amounts applied to the loan on the dates indicated:

1. 03/10/2005 $2,965.00 Funds Received; no source identified
2. 07/12/2006 23,215.13 Foreclosure Proceeds

After expenses of sale, an unpaid principal balance of $48,125.50 remained. *Id*.

In 2008, USDA received $1,973.00 from the United States Treasury which was applied to the outstanding balance, leaving an outstanding balance of $46,152.50 as of August 14, 2008. RX-6.

**Conclusions of Law**

1. The Petitioner, Loretta Evans, is indebted to USDA RD in the

[2] The Notice also indicated that the unpaid balance would also include any additional advances for the protection of the security, the interest accruing on any such advances, fees, or late charges and the amount of subsidy to be recaptured in accordance with the Subsidy Repayment Agreement.

amount of $46,152.50 as of August 14, 2008 for the mortgage loan extended to her on October 27, 1992, further identified as account number 0005982504.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. The Petitioner's failure to respond to repeated attempts to contact her for a hearing both by telephone and by the Orders of August 13, 2008 and November 19, 2008 shall be deemed to be a failure to appear and a waiver of the request for a hearing in this action.
4. The Respondent is entitled to administratively garnish the wages of the Petitioner.

**Order**

For the foregoing reasons, the wages of the Petitioner, Loretta Evans, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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**In re: MARVIN DURET.**
**AWG Docket No. 08-0150.**
**Decision and Order.**
**Filed December 9, 2008.**

**AWG – Disposable pay.**

Petitioner, Pro se.
Mary Kimball for RD.
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

**DECISION AND ORDER**

This matter is before the Administrative Law Judge upon the request of the Petitioner, Marvin Duret, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On July 8, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be

resolved, and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed and the Narrative and supporting documentation was provided to the Petitioner. A teleconference was held with the parties on November 18, 2008 to determine the status of the case and to set the matter for hearing. Mr. Duret was afforded a further opportunity to submit exhibits on his behalf and the matter was set for a telephonic hearing on December 9, 2008.

At the hearing on December 9, 2008, Mr. Duret appeared *pro se*. The Respondent was represented by Esther McQuaid of the St. Louis, Missouri Office and Yvonne Emerson of the New Orleans office. Two exhibits (PX-1 & 2) were tendered by Mr. Duret and five exhibits (RX-1 through 5) were submitted by the Respondent. The testimony of the participants was under oath.

The first page of RX-5 is a USDA Rural Housing Service Form RD 3560-8 titled Tenant certification. Ms. Emerson testified that the form was used by Bayou Fountain Townhouses to certify eligibility for occupancy in the housing complex. The form as completed by the Petitioner and Amelia Smith reflected that the only income that they were receiving as of November 19, 2005 was AFDC in the amount of $2,880. Page 4 of the same exhibit is a Self Certification of Income also signed by Mr. Duret on the same date indicating that on November 19, 2005, he had no income of any kind. RX-4, a Request for Verification of Employment, however reflects that Mr. Duret was employed on November 14, 2005, **only five days prior to his completing the forms for the Bayou Fountain Townhouses**. Mr. Duret admitted signing the forms and also admitted that the information concerning his employment contained in RX-5 was incorrect, but testified that the information had been filled in by Temika Smith, the Manager of the Complex and that he thought that he was applying for a FEMA program.

In addition to his testimony, Mr. Duret tendered two exhibits in his defense. PX-1 is a letter from Willie B. Martin indicating that Mr. Duret resided in a FEMA shelter trailer in front of his home from December 2005 through June of 2006. PX-2 is a letter from Amelia Smith indicating that she and Mr. Duret had moved into the Bayou Fountain Townhomes in November of 2005, but that he moved out when he became employed. As this account is contradicted by Mr. Duret's testimony, although PX-2 will be admitted, it will be given no weight.

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. The Petitioner, Marvin Duret, applied for and received a United States Department of Agriculture (USDA) Rural Development (RD) rental subsidy to reside in the Bayou Fountain Townhouses in Baton Rouge, Louisiana by completing a Tenant Certification, Form RD 3560-8, certifying on November 19, 2005 that the only income received by Amelia Smith and himself was AFDC in the amount of $2,880 per month. Page 1, RX-5.
2. On the same date, November 19, 2005, the Petitioner also completed a Temporary Housing Self Certification of Income indicating that he had no income of any kind and that there was no imminent change expected during the next 12 months. Page 4, RX-5.
3. The statements contained on RX-5 under penalty of perjury were in fact false and Mr. Duret knew that the statements were false as he had commenced working on November 14, 2005. RX-4.
4. As a result of the false statements made by the Petitioner, he received benefits in the amount of $3,120.00 to which he was not eligible to receive.
5. The current balance after application of all funds received to date is $684.92 as of December 9, 2008.

**Conclusions of Law**

The Petitioner, Marvin Duret, is indebted to USDA RD in the amount of $684.92 as of December 9, 2008 for the federal benefits paid on his behalf to which he was not eligible to receive.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner, subject to the limitations set forth in 31 C.F.R. §285.11(i).

**Order**

1. For the foregoing reasons, the wages of the Petitioner, Marvin Duret, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).
2. Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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**In re: DESTRY FUGATE.**
**AWG Docket No. 09-0004.**
**Decision and Order.**
**Filed December 9, 2008.**

**AWG – Disposable pay**.

Petitioner, Pro se.
Mary Kimball for RD.
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

## DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of the Petitioner, Destry Fugate, for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On October 20, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed together with supporting documentation. Following the filing of the Narrative by the Respondent, a teleconference was held with the parties on October 30, 2008. During the teleconference, Mr. Fugate indicated that he was not contesting the amount of the debt, but rather was seeking relief from or postponement of any garnishment based upon his limited ability to repay the indebtedness. A summary of that teleconference was mailed to the parties, and schedules[1] were mailed to the Petitioner to be filed with the Hearing Clerk's Office and the Respondent to facilitate a review of the Petitioner's ability to pay. The Petitioner filed the financial information with the Hearing Clerk's Office on November 13, 2008, and the Respondent acknowledged receipt of the copy sent to them.

A telephonic hearing was held with the parties on December 4, 2008 to determine if all necessary information was in the record. There being no additional information needed, the parties were advised that the case would be taken under advisement and a decision issued on the record. On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

[1] The financial schedules included, inter alia, an income statement and asset and liabilities schedules all to be filed under oath.

## Findings of Fact

On April 20, 2005, the Petitioner, Destry Fugate and his wife Staci Fugate, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on April 26, 2005 obtained a home mortgage loan for property located at 158 Peachtree Street, Loudon, Tennessee from J.P. Morgan Chase Bank, N.A. (Chase) for $97,500.00 (Loan Number 1082447754). RX-1.

In 2007, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on September 11, 2007 for $80,750.00. The property was later re-sold by Chase on December 19, 2007 for $77,900.00. RX-2.

The Summary of Loss Claim Paid on the Loan Guarantee reflects that USDA paid Chase $36,213.92 under the Loan Guarantee, including principal, accrued interest, the costs of foreclosure, maintenance, and subsequent sale, less the final sales proceeds.

## Conclusions of Law

The Petitioner, Destry Fugate, is indebted to USDA RD in the amount of $36,213.92 as of January 30, 2008 for the mortgage loan guarantee extended to him, further identified as Loan account number 1082447754.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of the Petitioner.

## Order

For the foregoing reasons, the wages of the Petitioner, Destry Fugate, shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, DC.

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**In re: TERRELL CARMOUCHE, JR.**
**AWG Docket No. 08-0172.**
**Decision and Order.**
**Filed December 11, 2008.**

**AWG – Disposable pay**.

Petitioner, Pro se.
Mary Kimball for RD.
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

## DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of the Petitioner, Terrell Carmouche, Jr., for a hearing to address the existence or amount of a debt alleged to be due, and if established, the terms of any repayment prior to imposition of an administrative wage garnishment. On September 22, 2008, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed together with supporting documentation. Following the filing of the Narrative by the Respondent, a teleconference was held with the parties on November 24, 2008. During the teleconference, Mr. Carmouche indicated that he did not have any exhibits to submit that were not already in the record and would not be calling any witnesses, but that he still desired the hearing. A summary of that teleconference was mailed to the parties and the matter was set for telephonic hearing on December 11, 2008 at 10:30 AM Eastern Standard Time.

During the telephonic hearing held with the parties on December 4, 2008, the Petitioner participated *pro se*. The Respondent was represented by Gene Elkin, Rural Development, United States Department of Agriculture, St. Louis, Missouri. Mr. Elkin introduced and identified the nine exhibits tendered by the Respondent, and testified that each of them were records maintained and kept by USDA in the operation of the Rural Development program.

Mr. Elkin testified that on June 27, 1996, Terrell Carmouche, Jr. (sometimes reflected in the file as Terrell Lee Carmouche, Jr.) executed and delivered to USDA a promissory note in the amount of $54,660 and mortgage for property located at 714 Evelyn Drive, Marksville, Louisiana. RX-1-2. The amount borrowed was entered into the

MortServ[1] system as account number 0005982504
RX-3.

Mr. Carmouche defaulted on the loan and was sent a Notice of Acceleration of Mortgage Loan, Demand for Payment of Debt, and Notice of Intent to Foreclose on November 3, 2006. RX-4. Prior to acceleration of the debt, the Petitioner had been granted an automatic moratorium on his loan as a result of the disaster conditions caused by Hurricane Katrina. RX-5. On October 12, 2006, Mr. Carmouche was advised that the moratorium would not be extended since he had not returned a moratorium review packet. RX-6. On September 7, 2006, the Petitioner had expressed his willingness to voluntarily convey the property to USDA (RX-7), but an inspection of the property that day reflected that the property had been abandoned and was in "horrible" condition. RX-8. After application of sale proceeds and other payments, a current balance of $25,720.07 remains due. RX-3 & 9.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

**Findings of Fact**

On June 27, 1996, the Petitioner, Terrell Carmouche, Jr., applied for and received a home mortgage loan from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at 714 Evelyn Drive, Marksville, Louisiana in the amount of $54,660 (Loan Number 0005982504). RX-1-3.

In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-4.

The secured property was sold at foreclosure sale on December 15, 2006 for $28,000. RX-9.

The amount remaining due after application of all recovery to date is $25,720.07. RX-3, 9.

**Conclusions of Law**

The Petitioner, Terrell Carmouche, Jr. (a/k/a/ Terrell Lee Carmouche, Jr.), is indebted to USDA RD in the amount of $25,720.07 as of September 30, 2008.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

The Respondent is entitled to administratively garnish the wages of

[1] A database system of records maintained by USDA RD.

the Petitioner.

**Order**

For the foregoing reasons, the wages of the Petitioner, Terrell Carmouche, Jr. shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

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**DEBARMENT NON-PROCUREMENT**

**DEPARTMENTAL DECISIONS**

**In re: DOLPHUS LAMAR DELOACH, ANTHONY B. FAIR, DEFAIR FARMS, LLC, AND DEFAIR FARMS, GENERAL PARTNERSHIP.**
**DNS-RMA Docket No. 08-0115.**
**Decision and Order.**
**Filed July 22, 2008.**

**DNS-RMA – Debarment – Responsible, not presently – Conviction of offense of moral turpitude – Tax fraud – Misprison of felony.**

William Penn for Petitioner.
Eldon Gould for USDA.
*Decision and Order by Administrative Law Judge Victor W. Palmer.*

## Decision and Order

This decision and order is issued pursuant to 7 C.F.R. § 3017.890 that governs appeals of debarment and suspensions under 7 C.F.R. §§ 3017.25-.1020, the regulations that implement a governmentwide system of debarment and suspension for the United States Department of Agriculture's nonprocurement activities. The purpose of the regulations is stated at 7 C.F.R. § 3017.110:

> (a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.
>
> (b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.
>
> (c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person for the purposes of punishment.

Respondents have appealed the April 3, 2008 decision of Eldon Gould, Debarring Official for the Risk Management Agency ("RMA"), United States Department of Agriculture, to debar each of them from participation in government programs for three years. Respondents

argue that the decision should be reversed and vacated because: (1) the Debarring Official relied on unproven allegations taken from a dismissed indictment rather than limiting his determination to the factual basis of the felony conviction that his prior letter of proposed debarment stated would be the basis for debarment and that precluded respondents from making any factual challenge; (2) the fact that Respondents Deloach and Fair were allowed by RMA to participate in its crop insurance program from 2000 through 2007 was a de facto determination by RMA that they were "presently responsible" for each of those years which the Debarring Official did not credibly overcome when he determined they were not presently responsible in 2008; (3) Respondents' exclusion from government programs was in fact punishment prohibited by 7 C.F.R. § 3017.110(c); (4) the Debarring Official failed to properly consider mitigating or aggravating factors as set forth in 7 C.F.R. § 3017.860; (5) the Debarring Official failed to properly assess Respondents' present responsibility by focusing on their present business responsibility, but instead considered only their past conduct; and (6) the length of the debarment is excessive.

My functions as the appeal officer in this proceeding are set forth at 7 C.F.R. § 3017.890:

> (a) ….The assigned appeals officer may 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.
>
> (b) The appeals officer will base the decision solely on the administrative record.

In exercise of those functions I have considered the Debarring Official's decision, the underlying administrative record and the arguments of the parties, and affirm the three-year debarment of the Respondents as being in accordance with law, fully supported by the administrative record and the applicable standard of evidence, and not arbitrary, capricious or an abuse of discretion.

## Findings and Conclusions

**1. The Debarring Official did not, as alleged, rely on unproven**

**allegations taken from a dismissed indictment, instead he based his determination to debar Respondents on their conviction for an offense indicating lack of business integrity or honesty. He also properly considered admissions by Respondents in their plea agreements and in their meeting with him to determine whether they should be excluded from federal programs for not being presently responsible.**

Before beginning his presentation at the January 23, 2008 meeting with Eldon Gould, the Debarring Official, Respondents' attorney, William Penn, asked whether the proposed debarment was based on the allegations in the underlying indictment or on the conviction. Mr. Gould responded:

MR. GOULD: It's based on the conviction.

(Tr. at 23)

Moreover, at pages 2 and 3 of the debarment letter sent to Respondent Deloach (the four letters are similar but for convenience, all page references shall be to the one sent to Deloach), Mr. Gould fully addressed this issue:

> As stated at the January 23, 2008, meeting, your debarment is based on your conviction. Under 7 C.F.R. § 3017.800, a person may be debarred for '(a) Conviction of or civil judgment for….(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility.' In any debarment action, the government must establish the cause for debarment by a preponderance of evidence. *See* 7 C.F. R. § 3017.850(a). If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

*See* 7 C.F.R. § 3017.850(b).

Therefore, to impose a debarment, the person:

(1) Must have been convicted or a civil judgment rendered;

(2) The crime convicted of must be an offense indicating a lack of business integrity or business honesty; and

(3) Must not be presently responsible.

> On December 29, 2006, you pled guilty to Misprision of a Felony. In accordance with 7 C.F.R. § 3017.925, a conviction means 'A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether

> entered upon a verdict or plea, including a plea of *nolo contendere'*. Therefore, you have been convicted for the purposes of 7 C.F.R. § 3017.800(a)(4).

In that plea, you admit that you knew that a person (Warren Holland) had committed a felony by making a material false statement in a tax return and associated Form 1099. You also admit that you did not report the fraud to the authorities and you concealed the felony by knowingly receiving the Form 1099 and using it in the preparation of your own tax return. Misprision of a Felony for failing to report a person that you knew was falsely providing financial information on their tax documents, concealing the false information and reporting it into your own tax documents certainly indicates a lack of business integrity or business honesty.

The last element is present responsibility. You admit in your plea agreement and in the meeting with me that you knew of the false statements made by Mr. Holland on his applications, claims, and receipts from crop insurance for the 2000, 2001, 2003 and 2004 crop years. You acknowledge that these acts are relevant to the charged offense and were taken into consideration by the Court at your sentencing. Even though you did not plead guilty to any crime for the 2001, 2002, 2003 and 2004 crop years, you acknowledge in your plea agreement that you knew of these false statements for each of these years and there is no evidence that you took any action to notify anyone at FCIC, the approved insurance provider, or anyone else in authority of these false statements. Since you admitted to these facts in your plea agreement, they can be used in determining your present responsibility.

The Administrative Record shows that the Debarring Official understood the legal standards that apply and the evidence he could and could not consider before debarring Respondents based upon their conviction by a United States District Court for Misprision of a Felony in violation of 18 U.S.C., Section 4. Contrary to Respondents' contentions, the Debarring Official limited himself to considering their convictions, and the admissions made in their plea agreements and those made when they met with him. The Debarring Official's resulting actions were therefore consistent with the governing regulations and within his authority.

**2. The fact that Respondents were allowed by RMA to participate in its crop insurance program from 2000 through 2007 was not a de facto determination by RMA that Respondents were presently responsible for each of those years, and did not preclude the Debarring Official from finding, in 2008, that Respondents were not then presently responsible.**

The Debarring Official completely answered contrary contentions by Respondents.

As explained at pages 3 and 4 of the debarment letter to Respondent Deloach, though USDA's Federal Crop Insurance Corporation (FCIC) was aware that there was an ongoing investigation of Respondents activities, it continued to allow participation in its crop insurance program while awaiting the outcome of the investigation. FCIC chose, as the more prudent course, not to seek Respondents' debarment until after criminal conviction. This benefited Respondents by allowing them to participate in the crop insurance program until grounds for their debarments were firmly established through the conviction.

For Respondents to now argue this forbearance amounted to approval of them as presently responsible and precluded their subsequent debarment, is not tenable. It is contrary to the intent and wording of 7 C.F.R. § 3017.800 which provides for debarment for a number of reasons which include conviction of an offense indicating a lack of business integrity or business honesty that seriously and directly affects present responsibility (7 C.F.R. § 3017.800(a)(4)), and any other cause of so serious or compelling a nature that it affects present responsibility (7 C.F.R. § 3017.800(d)). The regulation offers choices that may not be interpreted in a manner so as to nullify the effective intent or wording of the regulation. *Pettibone Corp. v. United States*, 34 F. 3d 536, 541 (7th Cir. 1994). Therefore, FCIC acted within its discretion when it chose to withhold action to debar Respondents pending criminal conviction, and the Debarring Official was not precluded by this forbearance from debarring Respondents for not being presently responsible.

**3. Respondents' exclusion from participation in Federal programs was not punishment prohibited by 7 C.F.R. § 3017.110(c).**

Respondents' contention that the debarment was used as a means of punishment has been like other contentions in their appeal, fully addressed by the Debarring Official:

> You also state that debarment is being used as a means of punishment. First, the regulations make it clear that debarment is

> solely to protect the Federal Government and not for purposes of punishment. *See* 7 C.F.R. § 3017.110. Further, the Supreme Court has stated that debarments are not considered punishment. *See Hudson v. United States*, 522 U.S. 93,104 (1997). The Court stated that even though debarment has a deterrent effect, the traditional goal of punishment, the presence of this purpose does not render debarment a punishment. *Id*. Another court stated, 'It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition. While those persons may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as a prophylactic governmental action.' *See United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *United States v. Hatfield*, 108 F.3d 67, 69-70 (4th Cir. 1997).
> Page 4 of the debarring letter to Deloach.

After rejecting punishment as an appropriate goal, the Debarring Official examined the various factors specified by the regulations as mitigating or aggravating factors before making his determination to debar Respondents. Contrary to Respondents' contention, he acted in accordance with law, and it cannot be found that his purpose was to punish the Respondents. Instead, the Debarring Official employed the applicable standard of law, and his determination does not qualify as arbitrary, capricious or an abuse of discretion.

**4. The Debarring Official properly considered the relevant mitigating or aggravating factors set forth in 7 C.F.R. § 3017.860.**

At pages 5-8 of the debarment letter to Deloach, the Debarring Official reviewed each of the factors listed in 7 C.F.R. § 3017.860 that he considered relevant. His review is both comprehensive and logical. He fully addressed every contention Respondents assert in this appeal to urge that the Debarring Official ignored relevant evidence in reaching his determination. The debarment letter shows that he weighed the relevant evidence in considering each applicable factor. His review included the letters provided from persons claiming that Respondents are presently responsible, and the fact that Respondents paid the special

assessments, fines and full restitution ordered by the United States District Court. His stated reasons for nonetheless debarring the Respondents meet the standards set forth in *Burke v. United States Environmental Protection Agency*, 127 F.Supp.2d 235, 239-240 (D.D.C.2001); and *Canales v. Paulson*, 2007 WL 2071709 (D.D.C. 2007).

The crime for which Respondents were convicted coupled with their admissions and failure to accept responsibility for either the wrongdoing or the seriousness of their misconduct outweighed, in his opinion, the mitigating factors. Specifically, DeLoach and Fair admitted knowing that Mr. Holland was defrauding the crop insurance program for at least four years by falsely claiming a 100 percent interest in crops on land that had not been rented to him by Respondents as Mr. Holland claimed and that the Form 1099 that he filed showed false rent payments. The Debarring Official, at page 8, concluded that despite the letters sent on behalf of the Respondents, he had no basis for finding that they would not again engage in dishonest conduct. It is not my function to second-guess him. My role in this instance is equivalent to that of an Article 3 court reviewing an agency decision as recently described by the Supreme Court in *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2529-2530 (2007):

> Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it
>
> > 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the Debarring Official's expertise.' *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).
> >
> > 'We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' *Ibid*. (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

The Debarring Official's determination meets these criteria. He weighed all relevant evidence, considered all pertinent mitigating or

aggravating factors, and his explanation for the determination is plausible based on his views and expertise.

**5. The Debarring Official properly assessed the Respondent's present responsibility.**

Respondents assert that the Debarring Official failed to properly assess Respondents' present responsibility by focusing on their present business responsibility, but instead considered only their past conduct. Review of the Debarring Official's determination fails to support this contention. The reasons why he concluded debarment is warranted are set forth at page 8 of the debarment letter sent to Respondent Deloach:

> I find that you have been convicted of an offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility under 7 C.F.R. § 3017.800(a)(4). After reviewing your information and arguments, reviewing the entire official record for the proposed debarment action and the factors listed above, I do not believe you have satisfactorily demonstrated that you are presently responsible and debarment is not necessary.
>
> While there are many letters attesting to your character, most express surprise that you would be involved in criminal conduct. However, you were involved. You admit to knowing that Mr. Holland was defrauding the crop insurance program for at least four years. For each of the relevant years you knew that Mr. Holland was claiming a 100 percent interest in the tobacco crop, which you admit was false. You knew that you and … (the other Respondent) had not leased Mr. Holland the acreage to which he claimed a 100 percent interest in the crop and that the Form 1099 that purported to be for rent was false. This conduct continued even after you claim FCIC had conducted its investigation and knew of the facts in early 2002. You have not fully taken responsibility for your actions or cooperated with the investigation or the court. Therefore, contrary to the letters, I have no basis to conclude that this conduct will not occur again. Therefore, to protect the interest of the government, debarment is warranted.

Page 8 of the debarment letter to Deloach.

The Debarring Official's analysis is consistent with the evidentiary requirements of the regulations. Under 7 C.F.R.§ 3017.855(b):

Once a cause for debarment is established, a respondent has the burden of demonstrating to the satisfaction of the debarring official that he or she is presently responsible and that debarment is not necessary.

As the Debarring Official explained, the Respondents failed to meet their burden of persuasion.

**6. The length of the debarment is not excessive.**

The Debarring Official has discretion to impose a period of debarment consistent with the circumstances after considering aggravating and mitigating factors. For the reasons previously stated, I have found and concluded his evidentiary review and consideration of aggravating and mitigating factors to be legally sufficient and in compliance with the controlling regulations. I do not find the period of debarment to be arbitrary or unsupported by the Administrative Record which is the limit of my responsibility in this review proceeding. *See Burke, supra*, at 127 F. Supp.2d 241-242.

*Burke*, at 127 F. Supp.2d 242, upheld the imposition of a five year period of debarment based on:

> The seriousness of Burke's criminal conviction, his failure to take personal responsibility for his offense, and his direct control of and involvement with ACMAR and the Landfill each provided an independent basis for EPA's conclusion….

Similarly, the Debarring Official in the instant proceeding has given valid reasons for imposing a three year period of debarment. He recognized and considered the fact that Respondents had been previously suspended for one year. He cited the number of years that Deloach and Fair knew false documents were being provided to obtain crop insurance and the payment of improper claims, and the fact that the conduct continued after the investigation had begun. The Debarring Official considered the fact that neither DeLoach nor Fair took any personal responsibility for the wrongdoing or the seriousness of their misconduct. Moreover, the Debarring Official considered all of the relevant aggravating and mitigating factors set forth in 7 C.F.R. § 3017.860. The Debarring Official in *Burke* was upheld in his imposition of a five year period of debarment. Here, the Debarring Official has imposed a lesser three year debarment. As in *Burke,* his determination must be given deference and upheld as meeting all of the requirements of the controlling regulations and law, being adequately supported by

the administrative record, and not being arbitrary, capricious or an abuse of discretion.

Accordingly, the following Order is being entered:

**Order**

The decision of the Debarring Official is affirmed.

This Order shall take effect immediately. This decision is final and is not appealable within USDA. 7 C.F.R. § 3017.890(d).

Copies of this Decision and Order shall be served upon the parties.

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**In re: TREVOR JAMES FLUGGE.**
**Docket No. DNS–FAS Docket No. 08-0139.**
**Decision and Order.**
**Filed August 26, 2008.**

**DNS-FAS – Bribery – Kickbacks – Not presently responsible – Oil for Food – Arbitrary and Capricious.**

Flugge appealed his 5 year debarment/suspension for his alleged participation in a fraud and kickback scheme in the "Oil for food program" in Iraq. The ALJ vacated the debarment holding that the findings of the debarment official was arbitrary and capricious and lacked the evidentiary level to be sufficiently reliable to support his factual findings and for the actions chosen.

Victoria Toensing for Respondent.
Steven Gusky for FAS.
*Decision and Order by Administrative Law Judge Victor W. Palmer.*

**DECISION AND ORDER**

This is an appeal under 7 C.F.R. § 3017.890 to vacate a Debarment Decision issued on May 2, 2008, by the Administrator of the Foreign Agricultural Service (FAS). Under the Debarment Decision, Petitioner, Trevor James Flugge, would be ineligible for five years from participation in nonprocurement transactions and contracts subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), throughout the executive branch of the Federal Government.

As the assigned appeals officer, my authority is specified by 7 C.F.R. § 3017.890:

(a) ….The assigned appeals officer may 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.

(b) The appeals officer will base the decision solely on the administrative record.

Upon my review of the Administrative Record (AR), I have concluded that the decision debarring Mr. Flugge for five years should be vacated under the "arbitrary and capricious" standard.

**The Issues**

The Administrator of FAS based the debarment of Mr. Flugge on his actions as an officer of the Australian corporation, AWB Limited. AWB was debarred for a period of two years in addition to one year of a previous suspension, or three years overall, to complete reforms needed to be "presently responsible" in light of its payment of kickbacks disguised as trucking fees to Saddam Hussein's government in violation of conditions applicable to its sale of wheat to Iraq as a participant in the United Nations' Oil-For-Food Program. *See In re: AWB LTD. and its Affiliated Companies,* DNS-FAS Docket No. 08-0053 (April 21, 2008). As was the case in AWB's debarment, the Administrator's debarment of Mr. Flugge is based on findings of a Commission established by the Australian government to investigate corruption by Australian companies that participated in the U.N. Program. The Commission was headed by the Honourable Terance RH. Cole AO RFD QC, and was given Royal Commission powers. Based on discussions with officers of AWB and the Saddam Hussein Iraq government, and a meticulous review of contracts, the Commission ascertained that:

> Between 1999 and March 2003 AWB paid in excess of US $224 million in inland transportation fees, including the 10 per cent after-sales-service fee (where that fee was imposed), in respect of 28 contracts concluded under the Oil-for-Food Programme.

(Cole Report at 43 of Vol. 2).

The findings of the Cole Report, support the conclusion stated as a finding by Justice Young, Federal Court of Australia that:

> AWB knew that paying inland transportation fees to Alia (the Iraqi company used as a front) was a means of making payments

> to the Iraqi Government. This plan was concealed from the United Nations.

(Cole Report at xi).

Mr. Flugge's appeal petition advises that between 1999 and March 2003, when these kickbacks were being paid, he was the Non-Executive Chairman of AWB with a small salary. He argues that the day-to-day management of AWB was the responsibility of another person who held the position of Managing Director and CEO. Mr. Flugge had been appointed to the Non-Executive position by the Australian government in April 1995. AWB started supplying substantial quantities of wheat to Iraq under the U.N. Oil-For-Food Program in 1997. Mr. Flugge left the position in March 2002 when he was provided a contract with AWB as a consultant that ended on April 1, 2003, when he accepted a position with the Australian government to lead its agricultural reconstruction team in Iraq as senior agricultural adviser to the Iraqi Provisional Authority. That position ended in February 2004, and his sole present connection to agriculture is working on the family farm, which is held in trust by others. His appeal petition states that he does not own or transact any agricultural business that has the capacity to contract with USDA.

The appeal petition argues that the Debarment Decision should be vacated for the following reasons:

> (1) The debarment violates due process because Mr. Flugge was not provided adequate notice of the conduct at issue, and the basis for debarment must be more than uncorroborated accusations.
>
> (2) Where a person has never contracted with the USDA and who has no capacity to contract with USDA as he is retired working only on the family farm, and where the conduct at issue occurred over five years prior, and where the debarment is for a period two and half times more than the entity for which he worked, the debarment violates 7 C.F.R. § 3017.800(d) and 7 C.F.R. § 3017.110(c).

## Conclusions

### 1. Mr. Flugge's Right to Due Process was not violated for lack of adequate notice or adequate evidence.

Mr. Flugge received adequate notice that the Administrator was going to rely upon the evidentiary findings of the Cole Report in

determining whether Mr. Flugge should be debarred. Mr. Flugge's Australian counsel received response after response to his inquiries that made this clear. (AR 1-56). On March 13, 2007, Mr. Flugge's counsel was advised that a fact-finding hearing was scheduled for April 30, 2007 in the FAS offices in Washington, and was asked whether Mr. Flugge denied specified statements in the Cole Report concerning the payment of kickbacks to the Iraqi regime by AWB and communications among officers of AWB that included Mr. Flugge regarding these payments. (AR 58-60). In response, his counsel again stated that FAS had failed to identify the documentary evidence relied upon and asked that the hearing FAS had scheduled be stayed as premature. (AR 61-62).

Though Mr. Flugge did not appear at the scheduled fact-finding hearing, the Administrator did consider and review submissions Mr. Flugge's counsel had made on his behalf in correspondence of February 27, 2007, that challenged the reliability of the findings of the Cole Commission and the recorded recollections of other AWB officers, and denied that he had knowledge that the trucking fees being paid by AWB were improper or in violation of any laws. (AR 134-136). The Administrator stated that to accept these contentions, he would need to determine that findings of the Cole Report were false and inaccurate.

Mr. Flugge's activities on behalf of AWB were specifically investigated by the Cole Commission which made findings concerning his possible accessorial liability and whether he may have committed offences under Australia's Corporations Act 2001. *See* Cole Report, Vol. 4, pp.216-225, paragraphs 31.274-31.294. Based on his presence at critical meetings when arrangements for paying the kickbacks were discussed, and statements obtained from other officers of AWB in attendance at the meetings, the Commission found that despite Mr. Flugge's denial of knowledge of the true arrangements:

> …he did know the true arrangements and, as chairman of AWB, approved of them. Those arrangements involved circumventing UN sanctions by paying money to Iraq using Ronly, shipowners and Alia to hide the making of such payments. By authorizing officers of AWB to proceed with the arrangements insisted on by IGB in its phase VI tender and agreed to by AWB, Mr. Flugge implicitly authorized officers of AWB to submit to DFAT and the United Nations contracts which did not disclose the true agreements reached with the IGB. Mr. Flugge approved of this course in order to preserve AWB's trade with Iraq which he knew would otherwise be lost.

(Cole Report at 222 of Vol. 4, paragraph 31.292).

Mr. Flugge has argued that the evidence relied upon by the Administrator of FAS was not of an evidentiary level sufficiently reliable for his factual findings. However, as stated in *AWB, supra,* slip opinion page 14, hearsay evidence is customarily allowed in administrative proceedings, and the Administrator's evaluation of the evidence set forth in the Cole Report was in accordance with law and based on the applicable standard of evidence. The debarment determination required only "adequate evidence" as defined in 7 C.F.R. §3017.900:

> *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

Therefore, Mr. Flugge did receive adequate notice of the evidence that the Administrator of FAS would consider, and there was adequate, legally sufficient evidence to support the Administrator's determination to debar Petitioner pursuant to 7 C.F.R. § 3017.800(d) and his underlying finding that:

> … there exists a cause of so serious or compelling a nature that it affects your present responsibility to participate in programs of the United States Government.

(AR 134).

**2. For the reasons previously stated, the Administrator's Debarment Decision does not violate 7 C.F.R. § 3017.800(d). The Debarment Decision also is not found to violate 7 C.F.R. § 3017.110(c). However, because it lacks satisfactory explanations for actions chosen, the Debarment Decision must be vacated as arbitrary and capricious.**

The Administrator stated he believed from the evidence set forth in the Cole Report that Mr. Flugge "either directly, or implicitly, authorized AWB officials to enter into contracts in a manner that resulted in illicit payments to the Iraqi government, and that…(Mr. Flugge) engaged in conduct to conceal such transactions from officials of the United Nations and the Australian Government." (AR 137). Based on this finding he concluded that Mr. Flugge "did not presently possess the requisite responsibility for purposes of participating in programs of the United States…. Further, there is nothing submitted by you to support, in any manner, that you now currently possess the capacity to insure that such egregious conduct could not be engaged by you or an entity with which you may be associated." (AR 137).

Mr. Flugge contends that his debarment is for the purpose of punishment that is forbidden by 7 C.F.R. § 3017.110 (c). He primarily bases this argument on the conduct at issue having occurred over five years prior to the Debarment Decision and the fact that he is no longer employed by AWB. These arguments are similar to those recently rejected by the United States District Court for the District of Columbia in *Uzelmeier v. U.S. Dept. of Health and Human Services,* 541 F.Supp.2d 241, 247-248 (D.D.C., March 31, 2008). The Court in that case held that a debarment action is not punitive because a long time period has passed between the underlying events and the decision to debar, or because the individual is not currently involved in a program that receives federal funding. As to the latter, when a governing regulation, such as 7 C.F.R. § 3017.105 (a) includes within its debarment provisions a "person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction", present employment is not the controlling criterion for debarment:

> While debarment requires the existence of 'past misconduct,' the phrase 'present responsibility' does not refer to plaintiff's current job, but rather to whether a person's exclusion is in the public interest.

*Uzelmeier, supra. See also Burke v. United States Environmental Protection* Agency, 127 F.Supp.2d 235, 239 (D.D.C.2001).

The Debarment Determination, however, must be vacated under the "arbitrary and capricious" standard for its failure to explain why Petitioner should be debarred for five years in addition to the suspension that had been in effect since December 20, 2006; which when combined amounts to almost six and a half years. This is more than double the combined three year debarment/suspension previously imposed on AWB. The regulations specify that a debarment should generally not exceed three years (7 C.F.R. § 3017.865(a)), and that a debarring official must consider the time that a person being debarred was previously suspended (7 C.F.R. § 3017.865(b)). The Debarment Decision lacks any language demonstrating that the Administrator took either provision into consideration or explaining why he believed a five year debarment was indicated.

This is not the first instance of a debarment by a USDA debarring official being vacated for such reasons. In *Indeco Housing Corp.*, 56 Agric.Dec. 738, 744 (1997), a determination that imposed a five year debarment without explanation was similarly vacated as arbitrary and capricious. The appropriate application of the arbitrary and capricious review standard has been explained in *Sloan v. Dept. of Housing & Urban Development*, 231 F.3d 10, 15 (C.A.D.C., 2000):

> It is well-established that, when conducting review under the "arbitrary and capricious" standard, a court may not substitute its judgment for that of agency officials; rather, our inquiry is focused on whether 'the agency…examine(d) the relevant data and articulate(d) a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

*Sloan* went on to reverse a decision by HUD that suspended a government contractor because HUD had failed to articulate a satisfactory explanation for its action that included a rational explanation between the facts found and the choice made.

The Debarment Decision in the present proceeding is being vacated because it (1) did not consider the time Mr. Flugge was previously suspended as 7 C.F.R. § 3017.865(b) requires, (2) did not explain why Mr. Flugge should be debarred for five years when debarments generally should not exceed three years as 7 C.F.R. § 3017.865(a) provides, and (3) did not explain why Mr. Flugge should be debarred for a longer period than his corporate employer.

## ORDER

The Notice of Debarment, issued on May 2, 2008, by the Administrator of the Foreign Agricultural Service that would debar Petitioner, Trevor Flugge, for five years is hereby vacated.

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## EQUAL CREDIT OPPORTUNITY ACT

## DEPARTMENTAL DECISIONS

**In re: WILBUR WILKINSON, ON BEHALF OF ERNEST AND MOLLIE WILKINSON.**
**SOL Docket No. 07-0196.**
**Final Determination.**
**Filed October 27, 2008.**

**ECOA – S.O.L. – B.I.A. – Discrimination, claim of – Native American – Notice of claim, what constitutes – Tribal lands, trust beneficiary of – Foreclosure, state laws regarding – Assignment of trust income, whether race based requirement – I.I.M. (Individual Indian Money).**

The Asst. Sect. for USDA Civil Rights (OCR) reversed the decision of the ALJ in finding a Complaint to be timely filed under SOL where a USPS certified mail receipt was produced for a Complaint letter to the Federal Trade Commission but such a receipt was not produced for a duplicate of this letter that was also addressed and purportedly sent at the same time to USDA ECOA. The Asst. Sec. ruled as error the ALJ's finding that a later letter from the Acting Chief, Program Investigations Division, OCR, to Petitioner acknowledging the filing of this Complaint on March 5, 1990 and giving it SOL Docket Number 2478 was inadequate proof of timely filing under the SOL rules. Under SOL procedural rules, the Complaint must be timely filed and request for relief must meet statutory guidelines.

Inga Bumbary-Langston, for FSA, OGC
John Mahoney, Center, ND, for Complainant.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Final Determination issued by Margo M. McKay, Assistant Secretary for Civil Rights.

### NATURE OF THE PROCEEDING

This proceeding is an adjudication under section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 (7 U.S.C. § 2279 note) [hereinafter Section 741] and the rules of practice applicable to adjudications under Section 741 (7 C.F.R. pt. 15f) [hereinafter the Rules of Practice]. Section 741 waives the statute of limitations on eligible complaints filed against the United States Department of Agriculture [hereinafter USDA] alleging discrimination in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) [hereinafter the

ECOA].[1] Section 741(b) provides that a complainant may seek a determination by USDA on the merits of an eligible complaint, and, after providing the complainant an opportunity for a hearing on the record, USDA shall provide the complainant such relief as would be afforded under the ECOA notwithstanding any statute of limitations.

Wilbur Wilkinson, on behalf of his parents Ernest Wilkinson and Mollie Wilkinson, both now deceased,[2] seeks redress for injuries allegedly sustained as a result of discrimination against Ernest Wilkinson and Mollie Wilkinson by the Farmers Home Administration, USDA.[3]

## PROCEDURAL HISTORY

Wilbur Wilkinson submitted a Complaint, dated March 5, 1990, alleging that FSA discriminated against his parents based on race[4] during the period 1981 through March 5, 1990. Specifically, Mr. Wilkinson alleges FSA discriminated against his parents in violation of the equal protection clause and the due process clause of the United States Constitution when, as a condition of loan approval, FSA required them to submit "Assignment of Income from Trust Property" forms authorizing FSA to withdraw funds from the Individual Indian Money account at will.

In September 1995, in response to an inquiry from a Three Affiliated Tribes chairman, the Office of Civil Rights, USDA,[5] conducted an investigation at the Fort Berthold Reservation and issued a report. In

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[1]The term *eligible complaint* is defined in Section 741 and the Rules of Practice as a nonemployment related complaint that was filed with USDA before July 1, 1997, and alleges discrimination during the period January 1, 1981, through December 31, 1996: (1) in violation of the ECOA, (2) in the administration of a commodity program, or (3) in the administration of a disaster assistance program. (7 U.S.C. § 2279(e) note; 7 C.F.R. § 15f.4.)

[2]Mollie Wilkinson died in September 1991. Ernest Wilkinson died in November 1997.

[3]The Farmers Home Administration ceased to exist in October 1994. The farm loan programs, which it administered and which are the subject of the instant proceeding, are now administered by the Farm Service Agency, USDA. In this Final Determination, I refer to both the Farmers Home Administration and the Farm Service Agency as the "FSA."

[4]Ernest Wilkinson and Mollie Wilkinson were Native Americans.

[5]The Office of Civil Rights was renamed the Office of Adjudication and Compliance pursuant to a reorganization on March 12, 2007. In this Final Determination, I refer to both the Office of Civil Rights and the Office of Adjudication and Compliance as the "OCR."

1999, a Three Affiliated Tribes chairman filed a discrimination complaint on behalf of tribal members engaged in farming and ranching. During October and November 1999, OCR conducted an investigation of the Three Affiliated Tribes complaint. As part of the Three Affiliated Tribes investigation, Mr. Wilkinson submitted an affidavit dated November 18, 1999, in which he addressed numerous allegations of discrimination, including the alleged discrimination that serves as the basis for the Complaint at issue in the instant proceeding.

On November 24, 1999, Native American farmers and ranchers filed a class action suit, *Keepseagle v. Johanns*, Civil Action No. 99-3119 (D.D.C.), alleging discrimination by FSA in farm loan and benefit programs. As a consequence of this class action, OCR suspended the Three Affiliated Tribes investigation. The *Keepseagle* class action complaint was broad enough to encompass Mr. Wilkinson's claim; thus, any investigation of Mr. Wilkinson's claim was held in abeyance pending further guidance from the United States district court. On November 10, 2005, the United States District Court for the District of Columbia granted Mr. Wilkinson's request to opt out of the *Keepseagle* class action and pursue his individual claim of discrimination pursuant to Section 741.

In 2006, OCR commenced its investigation of Mr. Wilkinson's individual claim. On September 17, 2007, after receiving no response to repeated requests to Mr. Wilkinson for information supporting allegations of discrimination, OCR filed a position statement with the Hearing Clerk. OCR concluded that Mr. Wilkinson failed to make out a prima facie case of discrimination based on race and that FSA had articulated a legitimate, nondiscriminatory reason for requiring Ernest Wilkinson and Mollie Wilkinson to secure loans with income from the trust fund and for withdrawing funds from the Individual Indian Money account.

On January 24, 2008, Mr. Wilkinson filed a response to OCR's position statement in which Mr. Wilkinson, for the first time, asserted discrimination claims other than the claim in his Complaint. Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] held a teleconference regarding the scope of the issues to be determined. On February 7, 2008, Mr. Wilkinson filed a motion to amend his Complaint to encompass all acts of discrimination by FSA, during the period January 1, 1981, through December 31, 1996. FSA opposed Mr. Wilkinson's motion to amend the Complaint on the ground that allowing Mr. Wilkinson to assert new discrimination claims beyond the claim asserted in the Complaint would impermissibly expand the Section 741 waiver of sovereign immunity. On February 29, 2008, the ALJ

granted Mr. Wilkinson's motion to amend the Complaint but provided that the amendment of the Complaint would take place at the conclusion of the hearing, when the Complaint would be conformed to proof of discriminatory treatment coming within the purview of Section 741.

Mr. Wilkinson elected to have the issue of actionable discrimination decided by the ALJ without a hearing and, on June 3, 2008, after numerous filings by the parties, the ALJ issued "Determination: Part One" in which the ALJ: (1) concluded FSA discriminated against Ernest Wilkinson and Mollie Wilkinson, as Native Americans, in violation of the ECOA; and (2) scheduled a hearing for June 25-26, 2008, to develop evidence regarding the damages that should be awarded to Mr. Wilkinson for losses suffered by his parents as a result of the discrimination by FSA.

On June 9, 2008, FSA filed a request that the Assistant Secretary for Civil Rights [hereinafter the Assistant Secretary] stay the damages hearing and review the ALJ's June 3, 2008, Determination: Part One. On June 12, 2008, after receipt of Mr. Wilkinson's opposition to FSA's request for a stay and request for review, I issued a ruling: (1) granting the request for a stay of the damages hearing; (2) granting the request for review of the ALJ's June 3, 2008, Determination: Part One; and (3) providing each party 30 days within which to file a brief in support of, or opposition to, the ALJ's June 3, 2008, Determination: Part One.

On June 18, 2008, despite my June 12, 2008, stay of the damages hearing, the ALJ, without hearing, issued "Determination: Part Two" awarding Mr. Wilkinson $5,284,647. The ALJ's damage award consists of: (1) tangible damages of $1,534,647 related to dispossession from the farm and farm equipment and lost income; and (2) intangible damages of $3,750,000 for anguish and emotional suffering.

On July 14, 2008, Mr. Wilkinson filed a brief in support of the ALJ's Determination: Part One and FSA filed a brief in opposition to the ALJ's Determination: Part One. On September 5, 2008, Mr. Wilkinson filed a motion for payment of the $5,284,647 awarded by the ALJ in the June 18, 2008, Determination: Part Two. On September 19, 2008, FSA filed a response in opposition to Mr. Wilkinson's request for payment.

## DETERMINATION

### *I. Final Determination Summary*

Based upon a careful review of the record and after consideration of Mr. Wilkinson's brief in support of the ALJ's June 3, 2008,

Determination: Part One and FSA's brief in opposition to the ALJ's June 3, 2008, Determination: Part One, I reverse the ALJ's June 3, 2008, Determination: Part One and dismiss with prejudice Mr. Wilkinson's Complaint. I conclude Mr. Wilkinson's Complaint is not eligible for review because: (1) the Complaint was not received by FSA before July 1, 1997, and (2) the Complaint was not filed within 180 days from the date Mr. Wilkinson knew, or reasonably should have known, of the alleged discrimination. Moreover, I conclude that, even if I had found Mr. Wilkinson's Complaint to be an eligible complaint (which I do not so find), the record does not support the conclusion that FSA discriminated against Mr. Wilkinson in violation of the ECOA. Finally, I conclude that, even if I had found that FSA discriminated against Mr. Wilkinson in violation of the ECOA (which I do not so find), the record does not support an award of damages to Mr. Wilkinson. I also vacate the ALJ's June 18, 2008, Determination: Part Two and dismiss as moot all motions pending before me.

### *II. The Complaint Is Not An Eligible Complaint*

#### *A. Introduction*

Section 741 waives the statute of limitations on eligible complaints filed against USDA alleging discrimination in violation of the ECOA. Section 741(e) defines the term *eligible complaint* as follows:

> WAIVER OF STATUTE OF LIMITATIONS
>
> . . . .
>
> (e) As used in this section, the term "eligible complaint" means 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. 1691 et seq.) in administering–
>
> (A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or
>
> (B) a housing program established under title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.]; or
>
> (2) in the administration of a commodity program or a disaster assistance program.

7 U.S.C. § 2279(e) note.[6] Section 741 is a limited waiver of sovereign immunity and must be strictly construed in favor of the United States.[7]

*B. Mr. Wilkinson's Complaint Was Not Timely Filed With USDA*

In order to be eligible for review under Section 741, a complaint must have been filed with USDA before July 1, 1997.[8] Mr. Wilkinson claims to have filed the Complaint with USDA before July 1, 1997, but offers no evidence of timely filing.

OCR did not receive information regarding Mr. Wilkinson's individual claim of discrimination until November 19, 1999, when he provided an affidavit dated November 18, 1999, in connection with OCR's investigation of the Three Affiliated Tribes' complaint. In that affidavit, Mr. Wilkinson addressed numerous allegations of discrimination, including the alleged discrimination that serves as the basis for the Complaint that is the subject of the instant proceeding. (Ex. A, Tab 1, Position Statement at 1 n.1.) The earliest reference to Mr. Wilkinson's having filed a Complaint with USDA is a letter, dated April 3, 2003, sent by the Acting Chief, Program Investigations Division, OCR, to Mr. Wilkinson noting that his Complaint is being processed under Section 741. (Ex. A, Tab 14, Wilkinson Position Statement Attach. A-5.)

In December 2005, Mr. Wilkinson provided to OCR a United States Postal Service receipt for certified mail, documenting a mailing from Parshall, North Dakota, to the Federal Trade Commission Equal Credit Opportunity office in Washington, DC, on March 12, 1990. (Ex. A, Tab 1, Position Statement at Ex. 1.) This receipt does not establish that Mr. Wilkinson mailed the Complaint to USDA. To the contrary, the receipt establishes that Mr. Wilkinson filed his Complaint with the incorrect agency. As there is no evidence that Mr. Wilkinson filed his Complaint with USDA prior to July 1, 1997, I find Mr. Wilkinson's Complaint to be late-filed and ineligible for consideration under Section

[6]The term *eligible complaint* is also defined in the Rules of Practice (7 C.F.R. § 15f.4).

[7]*Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986).

[8]*In re Larry and Susan Ansell*, HUDALJ No. 00-22-NA, USDA Docket No. 1150 (Nov. 21, 2001) (allegation of discrimination made for first time on October 21, 1997, was not timely filed).

741.[9]

Despite the untimeliness of Mr. Wilkinson's filing, the Director, OCR, by letter dated February 16, 2006, informed Mr. Wilkinson that the Complaint was accepted for processing under Section 741. (Ex. A, Tab 1, Position Statement at Ex. 4.) Nonetheless, it is undisputed that USDA has no record of the 1990 Complaint in its files prior to the expiration of the statutory deadline by which complaints must have been filed.[10]

In response to the timeliness argument made by FSA, Mr. Wilkinson cited to correspondence regarding the Complaint. (Wilkinson Response to Respondent's Motion for Summary Judgment.) However, none of the correspondence to which Mr. Wilkinson refers acknowledges that the Complaint was filed with USDA before July 1, 1997, and Mr. Wilkinson presented no evidence, other than his affidavit, to demonstrate that he filed the Complaint with USDA prior to July 1, 1997.

The ALJ notes the letter from the Acting Chief, Program Investigations Division, OCR, dated April 3, 2003, to Mr. Wilkinson, stating "the complaint you filed on March 5, 1990, has been assigned SOL Docket Number 2478 and is now being processed under section 741[.]" (ALJ's Determination: Part One at 9.) The ALJ relies upon this letter to make his determination that Mr. Wilkinson timely filed the Complaint with USDA. The ALJ states, if the Complaint had not been received directly by USDA, the letter would have noted this fact. *Id*. The ALJ concludes that it is "reasonable to infer" that the Complaint was received in the regular course of business by USDA "by way of certified mail." *Id*.

I find the ALJ's conclusion error. Mr. Wilkinson failed to prove that he filed his Complaint with USDA before July 1, 1997. As Mr. Wilkinson bears the burden of proving that he filed the Complaint

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[9] *In re Hugh Hall*, HUDALJ No. 03-44-NA, USDA Docket No. 1132 at 4 (Oct. 1, 2003) (oral complaints to agency officials, written complaints to other agencies or to a United States Senator, even if the written complaint was forwarded to USDA, are simply inadequate to satisfy the strict construction that must be given to the statute of limitations period waiver).

[10] OCR noted this untimeliness issue, stating that USDA had no record of receiving the Complaint prior to the expiration of the time during which complaints could be filed. (Ex. A, Tab 1, Position Statement at 1 n. l.) However, OCR gave "Complainants the benefit of the doubt and is using the date on the complaint as the date of filing." *Id*. Findings by OCR are not binding on USDA and are not binding on me. *In re Richard Banks*, HUDALJ No. 05-004-NA, USDA Docket No. 767 at 4 n.5 (Feb. 23, 2007) (stating any position taken by OCR is not binding on the USDA); *In re Esterine Cosby*, HUDALJ No. 03-38-NA, USDA Docket No. 1193 (Dec. 19, 2003); *In re Ronald Burleigh*, HUDALJ No. 99-09-NA, USDA Docket No. 1089 (June 5, 2000).

with USDA before July 1, 1997,[11] I find Mr. Wilkinson failed to file the Complaint before July 1, 1997; therefore, Mr. Wilkinson did not meet one of the elements necessary to assert jurisdiction for a Section 741 complaint and the Complaint is ineligible for review under Section 741.

*C. The Complaint Was Not Filed Within 180 Days From The Date Mr. Wilkinson Knew, Or Should Have Known, Of The Alleged Discrimination*

The Complaint is also not an eligible complaint because it was not filed within 180 days from the date Mr. Wilkinson knew, or reasonably should have known, of the alleged discrimination. In order to be eligible under Section 741, USDA regulations require a complainant to file a complaint within 180 days of the date the complainant knew, or reasonably should have known, of the alleged discrimination, as follows:

**§ 15d.4 Complaints.**

> (a) Any person who believes that he or she (or any specific class of individuals) has been, or is being, subjected to practices prohibited by this part may file on his or her own, or through an authorized representative, a written complaint alleging such discrimination. No particular form of complaint is required. The written complaint must be filed within 180 calendar days from the date the person knew or reasonably should have known of the alleged discrimination, unless the time is extended for good cause by the Director of the Office of Civil Rights or his or her designee.

7 C.F.R. § 15d.4(a).

By letter dated April 26, 1989, Ernest Wilkinson informed United States Senator Kent Conrad that he believed the reservation supervisor

[11] *See generally Bellecourt v. United States*, 784 F. Supp. 623, 629 (D. Minn. 1992) (holding the plaintiff had not satisfied his burden of showing that the Federal Medical Center received his administrative claim and noting "[p]laintiff must show that FMC actually received his claim and the deposition testimony that plaintiff relies on to establish presentment is too speculative to prove that FMC actually received his claim."); *Polk v. United States*, 709 F. Supp. 1473, 1474 (N.D. Iowa 1989) (granting defendant's motion to dismiss where the plaintiff presented no evidence indicating that a reconsideration letter related to a Federal Tort Claims Act complaint was ever received by the United States Postal Service).

acted in bad faith with actions bordering on criminal. (Ex. A, Tab 14, Wilkinson Position Statement Attach. B-53.) However, Mr. Wilkinson's Complaint is dated March 5, 1990, and thus, could not have been filed until, at the earliest, March 5, 1990. Therefore, even if I were to find that Mr. Wilkinson filed the Complaint with USDA in March 1990 (which I do not so find), under the provisions of 7 C.F.R. § 15d.4(a), Mr. Wilkinson did not timely file the Complaint.[12]

The ALJ states the April 26, 1989, letter to Senator Conrad "gives no indication that [Ernest Wilkinson] or his son, Wilbur, then appreciated that the Assignment of Income from Trust Property forms he and his wife were being required to sign constituted discriminatory treatment actionable under the ECOA." (ALJ's Determination: Part One at 9-10.) Mr. Wilkinson's own Position Statement shows the ALJ's conclusion is erroneous. Mr. Wilkinson alleges that in 1971, as a condition of obtaining an FSA operating loan, his parents were required to sign an Assignment of Income from Trust Property form, while white borrowers were not required to sign this form. (Ex. A, Tab 14, Wilkinson Position Statement at 11-12.) Mr. Wilkinson actually contradicts the ALJ's conclusion by noting that he suspected discrimination well prior to the 180 days before March 5, 1990. (Ex. A, Tab 14, Wilkinson Position Statement at 28-32.)

The letter to Senator Conrad was clearly based on Ernest Wilkinson's and Mollie Wilkinson's belief that FSA was discriminating against them. Therefore, I reject the ALJ's conclusion that the April 26, 1989, letter should be ignored for purposes of determining if the Complaint was timely filed. Even if I were to find that the Complaint was filed prior to July 1, 1997 (which I do not so find), I would find the Complaint ineligible for review because it was not filed within 180 days from the date Mr. Wilkinson knew, or reasonably should have known, of the alleged discrimination.

### *III. The ALJ Improperly Addressed Issues Not Alleged In The Complaint*

#### *A. Introduction*

The only issue upon which the ALJ had jurisdiction to rule on liability is the issue contained in the Complaint – namely, whether FSA discriminated against Ernest Wilkinson and Mollie Wilkinson on the

[12] *See Lewis v. Glickman*, 104 F. Supp. 2d 1311 (D. Kan. 2000) (rejecting an ECOA plaintiff's argument that his administrative complaint was timely, even though events occurred outside the 180-day period, because the agency's discrimination was ongoing).

basis of race by requiring, as a precondition for loan approval, a form entitled "Assignment of Income from Trust Property," authorizing FSA to withdraw funds from Individual Indian Money accounts at will. Instead, the ALJ improperly concluded FSA discriminated in a manner not alleged in the Complaint and improperly based his conclusion of discrimination on alleged events occurring outside the Section 741 statutory period.

Congress enacted Section 741 to provide a waiver of the statute of limitations for certain eligible complaints brought against USDA. Section 741 retroactively extended the limitations period for individuals who had filed complaints with USDA before July 1, 1997, for alleged acts of discrimination occurring during the period January 1, 1981, through December 31, 1996.[13] Congress did not enact Section 741 in order to allow claimants to file untimely claims. Instead, Section 741 was designed to toll the statute of limitations so that claimants who had previously filed claims would not be penalized because USDA failed to investigate those pending claims.[14]

Only complaints that fall within the jurisdiction conferred by Section 741 are eligible for adjudication.[15] The United States, as sovereign, is immune from suit and can be sued only with its consent.[16] Any waiver of sovereign immunity must be construed strictly in favor of the sovereign and must not be enlarged beyond what the language of the waiver requires.[17] Section 741 must be interpreted strictly in favor of the Government because Section 741 is a waiver of sovereign immunity.[18]

Under Section 741, an individual who files an eligible complaint with USDA can seek a determination on the merits of the eligible complaint by the USDA. Claims that were not filed before July 1, 1997, are not

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[13] *Ordille v. United States*, 216 F. App'x 160, 165-66 (3d Cir. 2007); *Garcia v. United States Dep't of Agric.*, 444 F.3d 625, 629 n.4 (D.C. Cir. 2006).

[14] *Ordille v. United States*, 216 F. App'x 160, 169 (3d Cir. 2007) (the purpose of Section 741 is to revive certain preexisting complaints which would otherwise be time barred).

[15] *In re Larry and Susan Ansell*, HUDALJ No. 00-22-NA, USDA Docket No. 1150 at 2 (Nov. 21, 2001).

[16] *United States v. Williams*, 514 U.S. 527, 531 (1995); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

[17] *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

[18] *Abercrombie v. United States Dep't of Agric.*, No. Civ. A. 04-143-WOB, 2006 WL 1371590 at *3 (E.D. Ky. May 18, 2006). *See also Ordille v. United States*, 216 F. App'x 160, 167 (3d Cir. 2007) (stating "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.")

eligible for processing under Section 741.[19] Moreover, claims for alleged acts of discrimination occurring outside the period January 1, 1981, through December 31, 1996, are not eligible for processing under Section 741.

### *B. The ALJ Improperly Ruled On Issues Not Alleged In The Complaint*

Allowing Mr. Wilkinson to amend the Complaint plainly exceeds the ALJ's authority under the Rules of Practice. The only complaint potentially eligible for processing under Section 741 is the one that Mr. Wilkinson allegedly filed in 1990. Allowing Mr. Wilkinson to assert additional claims impermissibly expands the scope of the limited waiver of sovereign immunity in Section 741, and I find the ALJ's ruling on issues beyond those contained in the Complaint in his Determination: Part One, error.

One of the reasons the ALJ allowed amendment of the Complaint was because Mr. Wilkinson was a lay person. (Ex. A, Tab 20, Summary of Teleconference Rulings and Hearing Notice.) However, I conclude that Mr. Wilkinson's lay-person status does not support expanding the waiver of sovereign immunity.[20] Section 741 was enacted for the limited purpose of waiving sovereign immunity with respect to pre-existing claims; therefore, the case for holding pro se litigants to strict deadlines established by Congress is even stronger.[21]

The ALJ also held that amendment of the Complaint would be allowed because Mr. Wilkinson was not advised of any need to file

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[19] *See In re Richard Banks*, HUDALJ No. 05-004-NA, USDA Docket No. 767 at 28 (Aug. 30, 2007) (stating the complainant first made the specific claim of color discrimination in September 1997, after the July 1, 1997, cut off for filing a timely claim); *In re Joseph & Patricia Tuchrello*, HUDALJ No. 03-30-NA, USDA Docket No. 427 at 5 (Dec. 31, 2003) (stating the complainant's "allegations were first made in 1999, well after the July 1, 1997, date required for eligibility under Section 741"); *In re Larry and Susan Ansell*, HUDALJ No. 00-22-NA, USDA Docket No. 1150 at 3 (Nov. 21, 2001) (stating an allegation of discrimination made for the first time on October 21, 1997, was not timely filed).

[20] *See Ansell v. United States*, No. 2:05-cv-505, 2007 WL 2593777 at *4 (W.D. Pa. Sept. 4, 2007) (stating a pro se plaintiff must plead the essential elements of her claim and is not immune from standard procedural rules); *Manley v. New York City Police Dep't*, No. CV-05-679, 2005 WL 2664220 at *1 (E.D.N.Y. Oct. 19, 2005) (stating the fact that a litigant is proceeding pro se does not exempt that party from compliance with relevant rules of procedural and substantive law); *Amnay v. Del Labs*, 117 F. Supp. 2d 283, 285 (E.D.N.Y. 2000) (same).

[21] *See In re Hugh Hall*, HUDALJ No. 03-44-NA, USDA Docket No. 1132 (Oct. 1, 2003) (holding, in a Section 741 case, the strict construction requirement of a waiver of sovereign immunity mandates exacting adherence to the prerequisites).

additional complaints or to amend the existing Complaint. (Ex. A, Tab 20, Summary of Teleconference Rulings and Hearing Notice.) Even if I were to find that Mr. Wilkinson was not so advised, this lack of advice would not support an expansion of the sovereign immunity waiver. There is no evidence in the record that Mr. Wilkinson raised any allegations of additional discriminatory practices prior to July 1, 1997 – the deadline for filing an eligible complaint under Section 741. Thus, regardless of how promptly USDA might have acted with respect to Mr. Wilkinson's additional allegations of discrimination, such allegations would not have been eligible for processing under Section 741.

Further, the ALJ held that a letter, dated December 2005, from the Director, OCR, to the attorney for the Three Affiliated Tribes supports expansion of the waiver of sovereign immunity so as to include allegations of discrimination beyond those in the Complaint. (Ex. A, Tab 20, Summary of Teleconference Rulings and Hearing Notice.) Since Section 741 is a congressional waiver of sovereign immunity, whether OCR treated the Complaint as including additional claims that were not otherwise eligible under Section 741 has absolutely no bearing on the instant proceeding. As the court in *Ordille* held, rejecting a similar argument that USDA mistakenly informed complainants that they had filed an eligible complaint:

> The terms of the waiver of sovereign immunity are clear. This Court cannot expand them, not even if it would like to. While the USDA was clumsy and careless in handling the Ordilles' complaint, this Court cannot provide relief to the Ordilles under the terms of section 741 to enlarge the time for filing the complaint beyond the period already created by Congress.

*Ordille v. United States*, Civ. No. 013503, 2005 WL 2372963 at *12 (D.N.J. Sept. 26, 2005). *See also Ansell v. United States*, No. 2:05-cv-505, 2007 WL 2593777 at *6 (W.D. Pa. Sept. 4, 2007) (finding plaintiff's administrative complaint ineligible under Section 741 despite a letter from OCR to plaintiff originally indicating that her administrative complaint was eligible). Thus, the December 2005 letter from OCR does not support the ALJ's decision to allow Mr. Wilkinson to amend the Complaint to include claims beyond the claim in the

Complaint.[22]

Therefore, even if I were to find the Complaint to be an eligible complaint under Section 741 (which I do not so find), I would reverse the ALJ's Determination: Part One because the determination is based, in part, upon a finding of discrimination which is not alleged in the Complaint.

### *C. The ALJ Improperly Expanded His Ruling To Events Occurring After The Applicable Section 741 Period*

The ALJ states that, based upon decisions from prior Federal court cases, the Assignment of Income forms were "illegally employed" to accomplish confiscations of the Wilkinsons' farm in order to help FSA collect its loans to Ernest Wilkinson and Mollie Wilkinson. (ALJ's Determination: Part One at 10-11.) The ALJ proceeds with his discrimination analysis by stating that "[t]he issue now before us is whether FSA's instigation of these illegal actions constituted discrimination against the Wilkinsons under the ECOA[.]" (ALJ's Determination: Part One at 11.) The ALJ states that the income assignment forms required to be signed by Ernest Wilkinson and Mollie Wilkinson were used to confiscate their farm in circumvention of the protections North Dakota affords mortgagors under its foreclosure laws. (ALJ's Determination: Part One at 11.)

The ALJ has misstated the issue in the instant proceeding. The Bureau of Indian Affairs' [hereinafter BIA] leasing of lands is the subject of prior and ongoing Federal litigation under the Federal Tort Claims Act. Leasing of land is not the subject of the instant proceeding. Mr. Wilkinson's Complaint alleges FSA discriminated by requiring the execution of Assignment of Income from Trust Property forms at the time of loan-making. Ernest Wilkinson and Mollie Wilkinson executed these forms in 1971 to obtain financing from FSA and in 1990, as a condition of loans being restructured with a write down of debt. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment at 13.)

The ALJ's analysis of discrimination is based upon the alleged use of these forms by BIA in leasing the Wilkinsons' property. This issue

[22]Moreover, the OCR Director sent Mr. Wilkinson's counsel a letter on October 27, 2006, in which the Director expressly stated that "there is no room to negotiate what issues will be presented to the ALJ. The only issues to be presented are those found in the complaint that is dated March 5, 1990. Any other issues fall outside the narrow extension of the SOLs found in the Section 741 legislation." (Ex. A, Tab 1, Position Statement, Attach. 7.)

is not the issue in the instant proceeding. However, even if it were, the leases of the Wilkinsons' land by BIA did not occur until 1997.[23] Thus, findings of discrimination based upon BIA's leasing cannot form a basis of recovery under Section 741, which covers acts of discrimination that occurred during the period January 1, 1981, through December 31, 1996. Acts on or after January 1, 1997, fall outside the eligible time period for consideration under Section 741.[24] The ALJ exceeded his authority under Section 741 and improperly expanded Section 741's limited waiver of sovereign immunity when he addressed issues beyond those alleged in the Complaint.

## *IV. The ALJ Failed To Conduct A Proper Discrimination Analysis Under ECOA*

### *A. Issue Preclusion Does Not Apply*

The ALJ states "[i]n accordance with the doctrine of issue preclusion," an Eighth Circuit Court of Appeals' decision and subsequent decision issued by the United States District Court for the District of North Dakota "shall be applied as controlling in the instant proceeding[.]" (ALJ's Determination: Part One at 10.) Claim preclusion (often referred to as "res judicata") and issue preclusion (often referred to as "collateral estoppel") are related doctrines which operate to prevent redetermination of an issue already litigated between the same parties in a previous action in a court of competent jurisdiction.[25] Generally, four conditions must be met in order to apply the doctrine of issue preclusion: (1) the issue previously adjudicated is identical with the issue presented; (2) the previous issue was actually litigated in the prior case; (3) the previous determination of that issue was necessary to the decision then made; and (4) the party precluded must have been fully represented in the prior action.[26] After comparing the issues in the Federal Court decisions relied upon by the ALJ with the issue in the instant proceeding, I find issue preclusion is not applicable.

Virgil Wilkinson, Charles Wilkinson, Alva Rose Hall, and Wilbur D.

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[23] *See Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 at *10 (D.N.D. Nov. 9, 2007).

[24] *In re Karen Moorehead*, HUDALJ No. 00-17-NA, USDA Docket No. 186 (Jan. 31, 2001).

[25] *In re David W. Landry*, HUDALJ No. 03-21-NA, USDA Docket No. 156 at 3-4 (July 10, 2003); *In re Ag Management and Billy Rutherford*, HUDALJ No. 99-18-NA, USDA Docket No. 233 at 7-8 (Dec. 13, 1999).

[26] *Thomas v. General Services Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986).

Wilkinson, for themselves and as heirs of Ernest Wilkinson, Mollie Wilkinson, Harry Wilkinson, and Virginia Wilkinson sued the United States, alleging trespass of several family allotments, conversion of farm equipment, intentional infliction of emotional distress, and wrongful death in the death of Ernest Wilkinson, under the Federal Tort Claims Act. The United States District Court for the District of North Dakota granted the United States' motion for summary judgment, holding that the Wilkinsons did not have standing. *Wilkinson v. United States*, 314 F. Supp. 2d 902, 911 (D.N.D. 2004). The essence of the Wilkinsons' suit was that a BIA officer improperly leased the allotted land without legal authority and diverted a portion of the income from unauthorized leases to FSA, a mortgage creditor. *Id*.

The United States Court of Appeals for the Eighth Circuit reversed the district court, holding the plaintiffs did have standing. *Wilkinson v. United States*, 440 F.3d 970, 979 (8th Cir. 2006). The Eight Circuit also held that the 1997 leases of portions of the Wilkinsons' land were unlawful because BIA acted without authority. *Id.* at 976-77. The Eighth Circuit did not decide the issue of whether BIA became vested with the authority to lease the allotments at a later date as a result of several of the Wilkinsons' deaths. *Id.* at 976 n.6. The Eighth Circuit opinion guided the remand of the case by outlining two issues: "[1] whether the initial actions of BIA personnel, taken without legal authority, comprised a federal tort or constitutional violation, and [2] whether those actions remained devoid of authority for the entire term of the BIA's seizure." *Id*. Those were the issues before the United States District Court for the District of North Dakota on remand from the Eighth Circuit. *See Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 at *10 (D.N.D. Nov. 9, 2007).

The plaintiffs filed a motion for summary judgment after the case was remanded by the Eighth Circuit, relying on the Eight Circuit's conclusion that "the Interior Board's finding that the seizure and initial leases were wrongful and without legal authority is settled." *Wilkinson v. United States*, 440 F.3d 970, 976 n.6 (8th Cir. 2006). The District Court held that it does not automatically follow that the United States committed the tort of conversion or trespass, and thus denied the plaintiffs' summary judgment motion.

After a trial, the United States District Court for the District of North Dakota noted in its opinion that the plaintiffs have claimed trespass, conversion, intentional infliction of emotional distress, and wrongful death as theories for recovery. *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 at *10 (D.N.D. Mar. 27, 2007). The Court noted that it "applies North Dakota state law to these

causes of action." *Id.* In addressing the claims in the case, the District Court, on remand after the trial, summarized the facts at issue. The Court noted that during the 1970s and 1980s, Ernest Wilkinson and Mollie Wilkinson mortgaged land to FSA and loans included an assignment of income generated from the land. *Id.* at *3. In August of 1996, FSA sent a letter to BIA stating the Wilkinsons had failed to make a number of payments and asked for aid in collecting on the Wilkinsons' debt. *Id.* at *4. BIA leased certain lands beginning in 1997. *Id.* at *5. BIA refused Ernest Wilkinson's request not to lease the land, and the BIA Area Director denied Ernest Wilkinson's appeal, stating the leases were justified. *Id.* Ernest Wilkinson then appealed the BIA Area Director's decision to the Department of Interior's Interior Board of Indian Appeals [hereinafter IBIA]. *Id.* at *7. In July of 1998, the IBIA concluded that the BIA had no authority to lease the Wilkinsons' allotments. The BIA superintendent took no action to effectuate the IBIA's decision. *Id.* The District Court found that BIA's improper lease of the allotments gave rise to liability on the causes of action of trespass, conversion of certain property, and intentional infliction of emotional distress. *Id.* at *10-19.

The Federal court cases summarized above address claims brought under the Federal Tort Claims Act based on issues that are unrelated to the requirement by FSA that the Wilkinsons execute an Assignment of Income from Trust form. The Eighth Circuit noted the IBIA's decision that the assignments of income "authorize[d] BIA only to pay FSA from income from the trust property; it [did] not authorize BIA to lease that property in order to generate income." *Wilkinson v. United States*, 440 F.3d at 974.

The ALJ stated that:

> The two decisions by the Federal courts are controlling law in this proceeding in respect to their holdings that the government circumvented North Dakota mortgage foreclosure laws that: (1) if they had been observed, would have provided the Wilkinsons procedural protections against the confiscation of their land and related chattels; and (2) the BIA Assignment of Income from Trust forms were illegally employed to accomplish these confiscations in order to help FSA collect its loans to the Wilkinsons.

ALJ's Determination: Part One at 10-11. The ALJ cites the opinions in Federal Tort Claims Act case and states he is deciding whether "FSA's

instigation of these illegal actions constituted discrimination against the Wilkinsons under ECOA[.]" (ALJ's Determination: Part One at 11.) The issue in the instant proceeding is not whether the actions of BIA in leasing land is discriminatory. The only issue is whether FSA's requirement that Ernest Wilkinson and Mollie Wilkinson execute an Assignment of Income form authorizing FSA to withdraw funds from Individual Indian Money accounts at will, is discriminatory on the basis of race, when non-Native American borrowers are allegedly not required to sign such assignment forms. I find the issues in the Federal cases summarized above are different from the issue in the instant proceeding.

Mr. Wilkinson alleges FSA discriminated against his parents by requiring execution of an Assignment of Income from Trust Property form in order to receive loans. Mr. Wilkinson never alleged that the requirement to sign such a form was a ruse to "dispossess" the Wilkinsons of their land. Further, Mr. Wilkinson did not allege discrimination or an ECOA claim in the United States District Court for the District of North Dakota Court or in the United States Court of Appeals for the Eighth Circuit. I find the ALJ did not engage in a proper ECOA analysis because he relied on the doctrine of collateral estoppel to find discrimination by FSA.

### *B. Mr. Wilkinson Failed To State A Valid Claim*

#### *1. The Framework For Analyzing Discrimination Claims*

A credit applicant may prove unlawful discrimination under the ECOA using one or more of three theories: (1) direct evidence; (2) disparate treatment analysis; and (3) disparate impact analysis.[27] Mr. Wilkinson's allegations do not specifically state whether this case is based on direct evidence of discrimination and/or circumstantial evidence of discrimination using the disparate treatment analysis. Under either theory, to prevail, Mr. Wilkinson must prove by a preponderance of the evidence that FSA employees were motivated to deny his parents credit benefits or treat his parents less favorably than other borrowers because they were Native Americans. Mr. Wilkinson has set forth no evidence to support a discrimination claim.

#### *2. No Direct Evidence Of Discrimination*

[27]*See, e.g.*, *Faulkner v. Glickman*, 172 F. Supp. 2d 732, 737 (D. Md. 2001); *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997); *In re Ruby J. Martens*, HUDALJ No. 02-09-NA, USDA Docket No. 1204 (June 30, 2003).

I find no direct evidence of discrimination. "Direct evidence is evidence that establishes the existence of discriminatory intent behind the . . . decision without any inference or presumption."[28] Direct evidence of discrimination may be established through explicit and unambiguous statements of hostility towards persons protected by the ECOA, which prove discrimination without inference or presumption.[29] Mr. Wilkinson did not allege in the Complaint any such statements of hostility or produce any direct evidence of discrimination.

The ALJ held:

> 1. There was direct evidence proving this discrimination was not inadvertent in the form of the uncontroverted eyewitness testimony by Complainant who observed ongoing animus, prejudice and discriminatory intent by the FSA local officials who administered the loan program when they dealt with his parents.

ALJ's Determination: Part One at 15.

The direct evidence to which the ALJ cites is Mr. Wilkinson's affidavit testimony that white farmers enjoyed a "chummy" relationship with the supervisor of the FSA county office, while the treatment of Native American customers was "definitely not 'chummy.'" *Id.* at 12. The ALJ ruled that, based on Mr. Wilkinson's 1999 affidavit, white farmers were treated as friends and neighbors, but Native American farmers were patronized. *Id.* These statements are not direct evidence of discrimination, and no evidence that Mr. Wilkinson presented in support of his Complaint proves discrimination without inference.

Only the most blatant remarks, whose intent could be nothing other than to discriminate on the protected classification are direct evidence of discrimination.[30] The applicant or borrower must show a sufficient nexus between the remarks in question and the adverse action taken.[31] I find nothing in the alleged "chumminess" by an FSA supervisor that, on its face, demonstrates discriminatory intent. The ALJ must make an inference or presumption in order to conclude that this behavior was

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[28] *Cooley v. Sterling Bank*, 280 F. Supp. 2d 1331, 1338 (M.D. Ala. 2003) (quoting *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (citations omitted)).

[29] *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 n.5 (N.D. Ill. 1997).

[30] *Cooley v. Sterling Bank*, 280 F. Supp. 2d 1331, 1338 (M.D. Ala. 2003).

[31] *Faulkner v. Glickman*, 172 F. Supp. 2d 732, 737 (D. Md. 2001).

discriminatory and done because of Ernest Wilkinson's and Mollie Wilkinson's race. One has to interpret this behavior in order to find an allegedly discriminatory motive; thus, the actions, even if I were to find that they did occur (which I do not so find), did not rise to the level of direct evidence of discrimination. In *Carlson v. Liberty Mut. Insur. Co.*, 237 F. App'x 446 (11th Cir. 2007), the Court addressed the appeal of a grant of summary judgment in favor of the employer on employee's lawsuit alleging disability and gender discrimination. The Court noted:

> Similarly, Carlson presented no evidence that Dietz's being "chummy" with the male RMDs, and her feeling like she did not receive certain information were because she was a female. Although Dietz may have asked a gender-related question, there is no evidence he made comments displaying discriminatory animus against women. None of Carlson's evidence establishes that proffered reason was false, or the real reason was her gender. Accordingly, the district court did not err in granting summary judgment to Liberty Mutual on Carlson's gender discrimination claim.

237 F. App'x at 450-51.

Administrative law judges deciding Section 741 claims under the ECOA have ruled that comments requiring interpretation do not constitute direct evidence of discrimination.[32] Consequently, I find, the ALJ erred in finding direct evidence of discrimination, and I dismiss any claims of discrimination based upon direct evidence. Mr. Wilkinson did not set forth any evidence of explicit and unambiguous statements of hostility towards persons protected by the ECOA which prove discrimination without inference or presumption.

*3. No Circumstantial Evidence Of Discrimination*

*(a). Introduction*

Absent a showing of direct evidence of discrimination, courts have generally applied a burden-shifting analysis to determine whether credit

[32] *See In re Peter Stark*, HUDALJ No. 00-24-NA, USDA Docket No. 1159 (Mar. 21, 2003) (the comment "We don't have any farmers like you around here" to a Jewish farmer by an assistant FSA supervisor did not prove, without resort to inference or presumption, that the assistant FSA supervisor intentionally discriminated against the complainant by taking an adverse action against him because he was Jewish or Semitic).

discrimination has occurred under the ECOA.[33] Under a burden-shifting analysis, the burden is initially on a complainant to establish a *prima facie* case of discrimination.[34] In order to establish a *prima facie* case of discrimination, Mr. Wilkinson must prove by a preponderance of the evidence that: (1) he is a member of a class of persons protected by the statute; (2) he applied for and was qualified to receive a credit benefit from FSA; (3) despite his qualification for a credit benefit, such a benefit was denied or withheld from him; and (4) he was treated differently (less favorably) than other similarly-situated persons who were not members of the protected class.[35]

If Mr. Wilkinson establishes a *prima facie* case of discrimination, the burden of production shifts to FSA to articulate a legitimate, non-discriminatory reason for its adverse credit decision.[36] FSA can satisfy its burden by producing admissible evidence that the requirement for assignment of income prior to loan making was not motivated by discriminatory animus.[37] "The defendant need not persuade the court that it was actually motivated by the proffered reasons."[38] The burden then shifts back to Mr. Wilkinson to prove by a preponderance of the evidence that FSA's proffered reason for its action was a pretext for discrimination.[39] Mr. Wilkinson can only potentially prevail if he proves by a preponderance of the evidence that a discriminatory reason more likely motivated FSA or that FSA's proffered explanation is unworthy of credence and is a pretext for discrimination.[40]

*(b). Mr. Wilkinson Failed To Establish A Prima Facie Case*

Mr. Wilkinson contends that the credit which his parents were seeking, farm loans, was tied to the requirement that income from trust

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[33] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992).

[34] *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 361 (D.C. 1993).

[35] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Rowe v. Union Planters Bank of S.E. Mo.*, 289 F.3d 533, 535 (8th Cir. 2002); *In re Henry D. Lockwood and Hattie G. Lockwood*, HUDALJ No. 99-38-NA, USDA Docket No. 1083 at 4 (May 24, 2000).

[36] *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

[37] *See Atlantic Richfield Co. v. District of Columbia Comm'n on Human Rights*, 515 A.2d 1095, 1099-1100 (D.C. 1986).

[38] *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

[39] *Id.* at 254-56.

[40] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992).

lands had to be assigned and that this was not required of any other similarly-situated group. (Ex. A, Tab 1, Position Statement, Ex. 1.)

Even if I were to find that there are similarly-situated individuals to Ernest Wilkinson and Mollie Wilkinson, Mr. Wilkinson failed to provide any evidence that his parents were treated less favorably than other applicants outside his parents' class who were similarly situated to them. This failure to provide such evidence is fatal to Mr. Wilkinson's claim of credit discrimination.[41] In fact, as FSA demonstrated, non-Native Americans are subjected to assignments of income, if necessary, to protect FSA's security interests. (Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment.)

In the ECOA context, courts have insisted on proof that similarly-situated persons outside the protected class were treated more favorably than the plaintiff.[42] Similarity of situation is vital because, to raise an inference of discrimination, the fundamental requirement is that a plaintiff show he or she "was treated differently than a similarly situated [person]."[43] I have consistently and repeatedly held that, if a complainant is to establish a prima facie case of discrimination based upon circumstantial evidence, the complainant must show that he or she was treated differently (less favorably) than others similarly situated who were not of his or her protected class.[44]

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[41] *See Guisewhite v. Muncy Bank & Trust*, No. 4:CV-95-1432, 1996 WL 511525 at *6 (M.D. Pa. Mar. 25, 1996) (*prima facie* case of age discrimination failed where the plaintiff "produced no evidence that younger individuals with a similar credit stature were given loans or treated more favorably"); *Gross v. United States Small Business Admin.*, 669 F. Supp. 50, 54 (N.D. N.Y. 1987) (no *prima facie* case of sex discrimination where plaintiff "offered scant evidence to demonstrate that males or married females of similar credit stature were given loans, or were treated more favorably than her in the application process"), *aff'd mem.*, 867 F.2d 1423 (2d Cir. 1988).

[42] *Visconti v. Veneman*, 204 F. App'x 150, 154 (3d Cir. 2006) ("To establish a prima facie case of discrimination under the ECOA in these circumstances, the Viscontis must establish, inter alia, that others not in their protected class were treated more favorably."); *Cooley v. Sterling Bank*, 280 F. Supp. 2d 1331, 1341 (M.D. Ala. 2003) (granting defendant's motion for summary judgment in a case brought under the ECOA where the plaintiff alleged racial discrimination in the denial of a loan, but was unable to establish that the defendant approved loans for white applicants with similar qualifications); *Guisewhite v. Muncy Bank & Trust*, No. 4:CV-95-1432, 1996 WL 511525 at *6 (M.D. Pa. Mar. 25, 1996) (prima facie case of age discrimination under the ECOA failed where plaintiff "produced no evidence that younger individuals with a similar credit stature were given loans or treated more favorably").

[43] *Cherry v. American Tel. and Tel. Co.*, 47 F.3d 225, 228 (7th Cir. 1995).

[44] *See, e.g., In re Glovetta Richberg*, HUDALJ No. 04-028-NA, USDA Docket No. 3015 at 6 (July 2, 2004); *In re Ruby J. Martens*, HUDALJ No. 02-09-NA, USDA Docket No. 1204 at 19 (June 30, 2003) (citing *In re Henry D. Lockwood and Hattie G.*

In the instant proceeding, other than his unsupported allegations, Mr. Wilkinson has not identified any similarly-situated individual outside his parents' protected class who was treated more favorably than his parents. Contrary to Mr. Wilkinson's unsupported allegations, non-Native Americans are not treated more favorably with respect to assignments of income. Under regulations in place at the time, FSA county supervisors were responsible for maintaining security instruments needed to protect FSA's security interests. (7 C.F.R. §§ 1962.5, .6 (1981).) Thus, non-Native Americans are clearly subjected to assignments of income, if necessary, to protect FSA's security interests.

In McLean County, North Dakota, where the Wilkinsons farmed and sought farm loans from FSA, non-Native American applicants for loans were frequently required to provide assignments as a requirement for loan closing.[45] I find FSA's seeking assignments of income from non-Native American applicants fatal to Mr. Wilkinson's claim of discrimination.

The assignment of income from Native American trust lands differ from other income assignments that FSA may utilize because the assignment is only invoked when a borrower's account becomes delinquent. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Radintz Decl. at ¶ 8.) Thus, Individual Indian Money assignments only serve as a secondary source of loan repayment. *Id.* As long as the borrower's account remains current, the Individual Indian Money assignment would not take effect. *Id.* Assignments of income which do not involve Individual Indian Money accounts (for example, mineral royalties and milk sales) are effective until cancelled, and the funds are automatically remitted to FSA, regardless of the status of the borrower's account. *Id.* at ¶ 9. Thus, non-Individual Indian Money assignments were actually more harsh on the non-Native American applicant or borrower because FSA was not required to wait until the loan was delinquent to utilize such assignments. *Id.*; *see also Id*, Mair Decl. at ¶ 7.

Mr. Wilkinson has failed to demonstrate that FSA treated non-Native

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*Lockwood*, HUDALJ No. 99-38-NA, USDA Docket No. 1093 (May 24, 2000)).

[45] *See* Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Radintz Decl., Ex. 1 (containing samples of Requests for Obligation of Funds (Forms FmHA 1940-1) demonstrating that white applicants were required by FSA to provide assignments of income from various sources).

Americans in a more favorable way with regard to assignments of income. Given the lack of evidence that any similarly-situated non-Native American borrower was treated more favorably by FSA than Ernest Wilkinson and Mollie Wilkinson, Mr. Wilkinson simply cannot establish a *prima facie* case of discrimination in violation of the ECOA.

*(c). Assignment Of Income Upon Default Does Not Raise Inference Of Discrimination*

Mr. Wilkinson fails to establish a *prima facie* case of credit discrimination because, separate and apart from the inability to show similarly-situated comparators were treated more favorably, he fails to present any evidence demonstrating that FSA's actions in following regulatory and statutory guidance in obtaining assignment of income from trust lands gives rise to an inference of discrimination on any basis. Assignments of income are required by FSA whenever the income in question is a source of loan repayment. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Radintz Decl. at ¶ 6.) Assignments are required by FSA on a wide variety of income sources derived from real estate, including oil, gas, and mineral leases and royalties, and utility leases. *Id.* Under regulations promulgated in 1958, Individual Indian Money accounts may be applied against delinquent claims of indebtedness. (25 C.F.R. § 104.9 (1958).) Individual Indian Money assignments differ from other income assignments in that the assignment is only invoked when the account becomes delinquent. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Radintz Decl. at ¶ 8.) Mr. Wilkinson simply cannot show any inference of discrimination in the manner in which FSA obtains repayment for outstanding loan indebtedness by making use of assignment of income from trust property.

Mr. Wilkinson is required to set forth facts demonstrating that the actions of FSA give rise to an inference of discrimination, but he sets forth no evidence permitting an inference of discrimination. Mr. Wilkinson alleges that Ernest Wilkinson and Mollie Wilkinson were required to sign Assignment of Income from Trust Property forms, authorizing FSA to withdraw funds from Individual Indian Money accounts "at will," because they were Native Americans, while non-Native Americans were not required to sign such documents. (Ex. A, Tab 1, Position Statement, Ex. 1.) FSA's use of assignment of income is a proper and non-discriminatory method of obtaining

repayment from a delinquent borrower, and no inference of discrimination is raised by the use of such assignments.

FSA's demand for payment was never "at will." First, the request for assignment of income from the trust property is only utilized when the borrower is delinquent on payments to FSA for funds provided by the Federal government. As noted on the Assignment of Income from Trust Property form, the debt must be delinquent prior to FSA's making demand upon a borrower's Individual Indian Money account. *Id.*, Statement of Material Fact No. 10. It is only after the debt became delinquent that FSA would submit Form FHA 450-13 "Request for Assignment of Income from Trust Property" to BIA. *Id.*, Statement of Material Fact No. 24. Second, the request for assignment of income was not "at will" because Form FHA 450-13 states that FSA has exhausted all other sources of collection with no success prior to making demands for payment of assignment of income from trust property. *Id.* Third, BIA's approval was required for each mortgage after it had been signed by the applicant. (7 C.F.R. § 1943.19(b)(6)(ii) (1981).) Fourth, individuals may appeal decisions to take funds from Individual Indian Money accounts (25 C.F.R. §§ 104.9, .12 (1958); 25 C.F.R. § 115.10(a) (1986)).[46]

Mr. Wilkinson was actually in a better position than some other non-Native American borrowers who are subject to assignments of income in that some of FSA's other assignments do not require that the borrower be in a delinquent status in order for FSA to obtain such income. FSA specifically informed BIA that there would be no demands on the Wilkinsons' trust income as long as the account remained current.[47]

In the instant proceeding, there is no inference of discrimination giving rise to a *prima facie* case. FSA made use of statutory and regulatory authority to seek repayment, after exhausting other avenues of redress. FSA's use of assignment of income was never "at will." Mr. Wilkinson states no facts which would demonstrate that FSA utilized these procedures in any manner to discriminate against Ernest

[46] In or around June of 1985, Mollie Wilkinson contested a BIA assignment pursuant to FSA request, demonstrating that Mollie Wilkinson availed herself of this appeal process (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Mair Decl. at ¶ 8).

[47] *See* Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, February 22, 1974, letter from FSA County Supervisor to BIA (Statement of Material Fact Ex. 6) (noting that the Wilkinsons have a current account with FSA and there will be "no further demand on their Trust Income unless the account should again become delinquent").

Wilkinson or Mollie Wilkinson because they were Native Americans.

*C. FSA Has Set Forth Unrebutted Legitimate, Non-Discriminatory Reasons For The Assignment Of Income From Individual Indian Money Accounts*

Even if I were to find that Mr. Wilkinson established a *prima facie* case of discrimination under the ECOA (which I do not so find), FSA had legitimate, non-discriminatory reasons for its actions which preclude Mr. Wilkinson from prevailing on the merits. When the Wilkinsons' loan payments became delinquent, FSA submitted the Request for Assignment of Income from Trust Property to BIA, making demand for payment against the delinquency shown on the form. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 24.)

Beginning in the 1960s, the Wilkinsons received farm loans from FSA, using land as collateral, and the Department of Interior approved the mortgage loans, as required by 7 C.F.R. § 1943.19(b)(6)(ii) (1981). (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 2.) FSA is, thus, specifically authorized to secure loans with real estate that is held in trust or restricted status. Trust lands are lands owned by the United States of America held in trust for use by Native Americans. *Id.*, Statement of Material Fact No. 7 (citing 25 C.F.R. § 150.2(h).) Specifically, FSA loans awarded to Native Americans can be secured by trust lands in the form of Assignment of Income from Trust Property agreements, as follows:

> **§ 1943.19 Security.**
>
> . . . .
>
> (b) *Real estate security*. . . .
>
> . . . .
>
> (6) The Departments of Agriculture and Interior have agreed that FmHA loans may be made to Indians and secured by real estate when title is held in trust or restricted status. When security is taken on real estate held in trust or restricted status:
>
> (i) The applicant will request the Bureau of Indian Affairs (BIA) to furnish Title Status Reports to the County Supervisor.
>
> (ii) BIA approval will be obtained on the mortgage after it has been signed by the applicant and any other party whose signature is required.

7 C.F.R. § 1943.19(b)(6) (1981).

Assignments from income received on trust lands were also authorized by an instruction issued by FSA's North Dakota State Office. On June 27, 1980, the North Dakota State Office issued an instruction permitting an assignment of the income received on trust land to secure loans. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 6; Ex. 1.) North Dakota Instruction 1901-N provides very specific direction on making and servicing real estate or operating loans secured by trust lands. *Id.* North Dakota Instruction 1901-N states that the loan approval official may determine that an assignment of income is necessary because of the amount of trust income to be received and because of the need to maintain control over this income. *Id.* at ¶ IV.C. Mr. Wilkinson can show no inference of discrimination by FSA's issuance of this instruction designed to provide guidance on obtaining repayment of loans in default.

Ernest Wilkinson and Mollie Wilkinson pledged trust land as security for FSA debt. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 10.) As required by 7 C.F.R. § 1943.19(b)(6)(ii) (1981), BIA approval was obtained for each mortgage after it had been signed by the applicant. In each mortgage, the borrowers agreed to grant, bargain, sell, convey, assign, and warrant unto the Government real estate security and the rents, issues, and profits thereof and revenues and income from the real estate. Between February 10, 1971, and January 10, 1990, as a condition of receiving FSA funds, Ernest Wilkinson and Mollie Wilkinson executed BIA Form 5-845. (Ex. A. Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 10.) As a result, FSA made demands to BIA for payments from the assignment of income, only after the account became delinquent. *Id.*, Statement of Material Fact No. 24. The forms executed by Ernest Wilkinson and Mollie Wilkinson authorized the BIA official, upon demand of the lender, to make payment from income from the trust land when the account is delinquent. *Id.*, Radintz Decl. at ¶ 7; Statement of Material Fact No. 24.

With each mortgage, Ernest Wilkinson and Mollie Wilkinson signed an Assignment of Income from Trust Property. *Id.* In addition, the mortgages gave FSA the right to "take possession of, operate or rent the property" or to foreclose upon the mortgage. *Wilkinson v. United States*,

440 F.3d 970, 972 (8th Cir. 2006). Ernest Wilkinson and Mollie Wilkinson experienced difficulties making timely loan payments in or around 1980, and their accounts became delinquent. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 22.) Thus, FSA submitted Form FHA 450-13 ("Request for Assignment of Income from Trust Property") to BIA on numerous occasions, making demand for payment against the delinquency shown on the form. *Id.*, Statement of Material Fact No. 24.

FSA acted pursuant to law. Congress authorized the funds from Individual Indian Money accounts to be applied against delinquent claims of indebtedness to the United States. Congress and USDA set forth specific procedures to allow FSA to obtain an assurance that loans that it financed would be secured by available resources held by the borrower. FSA farm loan programs are designed to assist a group of farmers who cannot obtain credit from commercial sources. *Id.*, Radintz Decl. at ¶ 3; 7 C.F.R. § 1941.6 (1981). In order to reach this target group, the credit standards for FSA loans are more lenient than those of commercial lenders. *Id.* Generally, these more lenient credit standards mean that there is a higher risk of loan default and loss because FSA borrowers generally have less equity, more debt, and lower repayment margins than do commercial borrowers. *Id.* To mitigate this risk, FSA takes security in the property and/or chattel and closely monitors loan collateral and farm income. (7 C.F.R. § 1924 Subpart B (1981).)

An assignment of certain payments and/or income is one method used by FSA to reduce the risk of non-collection. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Radintz Decl. at ¶ 4; 7 C.F.R. § 1962.6 (1981).) FSA officials are statutorily authorized to take an assignment of income from property to be mortgaged. *Id.*; *see also* 7 C.F.R. § 1941.19 (1981). Potential borrowers are required to agree to have the assignment of payments and/or income as a condition of receipt of a FSA farm loan. *Id.* at ¶ 5. Assignments on Individual Indian Money accounts held by BIA are only one of several different kinds of income assignments required as a condition of FSA loans. *See Id.*; 7 C.F.R. § 1943.19(b)(6) (1981).

Assignments are routinely required whenever the income in question is a source of loan repayment. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Radintz Decl. at ¶ 6.) Assignments are required on a wide variety of real estate-derived income sources, including oil, gas, and mineral leases and royalties, and utility leases. *Id.* FSA

assignments have been required on non-real estate farm income sources such as milk sales and payments under contracts for production of eggs, broilers, turkeys, vegetables, and other farm commodities. *Id.* Assignments may also be required on government farm program payments. *Id.*; *see also* 7 C.F.R. § 1962.6 (1981).

Ernest Wilkinson's and Mollie Wilkinson's account was frequently delinquent, which triggered the assignment of income in order to obtain payment on the 11 loans which FSA made to the Wilkinsons. (Ex. A, Tab 41, Agency's Cross-Motion for Summary Judgment and Response to Complainant's Motion for Summary Judgment, Statement of Material Fact No. 22.) In fact, even after FSA took assignments, the Wilkinsons' accounts remained delinquent and to date Mr. Wilkinson continues to owe the Federal Government for loans granted to him and his family. *Id.*, Statement of Material Fact No. 30. FSA had legitimate, non-discriminatory reasons for requesting assignments of income from trust lands – namely, an assurance of some method of repayment of delinquent loan accounts.

Moreover, Mr. Wilkinson cannot show that the reasons that FSA utilized assignments of income from Indian trust lands for repayment of delinquent loans were a pretext for racial discrimination. A complainant must demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradiction in [a creditor's] proffered legitimate reasons for its actions" such that the creditor's "articulated reason was not merely wrong, but that it was 'so plainly wrong that it cannot have been the [creditor's] real reason.'"[48] FSA's reasons for the use of income assignments were unrelated to the Wilkinsons' race and consistent with FSA regulations. Mr. Wilkinson cannot meet his burden merely by disagreeing with FSA's action in taking such assignments. Pretext cannot be established by simply showing that the FSA action was wrong or mistaken, or that Mr. Wilkinson disagrees with it.[49]

Mr. Wilkinson has advanced no evidence from which I could question FSA's reasons for its actions nor is there any evidence of discriminatory animus supporting these reasons. Mr. Wilkinson cannot demonstrate that the reason or need for the assignment of income forms used by FSA during the relevant period masked discriminatory intent on the part of FSA with respect to his or his family's farming business.

### *V. The ALJ's Damages Award Is Improper*

[48] *Visconti v. Veneman*, No. Civ. 01-5409, 2005 WL 2290295 (D.N.J. 2005).
[49] *See Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 331 (3d Cir. 1995).

*A. Introduction*

In the ALJ's June 3, 2008, Determination: Part One, the ALJ scheduled a hearing for June 25-26, 2008, to develop evidence regarding the damages that should be awarded to Mr. Wilkinson for losses suffered by Ernest Wilkinson and Mollie Wilkinson as a result of discrimination by FSA. (ALJ's Determination: Part One at 17.) On June 9, 2008, FSA filed a request for a stay of the damages hearing which I granted on June 12, 2008. (Ruling on Request to Review Proposed Determination, Order Establishing Briefing Schedule, and Stay Order.) On June 18, 2008, despite my June 12, 2008, stay of the damages proceeding, the ALJ, without hearing, issued Determination: Part Two awarding Mr. Wilkinson $5,284,647. The parties have not had an opportunity to file briefs in support of, or opposition to, the ALJ's June 18, 2008, Determination: Part Two. In light of this Final Determination, in which I conclude that Mr. Wilkinson failed to file an eligible complaint and failed to prove that FSA discriminated against Ernest Wilkinson and Mollie Wilkinson in violation of the ECOA, the ALJ's Determination: Part Two is moot. Nonetheless, in case a reviewing court should disagree with my conclusions regarding liability, I address the ALJ's June 18, 2008, Determination: Part Two in this Final Determination.

*B. The ALJ's Damages Award Is A Nullity And Is Vacated*

The Secretary of Agriculture delegated to the Assistant Secretary the authority to "[m]ake final determinations in proceedings under [7 C.F.R. pt. 15f] where review of an administrative law judge decision is undertaken." 7 C.F.R. § 2.25(a)(21). As Assistant Secretary, I also have been delegated authority to make final determinations on discrimination complaints, as follows:

> **§ 2.25 Assistant Secretary for Civil Rights.**
>
> (a) The following delegations of authority are made by the Secretary to the Assistant Secretary for Civil Rights:
>
> . . . .
>
> (20) Make final determinations, or enter into settlement agreements, on discrimination complaints in federally conducted programs subject to the Equal Credit Opportunity Act. This delegation includes the authority to make compensatory damage awards whether pursuant to a final determination or in a settlement agreement under the authority of the Equal Credit

> Opportunity Act and the authority to obligate agency funds, including CCC and FCIC funds to satisfy such an award.

7 C.F.R. § 2.25(a)(20).

Under the Rules of Practice, the function of the ALJ is to conduct a hearing at a complainant's request and to issue a proposed determination.[50] Pursuant to 7 C.F.R. § 15f.16(a), Mr. Wilkinson requested that the ALJ issue a proposed determination based on the written record, without hearing. On June 3, 2008, the ALJ, without hearing, issued Determination: Part One, finding FSA had discriminated against Ernest Wilkinson and Mollie Wilkinson in violation of the ECOA and scheduled a hearing on damages. On June 12, 2008, I stayed the damages proceeding, pending my review of the ALJ's June 3, 2008, Determination: Part One. (Ruling on Request to Review Proposed Determination, Order Establishing Briefing Schedule, and Stay Order.) On June 18, 2008, despite my previous stay of the damages proceeding, the ALJ awarded damages to Mr. Wilkinson in Determination: Part Two, in which the ALJ states his functions pursuant to the Rules of Practice are not completed until he recommends an award of appropriate relief. (ALJ's Determination: Part Two at 3.)

The ALJ has no authority to overrule my interpretation of the regulations. An agency's interpretation of its regulations is of controlling weight unless plainly erroneous or inconsistent with the regulations.[51] The Assistant Secretary, by regulation, is the person who makes the final determination on a Section 741 complaint of discrimination. Nowhere in the Rules of Practice is the administrative law judge authorized to ignore a ruling by the Assistant Secretary granting review. Once I granted review of the ALJ's Determination: Part One, the ALJ lost jurisdiction over the proceeding and his June 18, 2008, Determination: Part Two, in which he proposes a damage award has no weight or validity and exceeds the limited delegated authority to administrative law judges.[52] On June 12, 2008, I exercised my authority

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[50] 7 C.F.R. § 15f.13.

[51] *See e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Martin v. OSHRC*, 499 U.S. 144, 150-51 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *United States v. Larinoff*, 431 U.S. 864, 872 (1977); *INS v. Stansic*, 395 U.S. 62, 72 (1979); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

[52] The Rules of Practice provide that interlocutory review of rulings by an administrative law judge will not be permitted. (7 C.F.R. § 15f.21(d)(8).) I ruled in my June 12, 2008, Ruling on Request to Review Proposed Determination, Order

to review the ALJ's June 3, 2008, Determination: Part One, and stayed the damages proceeding. (Ruling on Request to Review Proposed Determination, Order Establishing Briefing Schedule, and Stay Order.) My June 12, 2008, ruling divested the ALJ of jurisdiction over this proceeding; therefore, the ALJ's June 18, 2008, Determination: Part Two is a nullity and is vacated.

### *C. FSA Was Harmed By Not Being Allowed To Present Damages Evidence*

Even if I were to find that the ALJ had authority to propose a damages award, I would remand the proceeding on damages to the ALJ with instructions that the ALJ provide FSA an opportunity to participate in the damages proceeding.

The ALJ issued a proposed determination on damages (ALJ's Determination: Part Two) without a fully developed record. The ALJ did not permit FSA to submit evidence to rebut Mr. Wilkinson's allegations regarding damages. Specifically, FSA was not allowed to refute Mr. Wilkinson's affidavit and statements and the report of Mr. Wilkinson's expert with regard to damages. The ALJ adopted the calculation of Mr. Wilkinson's expert as to loss of income without the benefit of the report of FSA's expert and without testimony by either of the experts through direct examination or cross-examination at a hearing.[53]

The ALJ has failed to fully develop the record by which a proposed determination on damages could be fairly made,[54] and he has issued a decision based upon nothing more than documentation presented by Mr. Wilkinson. As FSA noted in prior pleadings, the ALJ precluded any discovery in this matter other than allowing FSA to depose Mr. Wilkinson's expert witness. The ALJ had an affirmative duty to obtain all facts necessary to propose a damages award, if warranted,

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Establishing Briefing Schedule, and Stay Order, the ALJ's Determination: Part One is not an interlocutory ruling. *See also Union Pac. R.R. v. Surface Transp. Bd.*, 358 F.3d 31, 34-35 (D.C. Cir. 2004) (holding that a finding of liability pursuant to arbitration in a bifurcated proceeding is a reviewable final decision for the purposes of the Court's jurisdiction); *Hart Surgical, Inc. v. UltraCision, Inc.*, 244 F.3d 231, 235 (1st Cir. 2001) (holding that a finding of liability pursuant to arbitration in a bifurcated proceeding is a final action reviewable by the district court, not merely a ruling that would not be subject to interlocutory review).

[53] *See Dorn v. Burlington Northern Santa Fe R.R.*, 397 F.3d 1183, 1196 (9th Cir. 2005) (finding the court erred by not allowing an expert's testimony for purposes of determining the reasonableness of assumptions underlying the opposing expert's analysis, criticism of an expert's method of calculation of damages, and credibility).

[54] *See Nelms v. Bowen*, 803 F.2d 1164, 1165 (11th Cir. 1986) (per curiam).

including obtaining all relevant evidence from FSA. An administrative law judge has a duty to "fully and fairly develop the facts," which simply was not done in the instant proceeding.[55] FSA cannot be precluded from offering all evidence, including live testimony, to rebut damages simply because it requested a stay of the damages proceeding pending review of the ALJ's liability determination by the Assistant Secretary, an action that I have determined is in accordance with the Rules of Practice. The ALJ's disagreement with my interpretation of the Rules of Practice should not result in a written opinion awarding damages prior to providing FSA an opportunity to present evidence.

### *D. Mr. Wilkinson Is Not Entitled To Damages*

#### *1. Introduction*

Even if I were to find the ALJ had jurisdiction to issue Determination: Part Two and had conducted a fair damages proceeding (which I do not so find), I would reverse the ALJ's damages award. The ALJ improperly awarded Mr. Wilkinson damages of $5,284,647 for tangible and intangible losses based on Mr. Wilkinson's affidavits and Mr. Wilkinson's expert's report. FSA contends that any award of damages which includes lost income and emotional distress provides Mr. Wilkinson with a double recovery based on *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 (D.N.D. Nov. 9, 2007), and the award of damages is not supported by the record in the instant proceeding.

Actual damages are recoverable under the ECOA. As stated in *In re Will Sylvester Warren*, HUDALJ No. 00-19-NA, USDA Docket No. 1194 at 23 (Dec. 19, 2002):

> There are two categories of actual or compensatory damages: tangible and intangible. Tangible includes economic loss. Intangible damages include compensation for emotional distress, and pain and suffering, *Bohac v. Dept of Agriculture*, 239 F.3d 1334, (Fed. Cir. 2001); injury to personal and professional reputation, *Fabry v. Comm'r of IRS*, 223 F.3d 1261 at 1265, (11th Cir. 2000); injury to credit reputation, mental anguish, humiliation or embarrassment, (*Fischl v. General Motors Acceptance Corp.,* CA.5 *(La.)* 1983, 708 F.2d 143); "impairment

[55] *See Garrett v. Richardson*, 363 F. Supp. 83, 90 (D.S.C. 1973).

> of reputation and standing in the community, personal humiliation, and mental anguish and suffering" *U.S. v. Burke*, 504 U.S. 229, 112 S. Ct. 1867 at 1874 (1992); and intentional infliction of emotional distress. *Ricci v. Key Bancshares, Inc.*, 662 F. Supp. 1132 (D.C. Me. 1987) and *HUD v. Wilson*, 2 FH-FL (Aspen) ¶ 25,146 (HUDALJ 2000).

The ALJ proposed to award $1,534,647 for tangible losses due to the Wilkinsons being "dispossessed from their farm and farm equipment, and lost income from their farming operations" and $3,750,000 for intangible losses because the assignment of income forms were "later used to dispossess the Wilkinsons against their will from their farmland and homestead in circumvention of their protections under applicable North Dakota mortgage foreclosure laws." (ALJ's Determination: Part Two at 5.) I find Mr. Wilkinson is not entitled to damages because, in *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 (D.N.D. Nov. 9, 2007), the plaintiffs, which included Mr. Wilkinson, received damages for lost farm income in the amount of $227,569 and non-economic damages for emotional distress in the amount of $232,407. Moreover, even if I were to find that these earlier damage awards are not duplicative, Mr. Wilkinson would not be entitled to any award for lost farm income because the farm production was below average and the farm would have consistently lost money if it had continued in operation. Further still, the record does not support an award of emotional distress for the alleged discrimination experienced by Ernest Wilkinson and Mollie Wilkinson.

### *2. The ALJ's Damages Determination Provides A Duplicative Recovery*

Even if I were to find that FSA discriminated against the Wilkinsons on the basis of race (which I do not so find), I would not award for economic damages and emotional distress because economic damages including lost farm income and non-economic damages for emotional distress were awarded in *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 (D.N.D. Nov. 9, 2007). As stated in section IV.A of this Final Determination, several heirs of Ernest Wilkinson and Mollie Wilkinson sued the United States. In 2007, the United States District Court for the District of North Dakota awarded $459,976 to the plaintiffs, which included Mr. Wilkinson, for economic and non-economic damages.

In the instant proceeding, the ALJ adopted the calculation of

Mr. Wilkinson's expert, Mr. David Saxowsky, for economic damages for the loss of the farm, farm equipment, and income from farming operations. (ALJ's Determination: Part Two at 5.) However, Mr. Saxowsky testified in May 2008, during his deposition in the instant proceeding, that he calculated the same lost earnings and other economic damages for Mr. Wilkinson in the United States district court case decided on November 9, 2007, using the same methodology as he used in the instant proceeding. Mr. Saxowsky also testified during his deposition in May 2008 that his calculation for economic damages in the instant proceeding was just an update of the calculation of damages in the November 9, 2007, United States district court case for which an award was made. (Saxowsky Deposition of May 21, 2008, at 162-63.) Thus, an award of damages in the instant proceeding would constitute double recovery, which is prohibited.[56]

In the United States district court case filed by Mr. Wilkinson and other heirs, the court determined that Mr. Saxowsky testified regarding the value of the loss of use of the Wilkinson property by calculating the loss of farm income, equipment, and farmstead, and the court made an award based on that testimony and other evidence. See *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 at *21-30 (D.N.D. Nov. 9, 2007). I find the economic damages proposed to be awarded by the ALJ to compensate for the loss of the farm in the instant proceeding were the same damages as those awarded in *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 (D.N.D. Nov. 9, 2007), even though the ALJ and the court reached different calculations based on different assessments of the evidence.

With regard to non-economic or emotional distress damages, the court in *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 (D.N.D. Nov. 9, 2007), attempted to make the plaintiffs "whole" in order to address the "distress the family endured" from the loss of the farm and concluded that the family "is entitled to respect and substantial damages." *Id.* at *32. Consequently, the court awarded $232,407 for emotional distress to a group of heirs. In the

[56] *See, e.g.*, *Equal Employment Opp. Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (noting that "courts can and should preclude double recovery by an individual."); *Phelan v. Local 305 of the United Assoc. of Journeymen, and Apprentices of the Plumbing and Pipefitting Indus. of U.S. and Canada*, 973 F.2d 1050, 1063 (2d Cir. 1992) (stating the plaintiff may not recover twice for the same injury); *Equal Employment Opp. Comm'n v. United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (stating individuals who litigated their own claims were precluded from obtaining individual relief in a subsequent EEOC action based on the same claims).

instant proceeding, the ALJ also determined that Ernest Wilkinson and Mollie Wilkinson suffered considerable anguish and emotional distress from the loss of their farm, but the proposed award was more substantial than the November 9, 2007, award by the United States District Court for the District of North Dakota. (ALJ's Determination: Part Two at 5.)

Therefore, even if I were to find that FSA discriminated against Mr. Wilkinson in violation of the ECOA (which I do not so find), I would not award Mr. Wilkinson a windfall of "double recovery" for the same damages which were considered in the United States District Court for the District of North Dakota and led to an award in that Court.

### *3. The Wilkinsons Had Negative Farm Income For The Period At Issue*

Mr. Wilkinson is not entitled to damages for lost farm income and other economic damages because the farm was a below average farm which would have consistently operated at a loss if Mr. Wilkinson had continued to farm. I find the assumptions of Mr. Wilkinson's expert, Mr. Saxowsky, upon which he bases his calculation of lost farm income are not reliable. Consequently, Mr. Saxowsky's calculation of economic damages adopted by the ALJ, must be disregarded.

Lost profits should not be based on speculation, conjecture, or hypothesis.[57] There should be a rational basis for their calculation, and the lost profits must be directly traceable to a wrongful act of the other party.[58] Mr. Saxowsky's deposition testimony makes clear that his calculations for economic damages were not based on an enterprise analysis as he claimed; the data which Mr. Saxowsky used for his calculations were provided by Mr. Wilkinson with no documentation or support; and a critical assumption for calculating damages is inaccurate. Therefore, I find Mr. Saxowsky's calculation of economic damages unreliable, and I disregard those calculations.

In *In re Will Sylvester Warren*, HUDALJ No. 00-10-NA, USDA Docket No. 1194 (Dec. 19, 2002), I concluded that Mr. Warren and USDA calculated economic damages by determining what Mr. Warren should have earned with a fully functioning farm adjusted for actual income earned during the same time. This methodology is called an enterprise analysis. Mr. Saxowsky testified during his deposition that he used the same methodology, an enterprise analysis, to calculate economic damages, as was used in *Warren*. Specifically, he testified

[57] *McDermott v. Middle East Carpet Co., Associated*, 811 F.2d 1422, 1426 (11th Cir. 1987).

[58] *Id.* at 1427.

that the *Warren* methodology is "an enterprise analysis of what ag commodities were being produced, what quantity produced, what price are they sold at, what costs were incurred in producing them, and what's the difference between that revenue and that cost; and those are the lost earnings." (Saxowsky Deposition of May 21, 2008, at 91.) However, upon further questioning, Mr. Saxowsky testified that he did not have sufficient data to conduct an enterprise analysis of the Wilkinson farm and thus used a rate of return on assets to calculate economic damages.

[BY MS. BUMBARY-LANGSTON:]

Q. Did the Warren analysis use a rate of return like you did?

[BY MR. SAXOWSKY:]

A. No.

Q. So how, how was that calculation made then?

A. They, the Warren analysis prepared an enterprise analysis for the years of the discrimination.

There was, apparently there was some data as to the crops that were being raised on the part of the farm that they still controlled or that they operated and the number of hogs or whatever it was that they were raising in terms of livestock, so they had that data in which they could base an enterprise analysis.

That would have been my first choice for this analysis, but we don't have that level of detail, because there was no operation between '97 and the current time.

*Id.* at 97-98. Mr. Saxowsky further testified, "[i]n the Warren analysis there was enough data that the loss could be calculated by calculating revenue, minus expenses. In the Wilkinson matter we calculated loss by using a rate of return on assets, but the rate of return was calculated based on revenue minus costs." *Id.* at 102-03. Mr. Saxowsky tried to salvage his speculative calculations with this same theory in the United States district court case, but, during cross-examination, he admitted that his analysis was very different from the Warren analysis. (*Wilkinson* Trial Transcript, Cross-Examination of David Saxowsky (Ex. D at 227-28).)

Mr. Saxowsky testified in the United States District Court for the District of North Dakota that, for an enterprise analysis, "[y]ou consider the revenue generated by each portion of the business or each enterprise within the business. You consider the costs of operating each of those enterprises. The difference between the revenue and the cost would be your profit or your return for that particular enterprise." (*Wilkinson* Trial Transcript, Cross-Examination of David Saxowsky (Ex. D at 178).) However, Mr. Saxowsky did not have any farm records from Mr. Wilkinson to use to calculate the revenue or costs for the various Wilkinson enterprises in the United States district court case or the instant proceeding. (*Wilkinson* Trial Transcript, Cross-Examination of David Saxowsky (Ex. D at 190-92, 195); Saxowsky Deposition of May 21, 2008, at 97-99, 134-36.) In essence, Mr. Saxowsky was using data from an average of North Dakota farms to conduct an enterprise analysis for the Wilkinson farm. (Saxowsky Deposition of May 21, 2008, at 113-14).[59] This method is problematic based on *Warren*, which discounted the method used by FSA's expert in calculating damages because he modeled the average farmer in Mr. Warren's area to assess fair compensation for loss. I found in Warren "Dr. Glaze's [Agency's expert] calculation of loss to be highly implausible and unreliable."[60]

Mr. Saxowsky's calculations have other troubling aspects. Mr. Saxowsky testified he was unaware of the loans made by USDA to Ernest Wilkinson and Mollie Wilkinson and unaware that Ernest Wilkinson and Mollie Wilkinson had received loan restructuring, specifically a debt write down. (Saxowsky Deposition of May 21, 2008, at 84.) Even the ALJ determined that this information could be a mitigating factor in determining damages. (ALJ's Determination: Part One at 13.) Also, Mr. Saxowsky testified that he never "figured out" how many enterprises the Wilkinsons had, even though he claimed his calculations were based on an enterprise analysis. (Saxowsky Deposition of May 21, 2008, at 101.) He was not even sure which farms or tracts identified by USDA actually belonged to Ernest Wilkinson and Mollie Wilkinson. *Id.* at 49. In addition, Mr. Saxowsky relied on Mr. Wilkinson to provide information about the size of the herd, numbers of acres, and their valuation without verification from an

[59]FSA's expert, an agricultural economist from Pennsylvania State University, conducted an enterprise analysis of the Wilkinson farm using USDA data to calculate damages. (See Ex. A, Tab 56, Agency's Motion to Strike Determination: Part Two, Ex. C at Table II (Agency's Expert Report).) Mr. Saxowsky testified that FSA or USDA information would be an appropriate choice to obtain data about the Wilkinson farm. (Saxowsky Deposition of May 21, 2008, at 149.)

[60]*In re Will Sylvester Warren*, HUDALJ No. 00-10-NA, USDA Docket No. 1194 at 26 (Dec. 19, 2002).

independent source. (*Wilkinson* Trial Transcript, Cross-Examination of David Saxowsky (Ex. D at 208-12).) Even the United States district court in *Wilkinson* was troubled that "Wilbur's unsupported estimate of replacement equipment cannot be used in the calculation." *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 at *25 (D.N.D. Nov. 9, 2007).

One of Mr. Saxowsky's critical assumptions, that the Wilkinson farm was an average producer, is fatal to his calculation of damages based on a rate of return on assets. Mr. Saxowsky relied on the assumption that the Wilkinson farm was operating as a typical farm business for that region of North Dakota. (Saxowsky Deposition of May 21, 2008, at 50.) Reliance on this assumption meant that the rate of return on assets was higher as compared to a low producing farm operation. Mr. Saxowsky testified that if the Wilkinson farm, "would have enjoyed the income of an average operation in that region of North Dakota, this would have been the rate of return that they would have received, and that would have, multiplying that times the value of their assets, gives them their projected income." *Id.* at 94-95. He also testified that there is a range of profitability of farm operations and that the more highly profitable the farm, the higher the rate of return. *Id.* at 96.

The assumption that the Wilkinson farm was an average producing farm is critical to the rate of return on assets used in Mr. Saxowsky's calculation of damages. If the assumption that the Wilkinson farm was an average producer is changed, then the rate of return on assets would change. Mr. Saxowsky explained this change in the rate of return during the 2007 United States district court trial as follows:

> [BY MR. ROCKSTAD:]
>
> Q. If it turns out that your critical assumption is wrong, your report would be unreliable, is that correct?
>
> [BY MR. SAXOWSKY:]
>
> A. It would have to be modified.
>
> Q. So the report as it exists, if your assumption is wrong as it exists, it would be unreliable right?
>
> A. The methodology is correct. The assumptions and so forth would have to be modified, and then the methodology would

have to be applied, and the results could be updated or revised.

> Q. So if it turns out that the plaintiffs in this case do not have the farm management skills similar to those farmers who participate in the Farm Business Management Program, your report would be unreliable, isn't that correct?
>
> A. You would change some of the basic assumptions before you applied the methodology, yes.
>
> Q. What assumption would you change?
>
> A. You would change the rate of return on assets.

*Id.* at 218.

Mr. Saxowsky submitted a table as evidence during the United States district court trial which showed three columns of data reflecting rates of return for highly profitable farms, average farms, and least profitable farms. He testified he did not have any information or data to help him decide into which category the Wilkinson farm should be placed. *Id.* at 219.

The United States district court acknowledged that the Wilkinsons were unable to provide information for their farming operation so Mr. Saxowsky had to use economic databases to fill in the information in order to conduct the enterprise analysis which should include detailed information about the farm operation including acres, yields, revenues, and expenses. *Wilkinson v. United States*, Case No. 1:03-cv-02, 2007 U.S. Dist. LEXIS 83662 at *24-26 (D.N.D. Nov. 9, 2007). The Court agreed with the United States that the Wilkinsons had a below average farm with a below average rate of return. *Id.* at *9. The Court further stated:

> Professor Saxowsky's own report lists rates of return on assets for average, above average, and below average farms in the south-central region. Ex. P-30, at 4 Table 1. Professor Saxowsky's research shows a negative rate of return on assets for below average farmers. The Court finds this is the most appropriate category for the Wilkinsons' operation.

*Id.* at *25.

The Court acknowledged that an enterprise methodology with a negative rate of return would yield a negative damage award, so it based

its damages calculation on the rental value that the Wilkinsons could have received. Mr. Saxowsky did not provide any data in the instant proceeding regarding rental value for the land that the Wilkinsons leased, so I am left with a negative damages award or no lost income.

This result is supported by FSA's expert who actually conducted a detailed enterprise analysis of the Wilkinson farm using information about crop yields, sale of livestock, revenue, and costs from USDA. (Ex. A, Tab 56, Agency's Motion to Strike Determination: Part Two, at Ex. C at 8 and Table 1 (Agency's Expert Report).) In his report, Dr. Hanson concluded that the enterprise-based analysis estimate of lost income in 2007 dollars would be negative $164,337. He based his calculation that the Wilkinsons would not have made a profit if they had continued farming on "[t]he combination of poor yields and production, low prices, ineffective cost control, and the cost/price squeeze of the 1980's farm financial crisis, [which] resulted in the Wilkinson farm enterprises being generally unprofitable or only marginally profitable, especially in the 1970's rapid expansion phase of his farming career." *Id.* Therefore, based on the assessment of the United States District Court for the District of North Dakota and the assessment of the FSA expert – that the Wilkinson farm was a below-average producer and would not have generated any income over the years – I conclude Mr. Saxowsky's calculation of damages must be discounted and no economic damages be awarded.

### *4. There Is No Evidence To Support An Award For Non-Economic Damages*

The ALJ uses the "same 4.687 factor" that Mr. Wilkinson's expert used to calculate intangible losses. This factor resulted in the ALJ's determination that non-economic, intangible recovery should total $7,192,890. (ALJ's Determination: Part Two at 5.) Then, finding that the Wilkinsons' "level of suffering" was considerable but should be reduced, the ALJ concluded that intangible losses in the amount of $3,750,000 were proper. I find the ALJ's award based upon mental anguish and suffering without having seen or elicited testimony from Mr. Wilkinson, error.

Damages under the ECOA are not to be presumed.[61] Actual damages

[61] *Church of Zion Christian Center, Inc. v. SouthTrust Bank of Ala.*, No. CA 96-0922-MJ-C, 1997 WL 33644511 at *8 (S.D. Ala. July 31, 1997) ("Actual damages may include out-of-pocket monetary losses, injury to credit reputation, mental anguish, humiliation or embarrassment, but courts will not presume any injury.")

under the ECOA must be specifically proven.[62] The ALJ does not cite to the record for his determination that the Wilkinsons' "anguish and emotional suffering was truly considerable[.]" (ALJ's Determination: Part Two at 5.)[63]

Mr. Wilkinson set forth no specific information regarding entitlement to emotional distress damages. In *Ruffin-Thompkins v. Experian Information Solutions, Inc.*, 422 F.3d 603 (7th Cir. 2005), the Court addressed the argument of a plaintiff alleging violations of the Fair Credit Reporting Act that she need not produce evidence of emotional damages with a high degree of specificity. The Court noted that it has "maintained a strict standard for a finding of emotional damage because they are so easy to manufacture." 422 F.3d at 609 (citations omitted). The Court required that "when the injured party's own testimony is the only proof of emotional damages, she must explain the circumstances of her injury in reasonable detail; she cannot rely on mere conclusory statements." *Id.* (citation omitted). I find no specific evidence in the record regarding the nature and extent of emotional distress experienced by Ernest Wilkinson and Mollie Wilkinson. Further, I do not find in the record any specific evidence of the personal affect on Ernest Wilkinson or Mollie Wilkinson of the alleged discriminatory conduct. Mr. Wilkinson's claim for intangible damages in the instant proceeding "is too speculative and unsubstantiated to support an award of actual damages."[64]

The purpose of the now-cancelled damages hearing was so that the ALJ could determine, after receipt of testimony and exhibits and by

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[62] *Id.* (citing *Anderson v. United Finance Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982)); *see also DeCorte v. Jordan*, 497 F.3d 433, 442 (5th Cir. 2007) (compensatory damages for emotional distress and other intangible injuries for employment discrimination "are not presumed from the mere violation of constitutional or statutory rights, but require specific individualized proof, including how each Plaintiff was personally affected by the discriminatory conduct and the nature and extent of the harm.").

[63] The ALJ's award for non-economic damages must be limited to the emotional distress of Ernest Wilkinson and Mollie Wilkinson, as this Complaint is brought on their behalf. *See Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 678 n.1 (1st Cir. 1999) (ECOA cases that allow emotional damages must limit the damages to the applicant himself). However, the ALJ's opinion, as written, does not distinguish in any way between alleged emotional distress endured by Ernest Wilkinson and Mollie Wilkinson, and purported distress of other family members. In fact, Mr. Wilkinson's Position Statement only mentions non-economic damages as they relate to the Wilkinson children's emotional distress. (See Ex. A, Tab 14, Wilkinson Position Statement at 47 ("the Wilkinsons had to . . . witness the premature death of their proud father").

[64] *See DiNoto v. Rockland Financial Mtg. Co., LLC*, No. 3:06-cv-1132, 2007 WL 2460674 at *5 (D. Conn. Aug. 2, 2007) (holding in an ECOA case that the claim for intangible damages "is too speculative and unsubstantiated to support an award of actual damages).

judging witnesses' credibility, what damages, if any, Mr. Wilkinson was entitled to recover. The ALJ should have evaluated the damages at a hearing if I had upheld the ALJ's finding of liability in the ALJ's Determination: Part One.[65] Non-economic damages cannot be presumed, and the ALJ's application of a mathematical formula based upon economic damages to arrive at non-economic damages, is error. Therefore, I reject the ALJ's proposed damage award for emotional distress.

## CONCLUSIONS

1. Mr. Wilkinson's Complaint, dated March 5, 1990, is not an "eligible complaint" under Section 741 or the Rules of Practice and the Complaint is not eligible for review under Section 741.
2. Mr. Wilkinson failed to prove that FSA discriminated against Ernest Wilkinson or Mollie Wilkinson in violation of the ECOA.
3. Mr. Wilkinson failed to prove that Ernest Wilkinson or Mollie Wilkinson were damaged by FSA.

For the foregoing reasons, the following decision is issued.

## DECISION

1. Mr. Wilkinson's Complaint alleging FSA discriminated against Ernest Wilkinson and Mollie Wilkins in violation of the ECOA is dismissed with prejudice.
2. The ALJ's June 3, 2008, Determination: Part One is reversed.
3. The ALJ's June 18, 2008, Determination: Part Two is vacated.
4. Based upon my reversal of the ALJ's June 3, 2008, Determination: Part One and my vacating the ALJ's June 18, 2008, Determination: Part Two, all motions currently pending before me are rendered moot and are therefore dismissed.

## JUDICIAL REVIEW

Mr. Wilkinson has the right to seek judicial review of this Final Determination in the United States Court of Federal Claims or in a

[65] *See Green v. Rash, Curtis and Associates*, 89 F.R.D. 314, 317 (E.D. Tenn. 1980) (stating "this Court thinks that it can make a much more intelligent decision as to what mental anguish-type damages the respective plaintiffs might be able to recover under the provision of 15 U.S.C. § 1692k(a)(1) after hearing their proof at trial").

United States district court of competent jurisdiction.[66] Mr. Wilkinson has at least 180 days after the issuance of this Final Determination within which to commence a cause of action seeking judicial review of this Final Determination.[67]

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**In re: ROBERT A. SCHWERDTFEGER.**
**SOL Docket No. 07-0170.**
**OCR No. 1139.**
**Final Determination.**
**Filed December 15, 2008.**

**ECOA – Operating loans – Disparate treatment, when not.**

The Asst. Secy. USDA Civil rights (OCR), adopted the decision of the ALJ in finding no disparate treatment between two brothers on the same farm by the local FSA office regarding operating loans.

Inga Bumbary-Langston, for FSA, OGC
Complainant, Pro se.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Final Determination issued by Margo M. McKay, Assistant Secretary for Civil Rights.

## NATURE OF THE PROCEEDING

This proceeding is an adjudication under section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 (7 U.S.C. § 2279 note) [hereinafter Section 741] and the rules of practice applicable to adjudications under Section 741 (7 C.F.R. pt. 15f) [hereinafter the Rules of Practice]. Section 741 waives the statute of limitations on eligible complaints filed against the United States Department of Agriculture [hereinafter USDA] alleging discrimination in violation of the Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) [hereinafter the ECOA].[1] Section 741(b) provides that a complainant may seek a determination by USDA on the merits of an eligible complaint, and,

[66] 7 U.S.C. § 2279(d) note; 7 C.F.R. § 15f.26.
[67] 7 U.S.C. § 2279(c) note; 7 C.F.R. § 15f.26.
[1] The term *eligible complaint* is defined in Section 741 and the Rules of Practice as a nonemployment related complaint that was filed with USDA before July 1, 1997, and alleges discrimination during the period January 1, 1981, through December 31, 1996: (1) in violation of the ECOA, (2) in the administration of a commodity program, or (3) in the administration of a disaster assistance program (7 U.S.C. § 2279(e) note; 7 C.F.R. § 15f.4).

after providing the complainant an opportunity for a hearing on the record, USDA shall provide the complainant such relief as would be afforded under the ECOA notwithstanding any statute of limitations.

## PROCEDURAL HISTORY

Robert A. Schwerdtfeger [hereinafter Complainant] seeks redress for injuries allegedly caused by discriminatory treatment he received from the Farmers Home Administration, USDA,[2] in violation of the ECOA. Complainant filed a Complaint dated September 17, 1994, alleging FSA's county supervisor in Effingham County, Illinois, discriminated against him on the basis of age (GX 1).[3] On October 5, 1994, the Office of Civil Rights, USDA,[4] agreed to investigate the Complaint and issue a report with its findings (GX 2). On September 9, 1997, OCR recommended adjudication of the Complaint (GX 3). On January 15, 1999, OCR issued a determination concluding FSA did not discriminate against Complainant on the basis of age and advising Complainant of his options for further review (GX 4).[5] On June 28, 1999, Complainant requested a Section 741 review (GX 5), and on August 2, 1999, OCR informed Complainant that his Complaint was eligible for processing under Section 741 (GX 6). In a letter dated December 6, 1999, Complainant amended his Complaint to include "familial discrimination or any other category of discrimination that would apply to [his] case." Complainant also requested an administrative determination of his Complaint, but further requested, if the Director of OCR could not negotiate a settlement of the Complaint, that he be given a hearing before an administrative law judge. (GX 7.) On December 16, 2002, OCR determined that the Complaint was not appropriate for informal resolution (GX 8). By letter dated August 23, 2005, Complainant

[2]The Farmers Home Administration ceased to exist in October 1994. The farm loan programs, which it administered and which are the subject of the instant proceeding, are now administered by the Farm Service Agency, USDA. In this Final Determination, I refer to both the Farmers Home Administration and the Farm Service Agency as the "FSA."

[3]FSA's exhibits are designated as "GX"; Complainant's exhibits are designated as "CX"; and Administrative Law Judge Peter M. Davenport's [hereinafter the ALJ] exhibits are designated as "ALJX."

[4]The Office of Civil Rights was renamed the Office of Adjudication and Compliance pursuant to a reorganization on March 12, 2007. In this Final Determination, I refer to both the Office of Civil Rights and the Office of Adjudication and Compliance as the "OCR."

[5]The letter containing OCR's determination is erroneously dated January 15, 1998 (GX 9 Report of Investigation at 1).

requested a hearing before an administrative law judge and again amended his Complaint with new allegations sounding in tort (CX 5). On July 21, 2006, OCR issued a Supplementary Report of Investigation (GX 9).

OCR issued a Position Statement, dated June 6, 2007, concluding: (1) Complainant's allegation of discrimination by FSA in 1976 is ineligible for review under Section 741 because Section 741 only applies to discrimination that occurred during the period January 1, 1981, through December 31, 1996; and (2) as to the remaining claims of discrimination, Complainant failed to present a prima facie case.

On November 28, 2007, Complainant filed a response to OCR's June 6, 2007, Position Statement. On January 3, 2008, FSA filed a Motion To Dismiss And/Or For Summary Judgment, and on March 10, 2008, Complainant filed a response to FSA's Motion To Dismiss And/Or For Summary Judgment.

On June 25, 2008, the ALJ issued a Decision and Order [hereinafter Proposed Determination] granting FSA's Motion To Dismiss And/Or For Summary Judgment and dismissing the Complaint. On July 30, 2008, Complainant requested review of the ALJ's Proposed Determination, and on October 30, 2008, filed a brief in opposition to the ALJ's Proposed Determination. On December 1, 2008, FSA filed a brief in support of the ALJ's Proposed Determination.

## DETERMINATION

### *I. Final Determination Summary*

Based upon a careful review of the record and after consideration of Complainant's brief in opposition to the ALJ's Proposed Determination and FSA's brief in support of the ALJ's Proposed Determination, I adopt, with minor changes, the ALJ's Proposed Determination as the Final Determination. I affirm the ALJ's Proposed Determination granting FSA's Motion To Dismiss And/Or For Summary Judgment and dismissing the Complaint.

### *II. Complainant's Allegations*

Complainant's September 17, 1994, Complaint alleges FSA discriminated against Complainant on the basis of age. As the proceeding continued, Complainant made additional allegations of both discrimination and tortious conduct by FSA. The following is a synopsis of Complainant's allegations:

(1) On or about May 1976, FSA's county supervisor allegedly discriminated against Complainant on the basis of age when the FSA county supervisor made statements to Complainant and Complainant's older brother, Howard M. Schwerdtfeger, which caused Complainant and his brother to split the Schwerdtfeger family farm into two separately titled tracts. After the split, Complainant owned the non-homestead portion of the farm consisting of 59.4 unimproved acres on the south side of Interstate 70, and Complainant's brother owned the 43.07 acre homestead portion of the farm with all its improvements on the north side of Interstate 70. This split of the farm between Complainant and Complainant's brother started a chain of events whereby Complainant was allegedly financially disadvantaged in relation to his brother, Howard M. Schwerdtfeger.

(2) On or about November 27, 1979, the FSA county supervisor allegedly discriminated against Complainant on the basis of age by requiring him to co-sign an Economic Emergency loan along with his brother and to mortgage his parcel of land for improvements made, not on Complainant's land, but upon Complainant's brother's land.

(3) On or about April 17, 1985, the FSA county supervisor allegedly discriminated against Complainant by engaging in fraud and misleading and improper loan procedures when the FSA county supervisor arranged a partnership consolidation loan, but failed to provide for reversing the process that had divided the Schwerdtfeger family farm into two separately titled tracts of land.

(4) On or about July 1, 1994, the FSA county supervisor allegedly discriminated against Complainant by finding Complainant ineligible for a homestead exemption and the leaseback-buyback benefits of FSA's preservation loan service program for his unimproved, non-homestead portion of the farm, whereas Complainant's brother with the homestead portion of the farm, was eligible for a homestead exemption (GX 1, GX 5, GX 36).

(5) In a letter dated December 6, 1999, Complainant alleged FSA engaged in "familial [status] discrimination or any other category of discrimination that would apply to [his] case." (GX 7.)

(6) In a letter dated August 23, 2005, addressed to the Inspector General, USDA, Complainant alleged FSA engaged in fraud, intimidation, coercion, and retaliation designed to deny Complainant full benefits to which Complainant is lawfully entitled (CX 5).

(7) In a statement dated November 26, 2007, Complainant alleged his older brother, Howard M. Schwerdtfeger, forged Complainant's signature on FSA documents,"with total acceptance" by the FSA county

supervisor (CX 11-CX 12).

### *III. FSA's Position Concerning Complainant's Allegations*

FSA argues Complainant's allegations concerning the 1976 division of the Schwerdtfeger family farm and the 1979 Economic Emergency loan are outside the jurisdiction of the Section 741 process which contains the requirement that the alleged discrimination must have occurred during the period January 1, 1981, through December 31, 1996. As to the other allegations involving conduct within the eligible period, FSA contends there is no basis to find FSA discriminated against Complainant in violation of the ECOA.

### *IV. Factual Background*

Complainant is a resident of Altamont, Effingham County, Illinois, born on April 10, 1953. An older brother, Howard M. Schwerdtfeger was born on April 3, 1951. (GX 1; CX 22 at 18.)[6] For four generations, the Schwerdtfeger family has owned farm land in Effingham County, Illinois, having been originally purchased by Complainant's great-grandfather. The farm land has passed from the original settler to Complainant's grandfather and then to Complainant's father, Elmer M. Schwerdtfeger. Elmer and his two sons operated a dairy on the property. (CX 4 at 5.)

In 1975, Elmer Schwerdtfeger retired and withdrew his equity from the farm by selling the dairy to his sons, Howard M. Schwerdtfeger and Robert A. Schwerdtfeger. Elmer Schwerdtfeger had encumbered the property with FSA loans. Due to lending restrictions at that time precluding joint loans to the brothers, as a precondition to the assumption of the loans, FSA required the brothers to divide the farm into two tracts and enter into assumption agreements covering the indebtedness (ALJX 3; GX 14, GX 19, GX 21). In a letter dated December 1, 1975, addressed to both brothers, FSA's acting county supervisor wrote: "As I explained earlier, we cannot make a joint loan between brothers, so you must agree who will own which half of the farm and how much each half is worth." (GX 14.)

Complainant and Complainant's brother agreed upon a property division, with the older brother, Howard M. Schwerdtfeger, being

[6]A loan application completed on behalf of Howard M. Schwerdtfeger and Complainant indicates Howard M. Schwerdtfeger was born October 4, 1951, and Complainant was born September 4, 1953 (GX 12); however, Complainant states his birth date is April 10, 1953, and his older brother was born April 3, 1951 (CX 22 at 18).

deeded the homestead tract, which included the family home, two silos, a milking parlor, and all of the other dairy buildings on 43.07 acres. Complainant received the remaining 59.4 unimproved acres.[7] Although the original property was divided into two tracts when conveyed to the brothers, Complainant and his brother operated the farm together and continued to live together with their father in the family home on Howard M. Schwerdtfeger's tract. In order to make the equity payment to their father, the brothers obtained a loan from the First National Bank of Altamont.[8]

On May 7, 1976, the brothers assumed their father's loans, with Complainant executing a Farm Ownership loan which incorporated and replaced three of Elmer Schwerdtfeger's promissory notes dated October 30, 1969, November 23, 1970, and October 29, 1971, in the amount of $32,794.84. Howard Schwerdtfeger's Farm Ownership loan replaced his father's note dated November 23, 1970, in the amount of $25,818.48. (GX 21-GX 22.) FSA took liens subordinate to the first mortgages held by the First National Bank of Altamont (GX 23).

On April 28, 1978, Howard M. Schwerdtfeger obtained a Rural Housing loan from FSA in the amount of $32,800. As Elmer Schwerdtfeger and Complainant were residing in the house with Howard, all three were required to co-sign the note. (GX 24.) On May 2, 1979, the FSA county supervisor informed Howard Schwerdtfeger that he was eligible to receive a loan to add a parlor and machine shed and indicated that a joint loan might be appropriate since FSA had been authorized to grant partnership loans. In a subsequent letter to both Complainant and Complainant's brother, the FSA county supervisor suggested a meeting and stated that both of them must agree to borrow the money in order for the loan to be approved. (ALJX 2; GX 25-GX 26.) On November 27, 1979, Complainant and his brother signed a promissory note for a $100,000 Economic Emergency loan secured by mortgages on their respective tracts of land (GX 27).

On February 13, 1985, the FSA county supervisor contacted Howard M. Schwerdtfeger by letter, suggesting transfer of both brothers' notes to a partnership which would allow FSA to give them a larger set aside of the higher interest notes (GX 30). On April 17, 1985,

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[7] FSA appraised Howard M. Schwerdtfeger's 43.07 acre tract with the improvements on the north side of Interstate 70 at $51,500 and Complainant's unimproved non-homestead 59.4 acre tract on the south side of Interstate 70 at $53,000 (GX 23).

[8] Complainant borrowed $14,000 and Howard M. Schwerdtfeger borrowed $21,000. Both loans were closed on May 3, 1976, and were secured by mortgages on the respective tracts deeded to the brothers. (GX 21-GX 23.)

without any title change reversing the separate ownership of the tracts of land, the partnership assumed all four of the prior loans to the brothers, including each brother's Farm Ownership loan, the Rural Housing loan, and the Economic Emergency loan. Complainant and his brother, d/b/a Schwerdtfeger Dairy Farm, a partnership, executed five promissory notes. (GX 28.)

Complainant and his brother's dairy operation continued to need additional funds to operate. On June 16, 1992, FSA sent a Notice of Program Availability to the partnership, addressed to Howard M. Schwerdtfeger, explaining the primary and preservation loan service and debt settlement programs (GX 32). Complainant and his brother returned the form acknowledging they had received the Notice of Program Availability and asked that they be considered for the program (GX 32). By letter dated March 2, 1993, to the partnership, FSA informed the brothers that they were ineligible for Primary Loan Service Programs because the Debt and Loan Restructuring System (DALR$) analysis computation indicated that the partnership "was not able to restructure debts so that [the partnership would be] able to make required debt repayments, even with a 100% write down of all [FSA] debt eligible for write down." (GX 33.) Howard Schwerdtfeger appealed the determination of ineligibility; however, his appeal was denied by the National Appeals Division on January 28, 1994 (GX 31, GX 34).

FSA continued to correspond with the partnership and in letters dated May 5, 1994, and May 25, 1994, addressed to Schwerdtfeger Dairy, informed Complainant and his brother that FSA would consider Schwerdtfeger Dairy for preservation servicing in the form of homestead protection and leaseback-buyback. The letters stated that Complainant would have to provide 14 documents in order for FSA to process any request. (GX 35.) The partnership took no action to avail itself of the preservation servicing, and on July 1, 1994, FSA denied preservation loan serving for failure to provide any of the information or documents requested on May 5, 1994, and May 25, 1994 (GX 36). On August 26, 1994, FSA issued a Notice of Acceleration declaring the debts due for failure to pay (GX 38), and in September 1994, Complainant filed the Complaint which instituted the instant proceeding.

## *V. Applicable Legal Standards*

### *A. Summary Judgment*

Summary judgment is appropriate if the evidence shows that there is

no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[9] The party seeking summary judgment bears the initial burden to show the tribunal, by reference to materials on file, that there are no genuine issues of material fact that should be decided at hearing.[10] Once the moving party has satisfied its responsibility, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact.[11] When determining whether a genuine issue of material fact exists, the tribunal must resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.[12]

### *B. Section 741*

Section 741 waives the statute of limitations on eligible complaints[13] filed against USDA alleging discrimination, in violation of the ECOA. As a limited waiver of sovereign immunity, Section 741 must be strictly construed in favor of the United States.[14]

### *C. Equal Credit Opportunity Act*

ECOA creates a private right of action against a creditor, including the United States, who discriminates against an applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, or age or because the applicant in good faith exercised any right under 15 U.S.C. §§ 1601-1693r.[15]

### *D. Burden of Proof—Disparate Treatment*

A complainant may prove unlawful discrimination under the ECOA using one or more of three theories: (1) direct evidence; (2) disparate

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[9] *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).
[10] *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).
[11] *Id.*
[12] *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004); *LaFond v. General Physics Serv. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995).
[13] See note 1.
[14] *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986).
[15] 15 U.S.C. § 1691(a).

treatment analysis; and (3) disparate impact analysis.[16] Complainant has the burden of proving his claim of discrimination. To prevail using the direct evidence method, the evidence must be such that, if believed, proves the fact of intentional discrimination without inference or presumption.[17] Direct evidence includes any statement or written document showing a discriminatory motive on its face.[18] Complainant has provided no direct evidence of discrimination by FSA. Moreover, the disparate impact analysis is inapplicable in this case. Since there is no direct evidence of discrimination, consideration must be given to whether there is sufficient indirect or circumstantial evidence of discrimination to establish a violation of the ECOA.

Absent direct evidence of discrimination, courts have generally applied the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in discrimination cases, including cases arising under the ECOA.[19] In *McDonnell Douglas*, the Supreme Court of the United States articulated a three-part burden-shifting test for Title VII discrimination cases. The burden is initially on the complainant to make a prima facie showing of discrimination by a preponderance of the evidence.[20] The prima facie showing, when made, raises a rebuttable presumption that a respondent's conduct amounted to unlawful discrimination.[21] The burden of production then shifts to the respondent to articulate a legitimate business reason for his actions. The burden then shifts back to the complainant to prove that the articulated reasons given by the respondent are pretextual or unworthy of belief. At all

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[16] *Faulkner v. Glickman*, 172 F. Supp.2d 732, 737 (D. Md. 2001); *A.B.&S. Auto Serv., Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997); *In re Wilbur Wilkinson*, SOL Docket No. 07-0196 at 15 (Oct. 27, 2008); *In re Richard A. Banks*, USDA Docket No. 767, HUDALJ No. 05-004-NA at 28 (Feb. 23, 2007); *In re Ruby J. Martens* (Determination and Order Granting Motion for Summary Judgment), USDA Docket No. 1204, HUDALJ No. 02-09-NA (June 30, 2003).

[17] *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 195 (5th Cir. 2001); *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998); *Cooley v. Sterling Bank*, 280 F. Supp.2d 1331, 1338 (M.D. Ala. 2003), *aff'd*, 116 F. App'x 242 (Table) (11th Cir. 2004).

[18] *See*, *for example*, *Fierros v. Texas Dep't of Health*, 274 F.3d 187 (5th Cir. 2001) (where an employer told the plaintiff she was denied a pay raise because she filed a discrimination complaint); *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 402 (5th Cir. 2000) (where a dean was said to have stated he denied a professor a pay raise because the professor filed a discrimination suit against the university), *cert. denied*, 532 U.S. 937 (2001).

[19] *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713 (7th Cir. 1998); *Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 995 (5th Cir. 1995).

[20] *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 361 ( D.C. 1993).

[21] *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 361 (D.C. 1993).

times, the complainant bears the burden of persuasion.

In order for Complainant to make a prima facie case of age discrimination, he would be required to show: (1) he is a member of a protected class; (2) he applied for and was qualified to receive loan benefits offered by FSA; (3) despite his qualification for loan benefits, he was denied those benefits; and (4) he was treated differently (less favorably) than others similarly situated who were not of his protected class.[22]

## *VI. Discussion*

The Complaint fulfills the initial threshold Section 741 requirement of being a non-employment claim as well as the second requirement of being filed before July 1, 1997. The Complaint seeks relief under the ECOA and alleges a violation of the ECOA in connection with the administration of FSA loan programs on the basis of age, which is a protected basis. Aside from the conclusory allegations of age discrimination, however, there is little support for a prima facie showing of age discrimination. Nonetheless, I examine each of Complainant's allegations.

Complainant alleges FSA discriminated against him in connection with the 1976 division of the Schwerdtfeger family farm and the 1979 Economic Emergency loan. Claims for alleged acts of discrimination occurring outside the period January 1, 1981, through December 31, 1996, are not eligible for processing under Section 741.[23] Accordingly, these allegations of discrimination in 1976 and 1979 cannot be considered under Section 741 and must be dismissed.

Complainant further alleges FSA engaged in fraud and misleading and improper loan procedures during the 1985 loan consolidation when FSA arranged a partnership consolidation loan, but failed to provide for reversing the process that had divided the Schwerdtfeger family farm into two separately titled tracts of land. FSA's function was to administer the FSA loan program for proper farm related purposes and to ensure that adequate security in favor of FSA was maintained. As a co-signer, at any time during the transaction, Complainant could have refused to execute the April 17, 1985, loan documents until the

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[22] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Rowe v. Union Planters Bank of S.E., Missouri*, 289 F.3d 533, 535 (8th Cir. 2002); *Latimore v. Citibank, FSB*, 979 F. Supp. 662, 665 (N.D. Ill. 1997), *aff'd*, 151 F.3d 712 (7th Cir. 1998).

[23] See note 1.

underlying property of the Schwerdtfeger Dairy operation was re-titled in a manner satisfactory to Complainant. Consequently, Complainant's claim of fraud and misleading and improper loan procedures resulting in discrimination during the processing of the 1985 loan consolidation is without merit. A title merger with or without FSA's help or permission could have been effected at any time after FSA acquired authority to loan to partnerships (GX 25). FSA's security interest would have been unchanged and unharmed. The record contains no documents that suggest that FSA would have interfered with, or did interfere with, merging of the two parcels after 1979. Fraud and nonfeasance or malfeasance in loan processing procedures sound in tort and are beyond the reach of Section 741. Accordingly, the allegations related to FSA's 1985 loan consolidation must also be dismissed.

Complainant alleges that in 1994 FSA discriminated against him by finding him ineligible for the homestead exemption and the leaseback-buyout benefits of the FSA preservation loan service program. In order to qualify for the loans, FSA required 14 documents to be completed as a part of the application process. Complainant failed to provide the documents or to complete the application process. The letter dated July 1, 1994, addressed to Complainant, makes clear that FSA denied preservation loan services to Complainant, not because of his age, but because of Complainant's failure to provide FSA with any of the information requested or to complete the application process (GX 36). Accordingly, the allegations related to FSA's 1994 determination that Complainant was not eligible for the preservation loan service program must be dismissed.

Finally, Complainant's post July 1, 1997, allegations of: (1) "familial [status] discrimination or any other category of discrimination that would apply to [his] case" (GX 7); (2) fraud, intimidation, coercion, and retaliation (CX 5); and (3) misfeasance or nonfeasance related to FSA's acceptance of alleged forgery by Howard Schwerdtfeger (CX 11), are not eligible for Section 741 review.[24] Moreover, even if the allegations of fraud, intimidation, coercion, and retaliation contained in the August 23, 2005, letter to the Inspector

[24]See note 1. *See also In re Richard Banks*, HUDALJ No. 05-004-NA, USDA Docket No. 767 at 28 (Aug. 30, 2007) (stating the complainant first made the specific claim of color discrimination in September 1997, after the July 1, 1997, cut off for filing a timely claim); *In re Joseph & Patricia Tuchrello*, HUDALJ No. 03-30-NA, USDA Docket No. 427 at 5 (Dec. 31, 2003) (stating the complainant's "allegations were first made in 1999, well after the July 1, 1997, date required for eligibility under Section 741"); *In re Larry and Susan Ansell*, HUDALJ No. 00-22-NA, USDA Docket No. 1150 at 3 (Nov. 21, 2001) (stating an allegation of discrimination made for the first time on October 21, 1997, was not timely filed).

General, USDA (CX 5), had been timely filed, those allegations sound in tort and fall outside Section 741 review. Similarly, the November 26, 2007, allegation of FSA's acceptance of Complainant's brother's forgery (CX 11) fails for the same reason. Finally, Complainant's December 6, 1999, allegation of familial status discrimination (GX 7) is inapplicable to the facts of this case. As an initial matter, "familial status" is not a covered status under the ECOA. Moreover, even though "familial status" is a prohibited basis of discrimination in USDA programs, the term applies to individuals with children under the age of 18 living in the household and Complainant alleges "familial status discrimination" based on the birth order of Complainant and Complainant's brother. (GX 8.)

*VII. Complainant's Opposition to the ALJ's Proposed Determination*

Complainant raises nine issues in his brief in opposition to the ALJ's Proposed Determination. First, Complainant requests that I delay my review of the ALJ's Proposed Determination and perform an audit of the Office of Administrative Law Judges to ascertain whether mistakes acknowledged by the Hearing Clerk adversely affected Complainant. Complainant requests that I determine the extent of the Hearing Clerk's error and the reasons for the error and that I remand the proceeding to another administrative law judge. (Brief in Opposition to the ALJ's Proposed Determination at 1-2, 20.)

I find no basis for delaying the instant proceeding to conduct an audit of the Office of Administrative Law Judges. As stated in the July 31, 2008, Acknowledgment of Request for Review, the Hearing Clerk admits he inadvertently mailed Complainant two documents from another proceeding, *In re Wilbur Wilkinson*, SOL Docket 07-0196. These inadvertent mailings have absolutely no affect on the disposition of the instant proceeding and are not a basis for remanding the proceeding to another administrative law judge.

Complainant also asserts he did not receive a summary listing and description of his exhibits (CX 1-CX 22) and cites his lack of receipt of this summary and description as "further evidence of mistakes by the [Hearing] Clerk." (Brief in Opposition to the ALJ's Proposed Determination at 6.) Even if I were to find that the Hearing Clerk failed to mail Complainant the summary listing and description of his own exhibits (ALJX 1) (which I do not so find), I would find this failure to constitute harmless error and reject Complainant's request that I remand this proceeding to a new administrative law judge.

Second, Complainant asserts the ALJ "may not have had the entire record before him when he issued the Proposed Determination." (Brief

in Opposition to the ALJ's Proposed Determination at 2, 5-6.)

The administrative law judge is required to make a proposed determination based on the original complaint, the Section 741 complaint request, the OCR report, and any other evidence or written documents filed by the parties (7 C.F.R. § 15f.16(a)). The ALJ's Proposed Determination reflects a thorough review of the record, and the ALJ specifically states the Order in the Proposed Determination is based upon "consideration of the entire record[.]" (Proposed Determination at 15.) Moreover, in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties, and an administrative law judge is presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision.[25] Complainant does not specifically identify which, if any, document the ALJ allegedly may have failed to review. In light of the Proposed Determination, which reflects a careful consideration of the record, the ALJ's specific statement that he considered the entire record, and the presumption that the ALJ properly discharged his duty to adequately review the record, I must reject Complainant's unfounded speculation that the ALJ "may not have had the entire record when he issued the Proposed Determination."

Third, Complainant asserts FSA, in violation of the Rules of Practice,

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[25] *See 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); *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) (stating the presumption of regularity supports official acts of public officers; in the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties and the doctrine allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show to the contrary); *United States v. Studevent*, 116 F.3d 1559, 1563 (D.C. Cir. 1997) (stating in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 790-92 (2001) (stating, in the absence of clear evidence to the contrary, an administrative law judge is presumed to have considered the evidence in a proceeding prior to the issuance of a decision in the proceeding), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 435-36 (2001) (stating, in the absence of clear evidence to the contrary, an administrative law judge is 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-0890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating that 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).

failed to properly respond to his request for a hearing before the ALJ and wrongfully interfered with his Complaint "by doing everything in [its] power to convince [him] that [his] cases were properly settled and closed." (Brief in Opposition to the ALJ's Proposed Determination at 3.)

I have thoroughly reviewed the record, and I find no indication that FSA failed to properly respond to Complainant's request for a hearing or in any way interfered with any of Complainant's filings. The record reveals that Complainant requested a hearing before an administrative law judge only if the Director of OCR determined that he could not informally resolve the proceeding (GX 7). After OCR determined the proceeding could not be informally resolved, OCR referred the proceeding to the Office of Administrative Law Judges for the scheduling of a hearing (Letter from Ted H. Gutman to the Chief Administrative Law Judge, filed with the Hearing Clerk August 14, 2007).

Fourth, Complainant asserts the ALJ made an inappropriate request that FSA produce a copy of the regulation which supports FSA's position that in 1975 it could not make a joint loan (Brief in Opposition to the ALJ's Proposed Determination at 4).

An ex parte communication is a communication by one party to a proceeding with the administrative law judge outside of the presence of, or without notice to, the other parties to the proceeding (7 C.F.R. § 15f.13(b)). Administrative law judges are prohibited from engaging in ex parte communications regarding the merits of a complaint with any party at any time between the assignment of the proceeding to the administrative law judge and the issuance of the proposed determination; except that, this prohibition does not apply to: "[d]iscussions of the merits of the complaint where all parties to the proceeding on the complaint have been given notice and an opportunity to participate." (7 C.F.R. § 15f.13(b)(1)(ii).)

In support of its Motion To Dismiss And/Or Motion For Summary Judgment, FSA relied upon 7 C.F.R. § 1821.6 (1975). In a letter dated, April 14, 2008, Mr. James Hurt, attorney-advisor for Chief Administrative Law Judge Marc R. Hillson, requested that Ms. Brandi A. Peters, counsel for FSA, furnish a copy of 7 C.F.R. § 1821.6 (1975) to the Office of Administrative Law Judges and to Complainant. Mr. Hurt provided Complainant with a copy of his April 14, 2008, letter. In a letter dated April 24, 2008, Ms. Peters responded by providing Mr. Hurt and Complainant with one copy each of the requested regulation. Under the circumstances, I do not find

Mr. Hurt's communication with FSA's counsel constitutes a prohibited ex parte communication. Moreover, I do not find that Complainant was in any way prejudiced by Mr. Hurt's request that FSA's counsel provide Mr. Hurt with a copy of 7 C.F.R. § 1821.6 (1975).

Fifth, Complainant asserts the ALJ's Proposed Determination does not adequately address the issues and is not rationally related to the evidence presented in the proceeding (Brief in Opposition to the ALJ's Proposed Determination at 5-13).

I have carefully reviewed the record in this proceeding. I find the ALJ's Proposed Determination, which I adopt in this Final Determination, thoroughly addresses the issues, is fully supported by the evidence presented in the proceeding, and is well-reasoned.

Sixth, Complainant asserts FSA discriminated against him by failing to inform him of the amendment to 7 C.F.R. § 1821.6 (1975) which eliminated the provision that applicants for FSA loans must be individuals (Brief in Opposition to the ALJ's Proposed Determination at 13-15, 19).

As an initial matter, Complainant's October 30, 2008, allegation of FSA discrimination comes far too late to be considered. As stated in this Final Determination, *supra*, post July 1, 1997, allegations of discrimination are not eligible for Section 741 review.[26] Moreover, FSA published the amendment to 7 C.F.R. § 1821.6 (1975) in the *Federal Register*, thereby providing Complainant with constructive notice that FSA had eliminated the requirement that applicants for FSA loans must be individuals.[27] FSA had no obligation to provide Complainant with actual notice of the amendment to 7 C.F.R. § 1821.6 (1975).

Seventh, Complainant argues the ALJ erred because he did not conclude that 7 C.F.R. § 1821.6 (1975) is flawed because it did not serve the needs of borrowers (Brief in Opposition to the ALJ's Proposed Determination at 18).

Whether 7 C.F.R. § 1821.6 (1975) served the needs of borrowers is not relevant to any issue in this Section 741 proceeding. Therefore, I reject Complainant's contention that the ALJ erred because he failed to conclude that 7 C.F.R. § 1821.6 (1975) is flawed.

Eighth, Complainant asserts that, under Illinois law, the statute of limitations does not apply to a counterclaim; therefore, any and all

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[26] See note 24.

[27] *See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *Bennett v. Director, Office of Workers' Comp. Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam).

misconduct by USDA can be included in Complainant's counterclaim (Brief in Opposition to the ALJ's Proposed Determination at 20).

As an initial matter, Illinois law is not applicable to the instant proceeding. Complainant instituted the instant proceeding under Section 741 (7 U.S.C. § 2279 note) and the proceeding is conducted in accordance with the Rules of Practice (7 C.F.R. pt. 15f). Second, the word "counterclaim" is defined as follows:

> **counterclaim**, *n.* A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim.

Black's Law Dictionary 376 (8th ed. 2004). Complainant, as the moving party in the instant proceeding, has filed a complaint not a counterclaim.

Ninth, Complainant asserts his family's service to the United States and the Altamont, Illinois, community; the expense and difficulty with which Complainant has had to contend because Interstate 70 bisects the farm; and the efforts Complainant has made to avoid contamination of the Altamont city reservoir must be considered when determining the disposition of the instant proceeding (Brief in Opposition to the ALJ's Proposed Determination at 24-26).

Complainant's family's service to the United States and Altamont, Illinois, the expense and difficulty with which Complainant has had to contend because Interstate 70 bisects the farm, and the efforts Complainant has made to avoid contamination of the Altamont city reservoir are not relevant to the instant proceeding; therefore, I decline to take these factors into account when determining the disposition of the instant proceeding.

## CONCLUSION

There is no genuine issue of material fact and summary judgment dismissing Complainant's Complaint, as amended, is appropriate.

For the foregoing reasons, the following decision is issued.

## DECISION

1. FSA's January 3, 2008, Motion To Dismiss And/Or For Summary Judgment is granted.

2. Complainant's Complaint, as amended, alleging FSA

discriminated against him is dismissed with prejudice.

**JUDICIAL REVIEW**

Complainant has the right to seek judicial review of this Final Determination in the United States Court of Federal Claims or in a United States district court of competent jurisdiction.[28] Complainant has at least 180 days after the issuance of this Final Determination within which to commence a cause of action seeking judicial review of this Final Determination.[29]

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[28]7 U.S.C. § 2279(d) note; 7 C.F.R. § 15f.26.
[29]7 U.S.C. § 2279(c) note; 7 C.F.R. § 15f.26.

**HORSE PROTECTION ACT**

**COURT DECISION**

**HERBERT DERICKSON AND JILL DERICKSON v. USDA.**
**No. 07-4158.**
**Court Decision.**
**Filed November 10, 2008.**

(Cite as:546 F.3d 335).

**HPA – Horse industry organization (HIO) decisions – Laches – Sore – Transportation – Entering – Allowing entry – Service by regular mail – Civil penalty – Disqualification – Partnership.**

Court upheld the findings of the JO that he had substantial evidence to support his findings that the Horse Industry Organization (HIO) Operating Plan then in effect does not limit APHIS's ability to independently impose legal sanctions on persons determined to be in violation of the HPA and that APHIS may take actions necessary to fulfill the purposes of the Act. Serving a sanction for the same offense(s) under the HIO Operating Plan does not limit the sanctions under the HPA.

United States Court of Appeals,
Sixth Circuit.

Before: MOORE and COOK, Circuit Judges; HOOD, District Judge. [FN*]

FN* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

**OPINION**

KAREN NELSON MOORE, Circuit Judge.

Petitioners Herbert Derickson ("H. Derickson") and Jill Derickson ("J. Derickson") (referred to jointly as "the Dericksons") petition this court for review of the decision of the Secretary of Agriculture that they violated 15 U.S.C. §§ 1824(1) and 1824(2)(B), the Horse Protection Act of 1970 ("Act"), by transporting and entering in a horse show a sore[1]

[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" causing the horse "to lift its feet quickly, reproducing the distinctive, high-stepping gait that show judges look for in Tennessee Walking Horses." *McConnell v. United States Dep't of Agric.,* 198

horse, Just American Magic. The Dericksons make three arguments: (1) the Judicial Officer ("JO") did not have substantial evidence to find that the Dericksons transported Just American Magic in violation of the Act; (2) the JO did not have substantial evidence to find that J. Derickson entered Just American Magic in a horse show in violation of the Act; and (3) H. Derickson cannot be sanctioned by respondents, the Animal and Plant Health Inspection Service of the United States Department of Agriculture ("APHIS"), because H. Derickson has already served an "appropriate" penalty for his violations of the Act issued by the National Horse Show Commission ("NHSC") pursuant to the APHIS Horse Protection Operating Plan ("Operating Plan").

For the reasons discussed below, we **DENY** the Dericksons' petition for review.

## I. FACTS AND PROCEDURE

On March 21, 2002, H. Derickson presented a horse, Just American Magic,[2] for preshow inspection at the Thirty-Fourth Annual National Walking Horse Trainers Show ("Trainers Show"). Upon inspection, two Designated Qualified Persons ("DQPs") determined that Just American Magic was sore because he had bilateral scarring and did not comply with the Scar Rule.[3] The DQPs disqualified Just American Magic from showing. Two veterinary medical officers employed by the Department of Agriculture later confirmed the DQPs' finding.

J. Derickson admits that she signed a check to pay Just American Magic's entry fee for the show, drawn on the Herbert Derickson Training Facility account. Dericksons Br. at 6, 22. The Dericksons also assert that, prior to March 21, 2002, APHIS and NHSC executed a written agreement, the Operating Plan, which was in effect during the Trainers Show. *Id.* at 24-25. The Operating Plan outlined penalties for violations of the Act that a private organization could impose on violators. It is undisputed that NHSC issued a two-year suspension (effective dates December 16, 2002 to December 15, 2004) and a $700 fine to H. Derickson for the bilateral soring violation, H. Derickson's second such

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Fed.Appx. 417, 418 (6th Cir.2006) (unpublished opinion).

[2] H. Derickson is not the owner of the horse; Just American Magic is owned by Robbie Warley and Black Gold Farm, Inc.

[3] The Scar Rule provides that a horse is deemed sore if that horse suffers from certain physical conditions indicative of soring. *See Rowland v. United States Dep't of Agric.,* 43 F.3d 1112, 1115 (6th Cir.1995).

violation.[4] This sanction was consistent with those authorized for such violations in the Operating Plan.

On August 19, 2004, Kevin Shea, Administrator of APHIS, filed a complaint against the Dericksons, alleging that the Dericksons violated §§ 1824(1) and 1824(2)(B) of the Act by: (1) "transporting 'Just American Magic' to the … Trainers Show in Shelbyville, Tennessee, while the horse was sore, … with reason to believe that the horse, while sore, may be entered for the purpose of its being shown in that horse show" and (2) entering Just American Magic in said show while sore. Joint Appendix ("J.A.") at 72-73 (APHIS Compl. ¶¶ 11-12). Several others, including Robert Raymond Black, II ("Black"), were named in the complaint.[5]

In their answer, both H. Derickson and J. Derickson admitted that they were "at all material times herein," individuals "doing business as Herbert Derickson Training Facility, aka Herbert Derickson Stables, aka Herbert Derickson Breeding and Training Facility." J.A. at 75-76 (Ans.¶¶ 5-6). Both denied all other allegations.

The administrative law judge ("ALJ") held a hearing on June 26 and 27, 2006, at which time Steven Fuller ("Fuller"), senior investigator with the Department of Agriculture, testified that he completed several portions of APHIS Form 7077 ("Form 7077"), the disqualification form for Just American Magic from the Trainers Show. Two such portions were items 11 and 27. Fuller further testified that he obtained the information to fill out Form 7077 from Black. Item 27 asks "NAME AND ADDRESS OF PERSON(S) RESPONSIBLE FOR TRANSPORTATION" and is answered "same as # 11." J.A. at 167 (Form 7077). Item 11 is answered in pertinent part "Robert Raymond Black, II." *Id.*

Black and his wife were the only witnesses for the Dericksons. During Black's testimony, APHIS stipulated that Black "was employed by Herbert Derickson." J.A. at 359 (Hr'g Tr. at 468). When asked who he understood was the owner of the business that employed him, Black

[4] NHSC issued an eight-month suspension and a $600 fine to H. Derickson for a bilateral soring violation involving Just American Magic that occurred less than one year prior to the Trainers Show incident.

[5] The Dericksons are the only parties named in the complaint that are before this court.

testified, "I understood it to be Herbert Derickson." J.A. at 360 (Hr'g Tr. at 469).

On October 3, 2006, the ALJ found that H. Derickson violated the Act by entering a sore horse. For the entering violation, the ALJ issued a $2,200 fine and a two-year disqualification from "showing, exhibiting, or entering any horse, directly or indirectly," J.A. at 26 (ALJ Dec. at 15), but then suspended one year of the disqualification, giving H. Derickson "partial credit for the suspension imposed by" NHSC. *Id.* The ALJ dismissed all allegations against J. Derickson and the transportation allegation against all respondents, finding that the evidence regarding transportation was "scant, with the entry in item 27 of APHIS Form 7077 being the primary evidence introduced in support of the allegations." J.A. at 17 (ALJ Dec. at 6) (internal reference omitted).

H. Derickson and APHIS cross-appealed to the JO designated as the final decision maker by the Secretary of the Department of Agriculture. The JO found that the Dericksons violated the Act by entering and transporting Just American Magic while sore. First, the JO rejected H. Derickson's argument that the Operating Plan limited the ability of APHIS to impose legal sanctions against H. Derickson, stating that: (1) no signature page was attached to the copy of the plan entered into evidence that would show that the Operating Plan applied to the Trainers Show and (2) even if the Operating Plan applied, the terms of the Operating Plan do not limit the authority of APHIS to enforce the Act. To support the latter finding, the JO highlighted five specific passages in the Operating Plan:

> Nothing in this Operating Plan is intended to indicate that APHIS has relinquished any of its authority under the Act or Regulations.

It is not the purpose or intent of this Operating Plan to limit in any way the Secretary's authority. It should be clearly understood that the Secretary has the ultimate administrative authority in the interpretation and enforcement of the Act and the Regulations. This authority can only be curtailed or removed by an act of Congress, and not by this Plan.

The Department retains the authority to initiate enforcement proceedings against any violator when it feels such action is necessary to fulfill the purposes of the [Act].

Nothing in this section is intended to limit APHIS's disciplinary authority under the Act and the Regulations.

APHIS has the inherent authority to pursue a federal case whenever it determines the purposes of the [Act] have not been fulfilled.

J.A. at 37 (JO Dec. at 10) (internal references omitted).

The JO next concluded-based upon admissions made in the Dericksons' initial answer and several business invoices on Herbert Derickson Training Facility letterhead signed "Thank you, we appreciate your business!" and "Thanks, Herbert and Jill Derickson," J.A. at 298-99 (Business Invoices)-that the Dericksons were running a partnership known as Herbert Derickson Training Facility, aka Herbert Derickson Stables, aka Herbert Derickson Breeding and Training Facilities.

Then, the JO found that Herbert Derickson Stables was responsible for transporting Just American Magic to the Trainers Show. He based this finding on invoice # 945, sent from Herbert Derickson Stables to the owners of Just American Magic, noting "no charge" for the "Hauling/Show Prep/Stall" item. J.A. at 303 (Invoice # 945). The JO "interpret[ed the invoice] to indicate that Herbert Derickson Stables transported Just American Magic to the ... Trainers Show." J.A. at 53 (JO Dec. at 26). The JO concluded that the Dericksons, as partners of the business, were liable for transporting Just American Magic.[6]

The JO also found that the Dericksons entered Just American Magic in violation of the Act. In regards to J. Derickson, the JO found that she paid the entry fee and filled out the entry form. To support his entry-form finding, the JO stated:

> [a]lthough the signature block on the entry blank states "Herbert Derickson," the writing is similar in style to Jill Derickson's signature on the entry payment check, an entry payment check for the 2003 National Walking Horse Trainers Show, and an entry blank for the 2003 National Walking Horse Trainers Show. The signature on the entry blank for the 2002 National Walking Horse Trainers Show is very different from Mr. Derickson's signature as seen on other documents in the record....

[6] The JO further found that Just American Magic was sore when transported. This finding is not disputed in the instant appeal.

J.A. at 34 (JO Dec. at 7 n. 1) (internal references omitted).

Pertinent to this appeal, the JO also found that there was insufficient evidence to hold Black liable for transporting Just American Magic. While addressing Black's liability, the JO noted that Fuller's testimony regarding Form 7077, coupled with testimony from Black and his wife, caused him to "agree with the ALJ that there are inconsistencies that raise questions about the accuracy of some information" contained in Form 7077. J.A. at 45 (JO Dec. at 18).

For the transporting and entering violations, the JO disqualified each Derickson from showing, exhibiting, or entering horses in shows for two years (one year for each violation) and issued $4,400 in sanctions to each Derickson ($2,200 for each violation). The Dericksons timely petitioned this court for review of the JO's decision.[7]

## II. ANALYSIS

### A. Standard of Review

We review a decision of the U.S. Department of Agriculture under the Act only to determine "whether the proper legal standards were employed and [whether] substantial evidence supports the decision." *Gray v. United States Dep't of Agric.,* 39 F.3d 670, 675 (6th Cir.1994) (quoting *Fleming v. United States Dep't of Agric.,* 713 F.2d 179, 188 (6th Cir.1983)). Substantial evidence is relevant evidence that " 'a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *Murphy v. Sec'y of Health & Human Servs.,* 801 F.2d 182, 184 (6th Cir.1986)). The record, as a whole, is considered in determining the substantiality of evidence. *McConnell v. United States Dep't of Agric.,* 198 Fed.Appx. 417, 421 (6th Cir.2006) (unpublished opinion). "When 'an administrative agency disagrees with the conclusions of its ALJ, the standard does not change; the ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency.' " *Rowland v. United States Dep't of Agric.,* 43 F.3d 1112, 1114 (6th Cir.1995) (quoting *Stamper v. Sec'y of Agric.,* 722 F.2d 1483, 1486 (9th

[7] The Dericksons also filed a motion to stay enforcement of the sanctions issued pending appellate review, which was granted.

Cir.1984)).[8] We defer to the JO "in the matter of derivative inferences." *Rowland,* 43 F.3d at 1114.

The Dericksons argue that the JO did not have substantial evidence to support his findings that: (1) the Dericksons are liable for transporting Just American Magic; (2) J. Derickson is liable for entering Just American Magic;[9] and (3) the Operating Plan does not limit APHIS's ability to impose legal sanctions on H. Derickson. We address each argument in turn.

**B. Liability for Transporting Just American Magic**

A person violates the Act if she transports a horse while sore, "with reason to believe that such horse while it is sore may be shown, exhibited, [or] entered for the purpose of being shown or exhibited ... in any horse show, horse exhibition, or horse sale or auction." 15 U.S.C. § 1824(1); *see also* 15 U.S.C. § 1825(b)(1) (stating that "any person who violates section 1824 of this title shall be liable to the United States for a civil penalty"). "Person" is not defined in the Act, but 1 U.S.C. § 1 states that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] ... the words 'person' and 'whoever' include ... partnerships." 1 U.S.C. § 1.

The Dericksons do not dispute that Just American Magic was sore when transported, but contend only that they are not liable for the transportation. Dericksons Br. at 14-17. In concluding that the Dericksons were liable, the JO found: (1) the Dericksons were operating a partnership that went by several names, including Herbert Derickson Stables, and that they were liable for the actions taken by that partnership; and (2) Herbert Derickson Stables transported Just American Magic to the Trainers Show. We hold that both of these findings of the JO are supported by substantial evidence.

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[8] Though the Dericksons admit that substantial evidence is the proper standard of review, they assert that the JO's decision in this matter should be viewed " 'more critically than it would if the [JO] and the ALJ were in agreement.' " Dericksons Br. at 13 (quoting *Young v. United States Dep't of Agric.,* 53 F.3d 728, 732 (5th Cir.1995)) (alteration in Dericksons Br.). This argument is meritless. *Young* is not binding on this court, and is in direct contradiction to *Rowland. See Rowland,* 43 F.3d at 1114. As *Rowland* is a published opinion of the Sixth Circuit, we are bound by its holding. SIXTH CIR. R. 206(c).

[9] H. Derickson does not appeal the JO's finding that he entered Just American Magic in violation of the Act.

**1. The Dericksons' Partnership**

Under Tennessee law,[10] a partnership can be implied "where it appears that the individuals involved have entered into a business relationship for profit, combining their property, labor, skill, experience, or money," regardless of whether the parties intended to create a partnership. *Bass v. Bass,* 814 S.W.2d 38, 41 & n. 3 (Tenn.1991). All partners are liable for the obligations of the partnership. TENN.CODE § 61-1-306(a).[11]

Applying *Bass,* the JO found that the Dericksons were operating a partnership which went by several names, including Herbert Derickson Stables. The JO supported this finding with two pieces of evidence. First, he looked to the Dericksons' unequivocal admission that "each was an individual doing business as Herbert Derickson Training Facility, aka Herbert Derickson Stables, aka Herbert Derickson Breeding and Training Facility." J.A. at 52 (JO Dec. at 25); *see also* J.A. at 75 (Ans. at 1). This admission alone would have been substantial evidence to support a finding of implied partnership under Tennessee law. Though the Dericksons did not use the word "partnership," two individuals admitting that they are running the same business under the same name is such evidence that "a reasonable mind might accept as adequate to support a conclusion," *Gray,* 39 F.3d at 675, that the Dericksons "entered into a business relationship for profit, combining their property, labor, skill, experience, or money," *Bass,* 814 S.W.2d at 41. However, the JO further supported his finding with several invoices that include the statements "Thank you, we appreciate your business!" and "Thanks, Herbert and Jill Derickson." J.A. at 52-53 (JO Dec. at 25-26); *see also* J.A. at 283-286 (Invoices). Looking at the record as a whole, we conclude that it is clear that there is substantial evidence that the Dericksons were operating a partnership.

The Dericksons argue that H. Derickson operates as a sole proprietor and that the JO ignored evidence to that effect, specifically: (1) Black's testimony that he understood the owner of the business to be H. Derickson, not J. Derickson; (2) APHIS's stipulation that Black was an

[10] In their answer, the Dericksons state that the mailing address for their business is "Shelbyville, Tennessee." J.A. at 76 (Ans. ¶¶ 5-6). Neither party disputes that Tennessee partnership law applies in this case.

[11] The Dericksons do not dispute the JO's finding that, if they are partners of the partnership that transported Just American Magic, they are personally liable for the transportation violation.

employee of H. Derickson; and (3) the lack of any testimony or documentation, including tax returns, that indicated that a partnership existed.

The Dericksons' argument fails. The evidence to which the Dericksons refer does not render insubstantial the evidence on which the JO relied. First, Black testified only that he "understood" H. Derickson to be the owner of the business that employed him. J.A. at 360 (Hr'g Tr. at 469). Just as the parties' understanding of the legal effect of their relationship is not determinative regarding whether an implied partnership exists, *Bass,* 814 S.W.2d at 41, Black's understanding of the ownership of the business that employed him is not substantial evidence of the legal effect of the Dericksons' relationship.

Second, the Dericksons mischaracterize APHIS's stipulation that Black "was employed by Herbert Derickson." J.A. at 359 (Hr'g Tr. at 468). The questions being posed to Black at the time the stipulation was made concerned his status as an employee in general. Prior to the stipulation, the nature of the business relationship between the Dericksons had not been discussed.[12] In this context, stipulating that

[12] The exchange at the administrative law hearing between the various attorneys-Ms. Carroll ("Q"), Mr. Heffington, and Mr. Bobo-Judge Davenport, and Black ("A" or "THE WITNESS"), preceding the stipulation in question is as follows:

> Q: Okay. And were you a full-time employee?
>
> A: Yes
>
> Q: Okay. And I assume there were-you had W-2 form [sic] that you filled out and taxes withheld and-
>
> A: There was [sic] taxes-
>
> MR. BOBO: Your Honor, I will object to relevancy here.
>
> MR. HEFFINGTON: Your Honor, we can stipulate that he was employed by Herbert Derickson-what was the beginning date?-October 2001.
>
> THE WITNESS: October 2001.
>
> MR. HEFFINGTON: October 2001 until when?
>
> THE WITNESS: February of '03.
>
> MR. HEFFINGTON: February of '03

Black was an employee of H. Derickson does not equate to stipulating that H. Derickson was operating a sole proprietorship.

Third, the statement that no documentary evidence was introduced to support a finding of partnership is inaccurate. As outlined above, several invoices and the Dericksons' own answer to the complaint were used to support the JO's finding. Moreover, the fact that no tax returns or other financial documents were introduced into evidence does not diminish the evidence that *is* in the record. The Dericksons do not dispute the accuracy of the invoices or the admissions in the answer; instead, they simply argue that we should hold that there cannot be substantial evidence of a partnership without some evidence that directly states that the parties are running a partnership. Tennessee law does not require that specific evidence. *See Bass,* 814 S.W.2d at 41 (holding that a partnership can be implied from the surrounding circumstances).

Therefore, we hold that the JO relied on substantial evidence to find that the Dericksons were operating an implied partnership that went by several names, including Herbert Derickson Stables.

**2. Transporting Just American Magic**

The Dericksons further argue that the JO lacked substantial evidence to find that they transported Just American Magic in violation of the Act. The Dericksons contend that the JO admitted in his decision that the sole evidence on this issue is APHIS Form 7077, which states that Black was responsible for transporting Just American Magic. Because this was the sole evidence, the Dericksons assert that Black alone can be held liable for transportation.

This argument mischaracterizes the opinion below and the evidence. The JO referenced Form 7077 with regard to only *Black's* liability for transportation. J.A. at 45 (JO Dec. at 18). The JO did not state that Form 7077 was the sole evidence against the Dericksons; to the contrary, the JO found invoice # 945 and its statement of "no charge" for "Hauling/Show Prep/Stall" to be evidence of the Dericksons' liability. J.A. at 52-53 (JO Dec. at 25-26). Clearly, the JO did have substantial

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JUDGE DAVENPORT: Is that sufficient, Ms. Carroll-

MS. CARROLL: Thank you.

J.A. at 359 (Hr'g Tr. at 468).

evidence to support his finding.

The Dericksons contend, however, that the line marked "no charge" should have indicated to the JO that neither the Dericksons nor Herbert Derickson Stables were responsible for transporting Just American Magic. Essentially, the Dericksons argue that the JO incorrectly interpreted the evidence. This argument must fail. Typically, we will defer to a JO's reasonable interpretations. *Rowland,* 43 F.3d at 1114. Furthermore, the JO's interpretation in this case is supported by substantial evidence. As APHIS points out, "[i]t is a common commercial practice for sellers of goods and services to give buyers certain items without charge as an add-on to more expensive items." APHIS Br. at 45. We note that our review of the record supports the JO's interpretation of the evidence. *See* J.A. at 283-286, 290-304 (Invoices). Thus, the JO's inference from the invoice entry, made in light of his experience and familiarity with horse-industry practices, is sufficient evidence that "a reasonable mind might accept as adequate to support [the] conclusion" that Herbert Derickson Stables transported Just American Magic. *Gray,* 39 F.3d at 675.

Therefore, we hold that substantial evidence supports the JO's decision that Herbert Derickson Stables transported Just American Magic in violation of the Act and that the Dericksons, as partners of Herbert Derickson Stables, are liable for this violation.

**C. Liability for Entering Just American Magic**

Section 1824(2)(B) of the Act prohibits the "entering for purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore." 15 U.S.C. § 1824(2)(B). Entering a horse "entails paying the entry fee, registering the horse, and presenting the horse for inspection." *Gray,* 39 F.3d at 676 (citing approvingly *Elliott v. Adm'r, Animal & Plant Health Inspection Serv.,* 990 F.2d 140, 145 (4th Cir.1993)). Though there is no binding precedent in this circuit regarding what steps must be completed by an individual to subject her to liability for entering a sore horse under the Act, two panels of this court have held that an individual does not have to perform personally all the steps of entry in order to be found liable. *Stewart v. United States Dep't of Agric.,* 64 Fed.Appx. 941, 943 (6th Cir.2003) (unpublished opinion); *McConnell,* 198 Fed.Appx. at 423 (holding that merely presenting a horse for inspection is entry of the horse under the Act). The *Stewart* court stressed that "requiring an individual to have

personally performed every step of the entry process in order to qualify as having entered the horse for [Horse Protection Act] purposes would result in the untenable holding that if two individuals divide the entry responsibilities, both are able to escape liability." *Stewart,* 64 Fed.Appx. at 943.

We are persuaded by the reasoning of *Stewart* and conclude that liability for entering a horse must rest with any individual who completes any one of the various steps of entry-paying the entry fee, registering the horse, or presenting the horse for inspection. Congress intended the Act to "make it impossible for persons to show sored horses in nearly all horse shows." H.R.Rep. No. 91-1597 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4872. Because entry is a multi-step process, the intent of Congress can be achieved only by a rule that provides that any individual who performs any step of entry maybe held liable for a violation. A contrary rule would easily allow trainers and owners to circumvent the Act by delegating each step of the entry process to different individuals, preventing effective enforcement. Therefore, we hold that an individual can be held liable for entering a sore horse if she performs any one of the various acts of entry.

J. Derickson argues that her only role in the entering process was to sign the check that paid Just American Magic's entry fee and that this act alone is not enough to subject her to liability. She does not contest that paying an entry fee would constitute entering a horse, but rather she claims only that she did not actually pay the fee.

This argument is not supported by the evidence. J. Derickson admitted that she signed a check drawn on the account of Herbert Derickson Training Facility. The JO found, supported by substantial evidence as outlined above, that J. Derickson is a partner of a partnership that does business as Herbert Derickson Training Facility. As a partner, she is personally liable for the actions of the partnership. Therefore, she is personally liable for paying the entry fee. Thus, we hold that the JO had substantial evidence to support his finding that J. Derickson is liable for entering Just American Magic in violation of the Act.

**D. Applicability of Operating Plan**

H. Derickson argues that the Operating Plan prevents APHIS from sanctioning him for the violations that occurred at the Trainers Show. He contends that the Operating Plan is a binding contract that prevents

APHIS from pursuing actions against individuals who have been sanctioned in accordance with the Operating Plan by a private organization unless "it has been determined that the purposes of the Act are not being fulfilled" by the private sanction. Dericksons Br. at 30. H. Derickson asserts that the JO did not have substantial evidence to find that the purposes of the Act were not fulfilled by his completion of the two-year suspension issued by NHSC.[13]

The JO found that, even assuming the Operating Plan was a binding contract between APHIS and NHSC that applied to the Trainers Show,[14] the Operating Plan does not limit the ability of APHIS to pursue actions against individuals for violations previously sanctioned by private organizations. The JO cited five separate examples in the Operating Plan to support this finding:

> Nothing in this Operating Plan is intended to indicate that APHIS has relinquished *any of its authority* under the Act or Regulations.
>
> It is not the purpose or intent of this Operating Plan to limit in any way the Secretary's authority. It should be clearly understood that the Secretary has the ultimate administrative authority in the interpretation and enforcement of the Act and the Regulations. *This authority can only be curtailed or removed by an act of Congress,* and not by this Plan.
>
> The Department retains the authority to initiate enforcement proceedings *against any violator* when it feels such action is necessary to fulfill the purposes of the [Act].
>
> *Nothing in this section is intended to limit APHIS's disciplinary authority* under the Act and the Regulations.
>
> APHIS has the inherent authority to pursue a federal case

[13] The parties vigorously dispute whether H. Derickson did in fact comply with the suspension issued by NHSC. *Compare* Dericksons Br. at 25-28 *with* APHIS Br. at 25-27. Ultimately, whether H. Derickson served the NHSC suspension is irrelevant because, as explained below, the Operating Plan does not curtail the ability of APHIS to initiate an action of its own against H. Derickson.

[14] There is some question as to whether the Operating Plan was in effect at the time of the Trainers Show. The JO noted that the Operating Plan lacked a signature page. The copy provided to this court suffers from the same defect. However, we will assume for purposes of this opinion that the Operating Plan was in effect during the Trainers Show.

> *whenever it determines the purposes of the [Act] have not been fulfilled.*

J.A. at 37 (JO Dec. at 10) (internal references omitted) (emphases added).

The JO's finding is supported by substantial evidence. The terms of the Operating Plan clearly state that APHIS did not "relinquish[ ] any of its authority." Given the straightforward nature of the language and the frequency of the statements-five times in a twenty-seven-page document-the evidence is such that a reasonable mind would find it conclusive.

Furthermore, H. Derickson misconstrues the language in the Operating Plan that he cites to support his claim. The Operating Plan does state that APHIS "retains the authority to initiate enforcement proceedings against any violator when it feels such action is necessary to fulfill the purposes of the [Act]." J.A. at 310 (Operating Plan at 4 n. 8). It also states that "APHIS has the inherent authority to pursue a federal case whenever it determines the purposes of the [Act] have not been fulfilled." J.A. at 331 (Operating Plan at 25 n. 25). However, neither phrase contains language that limits the ability of APHIS to act; there is no language that suggest that APHIS can act only under these specified circumstances.

Moreover, the Dericksons' brief undermines H. Derickson's argument. The brief states that "APHIS *clearly retains the authority* under the terms contained within the Operating Plan to prosecute cases *when it feels that such action is necessary* to fulfill the purposes of the Act." Dericksons Br. at 29 (internal references and quotation marks omitted) (emphases added). This statement highlights the discretionary nature of APHIS's decision-making power. H. Derickson tries to soften this language by insisting that another phrase, found twenty-one pages later in the Operating Plan, requires that this discretion be exercised only when "it has been determined that the purposes of the Act are not being fulfilled, such as when a person on suspension by [a Horse Industry Organization] is violating the terms and/or conditions of that suspension." *Id.* at 30. However, H. Derickson does not explain why we should read these two phrases together, nor does he cite any law that would require that reading. Further, H. Derickson does not explain why, if this is the proper reading of the Operating Plan, the Operating Plan repeatedly expresses that APHIS has not relinquished any discretion in bringing actions. Considering all the language in the Operating Plan, we conclude that it is clear that the JO properly concluded that the

Operating Plan does not limit APHIS's ability to bring this action.[15]

Thus, we uphold the JO's decision that the Operating Plan does not curtail APHIS's ability to sanction H. Derickson for violations of the Act pertaining to the Trainers Show.[16]

## III. CONCLUSION

Because we conclude that the JO had substantial evidence to support his findings that: (1) the Dericksons are liable for transporting Just American Magic; (2) J. Derickson is liable for entering Just American Magic; and (3) the Operating Plan does not limit APHIS's ability to impose legal sanctions on H. Derickson, we **DENY** the Dericksons' petition for review.

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[15] For the first time at oral argument, H. Derickson, through his attorney, asserted that APHIS admitted, in a letter written in August 25, 2005, by then-Under Secretary of the U.S. Department of Agriculture Bill Hawks ("Hawks"), that APHIS is required to find that a privately sanctioned individual has not complied with the private sanctions before APHIS may initiate proceedings. We find this argument unpersuasive. In that letter, Hawks relies on *American Horse Protection Ass'n, Inc. v. Veneman,* No. 1:01-cv-00028-HHK (D.D.C. July 9, 2002), in discussing APHIS's enforcement role in light of the Operating Plan. J.A. at 225-26 (Under Secretary Letter at 3-4). The district court in *Veneman,* when determining whether the Operating Plan amounted to an impermissible delegation of APHIS's authority, found that APHIS's role under the Operating Plan was limited in some respects. *Veneman,* No. 1:01-cv-00028-HHK, at 6. With all due respect to that district judge, we believe that its determination is inaccurate. For the reasons discussed above, we conclude that APHIS did not limit its ability to enforce the Act by signing the Operating Plan. Because it appears that Hawks relied on *Veneman*'s interpretation of the Operating Plan, any statements that Hawks made in the letter are irrelevant.

[16] H. Derickson also claims, in the last paragraph of his brief, that the action by NHSC was "at the very lest [sic] quasi-criminal in nature, as he had to pay a fine, and also was suspended from practicing his chosen profession for a period of two (2) years." Dericksons Br. at 32. He then asserts, without further explanation, that double jeopardy should apply in the present action. Given his failure fully to develop this issue, the issue is waived. *See Dillery v. City of Sandusky,* 398 F.3d 562, 569 (6th Cir.2005) ("It is well-established that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (internal quotation marks omitted). Nonetheless, as there are no criminal actions or criminal penalties involved at any level of this case, we can easily observe that the double jeopardy claim is meritless. *See Herbert v. Billy,* 160 F.3d 1131, 1136 (6th Cir.1998).

## INSPECTION AND GRADING

## COURT DECISIONS

**LION RAISINS, INC. v. USDA.**
**No. 1:05-CV-00640 OWW-SMS.**
**Court Decision.**
**Filed July 14, 2008.**

**(Cite as 2008 WL 2762176 (E.D.Cal.))**.

**I&G – Res judicata.**

Petitioner filed a Petition which was dismissed through summary judgement. Petitioner's amended complaint file three months later was determined to advance substantially similar issues and the JO was justified is similarly dismissing the Amended Complaint.

**United States District Court,**
**E.D. California.**

MEMORANDUM DECISION RE DENYING MOTION TO AMEND/MOTION FOR RECONSIDERATION (DOC. 60)
OLIVER W. WANGER, District Judge.

Plaintiff Lion Raisins, Inc. ("Lion") moves to alter or amend the judgment entered on the March 20, 2008 Memorandum Decision re Granting in Part and Denying in Part Cross-Motions for Summary Judgment, (Doc. 56 March 20 Order), pursuant to Fed.R.Civ.P. 59(e) and moves for reconsideration pursuant to Local Rule 78-230(k). (Doc. 58, Motion, Filed April 2, 2008) Defendant United States Department of Agriculture ("USDA") opposes the Motion. (Doc. 60, Opposition, Filed April 25, 2008). Lion initiated this case in federal court by filing a complaint pursuant to section 608c(15)(B) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("AMAA") and the Administrative Procedure Act, 5 U.S.C. § 702-706 ("APA"). This case arises from the administration of a federal California raisin marketing order, enacted under the authority of the AMAA, which regulates raisins in the California raisin marketing area. *See* 7 C.F.R. § 989.1-.801. ("Raisin Marketing Order"). Oral argument was heard on June 23, 2008. No appearance by Plaintiff's counsel did not appear at oral argument.

### 1. PROCEDURAL BACKGROUND

A. Administrative Record

1. Lion initiated proceedings on November 10, 2004, by filing the November Petition ("November Petition") with the USDA pursuant to section 608c(15)(A) of the AMAA. (Doc. 43, Administrative Records, 2005 AMA Docket No. F & V 989-1, submitted by Defendant in Support of Motion for Summary Judgment ("AR 2005"), Tab 1)

2. On December 29, 2004, Defendant USDA filed a Motion to Dismiss the November Petition. (Doc. 43, AR 2005, Tab 5.)

3. On February 9, 2005, Plaintiff filed the February Amended Petition ("February Amended Petition"). (Doc. 43, AR 2005, Tab 9)

4. On February 14, 2005, Defendant filed a Motion to Strike the February Amended Petition. (Doc. 43, AR 2005, Tab 11)

5. On March 7, 2005, the ALJ issued an order dismissing the November Petition, striking the February Amended Petition as premature, and granting Lion an opportunity to file an amended petition within twenty (20) days. (Doc. 43, AR 2005, Tab 13)

6. On March 11, 2005, USDA appealed the ALJ decision, seeking dismissal of the November Petition with prejudice and opposing the decision to permit Lion to file an amended petition. (Doc. 43, AR 2005, Tab 15)

7. On March 24, 2005, Lion re-filed the February Amended Petition ("Re-Filed Amended Petition") pursuant to the March 7, 2005 Order. (Doc. 43, AR 2005, Tab 17)

8. On March 30, 2005, Lion filed a response to USDA's appeal petition. (Doc. 43, AR 2005, Tab 19)

9. On March 30, 2005, USDA filed a Motion to Strike the Re-Filed Amended Petition. (Doc. 43, AR 2005, Tab 20)

10. On April 21, 2005, Lion filed an opposition to USDA's Motion to Strike the Re-Filed Amended Petition. (Doc. 43, AR 2005, Tab 22)

11. On April 25, 2005, the Judicial Officer ("Judicial Officer" or "JO") dismissed the November Petition with prejudice, finding it was barred by *res judicata,* technical deficiencies, and failure to present a cognizable claim. The Judicial Officer also struck the February Amended Petition as premature, because it was filed before the March 7, 2005 ALJ Order. (Doc. 43, AR 2005, Tab 24) The Judicial Officer did not rule on the Re-filed Amended Petition.

12. On May 3, 2005, the ALJ dismissed the Re-Filed Amended Petition (filed in March 2005). (Doc. 43, AR 2005, Tab 26)

13. On June 3, 2005, Lion filed an appeal to the Judicial Officer from the ALJ May 3, 2005 Order dismissing the Re-Filed Amended Petition (filed in March 2005). (Doc. 43, AR 2005, Tab 27)

14. On June 27, 2005, USDA filed a response to Lion's petition for appeal. (Doc. 43, AR 2005, Tab 29)

15. On July 13, 2005, the Judicial Officer struck Lion's Re-Filed Amended Complaint (filed in March 2005). (Doc. 43, AR 2005, Tab 32)

B. Federal Court Proceedings

1. On May 16, 2005, Lion filed a complaint for judicial review of the Judicial Officer's April 25, 2005 Decision and Order, dismissing with prejudice the November Petition and striking the February Amended Petition. (Doc. 1, Complaint)

2. On August 10, 2005, USDA filed an Amended Answer to Complaint. (Doc. 13, Answer)

3. On April 24, 2007, USDA filed a Motion for Summary Judgment. (Doc. 36, USDA's MSJ)

4. On April 25, 2007, Lion filed a Cross-Motion for Summary Judgment. (Doc. 42, Lion's Cross-MSJ)

5. On March 20, 2008, the Memorandum Decision re Granting in Part and Denying in Part Cross-Motions for Summary Judgment was entered. (Doc. 56, March 20 Order).

6. On April 2, 2008, Lion filed its Motion to Alter or Amend Judgment

and Motion for Reconsideration. (Doc. 58, Motion)

7. On April 25, 2008, USDA filed its Opposition to Lion's Motion. (Doc. 60, Opposition)

**2. STANDARD OF REVIEW**

Plaintiff brings a motion to amend or alter judgment pursuant to Fed.R.Civ.P. 59(e) and a motion for reconsideration pursuant to Local Rule 78-230(k).

A. Motion to Alter or Amend Judgment, 59(e)

Pursuant to Rule 59(e), any motion to alter or amend judgment shall be filed no later than 10 days after entry of judgment. A motion to alter or amend judgment is appropriate under limited circumstances, such as where the court is presented with newly-discovered evidence, where the court "committed clear error or the initial decision was manifestly unjust," or where there is an intervening change in controlling law. *School District No. 1J Multnomah County v. ACandS,* 5 F.3d 1255, 1263 (9th Cir.1993).

A district court's denial of a motion for a new trial or to amend a judgment pursuant to Federal Rule of Civil Procedure 59 is reviewed for an abuse of discretion. *Far Out Productions, Inc. v. Oskar,* 247 F.3d 986, 992 (9th Cir.2001); *Defenders of Wildlife v. Bernal,* 204 F.3d 920, 928-29 (9th Cir.2000). A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. *Coughlin v. Tailhook Ass'n,* 112 F.3d 1052, 1055 (9th Cir.1997).

B. Motion for Reconsideration, Local Rule 78-230(k)

When filing a motion for reconsideration, Local Rule 78-230(k) requires a party to show the "new or different facts or circumstances claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion." Motions to reconsider are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking,* 825 F.2d 437, 441 (D.D.C.1987). To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *See, e.g., Kern-Tulare*

*Water Dist. v. City of Bakersfield,* 634 F.Supp. 656, 665 (E.D.Cal.1986), *aff'd in part and rev'd in part on other grounds,* 828 F.2d 514 (9th Cir.1987).

C. Agency Action

The starting point for judicial review of agency action is the administrative record already in existence, not a new record made initially in the reviewing court. *Camp v. Pitts,* 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973); *Southwest Center for Biological Diversity v. U.S. Forest Service,* 100 F.3d 1443, 1450 (9th Cir.1996). The court may, however, consider evidence outside the administrative record for certain limited purposes, *e.g.,* to explain the agency's decisions, *Southwest Center,* 100 F.3d at 1450; or to determine whether the agency's course of inquiry was insufficient or inadequate. *Love v. Thomas,* 858 F.2d 1347, 1356 (9th Cir.1988), *cert. denied,* 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 403 (1989); *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1436 (9th Cir.1988). In addition, a court, in certain instances, may require supplementation of the record or allow a party challenging agency action to engage in limited discovery. *Southwest Center,* 100 F.3d at 1450.

**3. DISCUSSION**

The background facts for this entire suit are set forth in prior rulings, therefore only pertinent facts are repeated and amplified upon for the purposes of evaluating Plaintiff's Motion. *See* Doc. 56, March 20 Order.

The Court on cross-motions for summary judgment remanded portions of the February Amended Petition to the Judicial Officer for further proceedings on the issue of breach of confidentiality by the USDA of Plaintiff's information, as the claim was not previously litigated and not barred by *res judicata.* Plaintiff contends in its Motion that the Court clearly erred in not remanding the issue of who can "cause" an inspection, specifically, Plaintiff seeks to have producers and growers "cause" an inspection, and claims this issue was not previously litigated in the November Petition nor the earlier filed September Petition and therefore is not barred by *res judicata.* Plaintiff contends that this interpretation by the USDA of the Raisin Marketing Order that growers and buyers cannot request such qualifying inspections, first arose in December 2004 through a denial letter from the RAC, and could not have been included in the November Petition of 2004.

Under the doctrine of *res judicata,* a prior adjudication may have two distinct types of preclusive effects: claim preclusion (*res judicata*) and issue preclusion (collateral estoppel).

Res judicata ensures the finality of decisions. Under res judicata, 'a final judgment on the merits bars *further claims by parties or their privies based on the same cause of action.'* Res judicata prevents litigation *of all grounds for,* or defenses to, *recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.* Res judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.

*Brown v. Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979), *superceded by statute on other grounds* (citations and quotations omitted). "Under the doctrine of res judicata, a final judgment on the merits precludes the parties from *relitigating claims which were or could have been raised in that action." Amaro v. Continental Can Co.,* 724 F.2d 747, 749 (9th Cir.1984) (emphasis added), *citing Nevada v. United States,* 463 U.S. 110, 103 (1983)). "A factor to be considered in determining whether the *same claim is involved* is whether the two suits involve *infringement of the same right." Id.* (citations and quotations omitted) (emphasis added).

Attempts to relitigate issues previously adjudicated have been specifically rejected by the USDA. In *In re Gerawan Co. Inc., A California Corporation,* 90 AMA Docket Nos. F & V 916-6 and 917-7, 50 Agric. Dec. 1363, 1991 WL 333618 (U.S.D.A. October 31, 1991), the JO affirmed an ALJ decision dismissing a petition under the doctrine of *res judicata* because the petition attempted to re-litigate the same issues previously dismissed in an earlier case.

The record in Gerawan I clearly shows that petitioner could have had its challenges to the 1988 interim final rules determined in that proceeding if it had chosen to do so. It neglected to do so, and the ALJ's determination of dismissal "with prejudice" correctly applied the standard of res judicata in the instant proceeding.

However, the instant Petition alleges the same wrong (the 1988 interim final rules are not in accordance with law) which infringes the

same right (the handling of nectarines, plums, and peaches), is based on the same statutory authority, and is made in virtually identical language as the dismissed allegations of Gerawan I.

The challenged regulations are the same regulations, imposing the same restrictions on the petitioner as were dismissed with prejudice in Gerawan I.

*In re Gerawan Co. Inc., A California Corporation* 90, AMA Docket Nos. F & V 916-6 and 917-7, 50 Agric. Dec. 1363, 1369-70, 1991 WL 333618 *4 (U.S.D.A. October 31, 1991).

The Court's March 20 Order found the September Petition of 2003[1] and the later filed November Petition of 2004 asserted similar claims and held that the JO's decision dismissing the claims on *res judicata* grounds was not arbitrary or capricious. The Court then ruled that Lion should have been permitted to address any new claims filed in the subsequently filed February Amended Petition of 2005 pursuant to § 900.52b.[2] The decision recognized that the February Amended Petition while largely similar to the November Petition, did contain one new claim, breach of confidentiality requirements.

> 11. During the course of incoming and outgoing Inspection services, USDA and RAC obtained and disclosed Petitioner's nonexempt confidential information in violation of Section 989.75; 7 U.S.C. § 608d; and 18 U.S.C.1905 ... On or about January 10, 2005, a RAC employee disclosed Petitioner's confidential information to one of Petitioner's chief competitors.

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[1] The September Petition is an earlier filed petition, filed on September 14, 2003 ("September Petition") that was dismissed by the same Judicial Officer on October 19, 2004 in *In re Lion Raisins, Inc.,* 63 Agric. Dec.___ (October 19, 2004) (Doc. 36-4, Administrative Records, 2003 AMA Docket No. F & V 989-7, submitted by Defendant in Support of Motion for Summary Judgment ("AR 2003"), September Petition, Tab 1 and October Decision and Order, Tab. 15).

[2] § 900.52b governs amended pleadings which states:

> At any time before the close of hearing the petition or answer may be amended, but the hearing shall at the request of the adverse party, be adjourned or recessed for such reasonable time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

7 C.F.R. § 900.52b.

(February Amended Petition, AR 2005, Tab 9, p. 4)

The question is whether the February Amended Petition asserted the same claims as the November Petition, with the exception of the breach of confidentiality claim.

Both petitions, the November Petition and the February Amended Petition challenge the same regulations, § 989.58 and 989.59 that govern the inspection requirements of raisins.[3] The title to the two petitions are as follows:

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[3] The relevant portions of 7 C.F.R. § 989.58 and § 989.59 are as follows:

§ 989.58 Natural condition raisins.

(d) Inspection and certification.

(1) *Each handler shall cause an inspection and certification* to be made of all natural condition raisins acquired or received by him, ... The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. *Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture,* unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart ...

7 C.F.R. § 989.58(d)(1) (emphasis added).

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

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

7 C.F.R. § 989.59(d) (emphasis added).

*November Petition Title:*

> Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Eliminate as Mandatory the Use of USDA's Processed Products Inspection Branch Services for All Incoming and Outgoing Raisins, as Currently Required by 7 C.F.R. §§ 989.58 & 989.59, *To Exempt Petitioners from the Mandatory Inspection Services by USDA* for Incoming and Outgoing Raisins and/or Any Obligations Imposed in Connection Therewith That are Not in Accordance with Law

(AR 2005, Tab 24, p. 1) (emphasis added)

*February Amended Petition Title:*

> *Amended* Petition to Enforce and/or Modify Raisin Marketing Order Provisions/Regulations; To Exempt Petitioner from the Mandatory Inspection Services by USDA for Incoming and Outgoing Raisins, To Preclude the Raisin Administrative Committee and/or USDA from Receiving the Raisin Administrative Committee and/or USDA from Receiving the Otherwise Required Raisin Administrative Committee Forms; *Petition to Allow Buyers and Producers to Call for Inspection Services,* and to Delete Certain Obligations Imposed in Connection Therewith that are Now Not in Accordance with Law

(AR 2005, Tab 9, p. 1) (emphasis added)

The March 20 Order held that Plaintiff's February Amended Petition "Statement of Facts" described the *same issues of who can "cause" an incoming and outgoing inspection of the raisins."* The March 20 Order further held that the "Statement of Grounds" largely mirrored the November Petition's "Statement of Grounds" except for the additional ground concerning disclosure of Plaintiff's confidential information by RAC and USDA. The Order also held the "Prayer for Relief" was substantially similar, except for the additional relief sought to remedy disclosure of Lion's confidential information.

The question is whether the "cause" claim is the same as or identical to the claim which was previously adjudicated by the Judicial Officer. The Raisin Marketing Order provisions challenged by Lion require each

"handler" of California raisins to "cause an inspection and certification to be made of all natural condition raisins acquired or received" with exceptions not applicable here, and set forth minimum grade and condition standards for such raisins. 7 C.F.R. § 989.58(d)(1). In the November Petition, Lion raised the inspection to determine whether Lion could obtain inspection services from a non-USDA provider and still satisfy its obligations under § 989.58(d) and 989.59(e). (Doc. 43, AR 2005, Tab 5, November Petition, p. 7.)

In the February Amended Petition, the same inspection service issue was asserted, e.g., whether a non-USDA provider could satisfy inspection obligations within the requirements of Sections 989.58(d) and 989.59(d). The February Amended Petition also challenged whether Lion, as the handler, could have the customers (buyers) and/or producers "call for" or "cause" inspections to satisfy inspection obligations again within the meaning of Sections 989.58(d) and 989.59(d). (Doc. 43, AR 2005, Tab 9, February Amended Petition, p. 3, 5).

USDA argues that the Court correctly found the inspection issue raised in Lion's earlier petition was finally decided and was barred by *res judicata*. The inspection issue had been adjudicated in prior judicial and administrative proceedings. Defendant USDA contends that the Court determined that both the November Petition and the February Amended Petition assert a challenge by Lion to the inspection requirements of the Raisin Marketing Order, albeit made with different degrees of specificity.

USDA also argues that the issue of whether growers and customers can "call for" or "cause" inspections on Lion's behalf has already been adjudicated against such an interpretation of the Raisin Marketing Order in other cases and administrative proceedings. The unpublished Eastern District of California case of *Lion Bros. v. U.S. Dep't of Agriculture,* No. CV-F-05-0292-REC-SMS, 2005 WL 2089809 (E.D.Cal. Aug. 29, 2005), determined that one must be a handler, not a grower or customer of a handler, to receive the "handler" rate for inspections, and to obtain inspections that meet the Raisin Marketing Order's inspection and certification requirements:

Lion argues that the sole issue before the court is a legal one: can "Lion Bros, a producer of raisins [ ] governed by the Raisin Marketing Order receive and pay for the same inspection that a handler, also

regulated by the same Marketing Order, can receive and pay for under the grade and condition requirements of the Marketing Order."

A. Lion Is Not Entitled to Inspections Under the Order

The Raisin Marketing Order is specific; it states that "Each handler, shall cause an inspection to be made...." 7 C.F.R. § 989.58(d) (emphasis added). It is undisputed that Lion is a producer and not a handler of raisins. Lion has cited no language in the Raisin Marketing Order under which it could be arguable that a producer such as Lion is required to procure inspections under the Order in the same manner and at the same rate as handlers. Nor is there any language in the Raisin Marketing Order that could be said to entitle a producer to receive inspections pursuant to the Order. This is precisely what Mr. Worthley communicated to Lion in October of 2004. Compl. Ex. B. Because Lion was not required or entitled to receive inspections under the Order, there can be no argument that such an inspection was wrongfully denied. 2005 WL 2089809, *4 (case dismissed for lack of subject matter).

USDA also cites to an administrative case discussion when a non-handler by virtue of "acquiring" raisins, becomes a "handler" subject to the regulations of the Raisin Marketing Order. *See In Re Marvin D. Horne and Laura R. Horne, dba Raisin Valley Farms, et al.,* AMAA Docket No. 04-0002, 67 Agric. Dec. 18, 32-34 2008 WL 1744490, *11-12 (Apr. 11, 2008).[4] USDA concludes that both judicial and administrative cases have already addressed the issue of whether non-handlers, such as customers or suppliers, can obtain the same inspections as handlers.

Plaintiff Lion argues that the interpretation of the Raisin Marketing Order that growers and buyers could not request such qualifying

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[4]. A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order ... 7 C.F.R. § 989.17.

The 1949 recommended decision, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that: The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins...." 2008 WL 1744490,

inspections first arose in December 2004 when the Raisin Administrative Committee stated in a letter that Lion, as the handler, was the only entity that could request inspections, and could not have been included in the November Petition of 2004. Counsel also argued this issue at oral argument on February 25, 2008. *See* 2/25 Hr'g Tr. Lion argues that the Judicial Officer did not address the underlying merits of this issue. The difference is the November Petition addressed solely who should "perform" the inspections (*i.e.* USDA, the Dried Fruit Association, or Lion). In comparison, the February Amended Petition describes that claim and the claim re "who can cause" an inspection (*i.e.* Lion, producers and/or growers). Plaintiff argues that the claims are not the same and *res judicata* does not apply.

Lion however, as USDA argues, is seeking to get around the inspection requirements and have the same provisions interpreted. Whether Lion argues the performance of the inspections by a non-USDA party, or whether it argues that another party, non-handler, can "cause" an inspection, the result is the same, to authorize independent third parties to be involved in the inspection process to absolve Lion from any USDA inspections. The same provisions are being challenged, § 989.58(d) and 989.59(d). All Lion's claims concerning these inspection regulations are barred by *res judicata* as they could have been raised. The law does not countenance parsing of claims to divide into varieties that permit serial reassertions of related claims. As the March 20 Order specifies: "Under the doctrine of res judicata, a final judgment on the merits precludes the parties from relitigating claims which were or could have been raised in that action." *Amaro v. Continental Can Co.,* 724 F.2d 747, 749 (9th Cir.1984) (citing *Nevada v. United States,* 463 U.S. 110, 103 (1983)). This variation of the inspection services claim, could have been alleged in the November Petition. Plaintiff also has not shown any "new or different facts or circumstances claimed to exist which did not exist or were not shown upon such prior motion" nor shown other grounds to grant its motion for reconsideration pursuant to Local Rule 78-230(k).

Plaintiff Lion's motion to amend the judgment and motion for reconsideration are DENIED.

## ***CONCLUSION***

For the reasons set forth above, Plaintiff's motion to amend the

judgment and motion for reconsideration are DENIED.

IT IS SO ORDERED.

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**LION RAISINS, INC. v. USDA.**
**No. 1:05-CV-00062 OWW-SMS.**
**Court Decision.**
**Filed August 14, 2008.**

**Cite as: (2008 WL 3834271 (E.D.Cal.))**

**I&G – FOIA – 7(A) exemptions to FOIA – 7(C) exemptions to FOIA – FRCP Rule 60(b).**

Petitioner is the largest Independent Raisin handler in California. USDA brought actions that if proven would dramatically curtail Petitioner's operations for an extended period. Petitioner's initial FOIA request for agency inspector records was partially denied under Rule 7(A)(ongoing investigation grounds) and 7(C) (privacy grounds) exemptions. During the lengthy litigation, Lion filed a new FOIA request which was denied on similar grounds. Petitioner appealed the interlocutory ruling under FRCP Rule 60(b)(6) which is available to set aside a prior judgment or order. Rule 60(b)(6) has a high evidentiary bar to overcome a presumption of agency integrity. Petitioner's justification for the Rule 60(b) relief was based upon ground of alleged government misconduct. The agencies decision to withhold a record must be judged at the time the action was taken not upon post-response occurrences.

**United States District Court,**
**E.D. California.**

Ernest H. Tuttle, III, James F. McBrearty, Tuttle & McCloskey, Fresno, CA, for Plaintiff.

Kristi Culver Kapetan, CV, United States Attorney's Office, Fresno, CA, for Defendant.

MEMORANDUM DECISION RE DENYING MOTION FOR RELIEF FROM JUDGMENT (DOC. 53)

OLIVER W. WANGER, District Judge.

**1. INTRODUCTION**

Plaintiff Lion Raisins, Inc. ("Lion") moves the Court pursuant to Rule 60(b)(5) and 60(b)(6) of the Federal Rules of Civil Procedure for relief, due to changed circumstances, from the summary judgment order entered on October 20, 2005 in favor of Defendant United States Department of Agriculture ("USDA"). Lion alleges that the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requires USDA to provide the Worksheets that Lion requested for the period from January 1995 to December 2000 and now seeks an order for the USDA to release copies of the Worksheets to Lion and allow physical access to inspect the originals. The matter was heard on February 25, 2008.

United States District Judge Robert E. Coyle previously upheld in a summary judgment order the USDA's FOIA Exemption claim, under 5 U.S.C. § 552(b)(7)(A), on the basis that the disclosure of worksheets sought by Plaintiff could reasonably be expected to interfere with the administrative enforcement proceedings. The Ninth Circuit Court of Appeals upheld that Court's decision in Case No. 05-17449. On September 20, 2007 Plaintiff submitted another FOIA request to the USDA to release copies of Worksheets from January 1995 through December 2000. Lion seeks relief in this motion from the Court's summary judgment order of October 20, 2005.

## 2. PROCEDURAL BACKGROUND

In January 2001, USDA issued an administrative complaint (Complaint 1) alleging that Lion and its principals, officers, agents and affiliates had falsified and misrepresented USDA Certificates of Quality and Condition in violation of the Agricultural Marketing Act ("AMA") and the USDA's inspection and certification regulations. USDA later issued two additional administrative complaints against Lion (Complaint 2 and 3). USDA asserted that Lion established a procedure whereby Lion's shipping department employees would falsify or fabricate USDA Certificates to conform to customer specifications.

By letter dated May 13, 2004, Lion submitted a FOIA request seeking all USDA Certificate of Quality and Condition for Raisins Worksheets issued or prepared by the USDA for product inspected at Lion during the period January 1995 to December 2000. By letter dated June 23, 2004, the FOIA Officer responded to the request and withheld the requested documents. Lion's administrative appeal was denied on January 3, 2005.

On January 11, 2005, Lion filed this action in federal court seeking declaratory and injunctive relief under FOIA. (Doc. 1, Complaint) The parties filed cross-motions for summary judgment. (Doc. 18 USDA MSJ and Doc. 23 Lion MSJ) On October 19, 2005, the Court entered its Order denying Lion's motion for summary judgment and granting USDA's motion for summary judgment. (Doc. 46, Order) Judgment was entered in accordance with the Order on October 20, 2005. (Doc. 47, Judgment) Lion appealed, and on April 30, 2007, the Court of Appeals entered its order affirming the judgment of the District Court.

Lion then filed the present motion for relief from judgment under Rule 60(b)(5) and (6) on September 24, 2007. (Doc. 53, Motion) UDSA filed an opposition to Lion's Motion on November 20, 2007, (Doc. 60, Opposition), and Lion filed it reply to USDA's Opposition on December 3, 2007. (Doc. 61, Reply)

**3. FACTUAL HISTORY**

This case concerns FOIA requests by Lion that the USDA denied, citing ongoing administrative proceedings against Lion. A summary judgment order was entered in favor of USDA on the basis of FOIA Exemption 7A, due to concerns that disclosure could reasonably be expected to interfere with the administrative enforcement proceedings. The Ninth Circuit Court of Appeals affirmed the District Court decision on appeal.

Lion and USDA have been involved in administrative proceedings since 1998, when the Agricultural Marketing Service (hereinafter referred to as "AMS") initiated an investigation of Lion after receiving an anonymous complaint regarding Lion. The proceedings stem from USDA's allegations that representatives of Lion forged signatures of USDA inspectors or recorded false moisture readings on inspection certificates for Lion's fruit. USDA alleges that Bruce Lion, an officer and director of Lion Raisins, instituted a procedure for falsifying or fabricating USDA certificates to conform to customer specifications. The fabricated certificates, USDA alleges, were then sent to foreign customers. After completing its investigative report on May 26, 1999, the USDA filed three separate administrative complaints against Lion.

On January 12, 2001, USDA suspended Lion's eligibility for government contracts and filed an administrative complaint (I & G Docket Number 01-0001) (Complaint 1) that sought to "debar" future

inspections of Lion's facilities. Two additional administrative complaints (I & G Docket Numbers 03-0001 (Complaint 2) and 04-0001 (Complaint 3) were also issued against Lion.

Lion is the largest independent handler of raisins produced in California. It handles and packs raisins produced by outside growers and by Lion and its affiliates. Lion is governed by the Agricultural Marketing Act of 1937 (7 U.S.C. §§ 601-627) and a "marketing order" promulgated thereunder that governs raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.801). The marketing order calls for an inspection process under which a handler must have USDA inspect its products once when they are received from the producer and again before they are sold to the producer. 7 C.F.R. §§ 989.58-989.59. The AMS is charged with the administration of the inspection regulations and provides inspection and grading services to applicants. The inspections entail USDA inspectors periodically taking samples from handlers' processing lines to assess the quality of the raisins in various categories, such as weight, color, size, sugar content, and moisture.

The inspection process generates a variety of paperwork. A USDA inspector completes a "Line Check Sheet" based on his or her observations and assigns grades to the raisins. The inspector then prepares a Certificate of Quality and Condition for Raisins Worksheet ("Worksheet") that serves as a draft for the official Certificate of Quality and Condition ("Official Certificate"), also known as form FV-146, and gives the Worksheet to an employee of the packer. At Lion the Worksheet is given to a shipping department employee. The employee's task is to type the Official Certificate based on the information on the Worksheet. The employee next returns the Official Certificate and Worksheet to the USDA grader. If the grader reviewing the Official Certificate determines that it has been correctly prepared, it is signed and the original, as well as up to four carbon copies of the Official Certificate are returned to Lion. USDA did not return the Worksheets to Lion. From time to time, USDA officials inspecting Lion's raisins, voided an Official Certificate and had a new one typed. USDA then provided a copy of the new Official Certificate to Lion. USDA retained the voided Official Certificate ("Voided Certificate") and did not at that time provide a copy to Lion.

In a letter dated May 13, 2004, Lion requested, under FOIA, any and

all USDA Certificate of Quality and Condition for Raisins Worksheets, issued or prepared by USDA for product inspected at Lion, during the period of January 1995 to December 2000. USDA responded by withholding the requested documents pursuant to 5 U.S.C. § 552(b)(7)(A). Lion appealed in a July 12, 2004 letter. The decision was upheld in a letter dated January 3, 2005. On January 11, 2005, Lion filed its Complaint in this case for declaratory and injunctive relief of USDA's decision to withhold the Worksheets. On October 20, 2005, United States District Judge Robert E. Coyle determined disclosure could reasonably interfere with the administrative enforcement proceedings and granted summary judgment in favor of the USDA. Lion appealed the decision and on April 30, 2007 the Ninth Circuit Court of Appeals affirmed the District Court decision.

Plaintiff now contends the taking of evidence closed on March 31, 2006, in the administrative hearings of Complaint 1 and on February 28, 2006 on Complaint 3. USDA however contends that each of the three enforcement actions against Lion continue as pending proceedings.

On September 20, 2007 Lion submitted another FOIA request for the USDA to release copies of Worksheets from January 1995 through December 2000 and provide access to the originals. Neither party has provided any information on the status of this September 20, 2007 FOIA request.

On September 24, 2007 Lion filed its motion for relief from judgment of the October 20, 2005 Summary Judgment Order issued by Judge Coyle and affirmed by the Ninth Circuit on April 30, 2007.

**4. STANDARD OF REVIEW**

A. Motion for Relief from Judgment

Lion moves the Court for relief from judgment under Rule 60(b) (5) and Rule 60(b)(6) of the Federal Rules of Civil Procedure. *See* Motion, p. 1. Rule 60 of the Federal Rules of Civil Procedure provides a means of altering a judgment in limited circumstances. *Delay v. Gordon,* 475 F.3d 1039, 1044 (9th Cir.2007).

Rule 60(b) provides in relevant part:

Grounds for Relief from a Final Judgment, Order, or

> Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed.R.Civ.P. 60(b)(5) and 60(b)(6).

"Rule 60 regulates the procedures by which a party may obtain relief from a final judgment.... The rule attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 Charles Alan Wright and Andrew D. Liepold, Federal Practice and Procedure § 2851 (4th ed.2008). A motion under Rule 60(b) must be made within a reasonable time. Fed.R.Civ.P. 60(c).[1]

## 5. DISCUSSION

A. Evidentiary Objections

Plaintiff requests pursuant to Federal Rules of Evidence 201(b), judicial notice of the following filings by Lion in the administrative hearing for Lion's Petition to Reopen Hearing in I & G Docket No. 01-0001 (Complaint 1): Petition to Reopen Hearing, attached as Exhibit "A" to Lion's Request for Judicial Notice of Exhibits (Doc. 64, Lion's Judicial Notice Request); Supplemental to Petition to Reopen the Hearing, attached as Exhibit "B" to Lion's Judicial Notice Request; Second Supplemental to Petition to Reopen the Hearing, attached as Exhibit "C" to Lion's Judicial Notice Request; Third Supplemental to Petition to Reopen Hearing, attached as Exhibit "D" to Lion's Judicial Notice Request; Fourth Supplemental to Petition to Reopen the Hearing, attached as Exhibit "E" to Lion's Judicial Notice Request; and Amended Fourth Supplemental to Reopen the Hearing, attached as Exhibit "F" to Lion's Judicial Notice Request.

[1] The only limitations are that if a Rule 60(b) motion is made pursuant to subsection (1), (2) or (3) the motion must be made no more than a year after the entry of judgment or order or the date of the proceedings. Plaintiff is not bringing a Rule 60(b) motion under these subsections, therefore the reasonableness standard applies here. Fed.R.Civ.P. 60(c).

Defendant USDA filed no opposition to Lion's Judicial Notice Request. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed.R.Evid. 201(d). Judicially noticed facts often consist of matters of public record, such as prior court proceedings, *see, e.g., Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1198 (9th Cir.1988); administrative materials, *see, e.g., Barron v. Reich,* 13 F.3d 1370, 1377 (9th Cir.1994); city ordinances, *see, e.g., Toney v. Burris,* 829 F.2d 622, 626-27 (7th Cir.1987) (holding that federal courts may take judicial notice of city ordinances); official maps, *see, e.g., Aiello v. Town of Brookhaven,* 136 F.Supp.2d 81, 86 n. 8 (E.D.N.Y.2001) (taking judicial notice of geological surveys and existing land use maps); or other court documents, *see, e.g., Rothman v. Gregor,* 220 F.3d 81, 92 (2d Cir.2000) (taking judicial notice of a filed complaint as a public record). Federal courts may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.,* 971 F.2d 244, 248 (9th Cir.1992), *quoting St. Louis Baptist Temple, Inc. v. FDIC,* 605 F.2d 1169, 1172 (10th Cir.1979).

Exhibits A and B contain a USDA "RECEIVED" date stamp acknowledging receipt and filing by a public agency. Exhibit B, C, D, E and F contain no such stamp or other identifying mark indicating they were filed with the USDA. Nor are they certified as true copies of publically filed documents. *See* Fed.R.Evid. 1005. The Court takes judicial notice of the fact of filing of Exhibits A and B, and DENIES Lion's request for judicial notice of Exhibit B, C, D, E and F, as unauthenticated and containing subject matter that is not reasonably undisputed.

B. Motion for Relief from Judgment

Plaintiff moves for relief from the October 20, 2005 Summary Judgment Order which denied Lion's FOIA request on the basis of Exemption 7(A) for a pending administrative enforcement. Under FOIA 7(A) exemption: an agency need not disclose "records or information

compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings ..." 5 U.S.C. § 552(b)(7)(A). In a suit asserting an Exemption 7(A), the government must show that one, a law enforcement proceeding is pending or prospective, and two, release of the information could reasonably be expected to cause some articulable harm. *See N.L.R.B. v. Robbins Tire & Rubber,* 437 U.S. 214, 224, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Lion claims that the justification for any discretionary claim of exemption has now materially changed because taking of evidence at any administrative hearing has been completed and the statute of limitations has run on any further civil enforcement. Lion also alleges that it has submitted a new FOIA request for access to original and copies of the Worksheets in question. Lion seeks an Order from the Court to require USDA to release copies of the Worksheets to Lion and allow physical access by Lion under protective conditions to inspect the originals.

I. 60 (b)(5) Relief

Lion moves for reconsideration under Rule 60(b)(5). In addressing Lion's request for relief from the October 20, 2005 Summary Judgment Order (2005 Order) denying Lion's FOIA request, the Order is not prospective and therefore no relief can be afforded under Rule 60(b)(5). Rule 60(b)(5) provides that the court may relieve a party from a final judgment when "the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Plaintiff argues it is no longer equitable that the 2005 Order have a prospective application.

The 2005 Order does not have "prospective" application. To have "prospective application" the order under Rule 60(b)(5) must be "executory" or involve the "supervision of changing conduct or conditions." *Twelve John Does v. District of Columbia,* 841 F.2d 1133, 1139 (D.D.C.1988). In addition, the moving party must establish that it is suffering hardship so extreme and unexpected that it constitutes oppression. *Elser v. I.A.M. Nat. Pension Fund,* 579 F.Supp. 1375, 1382 (C.D.Cal.1984). The *Elser* court also noted that a strong showing is required and many actions for relief on this ground are denied. *Id.*

The 2005 Order denied a specific FOIA request for information by Plaintiff. The order was affirmed on appeal and is final. No supervision of the October 20, 2005 Order has been required, nor will any supervision be required in the future. The October 20, 2005 Order has no "prospective application", it was a one time request for release of information under FOIA that was denied. "Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect ... That a court's action has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5)." *Twelve John Does,* 841 F.2d at 1138. "Any continuing injunction, for example, would have the requisite prospective effect." *Cook v. Birmingham News,* 618 F.2d 1149, 1152 (5th Cir.1980) "Rule 60(b)(5) is routinely used to challenge the continued validity of consent decrees, which courts often liken to contracts." *Bellevue Manor Associates v. U.S.,* 165 F.3d 1249, 1253 (9th Cir.1999) Courts typically apply the rule in "private" cases. *Id.* (citing a Seventh Circuit case upholding under Rule 60(b)(5) the dissolution of an injunction prohibiting a competitor from serving as a corporation's director). None of these incidents apply. The order is prohibitory and resolved a dispute over the accessibility of documents.

Rule 60(b)(5) does not afford relief.

II. Motion for Relief From Judgment Pursuant to FRCP 60(b)(6)

Plaintiff also moves for reconsideration under Rule 60(b)(6). Relief under Rule 60(b)(6) is only appropriate under "extraordinary circumstances." *Gonzalez v. Crosby,* 545 U.S. 524, 535, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2006). Rule 60(b)(6) is to be used "sparingly [and] as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir.1993). "60(b) motions are addressed to the sound discretion of the district court." *Martella v. Marine Cooks and Stewards Union, Seafarers Intern. Union of North America,* 448 F.2d 729, 730 (9th Cir.1971). Plaintiff Lion does not identify any extraordinary circumstances or manifest injustice to warrant relief under the "catch-all" provision, Rule 60(b)(6).

"The Rule 60(b)(6) 'catch-all' provision ... applies only when the reason for granting relief is not covered by any of the other reasons set forth in Rule 60." *Delay v. Gordon,* 475 F.3d 1039, 1044 (9th Cir.2007) The fact that Plaintiff Lion has the ability to file a new FOIA request based on the current conditions before the USDA demonstrates lack of

extraordinary circumstances. Plaintiff cites no analogous cases affording relief under Rule 60(b)(6) from judgment denying a FOIA request based on exemption 7(A). Rule 60(b) motions are not vehicles for parties to present known existing evidence that could have been presented prior to time of judgment or decision making. Plaintiff cites, without analysis, several cases for the proposition that the although Rule 60(b)(6) should be used sparingly, it applies when the FOIA requester presents compelling evidence of agency misconduct under a "reasonable person standard." A review of the cases does not provide support for Plaintiff's 60(b)(6) motion for relief from Judgment.

*Computer Professionals for Social Responsibility v. U.S. Secret Service,* 72 F.3d 897 (D.D.C.1996), involves a motion for reconsideration of defendant's motion for summary judgment in a FOIA suit. The suit involved a FOIA 7(D) exemption, not a 7(A) exemption. The Court had originally denied the government's assertion of an exemption to the FOIA request under Section 552(b)(7)(D). Section 552(b)(7)(D) provides an exemption where it:

> could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source

5 U.S.C. § 552(b)(7)(D).

The government in its reconsideration motion argued that a 7(D) exemption applied and cited to previously undisclosed information. The court on reconsideration found this information central to finding a 7(D) exemption applied, though noting that original failure to present information was inexcusable. The information that was sought by plaintiff in the suit on reconsideration was found to be obtained under an expectation of confidentiality and the individual providing the information had done so under such expectation. This new evidence demonstrated that the initial order was manifestly unjust, thus justifying reconsideration under Rule 60(b)(6). *Id.* at 903. *Computer Professionals* also addressed the necessary public interest showing required to override privacy interests protected under a FOIA 7(C) exemption. A 7(c)

exemption to a FOIA request authorizes the withholding of records or information compiled for law enforcement purposes to the extent that production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). This case is not applicable.

*Valdez v. U.S. Dept. Of Justice,* 474 F.Supp.2d 128, 133 (D.D.C.2007), also cited by Plaintiff for support, fails to advance its argument. In *Valdez,* the court granted summary judgment for the government on the basis of the FOIA 7(C) exemption, finding the public interest asserted by the plaintiff failed to override the privacy interest. "Here, plaintiff merely asserts that he has uncovered evidence 'suggesting massive government misconduct.' His burden is much higher, however. Absent 'evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred,' he fails to demonstrate a public interest" to outweigh the privacy interest. *Id.* at 133 (quoting *Nat'l Archives and Records Admin. v. Favish,* 541 U.S. 157, 174, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004)).

Plaintiff additionally cites without explanation *Bennett v. Drug Enforcement Admin.,* 55 F.Supp.2d 36, 42-43 (D.D.C.1999), a FOIA suit involving, not a 7(A) exemption, but a 7(C) exemption to a FOIA request. The DEA argued in response to a FOIA request that the payment records and the criminal history of a DEA informant were exempted from a FOIA request under 7(C), invasion of personal privacy. The court disagreed and found a public interest in disclosing information that outweighed the privacy interest because there was "compelling evidence" of government misconduct. The information sought would confirm whether Plaintiff's findings were "backed by the record." *Id.* at 42. "[W]hen government misconduct is alleged to justify disclosure, the public interest is unsubstantial without *compelling evidence* that the agency is involved in illegal activity, and that the information sought is necessary to confirm or refute that evidence." *Id.* (emphasis added). The Court held:

> Plaintiff and his counsel have already conducted significant research on the many instances in which Chambers [DEA informant] has perjured himself about his criminal record, and the government's apparent complacency about this conduct. The information uncovered by Plaintiff is *very compelling,* suggesting extensive government misconduct, and the information sought is necessary to confirm whether Plaintiff's findings are backed by the record. Furthermore, it is clear from the far-reaching and serious consequences of the activities and collaboration of

> Chambers and DEA that there is a substantial public interest in exposing any wrongdoing in which these two parties may have engaged. This public interest can only be served by the full disclosure of Chambers' rap-sheet, about which he has frequently testified, although not always truthfully, in open court around the country. Consequently, Defendant's withholding of Chambers' criminal record under Exemption 7(C) was improper.

*Id.* (emphasis added).

Plaintiff also cites *Sonds v. Huff,* 391 F.Supp.2d 152, 159 (D.D.C.2005) which also addresses the ability to overcome a 7(C) privacy exemption in a FOIA suit. A portion of the decision addresses overcoming the privacy concerns under a FOIA 7(C) by a larger public interest concern, similar to *Bennett* and does not address a 7(A) exemption to a FOIA request.[2]

Plaintiff next cites what is considers "compelling and substantial evidence of agency misconduct" by high-ranking officials to support its contention that extraordinary circumstances are present to grant Lion relief under its 60(b)(6) motion. (Doc. 6, Reply, p. 5:8-10). Plaintiff's arguments of agency misconduct to support an extraordinary circumstances finding was first stated in its Reply. Defendant USDA has not had the opportunity to respond to the new allegations of agency misconduct.

First, Plaintiff contends that David W. Trykowski, Director of Compliance, Safety and Security Division of the AMS, who at the time of the administrative hearings was Chief of Investigations for AMS and prior to that was Senior Compliance Officer of the AMS, is untrustworthy and lacks credibility. Plaintiff contends that Mr. Trykowski declared in 2005 he never signed a Worksheet, but Plaintiff alleges that in previous administrative proceedings, he submitted an exhibit that was a Worksheet he signed. Plaintiff also contends that Mr. Trykowski testified in an administrative proceeding in 2003 that he had

[2] Plaintiff also cites *American Civil Liberties Union v. Department of Defense,* 406 F.Supp.2d 330 (S.D.N.Y.2005), in which a civil liberties group brought forward new evidence in their motion for relief from judgment under 60(b)(2) and 60(b)(6). The government had been granted summary judgment on Plaintiff's FOIA request. Court denied motion for relief from judgment under 60(b) (2), and declined to rule on 60(b)(6) since new evidence is covered under 60(b)(2).

nothing to do with the preparation of the complaint but allegedly, later testified in a 2005 District Court case that he participated in drafting that complaint. Plaintiff also contends that Mr. Trykowski stated before a District Judge in 2004 that he was the lead investigator, however, allegedly in 2003 he testified before the ALJ that there were no team of investigators in that case. Plaintiff also argues that Mr. Trykowski gave inconsistent and false testimony to the ALJ about inspection procedures, practices and recording requirements. Plaintiff further claims that Mr. Trykowski withheld inspection sheets with reinspection results for raisins that were reconditioned and additional inspection sheets for reconditioned raisins are being withheld. (Doc. 61, Reply, 5:21-25 and 6:1-11)

Plaintiff does not state that it is providing this as newly discovered evidence, nor explains why this was not addressed in the 2005 summary judgment briefs. No mention of these issues are made in the 2005 Order. In addition, these are conclusory statements with references to the specific portions of Lion's petition to reopen proceedings in Complaint 1. It is unclear how alleged collateral misstatements in other cases provides *evidence* or shows extraordinary circumstances.

Plaintiff also describes certain actions allegedly attributable to Government Counsel Colleen Carroll that occurred in a proceeding in the U.S. Court of Federal Claims. *Lion Raisins, Inc. v. U.S.,* 64 Fed. Cl. 536 (2005). In the proceedings, the Department of Justice and USDA counsel were cited for contempt for violating a protective order after disclosing protected material to the ALJ in the proceedings for Complaint 1. *Id.* at 544. It is not clear from a review of the U.S. Court of Federal Claims decision that Colleen Carroll was the attorney being cited for contempt.

Plaintiff also complains about the manner in which Ms. Carroll allegedly presented evidence in the proceedings for Complaint 1. Ms. Carroll allegedly presented evidence to support USDA's claim that Lion forged the name of an inspector on three USDA certificates. However she did not call a handwriting expert. Lion claims it was precluded from conducting a handwriting analysis which its expert later independently concluded that the signature was probably authentic. Plaintiff contends disclosure of the Worksheets are important for the reason that Ms. Carroll is engaged in misconduct. (Doc. 61, Reply, 6:24-25 and 7:1-10) There is no explanation why Ms. Carroll's failure to call a handwriting expert precludes Plaintiff from calling its own handwriting expert. No

allegation is made that Ms. Carroll improperly interfered with the ALJ Judge's hearing of evidence. Also, this claim does not demonstrate agency misconduct by Ms. Carroll that is related to the Worksheets.

Plaintiff also complains of actions by Kenneth Clayton, USDA Associate Administrator of the AMS. The actions stem from a 2001 decision in a different suit involving the same parties. In the preliminary injunction decision Lion was suspended from bidding on government contracts. *See Lion Raisins, Inc. v. USDA,* CIV-F-01-5050 OWW DLB, *Findings of Fact and Conclusions of Law Re: Plaintiff's Motion for Preliminary Injunction,* p. 9, 14, 26. Lion challenged the suspension decision in federal court. The resulting order stated that the Suspending Officer "ignored, mischaracterized or minimized the numerous and good faith steps" taken by Lion. *Id.* at p. 14, ¶ 56. When the case was transferred to Federal Claims Court that court held that the suspension decision was arbitrary and capricious. Lion cites this decision to show that the failure to disclose the Worksheets could be explained by Mr. Clayton's previous behavior, which the 2001 decision found "puzzling." Lion claims receipt of the Worksheets would likely prove knowledge or constructive knowledge that inspectors recorded reinspection results on Worksheets without following the mandatory set aside and recording procedures." (Doc. 61, Reply, p. 7:21-24) The 2001 Clayton information was available to Lion before the 2005 Order issued. Lion never presented this information in 2005, it is not newly discovered evidence, nor does Lion provide a reason for not presenting this information at that time.

Finally, Plaintiff Lion claims that Mr. Clayton and/or Mr. Trykowski have gone to great lengths to destroy or suppress evidence of agency misconduct and punish Lion. Plaintiff Lion describes the alleged destruction of reinspection records, such as cover sheets for Certificates that were prepared to correct and supersede other Certificates and destruction or withholding of relevant portions of the Ledger in violation of records management regulations. (Doc. 61, Reply, p. 7:25-28 and 8:1-18) But these statement are also conclusory and Lion only cites its own petition to reopen the proceedings in Complaint 1, and a declaration by its in-house counsel. This does not amount to concrete or compelling evidence of wrongdoing to establish the extraordinary circumstances for a 60(b) (6) motion.

Allegations of agency misconduct, including alleged misconduct that

was known to Plaintiff Lion at the time of the 2005 Order and which stems in some instances from alleged misconduct as early as the 2001 decision does not suffice to overcome the high bar set for a 60(b)(6) motion requiring extraordinary circumstances.

The Ninth Circuit has not addressed at which point the FOIA examination takes place on review. The main case on point comes for the District Court of Columbia. *See Bonner v. U.S. Dep't of State,* 928 F.2d 1148, 1152 (D.D.C.1991). Two unpublished opinions, one for the Ninth Circuit, following *Bonner,* and one from the Northern District of California take two different approaches on the issue of when a review of a FOIA request is appropriate: (1) at the time of the agency decision (Ninth Circuit unpublished opinion); or (2) at the time of review by the court (Northern District unpublished opinion). According to the District of Columbia precedent, a FOIA review is to proceed from the time the agency denied the request, thus denying Lion relief here. *Bonner,* 928 F.2d at 1152. It will not leave Lion without recourse as the unpublished Ninth Circuit opinion notes that a FOIA request can be resubmitted, which it appears Lion has done. *Lynch v. Department of Treasury,* 2000 WL 123236 *3, 210 F.3d 384 (9th Cir.2000).

Under the District of Columbia Circuit precedent, a court reviewing a denial of a FOIA request must judge the agency's decision as of the time the agency responded to the FOIA request, not at the time of the court's review. “FOIA judicial review ..., while de novo, remains an assessment of the agency decision to withhold a document. That decision, we hold, ordinarily must be evaluated as of the time it was made.” *Bonner,* 928 F.2d at 1152. “Courts reviewing an agency's action must of necessity limit the scope of their inquiry to an appropriate time frame ... To require an agency to adjust or modify its FOIA responses on post-response occurrence could create an endless cycle of judicially mandated reprocessing.” *Id.* at 1152-53. This court, USDA argues has already evaluated USDA's decision to deny the FOIA request in light the circumstances existing at the time, granting summary judgment in favor of USDA on the grounds that the disclosure of the Worksheets could reasonably be expected to interfere with law enforcement proceedings. *See* Doc. 47, Judgment, p. 21. No Ninth Circuit case has explicitly adopted *Bonner'* s holding.

The Ninth Circuit Court of Appeals *unpublished opinion* held the following with regard to reviewing FOIA requests:

Similarly, the determination as to whether a release of records

> could reasonably be expected to interfere with enforcement proceedings is to be made as of the time the agency decided to withhold the documents. See *Bonner v. United States Dep't of State,* 928 F.2d 1148, 1152 (D.C.Cir.1991); *Institute for Justice and Human Rights v. Executive Office of the U.S. Attorney,* No. C 96-1469 FMS, 1998 WL 164965, at *3 (N.D.Cal. Mar.18, 1998)....

If Lynch now believes that, three years after the fire, no proceeding is currently pending or contemplated, his recourse is to resubmit an FOIA request for the records at this time.

*Lynch v. Department of Treasury,* 2000 WL 123236 *3, 210 F.3d 384 (9th Cir.2000). Plaintiff Lion seeks a review of the FOIA decision by the agency anew, and not at the time of the denial, which has been finally decided. Plaintiff Lion has not presented any evidence or argument on the original denial of its FOIA request. It instead seeks to have the court review the FOIA denial in light of the present circumstances which the law does not support. *See Bonner v. U.S. Dep't of State,* 928 F.2d 1148, 1152 (D.D.C.1991).

The Northern District of California court in an unpublished opinion declined to follow *Bonner:*

> Plaintiff argues that even if the government properly withheld the documents in 1994, its reason for the exemption is no longer valid. This position raises two questions: whether it is proper for the Court to analyze the present validity of the claimed exemption, and whether the result would be different if such an analysis is performed. The Court answers the first question in the affirmative and the second in the negative.

*Institute for Justice and Human Rights v. Executive Office of the U.S. Attorney,* No. C 96-1469 FMS, 1998 WL 164965 *4 (N.D.Cal. May 18, 1998). "The termination of law enforcement proceedings that formed the basis of an exemption would be an equally apparent and substantial change in circumstances. Accordingly, the government should be required to justify its withholdings based on present circumstances in this case." *Id.* The Northern District of California court found the proceedings to still be open and declined to find changed circumstances, thereby it did not mandate a different result but it reviewed the FOIA

request for the present circumstances. *Id.*

Even if *arguendo,* the Northern District of California approach is taken, the proceedings here are ongoing, preventing a decision to release the requested records. USDA contends through its Declaration by Director David W. Trykowski "that the basis for withholding worksheets remains valid, because while the enforcement proceedings have progressed, those proceedings are not completed, and release of the requested records could still interfere with AMS' enforcement efforts. Declaration of David W. Trykowski in Support of Defendant's Opposition to Motion for Relief from Judgment ("Trykowski Decl.") ¶ 6. Under Exemption 7(A), an agency "need only make a general showing that disclosure of its investigatory records would interfere with its enforcement proceedings." *Lewis v. I.R.S.,* 823 F.2d 375, 380 (9th Cir.1987). USDA contends that granting Lion access to these worksheets would provide Lion with an opportunity to create exculpatory evidence in pending and "prospective" administrative proceedings. *See Manna v. United States Dep't of Justice,* 51 F.3d 1158, 1164-65 (3d Cir.1995) (Exemption 7(A) covers both pending and "prospective" criminal proceedings). Plaintiff Lion is also not without recourse, as Lion can resubmit a FOIA request.

"The court is entitled to accept the credibility of the affidavits [of the government], so long as it has no reason to question the good faith of the agency." *Cox v. United States Dep't of Justice,* 576 F.2d 1302, 1312 (8th Cir.1978). "In evaluating a claim for exemption, a district court must accord 'substantial weight' to [agency] affidavits, provided the justifications for nondisclosure 'are not controverted by contrary evidence in the record or by evidence of [agency] bad faith.' " *Minier v. CIA,* 88 F.3d 796, 800 (9th Cir.1996) (quoting *Hunt v. C.I.A.,* 981 F.2d 1116, 1119 (9th Cir.1992)).

Lion disagrees and contends through its in-house corporate counsel, Wesley T. Green, that the evidence has concluded on Complaint 1 and Complaint 3. *See* Declaration of Wesley T. Green in Support of Plaintiff's Motion for Relief from Judgment ("Green Decl.") ¶¶ 1-2. Lion however has filed petitions to reopen hearings in two of the proceedings and the third proceeding (Complaint 2) has not been heard and is awaiting reassignment to an ALJ. Trykowski Decl. ¶ 8. USDA contends that the ALJ has not issued a decision on Complaint 1, even though Lion has petitioned to reopen the hearing. If the ALJ grants Lion's motion, USDA argues that the ALJ will hear further testimony

and evidence. Trykowski Decl. ¶ 7. As to Complaint 3, the ALJ dismissed more than half the counts and issued a decision and order finding on 33 occasions Lion had engaged in a "pattern of misrepresentation or deceptive or fraudulent practices in connection with the use of official inspection certificate [and/or] inspection results." The ALJ also barred Lion from receiving inspection services for a period of five years. Lion has petitioned to reopen that hearing. AMS has also asked the Judicial Officer to review the ALJ's decision that dismissed half the counts in the Complaint 3 proceedings. USDA contends that if the ALJ erred in dismissing those counts, they could be remanded for additional proceedings. *Id.* at ¶ 9.

Rule 60(b)(6) does not afford relief.

C. Request for Modification of Order

Lion also requests under its motion for relief from judgment an order from the Court modifying the 2005 Order to require the USDA to maintain originals of the requested worksheets pending resolution of the new FOIA request and judicial review thereon. " 'Rule 60(b) is available only to set aside a prior judgment or order; courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment.' " *Delay v. Gordon,* 475 F.3d 1039, 1044 (9th Cir.2007) (citing 12 Moore's Federal Practice § 60.25 (Matthew Bender 3d 2004)); *see also United States v. $119,980,* 680 F.2d 106 (11th Cir.1982). Plaintiff cannot seek an order modifying the 2005 Order to encompass a request related to a new FOIA request. The new FOIA request was not addressed by the October 20, 2005 Summary Judgment Order. Lion should be bringing a separate request under its new FOIA request not under the October 20, 2005 Summary Judgment Order.

## ***CONCLUSION***

For the reasons set forth above, Plaintiff's 60(b)(5) and 60(b) (6) motion for relief from judgment is DENIED.

IT IS SO ORDERED.

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# PORK PROMOTION, RESEARCH AND CONSUMER INFORMATION ACT

## DEPARTMENTAL DECISION

**In re: MARK MCDOWELL, JIM JOENS, RICHARD SMITH, AND THE CAMPAIGN FOR FAMILY FARMS, INCLUDING IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, LAND STEWARDSHIP PROJECT, MISSOURI RURAL CRISIS CENTER, ILLINOIS STEWARDSHIP ALLIANCE, AND CITIZENS ACTION COALITION OF INDIANA ON BEHALF OF THEIR PORK CHECKOFF-PAYING HOG FARMER MEMBERS.**
**AMA PPRCIA Docket No. 05-0001.**
**Decision and Order.**
**Filed December 18, 2008.**

**PPRCIA – Pork checkoff – AFO – Substantial interest – Research, use of fees for – Check-off funds, legitimate use of, when not.**

Susan Stokes for Petitioners.
Frank Martin, Jr. For AMS.
Initial Decision issued by Peter M. Davenport, Administrative Law Judge.
*Decision and Order by William G. Jenson, Judicial Officer*

### Decision and Order

### PROCEDURAL HISTORY

On March 14, 2005, Mark McDowell, Jim Joens, Richard Smith, and the Campaign for Family Farms [hereinafter Petitioners] instituted this proceeding by filing a letter dated March 2, 2005, addressed to the Secretary of Agriculture [hereinafter the Petition]. Petitioners filed the Petition pursuant to the Pork Promotion, Research, and Consumer Information Act of 1985, as amended (7 U.S.C. §§ 4801-4819) [hereinafter the Pork Act]; the Pork Promotion, Research, and Consumer Information Order (7 C.F.R. pt. 1230) [hereinafter the Pork Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Information Programs (7 C.F.R. §§ 900.52(c)(2)-.71; 1200.50-.52) [hereinafter the Rules of Practice].

On April 1, 2005, the Administrator, Agricultural Marketing Service,

United States Department of Agriculture [hereinafter the Administrator], filed a motion to dismiss the Petition asserting the Petition does not include information required by 7 C.F.R. § 1200.52(b)(1), (3), (6). On April 12, 2005, Administrative Law Judge Jill S. Clifton dismissed the Petition.

On May 6, 2005, Petitioners filed an Amended Petition. On June 6, 2005, the Administrator filed a motion to dismiss the Amended Petition for failure to state a legally cognizable claim. Petitioners opposed the Administrator's motion to dismiss the Amended Petition. On June 28, 2005, Petitioners filed an unopposed motion for leave to file a second amended petition, and on July 8, 2005, Administrative Law Judge Jill S. Clifton granted Petitioners' motion. On July 18, 2005, Petitioners filed a Second Amended Petition in which Petitioners request that: (1) the Secretary of Agriculture stop the National Pork Board's expenditure of pork checkoff funds for the study of air emissions from hog feeding operations; (2) the Secretary of Agriculture return any monies expended for the study of air emissions from hog feeding operations to the pork checkoff fund; (3) the Office of the Inspector General, United States Department of Agriculture, conduct an investigation of the use of pork checkoff funds for the study of air emissions from hog feeding operations; and (4) the Office of the General Counsel, United States Department of Agriculture, institute an action against the National Pork Producers Council for return of any pork checkoff funds that the National Pork Producers Council received for work relating to the study of air emissions from hog feeding operations (Second Amended Pet. at 1, 11). On August 3, 2005, the Administrator filed a motion to dismiss the Second Amended Petition for failure to state a legally cognizable claim. On August 22, 2005, Petitioners filed a response opposing the Administrator's motion to dismiss the Second Amended Petition.

On August 3, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a telephone conference during which the parties agreed that neither an evidentiary hearing nor oral argument was necessary. On September 5, 2006, (1) Petitioners filed Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioners' Brief in Support of Proposed Findings of Fact and Conclusions of Law; (2) the Administrator filed Respondent's Proposed Findings of Fact and Conclusions of Law and Respondent's Memorandum in Support of Its Proposed Findings of Fact and Conclusions of Law; and (3) Petitioners and the Administrator filed a Joint Statement of Undisputed Facts.

On October 24, 2006, the ALJ issued a Decision and Order

[hereinafter Initial Decision]: (1) concluding the National Pork Board's use of pork checkoff funds to pay a per-farm-fee associated with the United States Environmental Protection Agency's [hereinafter EPA] National Industrial Air Emissions Study [hereinafter Air Emissions Study] contravenes public policy and is not in accordance with law because the funds are used to purchase a limited and conditional release of civil liability and covenant by EPA not to sue certain animal feeding operations for violations of federal environmental statutes; (2) denying the Administrator's motion to dismiss the Second Amended Petition; and (3) enjoining the National Pork Board from using pork checkoff funds for the purpose of paying the per-farm-fee associated with EPA's Air Emissions Study (Initial Decision at 11).

EPA and the National Pork Producers Council each filed a motion for leave to file an amicus brief, both of which I granted. On December 15, 2006, the Administrator appealed the ALJ's Initial Decision and EPA and the National Pork Producers Council each filed an amicus brief. On January 9, 2007, Petitioners filed a response to the Administrator's appeal petition. On January 17, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

## DECISION

### Decision Summary

Based upon a careful review of the record, I reverse the ALJ's Initial Decision. I conclude Petitioners lack standing, the Second Amended Petition fails to state a legally cognizable claim, and the National Pork Board's payment of the per-farm-fee associated with EPA's Air Emissions Study is in accordance with the Pork Act and the Pork Order; therefore, I grant the Administrator's motion to dismiss the Second Amended Petition.

### Findings of Fact

1. The Pork Act was established to create an orderly procedure for financing and carrying out an effective and coordinated program of promotion, research, and consumer information designed to strengthen the position of the pork industry in the marketplace and to maintain, develop, and expand markets for pork and pork products. (See 7 U.S.C. § 4801(b)(1).) (Joint Statement of Undisputed Facts ¶ 2.)

2. The pork promotion, research, and education program created by

the Pork Act and Pork Order is commonly known as the "pork checkoff program" and is funded with mandatory assessments paid by every pork producer on every porcine animal marketed. (See 7 U.S.C. § 4809; 7 C.F.R. pt. 1230.) (Joint Statement of Undisputed Facts ¶ 3.)

3. Petitioners challenge the National Pork Board's expenditure of $6,000,000 of pork checkoff funds to support the Air Emissions Study conducted pursuant to EPA's Notice of Animal Feeding Operations Consent Agreement and Final Order [hereinafter Notice of Air Compliance Agreement]. (See 70 Fed. Reg. 4958-77 (Jan. 31, 2005).) The Notice of Air Compliance Agreement contains the Air Compliance Agreement, which animal feeding operations may voluntarily enter with EPA. (See 70 Fed. Reg. 4962-77 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 4.)

4. The Secretary of Agriculture has jurisdiction over the instant proceeding conducted under 7 U.S.C. § 4814(a)(1), which provides that a person subject to the Pork Order may file with the Secretary of Agriculture a petition stating that the Pork Order, a provision of the Pork Order, or an obligation imposed in connection with the Pork Order is not in accordance with law and requesting a modification of the Pork Order or an exemption from the Pork Order (Joint Statement of Undisputed Facts ¶ 5).

5. The instant proceeding is governed by the Rules of Practice (Joint Statement of Undisputed Facts ¶ 6).

6. Petitioners are Mark McDowell, Jim Joens, Richard Smith, and the Campaign for Family Farms, including Iowa Citizens for Community Improvement, Land Stewardship Project, Missouri Rural Crisis Center, Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana on behalf of their pork checkoff-paying hog farmer members (Joint Statement of Undisputed Facts ¶ 7).

7. Mark McDowell is an individual hog farmer residing in Hampton, Iowa, who pays the pork checkoff (Joint Statement of Undisputed Facts ¶ 8).

8. Jim Joens is an individual hog farmer residing in Wilmont, Minnesota, who pays the pork checkoff (Joint Statement of Undisputed Facts ¶ 9).

9. Richard Smith is an individual hog farmer residing in Wilmont, Minnesota, who pays the pork checkoff (Joint Statement of Undisputed Facts ¶ 10).

10. The Campaign for Family Farms is an unincorporated association comprised of: Iowa Citizens for Community Improvement, Des Moines, Iowa; Land Stewardship Project, Minneapolis, Minnesota; Missouri

Rural Crisis Center, Columbia, Missouri; Illinois Stewardship Alliance, Rochester, Illinois; and Citizens Action Coalition, Indianapolis, Indiana. The Campaign for Family Farms and its member organizations have hog farmer members who are subject to the Pork Act and Pork Order. (Second Amended Pet. at 2-3; Joint Statement of Undisputed Facts ¶ 11.)

11. The National Pork Board is a 15-member board created to carry out the Pork Act. The National Pork Board, which is overseen by the Secretary of Agriculture, is responsible for developing and implementing programs and projects under the Pork Act through the collection and expenditure of pork checkoff funds. (See 7 U.S.C § 4808.) (Joint Statement of Undisputed Facts ¶ 13.)

12. EPA is an agency of the United States government that administers the Air Emissions Study in conjunction with the Air Compliance Agreement. (See 70 Fed. Reg. 4962-77 (Jan. 31, 2005).) EPA is responsible for enforcement of numerous federal environmental statutes, including the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; and the Emergency Planning and Community Right-To-Know Act. (Joint Statement of Undisputed Facts ¶ 14.)

13. The Agricultural Air Resources Council is the nonprofit organization established by the Air Compliance Agreement to administer the funding for the Air Emissions Study. (See 70 Fed. Reg. 4969-70 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 15.)

14. The Air Emissions Study is a nationwide emissions monitoring study that allows EPA to collect and study data concerning air emissions from animal feeding operations, including pork operations. (See 70 Fed. Reg. 4958-77 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 29.)

15. During the Air Emissions Study, emissions data for hydrogen sulfide, ammonia, volatile organic compounds, fine particulate matter ($PM_{10}$ and $PM_{2.5}$) and total suspended particulate matter is to be collected. (See 70 Fed. Reg. 4963 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 30.)

16. EPA conducts the Air Emissions Study by monitoring air emissions from a small number of representative livestock and poultry operations selected from the pool of animal feeding operations that enter into the Air Compliance Agreement with EPA. (See 70 Fed. Reg. 4959 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 31.)

17. Under the Air Emissions Study, EPA selected for monitoring approximately six pork operations located within three geographic

regions. (See 70 Fed. Reg. 4971 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 32.)

18. The Air Emissions Study is conducted by the Independent Monitoring Contractor, which is required to be an organization that is separate from the industries funding the Air Emissions Study. The Agricultural Air Resources Council has selected Purdue University to be the Independent Monitoring Contractor. In addition, Albert J. Heber, Ph.D, P.E., professor and executive director of the Purdue Agricultural Air Quality Laboratory, has been chosen to be the science advisor. Dr. Heber and Purdue University are responsible for recruiting scientists from additional universities and for deploying monitoring teams to collect data and conduct the Air Emissions Study. (RX A;[1] 70 Fed. Reg. 4969-70 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 33.)

19. Pursuant to the Notice of Consent Agreement and the Air Compliance Agreement, EPA agreed to a limited and conditional release of civil liability and a covenant not to sue for certain violations of the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; and the Emergency Planning and Community Right-To-Know Act for animal feeding operations that sign the Air Compliance Agreement. Animal feeding operations that enter into an Air Compliance Agreement agree to pay a civil penalty, which is based on the size of the animal feeding operation, and approximately $2,500 per farm into a fund to conduct the Air Emissions Study. (70 Fed. Reg. 4959 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 34.)

20. The National Pork Board has agreed to use approximately $6,000,000 of pork checkoff funds to cover participating pork animal feeding operations' per-farm-fee required under the Air Compliance Agreement to fund the Air Emissions Study (RX E-H; Joint Statement of Undisputed Facts ¶ 35).

21. All pork animal feeding operations participating in the Air Compliance Agreement are individually responsible for paying the civil penalty assessed by EPA. The amount of the civil penalty is based on the size of the animal feeding operation. (See 70 Fed. Reg. 4959 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 36.)

22. The initiation of the Air Emissions Study was contingent upon EPA's determination that a sufficient number of animal feeding

[1] References to the Administrator's exhibits attached to the Declaration of Kenneth R. Payne in Support of Respondent's Supplemental Motion to Dismiss are designated "RX."

operations of each species elected to participate. The determination was based on whether the number of participants is sufficient to fully fund the Air Emissions Study and whether the number of participants for each type of operation was sufficient to provide a representative sample to monitor. If EPA had determined that the total number of participants was insufficient, EPA would not have signed any Air Compliance Agreements and would not have proceeded with the Air Emissions Study. (See 70 Fed. Reg. 4962 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 37.)

23. On August 22, 2006, EPA announced that its Environmental Appeals Board approved 2,568 Air Compliance Agreements (Joint Statement of Undisputed Facts ¶ 39).

24. Based on the approvals of the Air Compliance Agreements, EPA proceeded with the Air Emissions Study. (See 70 Fed. Reg. 4962 (Jan. 31, 2005).) (Joint Statement of Undisputed Facts ¶ 40.)

25. The National Pork Board entered into a Memorandum of Understanding with the Agricultural Air Resources Council whereby the National Pork Board agreed to pay $6,000,000 to the Agricultural Air Resources Council for preparatory expenses in two lump sums. The first payment of $4,000,000 was due upon EPA approval of the Independent Monitoring Contractor's proposed detailed plan to conduct the Air Emissions Study. The remaining balance was due within 60 days of final EPA approval of the monitoring plan. (RX I; Joint Statement of Undisputed Facts ¶ 41.)

26. The Secretary of Agriculture has approved the National Pork Board's budget requests for payments under the Memorandum of Understanding with the Agricultural Air Resources Council for the Air Emissions Study (RX E-H; Joint Statement of Undisputed Facts ¶ 42.)

**Petitioners' Petition and Amended Petition**

Administrative Law Judge Jill S. Clifton dismissed Petitioners' Petition on April 12, 2005. On May 6, 2005, Petitioners filed an Amended Petition, which, despite Petitioners' filing the Second Amended Petition, has not been dismissed. The Administrator correctly notes previous cases in which original pleadings have been treated as if they survive the filing of amended pleadings (Respondent's Supplemental Motion to Dismiss at 2).[2] Generally, an amended pleading

[2] *See e.g., In re Stark Packing Corp.*, 51 Agric. Dec. 1015, 1017 (1992) (dismissing the petition and the amended petition).

supercedes the original pleading and renders the original pleading of no legal effect.[3] Therefore, in order to avoid confusing and muddled records, I adopt the general rule and hold that in proceedings that come before me, unless the applicable rules of practice explicitly provide otherwise or the record clearly indicates otherwise, an amended pleading supercedes the original pleading and renders the original pleading of no legal effect. Therefore, I conclude Petitioners' Amended Petition, filed May 6, 2005, was superceded by Petitioners' Second Amended Petition and the Amended Petition is of no legal effect.

## Petitioners' Second Amended Petition

### *I. Introduction*

I dismiss the Second Amended Petition because Petitioners lack standing and the Second Amended Petition does not state a claim upon which relief can be granted. Moreover, even if I were to find Petitioners have standing and the Second Amended Petition states a claim upon which relief may be granted, I would deny the Second Amended Petition because the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study does not violate the Pork Act or the Pork Order.

### *II. Petitioners Lack Standing*

Petitioners allege the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study violates the Pork Act and the Pork Order. Petitioners have failed to allege any particularized harm they will suffer as a result of the National Pork Board's use of pork checkoff funds for the Air Emissions Study. The nature of the harm alleged by Petitioners is merely an injury to Petitioners' interest in the National Pork Board's lawful expenditure of its funds. This type of

[3] *Washer v. Bullitt County*, 110 U.S. 558, 562 (1884); *Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007), *cert. denied sub. nom Knox v. Mink*, 128 S. Ct. 1222 (2008); *Lucente v. International Business Machines Corp.*, 310 F.3d 243, 260 (2d Cir. 2002); *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000); *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1345 n.1 (11th Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000); *Kelley v. Crosfield Catalysts*, 135 F.3d 1202, 1204 (7th Cir. 1998); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999).

generalized harm is not an injury in fact.[4] Therefore, I conclude Petitioners do not have standing, and I dismiss the Second Amended Petition.

*III. Petitioners Do Not State A Claim Upon Which Relief Can Be Granted*

Even if I were to find that Petitioners suffered an injury in fact as a result of the National Pork Board's use of pork checkoff funds for the Air Emissions Study, I would dismiss Petitioners' Second Amended Petition because Petitioners do not seek modification of or exemption from the Pork Order. A person subject to the Pork Order may file a petition with the Secretary of Agriculture requesting modification of the Pork Order or exemption from the Pork Order (7 U.S.C. § 4814(a)(1); Rules of Practice). Petitioners seek four forms of relief in the Second Amended Petition. Petitioners request that: (1) the Secretary of Agriculture stop the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study; (2) the Secretary of Agriculture return any monies the National Pork Board expended for the Air Emissions Study to the pork checkoff fund; (3) the Office of the Inspector General, United States Department of Agriculture, conduct an investigation of the use of pork checkoff funds for the Air Emissions Study; and (4) the Office of the General Counsel, United States Department of Agriculture, institute an action against the National Pork Producers Council for return of any pork checkoff funds that the National Pork Producers Council has received for any work relating to the Air Emissions Study (Second Amended Pet. at 1, 11). None of Petitioners' requests are requests for modification of or exemption from the Pork Order; therefore, Petitioners have not stated a claim legally cognizable under 7 U.S.C. § 4814(a)(1).

*IV. The National Pork Board Has Not Violated The Pork Act Or The Pork Order*

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[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (rejecting as an injury the right to have the Executive observe procedures required by law and concluding the claimant did not have standing when the only claim was harm to the interest in the proper application of the Constitution and laws); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82 (1982) (holding a taxpayer challenge to the expenditure of funds belonging to the United States Treasury is nonjusticiable).

Even if I were to find Petitioners have standing and the Second Amended Petition states a legally cognizable claim, I would deny the Second Amended Petition because I find the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study is in accord with the Pork Act and the Pork Order. Congress, in enacting the Pork Act, described the purpose of the Pork Act as follows:

> **§ 4801. Congressional findings and declaration of purpose**
>
> . . . .
>
> (b)(1) It is the purpose of this chapter to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to—
>
> (A) strengthen the position of the pork industry in the marketplace; and
>
> (B) maintain, develop, and expand markets for pork and pork products.

7 U.S.C. § 4801(b)(1).

The Pork Act defines the term "research" as follows:

> **§ 4802. Definitions**
>
> For purposes of this chapter:
>
> . . . .
>
> (13) The term "research" means—
>
> (A) research designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products; or
>
> (B) dissemination to a person of the results of such research.

7 U.S.C. § 4802(13).

The Regulations contain a similar definition of the term "research":

> **§ 1230.23 Research.**

> *Research* means any action designed to advance, expand, or improve the image, desirability, nutritional value, usage, marketability, production, or quality of porcine animals, pork, or pork products, including the dissemination of results of such research.

7 C.F.R. § 1230.23.

The National Pork Board has authority to carry out research, as follows:

**§ 1230.58 Powers and duties of the Board.**

> The Board shall have the following powers and duties:
> . . . .
> (s) To carry out an effective and coordinated program of promotion, research, and consumer information designed to strengthen the position of the pork industry in the marketplace and maintain, develop, and expand markets for pork and pork products.

7 C.F.R. § 1230.58(s). The Air Emissions study is "research" as that term is defined in the Pork Act and the Pork Order. Although the Air Emissions Study is essentially an environmental study, I find environmental issues cannot be separated from the production and image of pork. Therefore, I conclude the Air Emissions Study is consistent with the Pork Act and the Pork Order in that it is designed to provide information which could be used to develop management practices which would reduce air emissions and thereby improve pork production, improve the image of the pork industry, and strengthen the pork industry. The National Pork Board clearly has authority under 7 C.F.R. § 1230.58(s) to use pork checkoff funds to carry out this research.

Petitioners contend the National Pork Board's use of pork checkoff funds for the Air Emissions Study violates the Pork Order's express prohibition on the use of pork checkoff funds to influence government policy and government action (Petitioners' Response to Respondent's Appeal at 32-39).

The Pork Order expressly prohibits the use of pork checkoff funds for the purpose of influencing legislation, government policy, and government action, as follows:

**§ 1230.74 Prohibited use of distributed assessments.**

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

7 C.F.R. § 1230.74(a). I agree with the ALJ's conclusion that the collection and study of data concerning air emissions falls far short of "influencing governmental policy or action." (ALJ's Initial Decision at 6.) I find the prohibition in 7 C.F.R. § 1230.74(a) is largely aimed at lobbying, not at data collection. The Air Emissions Study is not designed to advocate regulatory approaches to air emissions. Instead, it is designed to provide a more complete understanding of the environmental impacts of the pork industry and assist producers in developing responses to those impacts. The mere possibility that a government agency might at some point in the future use National Pork Board research when seeking the enactment of legislation, when formulating government policy, or as the basis for government action does not disqualify that research under 7 C.F.R. § 1230.74(a).

The ALJ concluded the National Pork Board has the authority to fund the Air Emissions Study; however, the ALJ found the National Pork Board used the pork checkoff funds not only to fund the Air Emissions Study, but also to purchase a limited and conditional release of civil liability, as well as a covenant on the part of EPA not to sue animal feeding operations for violations of environmental laws. The ALJ found the use of pork checkoff funds to purchase a release of civil liability and a covenant not to sue a contravention of public policy and a violation of law. (Initial Decision at 7.) Petitioners agree with the ALJ (Petitioners' Response to Respondent's Appeal), while the Administrator (Respondent's Appeal of October 24, 2006, Decision and Order), the National Pork Producers Council (Amicus Curiae Brief of the National Pork Producers Council), and EPA (U.S. Environmental Protection Agency Amicus Brief) disagree with the ALJ.

As an initial matter, whether the National Pork Board's expenditure of pork checkoff funds for the Air Emissions Study contravenes policy is not at issue in the instant proceeding.[5] The applicable statutory provision affords a means for adjudicating only whether the Pork Order,

[5] *In re Daniel Strebin*, 56 Agric. Dec. 1095, 1133 (1997); *In re Sunny Hill Farms Dairy Co.*, 26 Agric. Dec. 201, 217 (1967).

a provision of the Pork Order, or any obligation imposed in connection with the Pork Order is not in accordance with law.[6] Therefore, to the extent that the ALJ's Initial Decision is based upon the National Pork Board's contravention of policy, the Initial Decision must be set aside.

More importantly, I find the ALJ's determination that the National Pork Board purchased a release of civil liability and a covenant not to sue, error. The ALJ bases his conclusion on the incorrect view that the civil penalty and the per-farm-fee "are not severable and may be viewed as comparable to restitution required to be paid in addition to a fine or confinement" (ALJ's Initial Decision at 7 n.7).

EPA states the per-farm-fee is a flexible obligation that is not compulsory for some animal feeding operations and is conditional for all animal feeding operations. In contrast to the per-farm-fee, the civil penalty component is not optional or subject to being waived.[7] EPA discusses the civil penalty and the per-farm-fee as separate and distinct.[8] Animal feeding operations that sign an Air Compliance Agreement have a conditional obligation to fund the Air Emissions Study. The EPA makes clear that this conditional obligation to fund the Air Emissions Study is unrelated to any civil penalty and is not consideration provided in exchange for any release of civil liability:

> 42. [The Animal feeding operation] agrees not to claim or attempt to claim a federal income tax deduction or credit covering all or any part of the civil penalty paid to the United States Treasurer. Any payments made in connection with the [Air Emissions Study] do not constitute a fine or penalty and are not paid in settlement of any actual or potential liability for a fine or penalty.

70 Fed. Reg. 4965 (Jan. 31, 2005).

Thus, the ALJ's conclusion that the National Pork Board is purchasing a release of civil liability is incorrect. Instead, the National Pork Board is only funding research which the ALJ found to be authorized under the Pork Act and the Pork Order. The National Pork Board has chosen to accomplish this funding by helping to fund the Agricultural Air Resources Council. While EPA's covenant not to sue is being given to animal feeding operations "in consideration of [their] obligations under [the Air Compliance] Agreement" (70 Fed. Reg. 4963

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[6] 7 U.S.C. § 4814(a).
[7] 70 Fed. Reg. 4959, 4966 (Jan. 31, 2005).
[8] *Id.*

(Jan. 31, 2005)), these obligations do not inevitably include an obligation to fund the Air Emissions Study. The animal feeding operation may or may not have an obligation to fund the Air Emissions Study, but they are obligated to pay the EPA-imposed civil penalty.[9]

I find no quid pro quo between EPA's covenant not to sue and the National Pork Board's decision to help fund the Air Emissions Study through the Agricultural Air Resources Council. The National Pork Board's funding of the Air Emissions Study does not protect an animal feeding operation that fails to pay its civil penalty or otherwise fails to meet any of the other conditions in the Air Compliance Agreement. Accordingly, the ALJ's conclusion that the National Pork Board's expenditure of funds for the Air Emissions Study is not in accordance with law because it is a payment for a release from civil liability and a covenant not to sue, is error. To the contrary, I conclude the National Pork Board's expenditure of funds for the Air Emissions Study is an expenditure of funds for research designed to carry out the purposes of the Pork Act and the Pork Order and fully comports with the Pork Act and the Pork Order. Therefore, even if I were to find Petitioners have standing and the Second Amended Petition states a legally cognizable claim, I would deny Petitioners' Second Amended Petition.

For the foregoing reasons, the following Order is issued.

## ORDER

Petitioners' Second Amended Petition, filed July 18, 2005, is dismissed. This Order shall become effective on the day after service on Petitioners.

## RIGHT TO JUDICIAL REVIEW

Petitioners have the right to obtain review of the Order in this Decision and Order in the district court of the United States in which district Petitioners reside or do business. A complaint for the purpose of review of the Order in this Decision and Order must be filed not later than 20 days after the date Petitioners receive notice of the Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the complaint to the Secretary of Agriculture.[10]

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[9] 70 Fed. Reg. 4966 (Jan. 31, 2005).
[10] 7 U.S.C. § 4814(b)(1)-(2).

## MISCELLANEOUS ORDERS

**In re: MARVIN D. HORNE AND LAURA R. HORNE, D/B/A RAISIN VALLEY FARMS, A PARTNERSHIP AND D/B/A RAISIN VALLEY FARMS MARKETING ASSOCIATION, A/K/A RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION**
**and**
**MARVIN D. HORNE, LAURA R. HORNE, DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D/B/A LASSEN VINEYARDS, A PARTNERSHIP.**
**AMAA Docket No. 04-0002.**
**Order Granting Petition To Reconsider.**
**Filed September 18, 2008.**

**AMAA – Raisins – Petition to reconsider – Acquire – Assessments – Volume of raisins – Reserve tonnage – Civil penalty.**

Frank Martin, Jr. and Babak A. Rastgoufard, for Complainant.
David A. Domina and Michael Stumo, Omaha, NE, for Respondents.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
*Order issued by William G. Jenson, Judicial Officer*.

### PROCEDURAL HISTORY

On December 8, 2006, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards,[11] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. The ALJ further found that Mr. Horne and partners violated the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments. Pursuant to 7 U.S.C. § 608c(14)(B), the

[11] In this Order Granting Petition To Reconsider, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Mr. Horne and partners filed a timely petition for review of the ALJ's Decision and Order. On April 11, 2008, I issued a Decision and Order in which I found Mr. Horne and partners violated the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve California Natural Sun-dried Seedless raisins and by failing to pay to the Raisin Administrative Committee [hereinafter the RAC] the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003 and for crop year 2003-2004. Furthermore, I found that Mr. Horne and partners violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC for crop year 2002-2003 and for crop year 2003-2004. In total, I found that Mr. Horne and partners committed 673 violations of the Raisin Order. I ordered Mr. Horne and partners to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Finally, I assessed a civil penalty of $202,600 against Mr. Horne and partners for their violations of the Raisin Order.

On May 12, 2008, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer [hereinafter the Petition to Reconsider]. In the Petition to Reconsider, the Administrator alleged that the calculation of the assessments owed to the RAC by Mr. Horne and partners, as well as the calculations for the value of the raisins that Mr. Horne and partners failed to hold in reserve are not correct and should be modified. On June 3, 2008, Mr. Horne and partners filed Respondents' Opposition to Plaintiff's [sic] Petition to Reconsider [hereinafter Opposition to Petition to Reconsider]. In their Opposition to Petition to Reconsider, Mr. Horne and partners argue four issues:

1. The Administrator's Petition to Reconsider fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary [hereinafter the Rules of Practice] (7 C.F.R. § 1.146(a)(3));

2. The Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. The proposed reconsideration is inconsistent with the law; and

4. A custom or "toll" packer of raisins does not "acquire" raisins.

The Raisin Order mandates record keeping and reporting requirements that are necessary for the implementation of the Raisin Order (7 C.F.R. §§ 989.73, .77). Without such reports and without access to the documents that support these reports, it is difficult for the Agricultural Marketing Service [hereinafter AMS] and the RAC to properly determine the volume of raisins handled as well as the assessments and other monies due. Mr. Horne and partners failed to provide necessary documents until just before the second portion of the hearing on May 23, 2006.

I have spent considerable time examining the record in this proceeding. It appears that the document universe, entered into the record just prior to the second portion of the hearing, is likely missing some documents, while it contains duplicates of others. Determining exact volumes of raisins that flowed through Mr. Horne and partners' facility is difficult.

On June 19, 2008, I issued an Order Seeking Clarification in which I ordered the Administrator to explain how he reached the total weights used in calculating the amounts owed by Mr. Horne and partners. On July 11, 2008, the Administrator filed Administrator's Response to the Judicial Officer's Order Seeking Clarification. The response provides guidance for me to use in determining the appropriate amounts owed by Mr. Horne and partners to the RAC for the assessments and for the dollar equivalent of California raisins that Mr. Horne and partners failed to hold in reserve. The Administrator's analysis explained how AMS reached the proposed assessment amounts and the amounts owed for raisins that Mr. Horne and partners failed to hold in reserve. The analysis contained a citation to each relevant exhibit noting the weight of the raisins sold on the invoice in the exhibit.

Finally, on August 4, 2008, Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. This filing was Mr. Horne and partners' opportunity to challenge the Administrator's numbers. Mr. Horne and partners did not challenge any of the weights or calculations presented in the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, I find Mr. Horne and partners accept the Administrator's numbers as accurate and waive the opportunity to contest the numbers.

## DISCUSSION

As I discussed in my April 11, 2008, Decision and Order, there are three components of the Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order (Decision and Order at 32-40). First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c).

This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

> **§ 989.166 Reserve tonnage generally**.
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins*. . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]

7 C.F.R. § 989.166(c).

Mr. Horne and partners argued in their Opposition to Petition to Reconsider that the Administrator's calculations cannot be confirmed by resort to the evidence (Opposition to Pet. to Reconsider at 2). Mr. Horne

and partners' argument has some validity for the 2002-2003 crop year, in that, without additional clarification, the determination of the weight of the raisins handled by Mr. Horne and partners for the 2002-2003 crop year, is difficult. Because of this difficulty, I ordered the Administrator to clarify his calculations of the weight of the raisins. The Administrator's Response to the Judicial Officer's Order Seeking Clarification provides the necessary clarification. Mr. Horne and partners were given the opportunity to respond to the Administrator's clarifications. Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. However, in this submission, Mr. Horne and partners do not challenge the Administrator's numbers and the exhibits that support the numbers. Therefore, I find Mr. Horne and partners accept the Administrator's process for determining the weight of raisins handled as accurate and Mr. Horne and partners waive any challenge to the Administrator's conclusions regarding the weight of the raisins.

The Administrator did not challenge my findings regarding the weight of the raisins handled by Mr. Horne and partners in the 2003-2004 crop year. Furthermore, Mr. Horne and partners did not challenge the numbers I used in calculating the reserve tonnage for the 2003-2004 crop year. Therefore, I find that the Administrator and Mr. Horne and partners accept, as accurate, the weights used by me in my April 11, 2008, Decision and Order for the 2003-2004 crop year.

The final component necessary for the calculation of the value of the raisins Mr. Horne and partners failed to hold in reserve is the "latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types." (7 C.F.R. § 989.166(c).) In my April 11, 2008, Decision and Order, I used the "producer price" to calculate the reserve payment requirement. The Administrator argues that the appropriate price is the "announced price" found in the January 10, 2003, letter to the RAC from the Raisin Bargaining Association (CX 583). In *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit held that the "market price for free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations." The Administrator's "announced price" (CX 583 at 2) meets the Federal Circuit's definition of market price; therefore, I use the "announced price" found in the January 10, 2003, letter as the price for calculating the value of the raisins that Mr. Horne and partners failed to hold in reserve.

In the 2002-2003 crop year, Mr. Horne and partners packed out 1,266,924 pounds of raisins (Exhibit B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification). Applying the

shrinkage factor of 0.93857 (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 1,349,844.9769 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2-3). Mr. Horne and partners' reserve obligation for that crop year was 634,427.1392 pounds (.47 x 1,349,844.9769 = 634,427.1392). The announced price for raisins was $745 per ton (CX 583 at 2-3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $236,324.13 to the RAC for compensation for failing to deliver any reserve raisins to RAC (634,427.1392 pounds divided by 2,000 pounds per ton = 317.2136 tons; 317.2136 tons x $745 per ton equals $236,324.13).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Horne and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The announced price for raisins was $810 per ton (CX 583 at 2-3). Therefore, for the 2003-2004 crop year, Mr. Horne and partners owe $247,519.40 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2,000 pounds per ton = 305.5795 tons; 305.5795 tons x $810 per ton equals $247,519.40). The total amount owed to the RAC by Mr. Horne and partners for failing to deliver any reserve raisins to RAC is $483,843.53.

The Raisin Order also requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton

(CX 90).

As noted in this Order Granting Petition to Reconsider, *supra*, for the 2002-2003 crop year, Mr. Horne and partners received 1,349,844.9769 pounds of natural seedless raisins. The reserve obligation for the 2002-2003 crop year was 47 percent; therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for natural seedless raisins in that crop year was 715,417.8378 pounds (.53 x 1,349,844.9769 = 715,417.8378). In addition, Mr. Horne and partners received 25,523.0198 pounds of other variety raisins. There was no reserve requirement for those raisins; therefore, all of those other variety raisins were subject to the assessment. Mr. Horne and partners' assessment obligation for the 2002-2003 crop year for natural seedless raisins is $2,861.67 (715,417.8378 pounds divided by 2,000 pounds per ton = 357.7089 tons; 357.7089 tons x $8 per ton = $2,861.67). The assessment obligation for the other varieties is $102.09 (25,523.0198 pounds divided by 2,000 pounds per ton = 12.7615; 12.7615 tons x $8 per ton = $102.09). The total assessment owed for the 2002-2003 crop year is $2,963.76.

Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2,000 pounds per ton = 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for the 2002-2003 crop year and the 2003-2004 crop year is $8,783.39.

The third monetary payment resulting from Mr. Horne and partners' violations of the Raisin Order are civil penalties. The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

**§ 608c. Orders**

. . . .

**(14) Violation of order**

. . . .

(B) Any handler subject to an order issued under this section,

> or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation[.] . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[12]

As neither Mr. Horne and partners nor the Administrator challenged the amount of the civil penalties imposed in my April 11, 2008, Decision and Order, those civil penalties stand. As discussed in my April 11, 2008, Decision and Order, I find Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

[12]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(1)(vii) (2005)).

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow AMS to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

Mr. Horne and partners did not seek reconsideration of my April 11, 2008, Decision and Order; however, they did file an Opposition to Petition to Reconsider. In their opposition, Mr. Horne and partners raised four points:

1. that the Administrator's Petition for Reconsideration fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3));

2. that the Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. that the proposed reconsideration is inconsistent with the law; and

4. that a custom or "toll" packer of raisins does not "acquire" the raisins.

Mr. Horne and partners argue that the Petition for Reconsideration failed to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), in that "there is no section of the Petition devoted to a description of errors made." (Opposition to Pet. to Reconsider at 1.) The Rules of Practice do not require a specific format for petitions to reconsider. The only requirement is that the "petition must state specifically the matters claimed to have been erroneously decided and the alleged errors must be briefly stated." (7 C.F.R.

§ 1.146(a)(3).) The Administrator's Petition to Reconsider clearly meets that requirement. It was easy to discern, from the Petition to Reconsider, the errors that the Administrator claimed I made in my April 11, 2008, Decision and Order. I find that the Administrator's Petition to Reconsider meets the requirements of the Rules of Practice.

Next, Mr. Horne and partners claim "that the Administrator's suggested calculations cannot be confirmed by resort to the evidence." While I agree that the Administrator's filings do not present the image of clarity – which is why I ordered the Administrator to provide clarification – I found that I was able to follow the transactions identified in Exhibits A and B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, using Exhibits A and B to the Administrator's response, I was able to determine the volume of raisins that flowed through Mr. Horne and partners' facility and the tonnage of raisins that they failed to hold in reserve, as well as the assessments and the payments in lieu of reserve raisins that Mr. Horne and partners owed to the RAC.

Mr. Horne and partners' third point is that "the proposed reconsideration is inconsistent with the law." Mr. Horne and partners are challenging the constitutionality of the Raisin Order. As I discussed in my April 11, 2008, Decision and Order, I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners' questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.

As I discussed in my April 11, 2008, Decision and Order, the reference to Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) provides Mr. Horne and partners little solace. They argue that it exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that

statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order – which it does not – Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

The final issue raised by Mr. Horne and partners is whether a custom or "toll" packer of raisins "acquires" the raisins. This issue was discussed in my April 11, 2008, Decision and Order. A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> **§ 989.17 Acquire.**
>
> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . *Provided further*, That the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, were first handlers who acquired raisins during crop years 2002-2003 and 2003-2004. Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture, both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

*Inc*., 467 U.S. 837 (1984).

The 1949 recommended decision regarding the raisin growers' request for the Raisin Order, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

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

14 Fed. Reg. 3083, 3086 (June 8, 1949).

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

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the

term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?

A That is right.

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

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

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

A That is right.

ALJ Decision and Order, App. A.

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

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of – thus they "acquired" – raisins when a grower brought raisins to the facility.

For the foregoing reasons, I grant the Administrator's Petition to Reconsider and issue the following Order.

## ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 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
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $8,783.39 in assessments for crop years 2002-2003 and 2003-2004, and $483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $8,783.39 for owed assessments and of the $483,843.53 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

## RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Order Granting Petition To Reconsider in any district court of the United States in which they are inhabitants or have their principal place of business.[13]

[13] 7 U.S.C. § 608c(14)(B).

**In re: HEIN HETTINGA and ELLEN HETTINGA d/b/a SARAH FARMS and GH DAIRY, d/b/a GH PROCESSING.**
**Docket No. AMA-M-08-0069.**
**Memorandum Opinion and Order.**
**Filed August 26, 2008.**

**AMA – MREA, not Bill of Attainder**.

Sharlene Deskins and Charles English, Jr. for AMS.
Alfred W. Ricciardi for Respondent.
*Memorandum Opinion and Order by Administrative Law Judge Peter M. Davenport.*

## MEMORANDUM OPINION AND ORDER

This matter is before the Administrative Law Judge upon the Motion of the Petitioners for Judgment on the Pleadings. The motion seeks "a judgment dismissing the petition and certifying the right of the Petitioners to have their claims reviewed by an Article III court under 7 U.S.C. § 608(c)(15)(B) is appropriate." The Respondent has filed a response to the Motion, opposes the Motion, and suggests that a hearing is appropriate to introduce evidence that the Milk Regulatory Equity Act (MREA) (codified at 7 U.S.C. § 608(c)(5)(M-N) is not a Bill of Attainder, but also seeks dismissal of the Petition on the basis that the Petitioners filed a Petition that the District Court told the Petitioners could not be considered in an administrative challenge.

At the prehearing conference held in this case on June 11, 2008, the parties appeared to be in general agreement that the threshold question of whether an Administrative Law Judge may grant the relief sought of declaring the Milk Regulatory Equity Act unconstitutional might be disposed of by motion, provided the motion was appropriately limited. The Answer of the Respondent contained as its Second Defense the position that the petition failed to state a claim upon which relief could be granted. As I agree that the relief sought is not available from an administrative tribunal, the Petition will be dismissed.

The Petition in this action seeks both declaratory relief and restitution, seeking in eight separate paragraphs relief "to the extent that the Secretary has any power or authority to act and overrule Congress." As the Judicial Officer recently found, an administrative tribunal has no authority to declare unconstitutional a stature that it administers. *In re Jerry Goetz, d/b/a Jerry Goetz and Sons,* 61 Agric. Dec. 282, 287 (2002).[1] Although the Respondent suggests that a hearing is "essential"

[1] *See,* footnote 5 for the extensive listing of cases for this proposition.

to introduce facts that MREA is not a Bill of Attainder, given the limitation of availability of relief, it would appear that a different forum will need to address that question. Accordingly, the following Order will be entered.

## ORDER

The Petition will be **DISMISSED** for failure to state a claim upon which relief might be granted.

This Order will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service as provided in the Rules of Practice.

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

Done at Washington, D.C.

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**In re: LEROY H. BAKER, JR., d/b/a SUGARCREEK LIVESTOCK AUCTION, INC.; LARRY L. ANDERSON; AND JAMES GADBERRY.**
**A.Q. Docket No. 08-0074.**
**Order Denying Petition to Reconsider as to Leroy H. Baker, Jr.**
**Filed December 15, 2008.**

**A.Q. – Commercial Transportation of Equine for Slaughter Act – Petition to reconsider – Failure to file answer – Admission of allegations – Owner/shipper – Civil penalty – History of violations.**

Thomas N. Bolick, for the Acting Administrator, APHIS.
Respondent Leroy H. Baker, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

On November 17, 2008, I issued a decision concluding Leroy H. Baker, Jr., violated the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) and the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations].[1] On December 1, 2008, Mr. Baker

[1] *In re Leroy H. Baker, Jr.* (Decision as to Leroy H. Baker, Jr.), 67 Agric. Dec. ___ (Nov. 17, 2008).

filed a petition to reconsider the November 17, 2008, decision. On December 12, 2008, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Acting Administrator], filed a response to Mr. Baker's petition to reconsider, and the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Mr. Baker's petition to reconsider. Based upon a careful review of the record, I deny Mr. Baker's petition to reconsider and reinstate the order in *In re Leroy H. Baker, Jr.* (Decision as to Leroy H. Baker, Jr.), 67 Agric. Dec. ___ (Nov. 17, 2008).

## CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Mr. Baker raises four issues in his petition to reconsider. First, Mr. Baker asserts he was under the impression he would have a hearing (Pet. to Reconsider at 3).

Mr. Baker cites no basis for his belief that he is entitled to a hearing, and I find nothing in the record that supports Mr. Baker's belief that he is entitled to a hearing. To the contrary, on March 17, 2008, the Hearing Clerk served Mr. Baker with the Complaint, the rules of practice applicable to the instant proceeding,[2] and a service letter.[3] The Rules of Practice explicitly provide an answer to a complaint must be filed within 20 days after service of the complaint; failure to file a timely answer shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint; and failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing (7 C.F.R. §§ 1.136(a), (c), .139). Moreover, the Hearing Clerk's service letter informs Mr. Baker that "[f]ailure 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."[4] Further still, the Complaint informs Mr. Baker that "[f]ailure to file an answer within the prescribed time shall constitute an admission of the allegations in this complaint and a waiver of hearing." (Compl.

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[2]The rules of practice applicable to the instant proceeding are 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].

[3]United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7023 1197.

[4]Service letter dated March 12, 2008, from Joyce A. Dawson, Hearing Clerk, to Leroy Baker.

at 24.) Despite the Rules of Practice and the warnings in the Hearing Clerk's service letter and the Complaint, Mr. Baker filed his first response to the Complaint on November 5, 2008, 6 months 29 days after Mr. Baker was required to file an answer; therefore, Mr. Baker waived his right to a hearing, and I find no basis for Mr. Baker's continuing belief that he is entitled to a hearing.

Second, Mr. Baker contends that someone should have told him of the violations immediately after they occurred rather than presenting him with the Complaint that includes violations that occurred over a 5- or 6-year period (Pet. to Reconsider at 4).

As an initial matter, the Complaint alleges Mr. Baker committed violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations during a 3-year 9-month 12-day period, not a 5- or 6-year period, as Mr. Baker asserts (Compl. ¶¶ IV-XXXVIII). Moreover, Mr. Baker cites no requirement that he must be informed of his violations immediately after they occur, and I cannot locate any such requirement.

Third, Mr. Baker asserts 95 percent of the allegations in the Complaint are false (Pet. to Reconsider at 6).

The Hearing Clerk served Mr. Baker with the Complaint on March 17, 2008. Mr. Baker was required by the Rules of Practice to file a response to the Complaint within 20 days after service of the Complaint:[5] namely, no later than April 7, 2008. The Rules of Practice provide failure to file a timely answer shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint.[6] Mr. Baker's denial of 95 percent of the allegations of the Complaint in his petition for reconsideration, filed December 1, 2008, 7 months 24 days after Mr. Baker was required to file an answer, comes far too late to be considered. As Mr. Baker has failed to file a timely answer, Mr. Baker is deemed to have admitted the material allegations of the Complaint, and I reject his late-filed denial of 95 percent of the allegations in the Complaint.

Fourth, Mr. Baker asserts he cannot pay the $162,800 civil penalty assessed in the November 17, 2008, decision (Pet. to Reconsider at 7).

Neither the Commercial Transportation of Equine for Slaughter Act nor the Regulations provides that a respondent's inability to pay a civil penalty is a factor that I must consider when determining the amount of the civil penalty to be assessed for violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations.

[5]See 7 C.F.R. § 1.136(a).
[6]See 7 C.F.R. § 1.136(c).

Therefore, I decline to consider Mr. Baker's purported inability to pay the $162,800 civil penalty.

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. Mr. Baker's petition to reconsider was timely filed and automatically stayed *In re Leroy H. Baker, Jr.* (Decision as to Leroy H. Baker, Jr.), 67 Agric. Dec. ___ (Nov. 17, 2008). Therefore, since Mr. Baker's petition to reconsider is denied, I hereby lift the automatic stay, and the order in *In re Leroy H. Baker, Jr.* (Decision as to Leroy H. Baker, Jr.), 67 Agric. Dec. ___ (Nov. 17, 2008), is reinstated; except that, the effective date of the order is the date indicated in the order in this Order Denying Petition to Reconsider as to Leroy H. Baker, Jr.

For the foregoing reasons and the reasons in *In re Leroy H. Baker, Jr.* (Decision as to Leroy H. Baker, Jr.), 67 Agric. Dec. ___ (Nov. 17, 2008), Mr. Baker's petition to reconsider is denied and the following Order is issued.

**ORDER**

Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc., is assessed a $162,800 civil penalty. The civil penalty shall be paid by certified check or money order, payable to the Treasurer of the United States, and sent to:

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

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Mr. Baker. Mr. Baker shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 08-0074.

_____

**In re: KARL MORGENSEN d/b/a NATURAL BRIDGE ZOO.**
**AWA Docket No. 07-0144.**
**Miscellaneous Order.**
**Filed February 5, 2008.**

**AWA.**

Frank Martin, Jr. for APHIS.
H. David Natkin for Respondent.
*Miscellaneous Order by Administrative Law Judge Jill S. Clifton.*

**Supplemental Order**

Upon the motion of complainant, the Animal and Plant Health Inspection Service, the suspension of respondent's license as an exhibitor under the Animal Welfare Act, as amended, contained in the Order issued in this case on October 12, 2007, is hereby terminated.

This Order shall be effective upon issuance. Copies shall be served upon the parties.

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**In re: SAM MAZZOLA, d/b/a WORLD ANIMAL STUDIOS, INC.**
**WILDLIFE ADVENTURES OF OHIO, INC.**
**AWA Docket No.-06-0010**
**and**
**In re: SAM MAZZOLA.**
**AWA Docket No D-07-0064.**
**Filed July 31, 2008.**

**AWA –**

Sam Mazzola, Pro Se.
Babak A. Rastgoufard and Bernadette Juarez for APHIS.
*Oral Decision and Order by Administrative Law Judge Jill S. Clifton.*

[EDITOR's Note - See AWA Departmental Decisions of same date in this volume.]

In Cleveland, Ohio, in March 2008 and July 2008, a 19-day long hearing was held in the above-captioned cases. On July 31, 2008, I issued my Decision and Order orally from the bench, in accordance with

section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)). The parties' opportunity to submit their (1) requests for transcript corrections; (2) proposed Findings of Fact, Conclusions, and Orders; and (3) briefs in support thereof [*see* 7 C.F.R. §1.142(b)], was during the hearing, in writing and/or orally as closing argument.

Sam Mazzola, an individual doing business as World Animal Studios, Inc. and Wildlife Adventures of Ohio, Inc. ("Sam Mazzola"), was the Respondent in AWA Docket No. 06-0010; Sam Mazzola was the Petitioner in AWA Docket No. D-07-0064. Sam Mazzola represented himself (appeared *pro se*).

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS"), was represented by Bernadette Juarez, Esq. and Babak A. Rastgoufard, Esq. APHIS was the Complainant in AWA Docket No. 06-0010; the Respondent in AWA Docket No. D-07-0064.

The transcript excerpt draft containing my oral Decision and Order was provided to me via email on an expedited basis on August 8, 2008 at my request and was distributed to the parties in accordance with 7 C.F.R. § 1.142(c)(2).

That transcript excerpt, with transcript CORRECTIONS I have made,[1] is enclosed for publication of the oral Decision and Order on the USDA/OALJ website [ http://www.usda.gov/da/oaljdecisions ], and for eventual inclusion in Agriculture Decisions; also enclosed is the Second Amended Complaint, filed January 8, 2008, which is required to understand the transcript excerpt, with CORRECTIONS to paragraphs 42 and 50 included.

Copies of this Notice of Publication, plus the two enclosures, shall be served (by ordinary distribution including ordinary mail) by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
Filed 22nd day of August 2008, *nunc pro tunc* to the 31st day of July 2008.

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[1] If requested by the parties, other transcript corrections may be ordered in the future.

*[Editors's Note: See Oral Decision in this Volume.]*

**UNITED STATES DEPARTMENT OF AGRICULTURE**

**BEFORE THE SECRETARY OF AGRICULTURE**

| | |
|---|---|
| **In re: SAM MAZZOLA, an individual doing business as WORLD ANIMAL STUDIOS, INC., a former Ohio domestic corporation and WILDLIFE ADVENTURES OF OHIO, INC., a former Florida domestic stock corporation currently licensed as a foreign corporation in Ohio, Respondent.** | **) AWA No. 06-0010** |
| **and** | |
| **In re: Sam Mazzola,** | |
| **Petitioner.** | **AWA D-07-0064** |

**SECOND AMENDED COMPLAINT**

There is reason to believe that the respondent named herein has willfully violated the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*.) (the "Act"), and the regulations and standards (9 C.F.R. § 1.1 *et seq*.) ("Regulations" and "Standards") issued pursuant to the Act, and that respondent held an invalid Animal Welfare Act license. Therefore, the Administrator of the Animal and Plant Health Inspection Service ("APHIS") issues this Second Amended Complaint alleging as follows:

JURISDICTIONAL ALLEGATIONS

1. Respondent Sam Mazzola is an individual doing business as World Animal Studios, Inc., Wildlife Adventures of Ohio, Inc., and Animal Zone, and whose mailing address is 9978 N. Marks Road, Columbia Station, Ohio 44028.

2. At all times mentioned herein said respondent was operating as an exhibitor as that term is defined in the Act and the Regulations.

3. Respondent Mazzola, at all material times herein, held himself out as the president of World Animal Studios, Inc., a former Ohio domestic corporation.

4. On February 20, 1999, Ohio Secretary of State J. Kenneth

Balckwell notified World Animal Studios, Inc., through its registered agent respondent Mazzola, that:

> [World Animal Studios, Inc.] has failed to file the necessary corporate franchise tax reports or pay the required taxes within the time required by law.
>
> The OFFICE OF THE SECRETARY OF STATE, in accordance with the provisions of the section 5733.20 of the Ohio Revised Code, hereby provides notification that the Articles of Incorporation (or License to do business in Ohio) for the corporation have been canceled as of February 20, 1999. Continuation of business as a corporation after this date will be in violation of the law.

5. Despite receiving notice described above in paragraph 4, respondent Mazzola, on behalf of World Animal Studios, Inc., applied for, received, and renewed Animal Welfare Act exhibitor's license number 31-C-0065 issued to "WORLD ANIMAL STUDIOS INC."

6. Animal Welfare Act license number 31-C-0065 is and, since February 21, 1999, has been, an invalid license because it is issued to a corporation ("WORLD ANIMAL STUDIOS INC") that does not exist and cannot meet the licensing requirements set forth in the Act and the Regulations.

7. On October 12, 2006, complainant received from respondent a renewal application for Animal Welfare Act license number 31-C-0065, wherein respondent changed the licensee's name from "World Animals Studios, Inc." to "World Animals Studios" and changed the type of organization from "corporation" to "individual."

8. On or about October 27, 2006, complainant notified respondent that section 2.5(d) of the Regulations prohibits the transfer of licenses and returned to respondent the renewal application and licensing fee.

9. Thereafter, on or about October 27, 2006, and on or about November 1, 2006, respondent submitted additional information to support the renewal of Animal Welfare Act license number 31-C-0065.

10. Specifically, with regard to box 12 on the renewal form pertaining to "social security or tax identification number," respondent stated that the "federal tax id number is my personal federal tax id number."

11. Respondent also stated he "disolved [sic] the corporation."

12. On or about November 15, 2006, and after considering respondent's supplemental information, complainant notified respondent that Animal Welfare Act license number 31-C-0065 had not been renewed and was cancelled.

13. APHIS personnel conducted inspections of respondent's facilities, records and animals for the purpose of determining respondent's compliance with the Act, Regulations, and Standards on December 13,

2003 (27 animals inspected), February 11, 2004 (41 animals inspected), February 20, 2004, August 19, 2004, September 22, 2004 (3 animals inspected), March 18, 2005 (22 animals inspected), August 16, 2005 (10 animals inspected), March 18, 2006 (21 animals inspected), August 3, 2006 (unable to inspect), August 8, 2006, May 19, 2007, July 26, 2007, September 27, 2007, and December 18, 2007.

ALLEGATIONS REGARDING THE SIZE OF RESPONDENT'S BUSINESS, THE GRAVITY OF THE ALLEGED VIOLATIONS, RESPONDENT'S GOOD FAITH AND COMPLIANCE HISTORY

14. Respondent has a medium-sized business under the Act. During the material times herein, respondent exhibited, on average, 20 wild and exotic animals (including foxes, lemurs, caracals, ocelots, bears, tigers, lions, a cougar and a leopard) at multiple exhibition locations.

15. The gravity of the violations alleged in this complaint is great. Specifically, respondent repeatedly handled and housed animals in a manner that risked the safety of the animals and members of the public, and continually failed to comply with the Regulations and Standards after having been repeatedly advised of deficiencies. In addition, respondent has continually interfered with, threatened, verbally abused and harassed APHIS officials in the course of carrying out their duties, despite receiving notice that such behavior was unacceptable from the U.S. Department of Agriculture, Office of the Inspector General.

16. Although respondent has no history of previous litigated violations, on March 14, 1994, complainant issued to respondent an official warning for violations documented in connection with investigation OH 94-003 AC. Moreover, respondent's conduct over the period covered by this complaint reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. Such an ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and lack of good faith.

ALLEGED NONCOMPLIANCE WITH REGULATIONS

17. On or about December 13, 2003, through on or about August 3, 2006, respondent willfully violated section 4 of the Act and section 2.1(a)(1) of the Regulations, by operating as an exhibitor as that term is defined in the Act and the Regulations and/or by transporting animals

for exhibition, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

18. On or about January 8, 2007, through on or about January 11, 2007, respondent willfully violated section 2134 of Act and section 2.1(a)(1) of the Regulations, by operating as an exhibitor as that term is defined in the Act and the Regulations and by transporting animals for exhibition at the Ohio Fair Mangers Convention, Columbus, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

19. On or about March 14, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by intending to operate as an exhibitor as that term is defined in the Act and the Regulations and by transporting animals for exhibition at the Cleveland Sport, Travel & Outdoor Show, Cleveland, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

20. On or about May 18, 2007, through on or about May 19, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as an exhibitor as that term is defined in the Act and the Regulations and by transporting animals for exhibition at Vito's Pizza, Toledo, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

21. On or about July 26, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as an exhibitor as that term is defined in the Act and the Regulations and by transporting animals for exhibition at the Fayette County Fair, Washington Court House, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

22. On or about July 31, 2007, through on or about August 5, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as an exhibitor as that term is defined in the Act and the Regulations and by transporting animals for exhibition at the Hamilton County Fair, Cincinnati, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

23. On or about September 27, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as a dealer as that term is defined in the Act and the Regulations and offering to sell two skunks (a black and white skunk and an albino skunk) at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(f); 9 C.F.R. §§ 1.1, 2.1(a).

24. On or about October 23, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as a dealer as that term is defined in the Act and the Regulations and selling a black and white skunk at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(f); 9 C.F.R. §§ 1.1, 2.1(a).

25. On or about December 8, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as an exhibitor as that term is defined in the Act and the Regulations and by transporting animals for exhibition at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

26. On or about December 16, 2007, through on or about December 18, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by intending to operate and/or operating as an exhibitor as that term is defined in the Act and the Regulations at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(h); 9 C.F.R. §§ 1.1, 2.1(a).

27. On or about December 18, 2007, respondent willfully violated section 2134 of the Act and section 2.1(a)(1) of the Regulations, by operating as a dealer as that term is defined in the Act and the Regulations and offering to sell a skunk (albino) at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid license from the Secretary of Agriculture to do so. 7 U.S.C. §§ 2134, 2132(f); 9 C.F.R. §§ 1.1, 2.1(a).

28. On or about February 14, 2004, the U.S. Department of Agriculture, Office of the Inspector General ("OIG") counseled respondent regarding his threatening behavior toward APHIS officials during a December 13, 2003 inspection (for example, respondent stated a Supervisory Animal Care Specialist "needed a f _ _ _ ing bat upside his head"), and advised respondent that such behavior was unacceptable.

29. Nevertheless, respondent has willfully violated section 2.4 of the Regulations by interfering with, threatening, abusing (including verbally abusing), and harassing APHIS officials in the course of carrying out their duties, as follows.

30. On or about August 3, 2006, respondent called an APHIS Animal Care Inspector an "incompetent a _ _ hole" and "f_ _ _ ing imbecile" that was "too damn dumb" to conduct an inspection, and stated he was suing the Department and "would have" the jobs of both the Animal

Care Inspector and his supervisor. 9 C.F.R. § 2.4.

31. On or about August 8, 2006, respondent filed a frivolous complaint with OIG claiming that an APHIS Animal Care Inspector solicited a bribe during an inspection when, in fact, the Inspector had done no such thing and OIG determined that respondent's complaint was baseless. 9 C.F.R. § 2.4.

32. On or about August 3, 2006, respondent willfully violated section 2.126 of the Regulations by failing and refusing to make his facilities, animals, and records available to APHIS officials for inspection. 9 C.F.R. § 2.126.

33. On or about February 11, 2004, complainant notified respondent, in writing, of his failure to maintain and make available for inspection a written program of veterinary care and provided him with the opportunity to demonstrate or achieve compliance.

34. Nevertheless, respondent has willfully violated the attending veterinarian and adequate veterinary care regulations by failing to employ an attending veterinarian under formal arrangements that includes a written program of veterinary care and regularly scheduled visits to the premises, as follows:

35. On or about March 18, 2006, respondent had no written program of veterinary care available for inspection. 9 C.F.R. §§ 2.40(a)(1), 2.126(a)(2).

36. On or about August 8, 2006, respondent had no written program of veterinary care available for inspection. 9 C.F.R. §§ 2.40(a)(1), 2.126(a)(2).

37. On or about December 13, 2003, complainant notified respondent, in writing, of his failure to safely handle animals and provided him with the opportunity to demonstrate or achieve compliance.

38. Nevertheless, respondent has willfully violated section 2.131(c)(1) of the Regulations by failing, during public exhibition, to handle any animal so that there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of the animals and the public, as follows:

39. On or about August 19, 2004, respondent, during public exhibition at the Holmes County Fairgrounds in Millersburg, Ohio, allowed customers to enter the primary enclosure containing an adult black bear without distance or adequate barriers between the animals and the public. 9 C.F.R. § 2.131(c)(1).

40. On or about March 18, 2005, respondent, during public exhibition at the IX Center in Cleveland, Ohio, allowed customers to enter the primary enclosures containing an adult black bear and two adult tigers without distance or adequate barriers between the animals and the public. 9 C.F.R. § 2.131(c)(1).

41. On or about August 16, 2005, respondent, during public exhibition at the Holmes County Fairgrounds in Millersburg, Ohio, allowed customers to enter the primary enclosures containing an adult bear and an adult tiger without distance or adequate barriers between the animals and the public. 9 C.F.R. § 2.131(c)(1).

42. On or about March 18, 2006, respondent, during public exhibition at the IX Center in Cleveland, Ohio, allowed the public to enter the primary enclosures containing an adult bear, adult tiger, and juvenile lion without distance or adequate barriers between the animals and the public. 9 C.F.R. § 2.131(c)(1).

43. On or about May 12, 2006, respondent, during public exhibition at Posh Nite Club in Akron, Ohio, allowed customers to enter the primary enclosure containing an adult bear with no distance or barriers between the animals and the public, and specifically, allowed no fewer than 7 customers to wrestle the bear ("Ceasar") and attempt to pin the animal for a prize of $1,000. 9 C.F.R. § 2.131(c)(1).

44. On or about May 19, 2006, respondent, during public exhibition at Posh Nite Club in Akron, Ohio, allowed customers to enter the primary enclosure containing an adult bear with no distance or barriers between the animal and the public, and specifically, allowed no fewer than 9 customers to wrestle the bear ("Ceasar") and attempt to pin the animal for a prize of $1,000. 9 C.F.R. § 2.131(c)(1).

45. In addition, on or about May 19, 2006, respondent allowed members of the public to have their photograph taken with the bear with no distance or barriers between the animal and the public. 9 C.F.R. § 2.131(c)(1).

46. On or about May 26, 2006, respondent, during public exhibition at Posh Nite Club in Akron, Ohio, allowed customers to enter the primary enclosure containing an adult bear with no distance or barriers between the animal and the public, and specifically, allowed no fewer than 8 customers to wrestle the bear ("Ceasar") and attempt to pin the animal for a prize of $1,000. 9 C.F.R. § 2.131(c)(1).

47. On August 19, 2004, complainant notified respondent, in writing, of structural deficiencies in the primary enclosures he used to house animals and provided respondent with the opportunity to demonstrate or achieve compliance.

48. Nevertheless, respondent has willfully violated section 2.100(a) of the Regulations and Standards by failing to meet the minimum facilities and operating standards for animals (9 C.F.R. §§ 3.125-3.142), by failing to construct housing facilities so that they are structurally sound, protect the animals from injury, and contain the animals, as follows:

49. On or about March 18, 2005, respondent housed two adult tigers in open-top enclosures at IX Center in Cleveland, Ohio, that lacked adequate structural integrity and height to contain the animals. 9 C.F.R. §§ 2.100(a), 3.125(a).

50. On or about August 16, 2005, respondent housed an adult black bear and two adult tigers in open-top enclosures at the Holmes County Fair in Millersburg, Ohio, that lacked adequate structural integrity and height to contain the animals. 9 C.F.R. §§ 2.100(a), 3.125(a).

51. On or about March 18, 2006, respondent housed an adult black bear and adult tiger in open-top enclosures at the IX Center in Cleveland, Ohio, that lacked adequate structural integrity and height to contain the animals. 9 C.F.R. §§ 2.100(a), 3.125(a).

52. Each animal affected by respondent's failure to comply with the Act, and the Regulations and Standards and each day during which such violation continues, as alleged herein, constitutes a separate violation of the Act, Regulations and Standards. 7 U.S.C. § 2149(b); ¶¶ 17-18, 20, 22, 26, 40-46, & 49-51.

WHEREFORE, it is hereby requested that for the purpose of determining whether the respondent has in fact willfully violated the Act and the regulations issued under the Act, this Second Amended Complaint shall be served upon the respondent. Respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this Second Amended Complaint.

The Animal and Plant Health Inspection Service requests that unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of this Second Amended Complaint, that such order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order: (1) requiring the respondent to cease and desist from violating the Act and the regulations and standards issued thereunder; (2) assessing civil penalties against the respondent in accordance with section 19 of the Act (7 U.S.C. § 2149); and (3) suspending or revoking license number 31-C-0065, and/or disqualifying respondent from obtaining an Animal Welfare Act license.

DATED: January 4, 2008

Respectfully Submitted,

_____
Bernadette Juarez
Attorney for Complainant

**In re: SUNCOAST PRIMATE SANCTUARY FOUNDATION, INC.**
**AWA Docket No. D-05-0002.**
**Ruling.**
**Filed December 3, 2008.**

**AWA – EAJA**

Thomas J. Dander for Petitioner.
Colleen A. Carroll for APHIS.
*Ruling by Chief Administrative Law Judge Marc R. Hillson.*

## Ruling Denying Petitioner's Request for Attorney Fees

In this ruling, I am denying Petitioner's request for attorney fees even though Petitioner has substantially prevailed in its Petition appealing Respondent's denial of an exhibitor's license. My ruling is necessitated by the nature of the initial proceeding, since attorney's fees and other costs under the Equal Access to Justice Act are precluded for license denial proceedings.

This was the first case conducted under regulations that give an aggrieved person the opportunity to challenge a license denial with a hearing before an administrative law judge. Petitioner requested a hearing after its application for an exhibitor's license was denied on August 17, 2004. After a hearing on November 15, 2005, I issued a decision sustaining APHIS's original determination, but remanded the matter for a more full and complete investigation. After APHIS utterly refused to comply with my remand order, I granted Petitioner's Motion for Order to Issue Exhibitor's License on October 27, 2006. The Judicial Officer vacated my decision on January 8, 2008, effectively ordering the same relief, without time constraints, that I did in my initial decision.

The Equal Access to Justice Act, 5 U.S.C. § 504 et seq. makes attorney fees and other costs available to a party who has prevailed against the United States in an "adversary adjudication" if the position of the agency was not "substantially justified." However, I do not have to make a determination as to whether the APHIS's position in this matter was substantially justified, because the statute unequivocally bars the award of attorney's fees and other costs in this type of case. Fees and costs may not be awarded here because the statutory definition of "adversary adjudication . . . excludes an adjudication for the purpose . . . of granting or renewing a license." 5 U.S.C. § 504(b) (C). This case

was initiated by Petitioner's Request for Hearing where it stated that that it was seeking a reversal of APHIS's denying it a license or a determination that it did not require a license.

Petitioner has advanced several reasons for treating this proceeding as other than a statutorily barred licensing proceeding. Unfortunately for Petitioner, every aspect of this matter has been in the nature of an attempt to overturn a license denial, and no after-the-fact recharacterization can change that.

Accordingly, Petitioner's Application for Costs and Attorney Fees is denied.[1]

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**In re: FRED NEUMANN.**
**AWG Docket No. 08-0163.**
**Miscellaneous Order.**
**Filed October 17, 2008.**

**AWG.**

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Peter M. Davenport .

## ORDER

A telephonic hearing was held in this matter before the Administrative Law Judge on Friday, October 17, 2008. Those participating were the Petitioner, Fred Neumann, and his spouse, Tracie Neumann, and Mary Kimball and Connie Kremer, representing the Respondent, Rural Development, United States Department of Agriculture. Trible Greaves, Secretary to the Administrative Law Judge also was present.

At the hearing, the Respondent indicated that after review of the financial information provided by the Petitioner and his spouse amply demonstrating current inability to pay, the Respondent no longer desired to pursue the Administrative Wage Garnishment action, but would leave the account with the United States Treasury for offset or other resolution.

Accordingly, upon request of the Respondent to terminate the Administrative Wage Garnishment action, this action is **DISMISSED**,

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[1] Because I conclude that this was an appeal of APHIS's decision to deny a license to Petitioner, I make no findings as to the validity of the requested reimbursement rate, the individual items included in the attorney fees request, or whether the government's position was "substantially justified."

without prejudice. There being no further need for the Petitioner's Financial information to be maintained in the file maintained by the Hearing Clerk's Office, the Hearing Clerk is authorized to dispose of the same by shedding or other appropriate method.

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

Done at Washington, D.C.

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**In re: ANITRA HAYES.**
**FNS Docket No. 09-0012.**
**Miscellaneous Order.**
**Filed December 23, 2008.**

**FNS.**

Petitioner Pro se.
Jill Maze for FNS.
*Miscellaneous Order by Chief Administrative Law Judge Marc R. Hillson.*

**Order Granting Motion to Dismiss for Lack of Jurisdiction**

In this appeal of an order affirming a decision ordering that Petitioner Anitra Hayes repay the City of Virginia Beach Department of Social Services (DSS), via an offset against her federal income tax refund, for overpayment of Food Stamp Program benefits she received, I find that the United States Department of Agriculture's Office of Administrative Law Judges has no jurisdiction to hear cases of this nature, and I dismiss the appeal.

Ms. Hayes, a resident of Virginia Beach, Virginia, was notified by the DSS on November 7, 2007, that they had determined that her household had been overpaid $1933 in Food Stamp Program benefits. The DSS offered and scheduled a hearing on March 12, 2008 for Ms. Hayes to contest this determination, but she did not appear or otherwise respond to the notice. After the DSS Hearing Officer unsurprisingly affirmed the initial determination of the DSS[1], Ms. Hayes chose to not avail herself of the opportunity to appeal that decision to a Virginia Circuit Court.

After Ms. Hayes was notified on July 31, 2008, that DSS intended to submit the claim for $1933 to the Department of the Treasury under the

[1] See Respondent's Exhibit 3, dated April 8, 2008.

Treasury Offset Program (TOP) to be collected via Federal income tax refund offset, Ms. Hayes timely requested federal review. The Atlanta Regional office of the Food and Nutrition Service (FNS) of the United States Department of Agriculture issued a determination letter on October 10, 2008, affirming the earlier determination, and informing her that any further appeals must be made "through the courts."[2]

Ms. Hayes initially filed an appeal with the Departmental Appeals Board of the Department of Health and Human Services, which was dismissed for lack of jurisdiction[3]. Ms. Hayes then filed a Request for Hearing with the USDA on October 23, 2008. Respondent filed a Motion to Dismiss on November 25, 2008, Petitioner filed a reply on December 10, and Respondent filed a short reply on December 12, 2008.[4]

Most aspects of the Food Stamp Program are administered by the states. 7 U.S.C. § 2020. In particular, collections of overissuances are conducted by the State agency. 7 U.S.C. § 2022(b). The only cases where the Office of Administrative Law Judges has jurisdiction over cases involving the Food Stamp Program are where a State agency in charge of the food stamp program chooses to challenge an action by the FNS finding that the State's Quality Control program did not meet federal standards. 7 C.F.R. Part 283. Questions concerning individual benefits are subject to a carefully crafted multi-layer review process at the state level, but Petitioner chose not to avail herself of this process. Further, when Petitioner was notified that the TOP process was going to be instituted, she was offered federal review under that program's regulations. Having participated unsuccessfully in that process, there were no more administrative remedies for Petitioner. Her only recourse is with the appropriate courts.

Wherefore, Respondent'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[5].

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[2] Respondent's Exhibit 7. The FNS letter is non-specific as to the nature of "the courts."

[3] Petitioner's Exhibit 14.

[4] I grant Respondent's Motion for Leave to Reply to Petitioner's Motion.

[5] The documents in this case file contain personally identifiable information relating to Ms. Hayes. I direct the Hearing Clerk to either seal this file or to redact such information.

**ANIMAL QUARANTINE ACT**

**DEFAULT DECISIONS**

**LEROY H. BAKER, JR., d/b/a SUGARCREEK LIVESTOCK AUCTION, INC., LARRY L. ANDERSON, AND JAMES GADBERRY.**
**A.Q. Docket No. 08-0074.**
**Default Decision as to only Leroy H. Baker, Jr.**
**Filed October 1, 2008.**

**AQ – Default.**

Thomas Neil Bolick for APHIS.
Respondent Pro se.
*Default Decision by Administrative Law Judge Jill S. Clifton*

## Default Decision

The Complaint, filed on March 11, 2008, alleged that the Respondent Leroy H. Baker, Jr., doing business as Sugarcreek Livestock Auction, Inc., an owner/shipper of horses (9 C.F.R. § 88.1), failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*). The Complainant seeks $162,800 in civil penalties for Leroy H. Baker, Jr.'s failures to comply (9 C.F.R. § 88.6).

## Parties and Counsel

The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

The Respondent, Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc., (frequently herein "Respondent Baker" or "Respondent") has failed to appear.

## Procedural History

APHIS' Motion for Adoption of Proposed Default Decision and Order (as to only Respondent Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc.), filed July 2, 2008, is before me. Respondent Baker was served on July 5, 2008 with a copy of that Motion and a copy of the Proposed Default Decision and Order and has failed to respond.

The Hearing Clerk mailed a copy of the Complaint to Respondent Baker by certified mail on March 12, 2008, together with a copy of the Hearing Clerk's notice letter and a copy of the Rules of Practice. *See* 7 C.F.R. §1.130 *et seq*. Respondent Baker was served on March 17, 2008 with the copy of the Complaint and failed to answer. The Respondent's answer was due to be filed within 20 days after service, according to section 1.136(a) of the Rules of Practice. 7 C.F.R. § 1.136(a). The time for filing an answer to the Complaint expired on April 7, 2008. The Hearing Clerk mailed Respondent Baker a "No Answer" letter on April 8, 2008. Respondent Baker is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

Respondent Baker was informed in the Complaint and the letter accompanying the Complaint that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. Respondent Baker never did file an answer to the Complaint. Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

**Findings of Fact and Conclusions**

1. Respondent Leroy H. Baker, Jr., doing business as Sugarcreek Livestock Auction, Inc., was at all times material to this Decision a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter. Respondent Baker was an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1. The Secretary of Agriculture has jurisdiction over Respondent Baker and the subject matter involved herein.

2. Respondent Baker has a business mailing address of P.O. Box 452, 102 Buckeye Street SW, Sugarcreek, Ohio 44681, and at all times material to this Decision he owned and operated Sugarcreek Livestock

Auction, Inc., in the State of Ohio. Respondent Baker had been in the business of buying and selling horses since 1985 and regularly shipped over 1,000 horses per year to horse slaughter plants in Texas.

3. Respondent Baker is responsible not only for what he himself did or failed to do in violation of the Commercial Transportation of Equines for Slaughter Act and Regulations, but also for what others did or failed to do on his behalf in the commercial transportation of horses for slaughter, as his agents, in violation of the Act and Regulations. Respondent Baker is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers.

4. On or about March 26, 2003, Respondent Baker shipped 36 horses in commercial transportation from Sugarcreek Livestock Auction, Inc., in Sugarcreek, Ohio (hereinafter referred to as Sugarcreek), to BelTex Corporation in Fort Worth, Texas (hereinafter referred to as BelTex), for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: 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).

5. On or about March 30, 2003, Respondent Baker shipped 70 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: 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).

6. On or about March 31, 2003, Respondent Baker shipped 85 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) One of the horses in the shipment, a dark bay/brown horse with no back tag, died while en route to the slaughter plant, yet Respondent Baker and/or his driver did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(b) One of the horses in the shipment, a dark bay horse with no back tag, was blind in both eyes, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his driver thus failed to handle the blind 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).

(c) Respondent Baker was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but he threw it away less than three months later, in

violation of 9 C.F.R. § 88.4(f).

7. On or about July 16, 2003, Respondent Baker shipped 31 horses in commercial transportation from Sugarcreek to Dallas Crown, Inc., in Kaufman, Texas (hereinafter referred to as Dallas Crown), for slaughter and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the form incorrectly listed a chestnut gelding draft horse with USDA back tag # USAU 5539 as a draft mare, in violation of 9 C.F.R. § 88.4(a)(3)(v); (3) 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); and (4) the time when the horses were loaded onto the conveyance was not listed properly, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

8. On or about January 30, 2004, Respondent Baker shipped 34 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); (2) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay gelding, USDA back tag # USAH 7676, that was blind in both eyes, in violation of 9 C.F.R. § 88.4(a)(3)(viii); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a bay gelding with USDA back tag # USAH 7676, was blind in both eyes, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his driver thus failed to handle the blind 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).

9. On or about March 17, 2004, Respondent Baker shipped 29 horses from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) 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); and (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

10. On or about July 26, 2004, Respondent Baker shipped 43 horses from Sugarcreek to BelTex for slaughter. Records obtained from

BelTex indicate that two (2) of the horses in the shipment died while en route to the slaughter plant, and Respondent Baker's driver acknowledged that at least one of the dead horses had been down during transit from Oklahoma City, Oklahoma, to Ft. Worth, yet Respondent Baker and/or his driver did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horses, in violation of 9 C.F.R. § 88.4(b)(2).

11. On or about September 10, 2004, Respondent Baker shipped 42 horses from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (2) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

12. On or about September 29, 2004, Respondent Baker shipped 40 horses from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3), and (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

13. On or about November 17, 2004, Respondent Baker shipped 43 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (3) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

14. On or about November 27, 2004, Respondent Baker shipped 37 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the receiver's address and telephone number were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

15. On or about January 15, 2005, Respondent Baker shipped 43

horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3), and (2) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

(b) Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours, at approximately 1:30 a.m., and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

16. On or about January 28, 2005, Respondent Baker shipped 28 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

17. On or about February 4, 2005, Respondent Baker shipped 42 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) Records obtained from Dallas Crown indicate that three (3) of the horses in the shipment, two bearing USDA back tag #s USBQ 7939 and 7942 and one bearing sale barn tag # 31HA3541, died while en route to the slaughter plant, yet Respondent Baker and/or his driver did not check the physical condition of the horses at least once every six (6) hours or, in the alternative, did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horses, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

18. On or about March 20, 2005, Respondent Baker shipped 38 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the owner/shipper's name, address, and telephone number were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(i).

19. On or about April 3, 2005, Respondent Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the form did not indicate the breed and/or sex of several horses, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) 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).

(b) Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

20. On or about May 2, 2005, Respondent Baker shipped 38 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: 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).

(b) Respondent Baker and/or his driver delivered the horses outside of BelTex's normal business hours and left the slaughter facility, but did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

21. On or about May 22, 2005, Respondent Baker shipped 37 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a gelding with USDA back tag # USBQ 8786 that had a severe cut on its left rear leg, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) One of the horses in the shipment, a gelding with USDA back tag # USBQ 8786, had a severe cut on its left rear leg such that it was unable to bear weight on all four limbs, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his driver thus 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).

22. On or about May 29, 2005, Respondent Baker shipped 44 horses

in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay gelding, bearing sale barn tag # 31HA0505, that was blind in both eyes, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) One of the horses in the shipment, a bay gelding bearing only sale barn tag # 31HA0505, was blind in both eyes, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his driver thus failed to handle the blind 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).

(c) Respondent Baker and/or his driver delivered the horses outside of BelTex's normal business hours and left the slaughter facility, but did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

23. On or about June 18, 2005, Respondent Baker shipped 7 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (2) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) Respondent Baker and/or his driver delivered the horses outside of BelTex's normal business hours and left the slaughter facility, but did not return to BelTex to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

24. On or about June 18, 2005, Respondent Baker shipped 28 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the form incorrectly listed a stallion in the shipment, USDA back tag # USBQ 8891, as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, back tag # USBQ 8898, died

en route to the slaughter plant, yet Respondent Baker and/or his driver did not check the physical condition of the horse at least once every six (6) hours or, in the alternative, did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

25. On or about July 16, 2005, Respondent Baker shipped 12 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay mare with USDA back tag # USBQ 5105 that had old, severe cuts on its left hind leg, in violation of 9 C.F.R. § 88.4(a)(3)(viii); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a bay mare with USDA back tag # USBQ 5105, had old, severe cuts on its left hind leg such that it could not bear weight on all four limbs, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his driver thus 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).

26. On or about July 22, 2005, Respondent Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address and telephone number were not listed correctly, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) 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); (3) the shipment contained two (2) stallions bearing USDA back tag #s USBQ 5159 and 5169 that were incorrectly identified as geldings, in violation of 9 C.F.R. §

88.4(a)(3)(v); (4) one of the boxes indicating the fitness of the horses to travel at the time of loading was not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (5) the month in which the horses were loaded onto the conveyance was incorrectly listed as February, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a stallion with USDA back tag # USBQ 5169, went down at least three (3) times during transportation, indicating that it was in obvious physical distress, and died en route to the slaughter plant, yet Respondent Baker and/or his driver neither obtained veterinary assistance as soon as possible from an equine veterinarian, nor contacted the nearest APHIS office as soon as possible to allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(c) One of the horses in the shipment, a stallion with USDA back tag # USBQ 5169, went down at least three (3) times during transportation, indicating that it was in obvious physical distress. Respondent Baker and/or his driver thus failed to handle this 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).

27. On or about July 25, 2005, Respondent Baker shipped 41 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (3) the prefix for each horse's USDA back tag number was not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (4) the time and date when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

28. On or about October 24, 2005, Respondent Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the date that the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the horses in the shipment, a bay mare with USDA back tag # USBQ 5832, died en route to the slaughter plant, and Baker's driver stated that he had observed one or more horses in the shipment kicking the bay mare in the ribs four to five hours before the shipment arrived at Dallas Crown. The bay mare thus was in obvious physical

distress, yet Respondent Baker and/or his driver neither obtained veterinary assistance as soon as possible from an equine veterinarian, nor contacted the nearest APHIS office as soon as possible to allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, and did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

29. On or about November 6, 2005, Respondent Baker shipped 42 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: five (5) stallions bearing USDA back tag #s USBQ 5940, 5938, 5937, 5908, and 5905, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained five (5) stallions bearing USDA back tag #s USBQ 5940, 5938, 5937, 5908, and 5905, but Respondent Baker did not load the five (5) stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

30. On or about November 9, 2005, Respondent Baker shipped 30 horses in commercial transportation from Sugarcreek to BelTex for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the date and time when the horses were loaded onto the conveyance were not listed properly, in violation of 9 C.F.R. § 88.4(a)(3)(ix); and (3) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(b) Respondent Baker failed to maintain a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, in violation of 9 C.F.R. § 88.4(f).

31. On or about May 3, 2006, Respondent Baker shipped 46 horses in commercial transportation from Sugarcreek to BelTex for slaughter but did not properly fill out the required owner-shipper certificate, VS

Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv), and (2) the time and date when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

32. On or about May 4, 2006, Respondent Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter but did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv), and (2) the time and date when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

33. On or about June 11, 2006, Respondent Baker shipped 43 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a bay mare with USDA back tag # USDB 6853 that had a severe, pre-existing cut on its right shoulder that was badly infected, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) One of the horses in the shipment, a bay mare with USDA back tag # USDB 6853, had a severe, pre-existing cut on its right shoulder that was badly infected, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his drivers thus 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).

(c) The USDA representative at Dallas Crown reported that Respondent Baker's drivers "began to get nervous upon my arrival and left quickly after the horses were unloaded." Respondent Baker and/or his drivers thus left the premises of the slaughtering facility before the horses had been examined by the USDA representative, in violation of 9 C.F.R. § 88.5(b).

34. On or about July 3, 2006, Respondent Baker shipped 24 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following

deficiencies: at least six (6) stallions bearing USDA back tag #s USDB 7052, 7045, 7061, 7063, 7065, and 7066, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained at least six (6) stallions bearing USDA back tag #s USDB 7052, 7045, 7061, 7063, 7065, and 7066, but Respondent Baker did not load the six (6) stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(c) The USDA representative at Dallas Crown reported that Respondent Baker's driver "seemed to become very uneasy when I arrived at the plant, he was in a hurry to finish unloading and did not waste much time leaving the plant." Respondent Baker and/or his driver thus left the premises of the slaughtering facility before the horses had been examined by the USDA representative, in violation of 9 C.F.R. § 88.5(b).

35. On or about July 16, 2006, Respondent Baker shipped 41 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker shipped the horses in a conveyance that had large holes in its roof. Respondent Baker thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) at least two stallions, one bearing USDA back tag # USBQ 7128 and another bearing no USDA back tag, were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (2) there was no description of pre-existing injuries or other unusual conditions that may have caused some of the horses to have special handling needs, even though the shipment included a chestnut mare with USDA back tag number USBQ 6643 that had a pre-existing injury to its left hind foot, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(c) The shipment contained at least two (2) stallions, one bearing USDA back tag # USBQ 7128 and another bearing no USDA back tag, but Respondent Baker did not load the two (2) stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(d) One of the horses in the shipment, a chestnut mare with USDA

back tag # USBQ 6643, had a pre-existing injury to its left hind foot such that it could not bear weight on all four limbs, yet Respondent Baker shipped it with the other horses. Respondent Baker and/or his driver thus 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).

36. On or about August 7, 2006, Respondent Baker shipped 36 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter. Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

37. On or about December 23, 2006, Respondent Baker shipped 32 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: at least two (2) stallions bearing plant tag #s 127985 and 128011 were incorrectly identified as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained at least two (2) stallions bearing plant tag #s 127985 and 128011, but Respondent Baker did not load the stallions on the conveyance so that they were completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(c) Respondent Baker and/or his driver delivered the horses outside of Dallas Crown's normal business hours and left the slaughter facility but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

38. On or about January 7, 2007, Respondent Baker shipped 31 horses in commercial transportation from Sugarcreek to Dallas Crown for slaughter:

(a) Respondent Baker did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) at least one stallion bearing USDA back tag number USCU 6770 and plant tag number 128577 was incorrectly identified as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained at least one stallion bearing USDA back tag # USCU 6770 and plant tag # 128577, but Respondent Baker did not load the stallion on the conveyance so that it 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).

(c) One horse in the shipment, a chestnut gelding bearing USDA

back tag # USCU 6782 and white back tag # 31HA6205, went down near Little Rock, Arkansas and died en route, but Respondent Baker and/or his driver did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

(d) Two (2) horses in the shipment bearing USDA back tag #s USCU 6782 and 6769 went down near Little Rock, Arkansas and were not able to get up, such that one died en route and one had to be euthanized on the conveyance upon its arrival at Dallas Crown. The fact that these two (2) horses became nonambulatory en route indicated that they were in obvious physical distress, yet Respondent Baker and/or his driver did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(e) Two (2) horses in the shipment bearing USDA back tag #s USCU 6782 and 6769 went down near Little Rock, Arkansas and were not able to get up, such that one died en route and one had to be euthanized on the conveyance upon its arrival at Dallas Crown. Respondent Baker and/or his driver thus failed to handle these two (2) horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

39. On the numerous occasions detailed in paragraphs 4 through 38, Respondent Leroy H. Baker, Jr., doing business as Sugarcreek Livestock Auction, Inc., failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq*.). Many of Respondent Baker's violations described in paragraphs 4 through 38 are so serious and Respondent Baker's culpability so great as to warrant the $5,000 maximum civil penalty per violation. Consequently, in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed July 2, 2008, I issue the following Order.

## Order

40. The **cease and desist** provisions of this Order (paragraph 41) shall be effective on the first day after this Decision and Order becomes final. The remaining provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 44 to determine when this Decision and Order becomes final.

41. Respondent Leroy H. Baker, Jr., d/b/a Sugarcreek Livestock Auction, Inc., and 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 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*.).

42. Respondent Baker is assessed a civil penalty of **$162,800.00** (one hundred sixty two thousand eight hundred dollars), 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**." Respondent Baker shall include with his payments any change in mailing address (from that shown in paragraph 2), or other contact information.

43. Respondent Baker shall reference **A.Q. Docket No. 08-0074** 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

within sixty (60) days from the effective date of this Order. [See paragraph 40 regarding effective dates of the Order.]

**Finality**

44. This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties (including the respondents who are not in default).

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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**ANGEL DALFIN d/b/a BOSAGLO, INC.**
**A.Q. Docket No. 07-0141.**
**Default Decision.**
**Filed October 15, 2008.**

**AQ – Default.**

Cory Spiller for APHIS.
Respondent, Pro se.
*Default Decision by Chief Administrative Law Judge Marc R. Hillson.*

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.*)(the "Act"), and the regulations written under the authority of the Act (9 C.F.R. section 94.18), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.*

On June 18, 2007, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, instituted this proceeding by filing an administrative complaint against Angel Dalfin, doing business as Bosaglo, Inc. (hereinafter, Respondent). The complaint was sent to Respondent by certified mail and was returned by the postal service marked "Unclaimed." Pursuant to Rule 1.147(c)(1), a copy of the complaint was then mailed to Respondent via regular mail on July 24, 2007, and was deemed by rule to have been served on that day. 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 never filed an answer to the complaint.

Therefore, Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and failed to deny or otherwise respond to an allegation of the complaint. 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. Furthermore, 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 material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Complainant seeks a penalty of $5,000 in its Motion for Adoption of Proposed Default Decision and Order. Other than citing the need for deterrence, Complainant cites no facts that would warrant this specific penalty amount. The statute states that "in determining the amount of a civil penalty the Secretary shall take into the nature, circumstance, extent and gravity of the violation or violations." 7 U.S.C. § 8313(b)(2). Complainant does not allege facts or circumstances that would even allow me to conclude that the violations warrant a penalty as high as requested. In the evidence of evidence to the contrary, I am imposing a civil penalty of $2,000.

**Findings of Fact**

1. Angel Dalfin d/b/a Bosaglo, Inc., is an individual with a mailing address of 555 Crown Street, Apt. #1E, Brooklyn, New York 11213-5138.
2. Angel Dalfin d/b/a Bosaglo, Inc., buys food products wholesale and distributes them to various customers for monetary gain.
3. On or about July 18, 2003, and July 29, 2003, the Respondent violated 9 C.F.R. § 94.18(b) by importing 240 cases of Ragu Tomato Sauce from Canada containing beef.

**Conclusion**

By reason of the Findings of Fact set forth above, Respondent, Angel Dalfin d/b/a Bosaglo Inc. violated Animal Health Protection Act (7 U.S.C. § 8031 et seq.). Therefore, the following Order is issued.

**Order**

Respondent, Angel Dalfin d/b/a/ Bosaglo Inc., is hereby assessed a civil penalty of two thousand dollars ($2,000.00). 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 shall indicate that payment is in reference to P.Q. Docket No. 07-0141.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon Respondent, Angel Dalfin, 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).

Done at Washington, D.C.

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**ANIMAL WELFARE ACT**

**DEFAULT DECISIONS**

**In re: KARLA JEAN SMITH.**
**AWA Docket No. 08-0107.**
**Default Decision.**
**Filed October 1, 2008.**

**AWA – Default.**

Frank Martin, Jr. for APHIS.
Respondent, Pro se.
*Default Decision by Administrative Law Judge Jill S. Clifton.*

## Decision and Order by Reason of Default

The Complaint, filed on April 21, 2008, alleged that the Respondent, Karla Jean Smith, without being licensed under the Animal Welfare Act, beginning in 2005, sold dogs in commerce for compensation or profit and operated as a dealer, thereby violating section 4 (7 U.S.C. § 2134) of the Animal Welfare Act, as amended (frequently herein the "Animal Welfare Act" or the "AWA" or the "Act") and section 2.1(a)(1) of the regulations issued pursuant to the Act (frequently herein the "Regulations"). 9 C.F.R. § 2.1(a)(1). The Complainant asks that Respondent Smith consequently be permanently disqualified from obtaining an Animal Welfare Act license.

## Parties and Counsel

The Complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (herein frequently "APHIS" or "Complainant"), is represented by Frank Martin, Jr., Esq., Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

The Respondent, Karla Jean Smith (frequently herein "Respondent Smith" or "Respondent"), has failed to appear.

## Procedural History

The Complainant's Motion for Adoption of Proposed Decision and Order, filed July 14, 2008, is before me. A copy of the Motion and a copy of the proposed Decision and Order were delivered and signed for

by Respondent Smith on July 18, 2008; she failed to respond. [*See* Domestic Return Receipt for Article Number 7007 0710 0001 3860 1898.]

On April 21, 2008, the Hearing Clerk had mailed a copy of the Complaint to Respondent Smith by certified mail. The Complaint and the Hearing Clerk's notice letter dated April 21, 2008, and a copy of the Rules of Practice, were delivered and signed for by Respondent Smith on April 24, 2008. [*See* Domestic Return Receipt for Article Number 7007 0710 0001 3858 9622.] No answer to the Complaint has been received. The time for filing an answer expired on May 14, 2008.

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 Smith'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*., especially 7 C.F.R. § 1.139.

**Findings of Fact and Conclusions**

1. Respondent Karla Jean Smith is an individual whose mailing address is in Holden, Missouri 64040.

2. Respondent Smith, at all times material herein beginning on or about October 15, 2005, was operating as a dealer as defined in the Animal Welfare Act and the Regulations, without being licensed, and sold in commerce, for compensation or profit, at least 14 dogs for use as pets, in willful violation of section 4 (7 U.S.C. § 2134) of the Animal Welfare Act and section 2.1(a)(1) of the Regulations. 9 C.F.R. § 2.1(a)(1).

3. The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.

4. The Secretary of Agriculture has jurisdiction over Respondent Smith and the subject matter involved herein.

5. Enforcement of the Act and Regulations depends upon the identification of persons operating as dealers. *See* 7 U.S.C. § 2131; *see* the opinion of the Judicial Officer of the United States Department of Agriculture: "[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: J. Wayne*

*Shaffer*, 60 Agric. Dec. 444, 478, 2001 WL 1143410, at *23 (U.S.D.A. Sept. 26, 2001).

**Order**

6. Respondent Smith, 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 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, effective on the day after this Decision becomes final.

7. Respondent Smith 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.

**Finality**

8. This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

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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**In re: MILTON WAYNE SHAMBO, d/b/a WAYNE'S WORLD SAFARI AND ARBUCKLE WILDERNESS; ANIMALS, INC., d/b/a WAYNE'S WORLD SAFARI AND, ANIMALS, INC. d/b/a ARBUCKLE WILDERNESS.**
**AWA Docket No. 05-0024.**
**Default Decision.**
**Filed November 10, 2008.**

**AWA – Default.**

Bernadette Juarez for APHIS.
Phillip Westergren for Respondent.
*Miscellaneous Order by Administrative Law Judge Peter M. Davenport.*

## ORDER

This action was brought by the Administrator of the Animal and Plant Health Inspection Service on July 7, 2005 seeking a cease and desist order and assessment of a civil penalty for allegedly willful and repeated violations of the Animal Welfare Act (the "Act") (7 U.S.C. § 2131, *et seq.*) while being licensed and operating as an "exhibitor" under the Act. Pursuant to information provided by the Administrator, three copies of the Complaint and the Hearing Clerk's letter of transmittal were sent to the Respondents, two of which were sent to Route 1, Box 63, Davis, Oklahoma 73030, and the third was sent to 400 Mann Street, Suite 901, Corpus Christi, Texas 78401.[1]

The certified mail addressed to the Davis, Oklahoma address was signed for by a Melinda Baxter;[2] however, the mail sent to the Corpus Christi, Texas address was returned as undeliverable as addressed. Upon receipt of notification by the Postal Service that the mail to the Corpus Christi, Texas address could not be delivered, the mail was resent to the Davis, Oklahoma address where it was refused. A copy was then sent by

[1] Of the two copies sent to the Davis, Oklahoma address, one was sent to Milton Wayne Shambo, d/b/a Wayne's World Safari and Arbuckle Wilderness and the other was sent to Animals, Inc., d/b/a Arbuckle Wilderness. The copy sent to the Corpus Christi, Texas address was addressed to Animals, Inc., d/b/a Wayne's World Safari. *See,* Hearing Clerk's Letter, Docket Entry 2.

[2] The First Amended Motion indicates that Melinda Baxter is employed at a gift shop for a new owner and has no relationship with the Respondent.

regular mail to the Davis, Oklahoma address.

Upon expiration of the time allowed for filing an answer to the Complaint, relying upon the **presumption** set forth in Section 1.147(c) of the Rules of Practice, 7 C.F.R. § 1.130, *et seq.*, on November 16, 2005, the Administrator filed a Motion for Adoption of Proposed Decision and Order. On February 23, 2006, Administrative Law Judge Jill S. Clifton granted the Motion and entered a Decision by Reason of Default against all Respondents, ordering them to cease and desist from further violations of the Act and assessing a civil penalty against them, jointly and severally, in the amount of $23, 265.00.

Following entry of the decision, no appeal was filed within the presumptively allotted time and the decision was pronounced final by the Hearing Clerk on May 3, 2006.

This matter is now pending before me[3] as on July 17, 2006, the Hearing Clerk's Office received a letter dated July 11, 2006 from Milton Wayne Shambo, *pro se,* requesting that his letter be considered a Motion to Set Aside the Decision and Order,[4] alleging that he had never received copies of the complaint filed against him and the other respondents. The Administrator responded to the Motion on January 10, 2007, opposing the Motion to Set Aside the Decision and Order. On March 6, 2007, the Respondent, by and through counsel, filed a First Amended Motion to Set Aside Decision and Order and Reply to Complainant's Response to Respondent's Original Motion. The Administrator again responded in opposition to any move to set aside the Decision and Order entered by Judge Clifton on February 23, 2006, arguing that even if there was no actual notice of the pending action, the Department's position was that under existing departmental case law, all that is required is that notice of proceedings be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Citations omitted). [5]

It is well settled that the neither the Federal Civil Rules of Procedure, nor those procedural rules of either Texas or Oklahoma are applicable

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[3] The case was assigned to me by Order entered on November 10, 2008 .

[4] The letter apparently was originally routed to the Judicial Officer who after review returned it to the Hearing Clerk's Officer to be returned to Judge Clifton who electronically contacted the parties and directed that copies of the relevant documents in the file be mailed to the Respondent at the address contained on his letterhead.

[5] Although the First Amended Motion was filed by counsel retained to represent the Respondents, for reasons which are not clear, rather than serving Respondents' counsel, the Administrator's response was sent to the Respondent's address provided in his July of 2006 letter.

to proceedings before the Secretary and while on rare occasions, defaults have been set aside, good cause must be demonstrated before such relief will be granted. In ascertaining whether such good cause has been established, the interests of both parties must be considered. In this action, I am troubled by the fact that notice for both individual and corporate liability was predicated upon service to an Oklahoma address which the Respondents (now in Texas) assert that is no longer used and that first notice of the action was prompted by Treasury action which was relayed through Mr. Shambo's son. On the other hand, in view of the fact that no answer was tendered with the Motion requesting that the Decision and Order be set aside (other than general denials contained in the initial letter), there is a question of whether affording the Respondents the opportunity to answer the allegations will serve to do more than provide additional delay in the corrective action requested. Given the significant number of violations, it is of course also possible that the amount of the civil penalty might well be increased in the event a hearing is required. As I will find that good cause has been established, it will be unnecessary to determine whether the Administrator had knowledge from his inspectors that the Respondents no longer maintained any ties with the Oklahoma address used for service and whether additional effort should have been expended to provide a more accurate current address.

Accordingly, on the basis of the record before me, the following Order is entered:

The Decision and Order entered on February 23, 2006 is **SET ASIDE** and **VACATED.**

The Respondent is given Twenty (20) from date of service of this Order in which to file an Answer to the Complaint with the Hearing Clerk's Office. Failure to file an Answer within the allotted time may result in reinstatement of the Original Decision and Order.

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

Done at Washington, D.C.

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## FEDERAL CROP INSURANCE ACT

## DEFAULT DECISIONS

**In Re: MICHELLE FLEENOR, d/b/a CT FARMS.**
**FCIA Docket No. 08-0154.**
**Default Decision.**
**Filed October 28, 2008.**

**FCIA – Default.**

Mark Simpson for FSA.
Respondent, Pro se.
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

## DEFAULT DECISION AND ORDER

This proceeding was initiated by a Complaint filed on June 30, 2008, by the Manager of the Federal Crop Insurance Corporation, Complainant (frequently herein "the FCIC"). The Complainant is represented by Mark A. Simpson, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1718 Peachtree Road, Suite 576, Atlanta, Georgia 30309-2409.

The Complaint alleges that Michelle Fleenor, d/b/a CT Farms, the Respondent (hereinafter "Respondent Fleenor") violated the Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq.*) ("the FCIA" or "the Act") and the regulations promulgated thereunder governing the administration of the Federal crop insurance program (7 C.F.R. part 400). The FCIC has requested that Respondent Fleenor be required to pay a $2,000 civil fine, and that Respondent Fleenor be disqualified for a period of two years from receiving any benefit from any program listed in section 515(h)(3)(B) of the Act. 7.U.S.C. § 1515(h)(3)(B).

On July 1, 2008, the hearing Clerk sent to Respondent Fleenor, by certified mail, return receipt requested, a copy of the Complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Fleenor was informed in the Complaint and in the service letter that an answer to the complaint should be filed in accordance with the Rules of Practice within 20 days, and that failure to answer any allegation in the complaint would constitute an admission of that allegation. 7 C.F.R. § 1.136. The envelope containing the Complaint, Rules of Practice, and service letter was served on Respondent on July 3, 2008 (see Return Receipt in the record file). Respondent Fleenor had

until July 23, 2008, to file an answer to the Complaint. 7 C.F.R. § 1.136(a). Respondent Fleenor failed to file an answer to the Complaint by July 23, 2008, as required. [Now, two months later, she still has not filed an answer.] On August 28, 2008, the FCIC filed a Motion That Complaint Be Deemed Admitted. Complainant has received no response from Respondent.

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 Fleenor's default, will be adopted and set forth herein as Findings of Fact and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. § 1.130 *et seq.*

## Findings of Fact

1. Respondent Michelle Fleenor, d/b/a CT Farms, has a mailing address of 24121 Young Drive, Bristol, Virginia 24202. CT Farms is a general partnership established in the State of Virginia in February 2002. Respondent is an owner of CT Farms with a 20 percent interest.
2. Respondent Fleenor was a participant in the Federal crop insurance program under the Act and the regulations for the 2003 crop year.
3. For crop year 2003, Respondent Fleenor insured Farm Serial Number (FSN) 7542, unit 0100 in Washington County, Virginia under a Multiple Peril Crop Insurance policy (Policy Number 723292) with Rural Community Insurance Services (RCIS), managing agent for Rural Community Insurance Company, an approved insurance provider as described in §515(h) and 502(b)(2) of the Act. FCIC reinsured this policy.
4. Respondent Fleenor was required under the Common Crop Insurance Policy, Basic Provisions for 2003 (01-BR), to submit the date the insured crop was planted. For crop year 2003, the final planting date for burley tobacco in Washington County, Virginia was June 30, 2003.
5. Respondent Fleenor certified on a RCIS Acreage reporting Form dated July 15, 2003 that she had planted 2.95 acres of burley tobacco on FSN 7542 on June 27, 2003 and that she had a 100 percent interest in the crop on FSN 7542. The certification above the Respondent Fleenor's signature stated "I submit this report as required or the above MPCI or alternative policy and certify that to the best of knowledge and belief the

information is correct and includes my entire interest in all acreage of the reported crops planted…"

6. Respondent Fleenor's partner, Timothy Mays, on behalf of CT Farms, certified to the Farm Service Agency (FSA) on July 15, 2003 and July 24, 2003 Acreage Report Farm Summary forms (FSA-578) that in crop year 2003, burley tobacco was planted on FSN 7542, tract 25370, fields 1, 2, 3, 4 and 7.

7. On or about August 29, 2003, Respondent Fleenor filed a loss claim with RCIS, indicating that the burley tobacco on CT Farms was damaged due to excessive precipitation that occurred during the months of June and July of 2003 and because of the representations was paid under her policy the amount of $6,034 for the loss to the burley crop.

8. Thereafter, FCIC received notification from an anonymous individual concerned about the late planting dates of CT Farms and concerns arose from FSA regarding discrepancies from the Crop Disaster Program.

9. On October 15, 2003, a RCIS loss adjuster inspected CT Farms and looked at all of the Respondent's fields. The loss adjuster observed that all of the insured burley tobacco had been harvested and the fields had been disked. The adjuster further noted that the personal uninsured tobacco of Respondent Fleenor's partner was being harvested.

10. On October 22, 2003, FSA representatives visited CT Farms to determine tobacco acreage. The FSA representatives observed some of the acreage had been harvested and disked, but the acreage did not appear to have been planted to tobacco. The FSA representatives observed approximately 14 acres of unharvested tobacco which was later determined to belong to Respondent Fleenor's partner and that the partner's tobacco was uninsured. From the appearance of the field, FSA representatives concluded that a weed eater had been used in the tobacco fields and that weeds and Johnson grass were approximately head high around the edges of the field.

11. Respondent Fleenor certified to RCIS a Production Worksheet dated January 7, 2004 indicating that she had planted 1.91 acres of burley tobacco on FSN 7542 in crop year 2003 and that she had sold 258 pounds of production to Philip Morris.

12. FCIC requested the Office of Strategic Data Acquisition and Analysis perform a Remote Sensing Satellite Imagery to verify if tobacco was planted on FSN 7542. On the basis of the imagery, it was concluded that between June 2, 2003 and July 4, 2003 that the field in question could not have been planted in burley tobacco as had been reported.

13. Respondent Fleenor's tobacco production was not comparable to

the area and the production was well below the average of neighboring fields. CT Farms produced only 142 pounds of burley tobacco per acre; neighboring growers averaged 1,184 pounds per acre. Respondent Fleenor's partner's uninsured burley production on FSN 7542 was 500 pounds more per acre than the insured crop.

14. In crop year 2003, there were 184 other units of tobacco losses due to excessive precipitation in Washington County, Virginia. These units produced an average of 1,752 pounds of burley tobacco per acre. The Washington County loss ratio for burley tobacco, excluding CT Farms was 4.22. CT Farm's ratio was 9.32 (more than twice the county ratio excluding CT Farms).

15. On May 23, 2003, Respondent's partner signed a FSA Form CCC-502A indicating that the Respondent Fleenor did not provide any capital for her tobacco crop and that she did not acquire a loan to sustain the crop in 2003.

16. On February 22, 2006, Respondent Fleenor signed a written statement taken by FCIC investigators indicating that she did not play an active role in the operation of CT Farms, that Timothy Mays was the controlling partner, and that she was not consulted or involved in the decision making process of farm operation. She further could not provide any detailed or definitive information regarding the farming operation, including farm practices used, processing and care of the crop, planting dates, storage or equipment used.

17. On the basis of the investigation, FCIC determined that the Respondent Fleenor had misrepresented material facts and did not have a bona fide insurable interest in the burley tobacco on FSN 7542 and therefore was ineligible for crop insurance for the crop year 2003. As a result of the FCIC determination, RCIS deleted Respondent's burley tobacco policy, revised her acreage report to zero and assessed a $6,034 overpayment for the indemnity that Respondent Fleenor received to which she was ineligible and not entitled to receive.

## Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent Fleenor intentionally misrepresented her harvested burley tobacco production for the 2003 crop year.
3. Respondent Fleenor knew or should have known that the information was false at the time that she provided it.
4. As a result of her intentional misrepresentations, Respondent Fleenor received an indemnity overpayment of $6,034 in 2003.

5. Respondent Fleenor willfully and intentionally provided false information to the insurer and to the Federal Crop Insurance Corporation with respect to an insurance plan or policy under the Federal Crop Insurance Act. 7 U.S.C. § 1515(h).

6. Pursuant to section 515(h) of the Act (7 U.S.C. § 1515(h) and subpart R of FCIC's Regulations (7 C.F.R. § 400.451-400.500), the conduct of willfully and intentionally providing false or inaccurate information as detailed above in the Findings of Fact constitutes grounds for a civil fine of up to $10,000 for each violation, or the amount of the pecuniary gain obtained as a result of the false or incorrect information, and disqualification from receiving any monetary or non-monetary benefit that may be provided under each of the following for a period of up to five years:

(a) The Federal Crop Insurance Act (7 U.S.C. § 1501 *et seq.*);

(b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq.*), including the non-insured crop disaster assistance program under section 196 of that Act (7 U.S.C. § 7333);

(c) The Agricultural Act of 1949 (7 U.S.C. § 1421 *et seq.);*

(d) The Commodity Credit Corporation Charter Act (15 U.S.C. § 714 *et seq.*);

(e) The Agricultural Adjustment Act of 1938 (7 U.S.C. § 1281 *et seq.*)

(f) Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 *et seq.*);

(g) The Consolidated Farm and Rural Development Act (7 U.S.C. § 1921 *et seq.*); and

(h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities. This includes, but is not limited to, Title I of the Farm Security and Rural Investment Act of 2002.

7. Disqualification under section 515(h) of the Act will affect a person's eligibility to participate in any programs or transactions offered under any of the statutes specified above. All persons who are disqualified will be reported to the U. S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA maintains and publishes a list of all persons who are determined ineligible from non-procurement or procurement programs in its Excluded Parties List System.

8. It is appropriate that Respondent Fleenor (a) be assessed a civil fine of $2,000; and (b) be disqualified from receiving any monetary or non-monetary benefit provided under each of the programs listed above for a period of three years.

**Order**

1. Respondent Michelle Fleenor, is hereby assessed a civil fine of $2,000, as authorized by section 515(h)(3)(A) of the Act. 7 U.S.C. 1515(h)(3)(A). Respondent Fleenor shall pay the $2,000 civil fine by cashier's check or money order or certified check, made payable to the order of the "Federal Crop Insurance Corporation" and sent to:

Federal Crop Insurance Corporation
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road
Kansas City, Missouri 64133.

2. Respondent Michelle Fleenor, is disqualified from receiving any monetary or non-monetary benefit provided under each of the applicable laws identified above for a period of two years, pursuant to section 515(h)(3)(B) of the Act. 7 U.S.C. 1515(h)(3)(B).

3. Unless this decision is appealed as set out below, Respondent Fleenor shall be ineligible for all of the programs listed above beginning on the first day after this Decision and Order becomes final. As a disqualified individual, Respondent Fleenor will be reported to the U. S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

4. This Order shall be effective on the first day after this Decision and Order becomes final. 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).

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

Done at Washington, D.C.

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**In re: JAMES A. BOLLER.**
**FCIA Docket No. 08-0102.**
**Default Decision.**
**Filed December 18, 2008.**

**FCIA – Default.**

Kimerley E. Arrigo for FSA.
Respondent, Pro se.
*Default Decision by Chief Administrative Law Judge Marc R. Hillson.*

## DECISION AND ORDER

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of Respondent, James A. Boller, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

After considering the gravity of the violation, it is further found that, pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. §1515(h)(3)(A)) and (4), a civil fine of $2,000 is imposed upon the Respondent. This civil fine shall be paid by cashier's check or money order or certified check, made payable to the order of the "**Federal Crop Insurance Corporation"** and sent to:

Federal Crop Insurance Corporation
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road, Room 271
Kansas City, Missouri 64133

This order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. §1.145.
Done at Washington, D.C.

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**HORSE PROTECTION ACT**

**DEFAULT DECISION**

**In re: BERNARD A. DORSEY a/k/a B. A. DORSEY.**
**HPA Docket No. 08-0106.**
**Default Decision.**
**December 18, 2008.**

**HPA – Default.**

Sharleen A. Deskins for APHIS.
Respondent, Pro se.
*Default Decision by Administrative Law Judge Peter M. Davenport.*

**DEFAULT DECISION AND ORDER**

This proceeding was instituted under the Horse Protection Act ("Act"), as amended (15 U.S.C. § 1821 *et seq*.), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that Bernard A. Dorsey also known as B.A. Dorsey willfully violated the Act.

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served on said respondent by the Hearing Clerk by regular mail on or about May 21, 2008. The Respondent was informed in the accompanying letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegations.

Said Respondent failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, are hereby admitted by the respondent's failure to file an answer, and are adopted and set forth herein as Findings of Fact.

**Findings of Fact**

1. Bernard A. Dorsey also know as B. A. Dorsey (hereafter Respondent) is an individual who resides in Shelbyville, Tennessee 37160.
2. On July 11, 2003 , the Secretary of Agricultural through the Judicial

Officer issued a decision and order regarding B. A. Dorsey also known as Bernard A. Dorsey. The Judicial Officer has been delegated with final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557. See 7 C.F.R. § 2.35. The Secretary of Agriculture concluded that "B.A. Dorsey entered Ebony's Bad Bubba for pre-show inspection, thereby entered Ebony's Bad Bubba to be shown or exhibited while the horse was sore, in the 32nd Annual National Walking Horse Trainers Show in Shelbyville, Tennessee, on March 22, 2000, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B))." *In re Bowtie Stables, James L. Corlew, Betty Corlew, and B. A. Dorsey*, 59 Agric. Dec. 795 (2003) , 2000 WL 33667891. The Judicial Officer assessed each respondent in *In re Bowtie Stables* a $2,200 civil penalty, and ordered that each respondent be disqualified 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. *Id*. Bernard Dorsey did not pay the civil penalty assessed by the Judicial Officer.

3. The USDA's Office of the Hearing Clerk served the Judicial Officer's Decision and Order on the attorney for the respondent, David Broderick of Broderick and Thornton, Bowling Green, Kentucky on or about July 22, 2003. The Decision and Order stated that the "disqualification of Respondents shall become effective on the 60th day after service of this Order on Respondents." *Id.* The 1-year disqualification commenced on September 23, 2003.

4. The Respondent from September 23, 2003 to September 22, 2004 was under a one year order of disqualification issued pursuant to the Act 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.

5. Section 6 of the Act provides:

> (c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures.
>
> In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period

> of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection. 15 U.S.C. § 1825(c).

6. The civil penalty for failure to obey an order of disqualification at all relevant times under the Act was $4,300. See 7 C.F.R. § 3.91(b)(2)(ix).
7. On or about November 20, 2003, the Respondent knowingly disobeyed the order of disqualification issued by the Secretary, by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction, in willful violation of the order of disqualification by participating in the exhibiting and exhibiting a horse called "Really" at the Southern Championship Charity Horse Show in Perry, Georgia in willful violation of the order of disqualification and Section 1825(c) of the Act .
15 U.S.C. § 1825(c ).
8. On or about November 21, 2003, the Respondent knowingly disobeyed the order of disqualification issued by the Secretary, by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction, in willful violation of the order of disqualification by participating in the exhibiting and exhibiting a horse called "Really" at the Southern Championship Charity Horse Show in Perry, Georgia in willful violation of the order of disqualification and Section 1825(c) of the Act.
15 U.S.C. § 1825(c).
9. On or about November 21, 2003, the Respondent knowingly disobeyed the order of disqualification issued by the Secretary, by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction, in willful violation of the order

of disqualification by participating in the exhibiting and exhibiting a horse called "Chinatorion" at the Southern Championship Charity Horse Show in Perry, Georgia in willful violation of the order of disqualification and Section 1825( c ) of the Act .
15 U.S.C. § 1825 ( c ).

10. On or about November 22, 2003, the Respondent knowingly disobeyed the order of disqualification issued by the Secretary, by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction, in willful violation of the order of disqualification by participating in the exhibiting and exhibiting a horse called "Really" at the Southern Championship Charity Horse Show in Perry, Georgia in willful violation of the order of disqualification and Section 1825(c) of the Act .
15 U.S.C. § 1825(c).

11. On or about November 22, 2003, the Respondent knowingly disobeyed the order of disqualification issued by the Secretary, by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction, in willful violation of the order of disqualification by participating in the exhibiting and exhibiting a horse called "Prisim Sky" at the Southern Championship Charity Horse Show in Perry, Georgia in willful violation of the order of disqualification and Section 1825(c) of the Act .
15 U.S.C. § 1825(c).

12. On or about March 26, 2004, the Respondent knowingly disobeyed the order of disqualification issued by the Secretary, by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction, in willful violation of the order of disqualification by participating in the exhibiting and exhibiting a horse called "Judge's Evidence" at the National Trainers Show in Shelbyville, Tennessee in willful violation of the order of disqualification and Section 1825(c) of the Act .
15 U.S.C. § 1825(c).

**Conclusions of Law**

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

2. By reason of the facts set forth in the Findings of Fact above, said respondent violated 15 U.S.C. § 1825(c) six times by managing, judging, or otherwise participating in a horse show, horse exhibition, horse sale, or horse auction while under an order of disqualification issued pursuant to the Horse Protection Act.

3. The following Order is authorized by the Act and warranted under

the circumstances.

**Order**

The Respondent is assessed a civil penalty of $25,800 which shall be paid by a certified check or money order made payable to the Treasurer of United States. The notation "HPA Dkt. No. 08-0106" 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 this decision becomes final. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

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## PLANT QUARANTINE ACT

## DEFAULT DECISION

**In re: YASMIN SEVELO.**
**PQ. Docket No. 08-0078.**
**Default Decision.**
**Filed December 02, 2008.**

**PQ – Default.**

Krishna G. Ramaraju 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 a violation of the regulations governing the movement of fruits and plant pests from Hawaii into the continental United States by post (7 C.F.R. §§ 318.13 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 7 C.F.R. §§ 380.1 *et seq.*.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701 *et seq.*)(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on March 12, 2008, alleging that respondent Yasmin Sevelo violated the Act and regulations promulgated under the Acts (7 C.F.R. §§ 318.13 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about January 8, 2004, respondent attempted to ship by USPS from Hawaii to the Continental United States approximately 4.5 pounds of fresh herbs and 0.6 pounds of ti leaves, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

On March 17, 2008, respondent or her agent signed for the complaint filed five days earlier. Accordingly, pursuant to the Rules of Practice, an answer was due within twenty days of receipt of the complaint. On April 8, 2008, the USDA, Office of Administrative Law Judges, Hearing Clerk's Office sent a letter to respondent informing her that an answer to the complaint had not been received within the allotted time. On October 8, 2008, that same office sent a letter to both respondent and complainant to inform them that there had been no

activity for six months in this case.[1] Accordingly, the respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

## Findings of Fact

1. Yasmin Sevelo, hereinafter referred to as respondent, is an individual with a mailing address of 46-2101 Haiku Road, Kaneohe, Hawaii 96744.
2. On January 8, 2004, at Kaneohe, Hawaii, the respondent offered to a common carrier, specifically the U.S. Postal Service, 4.5 pounds of fresh herbs and 0.6 pounds of ti leaves for shipment from Hawaii into the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

## Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 318.13 *et seq)*. Therefore, the following Order is issued.

## Order

Respondent Yasmin Sevelo is assessed a civil penalty of five hundred dollars ($500). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office

[1] This notice mistakenly described the case number as “AQ-08-0074"

Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondents shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 08-0078.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Copies of this Default Decision and Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

**VETERINARIAN ACCREDITATION**

**DEFAULT DECISION**

**In re: JOSE LOPEZ GARCIA.**
**V.S. Docket No. 06-0001.**
**Default Decision.**
**Filed October 15, 2008.**

**VA – Default**.

Krishna G. Ramaraju for APHIS.
Respondent, Pro se.
*Decision and order by Chief Administrative Law Judge Marc R. Hillson.*

**DECISION and ORDER**

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of horses from Mexico into the United States (9 C.F.R. § 93.300 *et seq.*) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq.* and 9 C.F.R. § 99.1 *et seq*.

This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.)*(Act), by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS) on August 11, 2006, alleging that respondent Jose Lopez Garcia violated the Act and regulations promulgated under the Acts (9 C.F.R. § 93.300 *et seq.*).

The complaint sought civil penalties as authorized by 7 U.S.C. § 8313. This complaint specifically alleged that on or about November 30, 2002, at or near Laredo, Texas, respondent failed to deliver an application for inspection to the veterinary inspector for two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.321; that on or about November 30, 2002, at or near Laredo, Texas, respondent failed to present copies of a declaration to the collector of customs for two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.305, 93.322; that on or about November 30, 2002, respondent failed to have inspected two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9

C.F.R. §§ 93.301(a), 93.323, 93.325; and that on or about November 30, 2002, respondent failed to have quarantined until qualified for release two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.324, 93.325.

The complaint was sent to Respondent by certified mail and was returned by the postal service marked "Unclaimed." Pursuant to Rule 1.147(c) (1), a copy of the complaint was then mailed to Respondent via regular mail. Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). On October 19, 2006, the Office of Administrative Law Judges, Hearing Clerk, sent respondent a letter informing him that he had failed to file an Answer within the time prescribed by Section 1.136 of the Rules of Practice. Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

In its Motion for Adoption of Proposed Default Decision and Order, Complainant seeks a penalty of $8,000. The statute states that "in determining the amount of a civil penalty the Secretary shall take into the nature, circumstance, extent and gravity of the violation or violations." 7 U.S.C. § 8313(b)(2). Other than stating that Respondent's actions undermine USDA programs, and emphasizing the need for deterrence, Complainant does not allege facts that would even allow me to conclude that the violations warrant a penalty as high as requested. Accordingly, I am imposing a civil penalty of $1,000 for each of the two violations.

**Findings of Fact**

1. Jose Garcia Lopez, hereinafter referred to as Respondent, is an individual with a mailing address of 1412 Palmer Drive, Laredo, Texas, 78045.
2. On or about November 30, 2002, Respondent failed to deliver an application for inspection to the veterinary inspector for two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.321.
3. On or about November 30, 2002, Respondent failed to present copies

of a declaration to the collector of customs for two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.305, 93.322.

4. On or about November 30, 2002, Respondent failed to have inspected two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.323, 93.325.

5. On or about November 30, 2002, Respondent failed to have quarantined until qualified for release two horses entered into the United States from Mexico at or near Laredo, Texas, in violation of 9 C.F.R. §§ 93.301(a), 93.324, 93.325.

## Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulations issued under the Act (9 C.F.R. § 93.300 *et seq*). Therefore, the following Order is issued.

## Order

Respondent Jose Lopez Garcia is assessed a civil penalty of two thousand dollars ($2,000). This civil penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate on the certified check or money order that payment is in reference to V.S. Docket No. 06-0001.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

Done at Washington, D.C.

## Consent Decisions

Date Format [YY/MM/DD]

### Animal Welfare Act

Ervin Hall d/b/a Ervin's Jungle Wonders, AWA-08-0129, 08/07/11.

Henry Lee Cooper, AWA 07-0181, 08/08/27.

Northwest Airlines, AWA 08-0050, 08/09/02.

Lacey R. Earp f/k/a Lacey R. Nicholas, AWA-08-0103, 08/09/12.

Herb and Betty Rawlins, d/b/a Rawlins Kennel, AWA 07-0112, 08/10/20.

LeAnne Caraway, AWA 08-0028, 08/11/21.

Don and Jennifer Carter d/b/a Jireh Farm, AWA-07-0197, 08/11/26.

Julius Von Uhl d/b/a Circus Winterquarters, AWA-07-0177, 08/12/16.

Mostyn Enterprises, Inc. d/b/a Wonder World and Wonder World Park, AWA-08-0042, 08/12/18.

### Federal Meat Inspection Act

International Dehydrated Foods, Inc., FMIA 09-0021 & PPIA 09-0021, 08/11/13.

Winter Sausage Manufacturing Inc..a/k/a Winter Sausage and Eugene M. Wuerz, FCIA 09-0044,08/12/10.

Winter Sausage Manufacturing, Inc. a/k/a Winter Sausage and Eugene M. Wertz, FMIA 09-0044, 08/12/11.

**Plant Quarantine Act**

William Hunter d/b/a Bill Hunter, Inc., PQ-07-0038 ,08/07/02.

Arrow Air, Inc d/b/a Arrow Cargo, PQ-08-0108 & AQ-08-0108, 08/07/31.

Parmar Dhanraj, Inc. d/b/a Dhanraj, PQ-07-0105, 08/08/05.

Flamingo Holland, Inc., PQ-09-0007, 08/11/24.

Farovi Shipping Corporation, PQ 08-0093 & AQ 08-0093, 08/11/17.

Home Depot U.S.A., Inc., PQ 09-0022, 08/12/11.

Chistopher J. Rohana, Sr. d/b/a Plantman Aquatics, PQ 08-0119, 08/12/11.

# AGRICULTURE DECISIONS

**Volume 67**

July - December 2008
Part Two (P & S)
Pages 1326 - 1386


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 individual cases may be available upon request. Gross downloading of the scanned pre-1999 cases will not be available due to Personal Identity Information (P.I.I.) concerns. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 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.

**LIST OF DECISIONS REPORTED**

**JULY - DECEMBER 2008**

**PACKERS AND STOCKYARDS ACT**

**DEPARTMENTAL DECISIONS**



**MISCELLANEOUS ORDERS**



**DEFAULT DECISIONS**

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## PACKERS AND STOCKYARDS ACT

## DEPARTMENTAL DECISIONS

**In re: TODD SYVERSON, d/b/a SYVERSON LIVESTOCK BROKERS.**
**P&S Docket No. D-05-0005.**
**Decision and Order.**
**Filed August 27, 2008.**

**P&S – Cease and desist – Suspended as registrant – Failure to keep and produce records – Unfair, unjustly discriminatory, or deceptive practices – Receiving, marketing, buying, or selling on commission basis – Cost basis.**

Charles S. Spicknall and Gary F. Ball, for GIPSA.
E. Lawrence Oldfield, Oak Brook, IL, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

On December 14, 2004, the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter GIPSA], filed a complaint alleging Todd Syverson, doing business as Syverson Livestock Brokers, violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]. The complaint alleges that Mr. Syverson violated section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) by "engag[ing] in . . . unfair, unjustly discriminatory, or deceptive practice[s] . . . in connection with . . . receiving, marketing, buying, or selling on a commission basis or otherwise . . . livestock." (7 U.S.C. § 213(a).) Specifically, the complaint alleges that on eight occasions, between June and August 2002, Mr. Syverson purchased 24 cows at auction, consigned the cattle back to the auction for sale the next day, then repurchased the cattle out of his own consignment at a higher price than he originally paid for the cattle and used the repurchase invoice to bill his customers who were buying on a cost plus $15 basis.

Mr. Syverson filed an answer on January 19, 2005, in which he denied the allegations of the complaint and stated affirmatively, among other things, that "there was no obligation on either party for cattle to change hands on a first cost basis or on any basis" and that "[a]t no time was Mr. Syverson hired to fill an order for or purchase cattle on an at cost plus commission basis for [Lance Quam]."

Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Red Wing, Minnesota, on April 4-5, 2006. Charles E. Spicknall and Gary F. Ball, Office of the General Counsel, United States Department of Agriculture, represented GIPSA. E. Lawrence Oldfield, Oldfield & Fox, P.C., Oak Brook, Illinois, represented Mr. Syverson. During the hearing, GIPSA entered 22 exhibits into evidence while Mr. Syverson entered nine exhibits.[1] GIPSA and Mr. Syverson each called four witnesses.[2]

On August 31, 2007, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which she concluded that Mr. Syverson violated the fair dealing requirement of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and that Mr. Syverson violated section 401 of the Packers and Stockyards Act (7 U.S.C. § 221) when he failed to produce his records for examination. However, the ALJ found that Mr. Syverson was not acting as an "order buyer" or market agent, rather his purchases of cows were for his own inventory. The ALJ assessed Mr. Syverson a $5,000 civil penalty for his violations of the Packers and Stockyards Act. In

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[1]GIPSA's exhibits are identified as: EX 1; CX 1 at 1; CX 2 at 1-2; CX 3; CX 4 (limited purposes); CX 5 (limited purposes); and CX 6 through CX 21. Mr. Syverson's exhibits are identified as RX 1 through RX 9.

[2]GIPSA called: Mr. Quam who purchased the cows from Mr. Syverson; William Arce, a senior marketing specialist with GIPSA based in Des Moines, Iowa; Robert Merritt, the resident agent for GIPSA in Minnesota; and Branard England, an auditor with GIPSA in Washington, DC, who was GIPSA's sanction witness. Mr. Syverson called: Tom Webster who was an owner of Zumbrota Livestock Auction Market when the sales in question took place; Marilyn Syverson, Mr. Syverson's wife; and Sterling Sibley, who worked for Mr. Syverson "off and on" since 1978. Mr. Syverson testified on his own behalf.

addition, the ALJ ordered Mr. Syverson to cease and desist from further violations of the Packers and Stockyards Act.

On September 27, 2007, GIPSA filed a timely appeal of the ALJ's Initial Decision. On October 17, 2007, Mr. Syverson filed a Response to Complainant's Appeal Petition. In this response, Mr. Syverson questioned the ALJ's conclusions that he violated the Packers and Stockyards Act and suggested that no sanction be assessed.

## FACTS

Lance Quam and Todd Syverson were neighbors who lived approximately 3 miles apart (Tr. 123). They had engaged in the cattle business with one another for approximately 15 years (Tr. 452). Mr. Syverson is an individual who, during 2002 and 2003, farmed in Minnesota and was registered as a livestock dealer and market agency who did business under the name of Syverson Livestock Brokers (EX 1). Mr. Quam is an individual who, during 2002 and 2003, bought and sold real estate, rented apartments, operated a car lot and car repair shop, and drove a school bus. Mr. Quam also farmed and dealt in dairy cattle. (Tr. 43-44, 117, 420.) Mr. Quam's place was "about seven miles from Zumbrota Livestock barn." (Tr. 123.)

In April or May 2002, Mr. Quam went to Mr. Syverson's facility to discuss obtaining cattle through Syverson Livestock Brokers (Tr. 43-46). Mr. Quam's understanding of the agreement with Mr. Syverson was that Mr. Syverson was a market agency "order-buying" cows for Mr. Quam.

> [BY MR. SPICKNALL:]
>
> Q. Do you recall anything about your initial conversation with Mr. Syverson regarding the cattle?
>
> [BY MR. QUAM:]
>
> A. Yes, I basically had talked to him at different times, I guess it was a Saturday or a Sunday afternoon I stopped out to his place, the farm where he was living, and asked him about if he could

buy some, you know, cows that were open or short bred dairy cows on the -- on the Tuesday dairy sale and any farm auctions he was at or whatever.

Q. Was anything else discussed?

A. Yeah, I guess expenses. I agreed to pay whatever he paid for them plus a $15 commission, trucking and any expenses that occurred, basically expenses.

Tr. 44-45.

Mr. Syverson's recollection of the meeting with Mr. Quam is somewhat different.

[BY MR. OLDFIELD:]

Q. When were you first contacted by Lance Quam with respect to any cattle dealings you had with him?

[BY MR. SYVERSON:]

A. If I remember, it was late April-early May, spring of 2002.

Q. Can you recall the circumstances, the time of day?

A. I believe it was a weeknight. During that time me and Mr. Sibley were burning trash -- I shouldn't say trash. Rubbish and stuff around the buildings there and brush and stuff like that. And Mr. Quam drove in that early evening and come up where we were at.

. . . .

Q. You were describing when Lance Quam came to your

place April or May 2002.

A. Yes, we were doing some burning, me and Mr. Sibley, and Mr. Quam drove in, out to actually a small pasture I have north of my house where we were doing this, and asked what cattle that I had for sale at that time.

Q. Did you show him any cattle?

A. Yes, we proceeded -- there was another yard that's adjacent to that yard. There was cattle out in that yard and we walked down to it and pointed out cattle that he was interested in and talked about them and looked at them.

. . . .

Q. Did you sell any cattle to Mr. Quam on that particular day in April or May of 2002?

A. No.

. . . .

Q. Did you talk about any possibility of selling Mr. Quam cattle in the future?

A. Yes, he said that he would stop back at a later time during the summer. He said that he needed to line up financing first.

Tr. 453-55. Mr. Quam and Mr. Syverson each understood that Mr. Quam intended to obtain approximately 60 cows during the summer of 2002 (Tr. 48, 489-90).[3]

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[3]Mr. Quam obtained approximately 60 cows from Mr. Syverson during the summer of 2002. However, only 24 cows are identified in the complaint (CX 6). William Arce, (continued...)

While Mr. Quam and Mr. Syverson disagree regarding the agreement covering Mr. Quam's purchase of cows from Mr. Syverson during the summer of 2002, there is no dispute regarding Mr. Syverson's acquisition of the cows. Mr. Syverson attended the Zumbrota Livestock Auction Market in Zumbrota, Minnesota, on Mondays (Tr. 453, 456, 515). Zumbrota's letterhead indicates the Monday auction is for "Cattle and Sheep." (CX 14 at 1.) The Monday auction is also referred to as the "cull" auction or the "slaughter" auction (Tr. 49-50, 217, 362). On these Mondays, Mr. Syverson would buy "mostly Holstein cows that [he] thought had the potential to take home to breed or to hopefully were bred back at the time that looked like sound young uddered dairy cows." (Tr. 456.) Mr. Syverson would then take the cows to "the veterinary clinic at the sale barn in Zumbrota [which] would go through a process of pregnancy-checking them, checking their overall health, checking their udders, taking blood samples, TB, tuberculosis, and they would qualify which animals that would qualify for the dairy sale on Tuesday." (Tr. 456-57.)

On Tuesday, Mr. Syverson consigned the cows he bought on Monday to the Zumbrota "dairy cattle" auction on Tuesday. At the Tuesday dairy auction, Mr. Syverson would buy his own cows at a price higher than the original amount he paid for the cows at the Monday auction. (Tr. 515.) Zumbrota Livestock Auction Market provided an invoice to Mr. Syverson that reflected the higher Tuesday price (*see*, *e.g.*, CX 14 at 6). On either Tuesday evening or Wednesday morning, the cows were delivered to Mr. Quam's facility.[4] Mr. Syverson gave Mr. Quam a Syverson Livestock Brokers' invoice for the delivered

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[3](...continued)
GIPSA senior marketing specialist, testified that due to "Mr. Syverson's lack of records," GIPSA was able to trace the transaction history only on 24 of the cows (Tr. 247).

[4]Mr. Syverson testified Mr. Quam came to his facility and picked the specific cows to purchase (Tr. 517), while Mr. Quam testified that he did not pick out the cows but that they were delivered as part of the ongoing agreement with Mr. Syverson (Tr. 109; CX 19).

cows. The invoice showed the number of cows delivered, the price per cow, and the total (CX 14 at 11). These items correspond to the information on the Zumbrota invoice given to Mr. Syverson after the Tuesday auction. Mr. Syverson's invoices to Mr. Quam also show amounts for "commission,"[5] veterinary fees, and trucking (CX 14 at 11). Mr. Syverson provided Mr. Quam with a copy of the Zumbrota Tuesday invoice.

Mr. Quam paid the invoices for all the cows he received during the summer of 2002 (CX 16). In February 2003, Mr. Quam obtained eight more cows from Mr. Syverson. Mr. Quam did not pay for these cows. On February 18, 2003, Jim Klecker delivered cows to Mr. Quam that were purchased from Mr. Syverson. During their conversation, Mr. Klecker said, "Oh, you're the one" telling Mr. Quam that the rumors at the Zumbrota auction were "that Todd [Syverson] was buying these cattle on Monday and turning around and running them up on Tuesday and selling them to somebody and they didn't know who. It was sort of interesting during the summer of the conversation when I was talking to Mr. Syverson he just said, Well, just keep it quiet about who we tell about where we got cattle there. Nobody else needs to know this so -- " (Tr. 57).

On May 8, 2003, Mr. Quam called Robert Merritt, the Minnesota resident agent for GIPSA, complaining that he "had some problems with some cattle that Mr. Syverson had purchased for him." (Tr. 327-28.) This call led to an investigation of Mr. Syverson by Packers and Stockyards Programs. The investigation raised sufficient concern regarding Mr. Syverson's dealings with Mr. Quam that, on December 14, 2004, GIPSA filed a complaint instituting these proceedings.

## DISCUSSION

On August 31, 2007, the ALJ found that "in every sale of cows to Lance Quam during 2002 and 2003 at issue here, Respondent Todd

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[5]Mr. Syverson refers to the "commission" as a "handling fee." In this case, this is a distinction without a difference.

Syverson . . . was ***not*** acting as a market agency or 'order-buyer' who had bought those cows for Lance Quam but was instead acting as a cattle dealer who had bought those cows for his own account." In addition, the ALJ concluded Mr. Syverson "did violate the fair dealing requirements of Section 312(a) of the Packers and Stockyards Act, . . . 7 U.S.C. § 213(a), on those occasions when he represented to Lance Quam that his higher, second, purchase price was his price for the cows but failed to disclose to Lance Quam his (Respondent Syverson's) lower, initial, 'arm's length' purchase price, at times one day earlier." (Initial Decision at 1.)

GIPSA appealed both findings, first arguing that Mr. Syverson acted as a "market agency" and, second, that Mr. Syverson's actions, representing that the invoice for the Tuesday auction was his purchase price, constituted fraud, deceit, deception, or misrepresentation sufficiently grave to be a serious violation of the Packers and Stockyards Act.

The Packers and Stockyards Act prohibits unfair, discriminatory, or deceptive practices, as follows:

> **§ 213. Prevention of unfair, discriminatory, or deceptive practices**
>
> (a) It shall be unlawful for any stockyard owner, market agency,
> or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

7 U.S.C. § 213(a). Furthermore, the Packers and Stockyards Act defines both "market agency" and "dealer," as follows:

> **§ 201. "Stockyard owner"; "stockyard services"; market**

**agency"; "dealer"; defined**

When used in this chapter—

. . . .

(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; and

(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.

7 U.S.C. § 201(c)-(d).

Two witnesses in this case, Mr. Syverson and Mr. Quam, offer conflicting testimony about the transactions between them. This conflicting testimony is complicated by the fact that the ALJ found credibility issues with each of them (Initial Decision at 9, 15-16). After reading the transcripts, reviewing the exhibits, and studying the briefs and other filings, I agree with the ALJ that Mr. Syverson and Mr. Quam each had problems presenting credible testimony. Therefore, I give the testimony of each of them the appropriate weight (usually very little), instead relying on the testimony of unbiased witnesses, the relevant exhibits entered into evidence, and other filings in the record of the case.

The Packers and Stockyards Act defines "market agency" as "any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis." Mr. Syverson is a person in the business of selling livestock in commerce. Mr. Syverson does not dispute that he satisfies this element of the definition. However, Mr. Syverson claims he was not selling on a commission basis but was charging a "fee" of $15. The fee argument gives Mr. Syverson little comfort.

**commission** . . . 6: a fee paid to an agent or employee for transacting a piece of business or preforming a service <a broker receives a ~ on each share of stock bought for a customer> <a ~

of 50 cents for each car washed>

*Webster's Third New International Dictionary of the English Language, Unabridged* 457 (1981). Under this definition, if Mr. Syverson was Mr. Quam's agent, then Mr. Syverson's fee was a commission.

An agent is "a person authorized by another to act for him, one intrusted with another's business." *Black's Law Dictionary* 59 (5th ed. 1979). Because I find the credibility of both Mr. Syverson and Mr. Quam suspect, I do not accept the opinion of either of them regarding the nature of the business relationship between them. Therefore, I must look at the other evidence to reach my determination.

First, I look at evidence of any agreement between Mr. Syverson and Mr. Quam. Mr. Syverson testified that there was no agreement or arrangement with Mr. Quam (Tr. 490-91). However, in his Response to Complainant's Appeal Petition at 7, Mr. Syverson states:

> The deal between Respondent Syverson and Lance Quam was that the cattle that were sold to Lance Quam by Syverson were to be for the purchase price of the cattle, as established by an account of sale from the seller . . . plus the actual cost of veterinarian services, a transportation cost for hauling the cattle from Syverson's farm to Lance Quam's farm, plus a flat fee service charge of $15.00 per head.

I interpret this statement to indicate that Mr. Syverson had an agreement with Mr. Quam prior to any sales of cattle. In addition, Mr. Syverson's listing of each expense he was including in the price, as opposed to giving Mr. Quam "a price 'laid-in' or 'delivered-in'", indicates he was acting as a market agency rather than a dealer. *Western States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88, 90 (8th Cir. 1989). Conversely, Mr. Syverson argues that the fact that Mr. Quam paid Mr. Syverson rather than Zumbrota Livestock Auction Market for the cattle, points toward a conclusion that Mr. Syverson was not a market agency. However, I put little weight in this argument. Under the Packers and Stockyards Act it has long been held that "[w]ho pays for the livestock

is immaterial under the definitions of dealer and market agency in the Act." *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 221 (1980).[6] Furthermore, it was easier for Mr. Syverson to hide his scheme of Monday purchase and Tuesday repurchase at an increased price from Mr. Quam if Mr. Syverson paid Zumbrota directly.

Furthermore, there are two other factors that should be considered in determining if Mr. Syverson acted as a market agency. First, the documentation provided to Mr. Quam "is a typical documentation that a market agency buying on commission would provide to the principal." (Tr. 238.) When asked specifically about his experience with a dealer providing a copy of his purchase invoice to his customer, GIPSA senior marketing specialist William Arce stated: "My experience, no. Like any other business, dealers are very protective of their cost source. Like any other business, they protect this information, that they will increase the price or decrease, they can do whatever they want basically, but they will not, definitely not show this." (Tr. 238-39.) Furthermore, Robert Merritt, GIPSA resident agent in Minnesota, testified that commission brokers are required to attach invoices showing their price and from whom they purchased the animal (Tr. 332).

Next, I find Mr. Syverson had most, if not all, of the cows he repurchased during the Tuesday Zumbrota auction, that he sold to Mr. Quam, segregated by Zumbrota into a grouping that he designated "Order 2." (*See*, *e.g.*, CX 9 at 17; CX 14 at 12.) Mr. Syverson challenges this finding (Response to Complainant's Appeal Petition at 17-18), but his argument is unconvincing. Mr. Syverson states: "As a point in fact, if one looks at Complainant's Exhibits CX-7 to CX-14, four head of cattle were shown as 'Order 2' on June 25, 2002, but only one of these was sold to Lance Quam. On July 8, 2002, five head of cattle were shown as 'Order 1' and all were sold to Lance Quam." (Response to Complainant's Appeal Petition at 18.) Mr. Syverson fails

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[6]The United States Court of Appeals for the Fifth Circuit held that, under Texas law, whether a person buys cattle in his own name and pays for the cattle is a factor in determining if a person is a dealer or agent. However, the Fifth Circuit did not find it a controlling factor. *Valley View Cattle Co. v. Iowa Beef Processors, Inc.*, 548 F.2d 1219, 1223 (5th Cir. 1977).

to cite to any specific document in the record to support his position. Furthermore, I find the first part of his statement, regarding the June 25, 2002, auction, inaccurate and the second part, regarding the July 8, 2002, auction, misleading.

On June 25, 2002, Mr. Syverson invoiced Mr. Quam for five cows[7] (CX 9 at 16). Mr. Syverson provided an invoice from the Tuesday Zumbrota auction to Mr. Quam to support the price he charged Mr. Quam (CX 9 at 17). This Zumbrota invoice contained printed entries for four cows plus a handwritten fifth entry making a total of five cows. The Zumbrota invoice indicates that the four cows were designated "Order 2." Other documents show that Mr. Syverson purchased at least 10 cows at the Zumbrota Tuesday auction on June 25, 2002 (CX 9 at 8). This evidence allows me to conclude that these four "Order 2" cows were purchased by Mr. Syverson with the intent of providing them to Mr. Quam. Furthermore, the pricing of these cows on the Tuesday Zumbrota invoice (CX 9 at 17) is identical to the pricing on the invoice Mr. Syverson used to bill Mr. Quam for that sale (CX 9 at 16.) This identical pricing allows me to conclude that the cows Mr. Syverson designated as "Order 2" on June 25, 2002, were, in fact, the cows sold and delivered to Mr. Quam.

On each of the other Tuesdays that Mr. Syverson sold cows to Mr. Quam, the Zumbrota invoice provided to Mr. Quam by Mr. Syverson to support the price of each cow, indicates that the cows provided to Mr. Quam were designated as "Order 2." Further, the documents show that most of these cows were purchased at the Tuesday auction from Mr. Syverson's own inventory (CX 7 at 5, 15-16; CX 8 at 5, 14-15; CX 10 at 9, 19-20; CX 11 at 7, 15-16; CX 12 at 9, 16-17; CX 13 at 6, 14-15; CX 14 at 3, 11-12). This designation of "Order 2" cows leads me to conclude that Mr. Syverson purchased these cows for Mr. Quam.

Regarding Mr. Syverson's claim that on July 8, 2002, he designated five head of cattle "Order 1" and sold these to Lance Quam, the statement is accurate but misleading. On Monday July 8, 2002,

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[7]Only one of these cows was included in the complaint.

Mr. Syverson bought cattle at the Zumbrota Monday auction. Included in his purchases were five cows that he had designated "Order 1." (CX 11 at 3.) On Tuesday July 9, 2002, Mr. Syverson consigned eight head of cattle from his own inventory for the Tuesday dairy auction (CX 11 at 7). At the auction, Mr. Syverson purchased seven of the eight head of cattle that he consigned from his own inventory (CX 11 at 7, 16). Mr. Syverson designated those seven repurchased cows as "Order 2." (CX 11 at 16.) Mr. Syverson used that July 9 "Order 2" Zumbrota invoice to prove his cost to Mr. Quam (CX 11 at 16). While it is accurate for Mr. Syverson to claim that "five head of cattle were shown as 'Order 1' and all were sold to Lance Quam," it does not tell the complete story. Mr. Syverson designated those cows "Order 1" when he first purchased them on Monday July 8, 2002 (CX 11 at 3), but then designated those same cows "Order 2" when he repurchased them at the Tuesday dairy auction (CX 11 at 16).

None of the factors discussed above is sufficient standing alone to automatically conclude that Mr. Syverson acted as a market agency in his transactions with Mr. Quam during the summer of 2002. However, when all the factors are examined together, the weight of the evidence leads me to conclude that Mr. Syverson acted as a "market agency," as that term is defined in section 301 of the Packers and Stockyards Act (7 U.S.C. § 201), in his transactions with Mr. Quam during the summer of 2002.

Mr. Syverson's actions show a great disregard for the purposes of the Packers and Stockyards Act. One of the primary reasons Congress enacted the Packers and Stockyards Act was "to assure fair competition and fair trade practices in livestock marketing. . . ." H.R. Rep. No. 1048, 85th Cong., 2d sess., *reprinted in* 1958 U.S.C.C.A.N. 5212-13. No matter what role Mr. Syverson played in the summer of 2002, either market agency or dealer, showing the Tuesday Zumbrota invoice to Mr. Quam in order to create a price basis is an unfair and deceptive practice.

Mr. Syverson's agreement with Mr. Quam was that the cattle that were sold to Lance Quam by Syverson were to be for the purchase price of the cattle, as established by an account of sale from a seller, in this case Zumbrota Livestock Auction, plus the actual cost of veterinarian

services, a transportation cost for hauling the cattle from Syverson's farm to Lance Quam's farm, plus a flat fee service charge of $15.00 per head.

Response to Complainant's Appeal Petition at 7. Despite Mr. Syverson's claims otherwise, the price indicated on the Tuesday Zumbrota invoice that he used to establish a price for sale of the cattle to Mr. Quam, was not Mr. Syverson's purchase price. Mr. Syverson's purchase price is the price he paid at the Zumbrota Monday auction.[8]

Using the August 19-20, 2002, transaction as an example, it becomes clear that Mr. Syverson's actions fall outside the concept of "fair trade practice." On Monday August 19, 2002, Mr. Syverson bought a cow at the Zumbrota Livestock Auction Market. The cow was identified with back tag "T4827." It weighed 790 pounds and sold for $30 per hundredweight. Mr. Syverson paid a total of $237 for this cow (CX 14 at 1). Mr. Syverson then had the cow examined by the veterinarian at Zumbrota. After the examination, the veterinarian assigned the cow tag number 565 (CX 14 at 2 line 10).

On Tuesday, August 20, 2002, Mr. Syverson consigned three cows for sale at Zumbrota Livestock Auction Market, including the cow identified by tag number 565. At the Tuesday auction, Mr. Syverson "purchased" cow 565 from himself for $475. (CX 14 at 3.) As purchaser of cow 565 at the Tuesday auction, Mr. Syverson had cow 565 designated to "Order 2." (CX 14 at 12.) Mr. Syverson then had cow 565 taken to Anderson Veterinary Service at Zumbrota Livestock Auction Market for various shots which cost a total of $15.50 (CX 14 at 13). On August 20, 2002, Mr. Syverson sold cow 565 to Mr. Quam and billed him $475 for cow 565. In addition, Mr. Syverson billed Mr. Quam a $15 commission, $15.50 in veterinary fees, and $10 for trucking. The total cost to Mr. Quam for cow 565 was $515.50 (CX 14 at 11). Mr. Syverson gave Mr. Quam a copy of the Zumbrota Tuesday, August 20, 2002, invoice and a copy of the August 20, 2002, veterinary

[8]Mr. Syverson's costs could be a bit higher, including any veterinary charges and other expenses associated with acquiring the cows.

bill to justify the price he charged for cow 565 (CX 14 at 12-13).

Mr. Syverson purchased cow 565 on Monday August 19, 2002, for $237. Mr. Syverson's claim that his purchase price of cow 565 was $475, based on the Tuesday invoice, is absurd. Mr. Syverson's actions are nothing more than a scheme that allows him to generate an invoice for cattle at a price significantly higher than he paid for the cattle. As a matter of law, I find that the use of a market generated invoice to establish the purchase price of cattle when the cattle are being "purchased" from the dealer's or market agency's own inventory, and using that purchase price to establish the price charged to a buyer, is an unfair and deceptive trade practice that violates section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)).

Had Mr. Syverson been a dealer, as he claimed, I still would have found his use of the Tuesday invoice to represent his purchase price a serious violation of the Packers and Stockyards Act. As a dealer, Mr. Syverson could have sold cow 565 to Mr. Quam for $515.50 without violating the Packers and Stockyards Act – when asked the price of the cow he could have stated $515.50, as a "laid-in" or "delivered-in" price without any explanation regarding how he arrived at that price. Such fixed pricing would not have been a violation of the Packers and Stockyards Act. *Western States Cattle Co.*, 880 F.2d at 90. However, when he used the Tuesday invoice to show a price higher than his actual costs as a justification for the higher price, Mr. Syverson was being unfair and deceptive.

As a market agency, the threshold was higher than as a dealer. Mr. Syverson had an obligation to purchase the cattle at the lowest possible price. *In re Mark V. Porter*, 47 Agric. Dec 656, 669 (1988). When a market agency buys from its own inventory, it creates an inherent conflict of interest between buying for the principal at the lowest price and selling his inventory at the highest price. The only way to resolve the conflict is to fully disclose to the principal that cattle were coming from its own inventory and get the principal's approval for the transaction. *Id.* The United States Department of Agriculture has long held that when a market agent, such as Mr. Syverson, sells cattle to a principal, such as Mr. Quam, from his own inventory without disclosing the source of the cattle, the market agency violates section 312(a) of the

Packers and Stockyards Act (7 U.S.C. § 213(a)). *In re Harry Vealey, Jr.*, 39 Agric. Dec. 8, 13 (1979). Mr. Syverson's sale of cows from his own inventory, without informing Mr. Quam of that fact, is a violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)).

Furthermore, it is well settled that when a market agency deceives a principal regarding the cost of cattle, it is "one of the most serious violations that can be committed under the Act." *Spencer Livestock Comm'n Co. v. U.S. Dep't of Agric.*, 841 F.2d 1451, 1458 (1988). As a market agency, Mr. Syverson's use of the Tuesday Zumbrota invoice deceived Mr. Quam regarding the cost of the cattle. Such a deception is a violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)). I find that Mr. Syverson's violations are most serious.

Further, the record establishes that the size of Mr. Syverson's business is small to medium. Based on the size of Mr. Syverson's business, I do not find that the assessment of a reasonable civil penalty would affect his ability to continue in business.

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

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The

administrative officials charged with the responsibility of administering the Packers and Stockyards Act recommend that I suspend Mr. Syverson as a registrant under the Packers and Stockyards Act for a period of 5 years. However, the recommendation of administrative officials as to the sanction is not controlling.

The purpose of an administrative sanction is to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future similar violations of the Packers and Stockyards Act. This case involves most serious violations of the Packers and Stockyards Act. Furthermore, Mr. Syverson committed these violations within a year of Mr. Syverson's consenting to a decision which ordered him to cease and desist from "[i]ssuing accounts of purchase or sale which fail to show the true and correct nature of the livestock transaction accounted for therein" and "causing false records to be prepared." *See* CX 5 at 2-3, *In re Todd Syverson*, P&S Docket No. D-99-0011 (June 12, 2001), at 2-3.

Based on the record before me, I find that Mr. Syverson's violations warrant a suspension as a registrant under the Packers and Stockyards Act for a period of 5 years. However, Mr. Syverson may apply to the Packers and Stockyards Programs for permission to be a salaried employee of another registrant or packer after serving 1 year of the suspension.

## ORDER

1. Todd Syverson, his agents and employees, directly or indirectly through any corporate or other device, including but not limited to Syverson Livestock Brokers, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

   a. failing to comply with the requirements of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)), and specifically, Mr. Syverson shall not represent to any buyer that his cost of cattle is based on a "purchase price" resulting from the "purchase" of cattle from his own inventory unless he discloses that he bought the cattle from his own consignment and his initial purchase price of the cattle; and

   b. failing without good cause to produce for examination within

a reasonable time when asked by GIPSA, all of the accounts, records, and memoranda as are required to be kept under section 401 of the Packers and Stockyards Act (7 U.S.C. § 221), including, but not limited to, a purchase journal (recording, at minimum, the date of purchase; seller; number of head; description of livestock; purchase price(s); date(s) received; commission charges, if any; other fees or charges; whether the livestock were purchased for the account of another, and if so, the identity of that person or firm) together with all invoices, buyer bills, consignment sheets, and other records associated with individual livestock purchases and sales.

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

2. Todd Syverson is hereby suspended as a registrant under the Packers and Stockyards Act for a period of 5 years; *Provided*, *however*, That this Order may be modified upon application to Packers and Stockyards Programs to permit the salaried employment of Mr. Syverson by another registrant or packer after the expiration of 1 year of this suspension term.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Order on Mr. Syverson.

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**In re: TIMOTHY R. BAUMERT.**
**P. & S. Docket No. D-07-0190.**
**Decision and Order.**
**Filed October 22, 2008.**

**P&S – Failure to file answer – Failing to pay full purchase price – Dealer – Bond coverage – Cease and desist – Civil penalty.**

Eric Paul for the Deputy Administrator, GIPSA.
Antonio D. Michetti, Trevorton, PA, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer*.

## PROCEDURAL HISTORY

Alan R. Christian, Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on September 12, 2007. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued under the Packers and Stockyards Act (9 C.F.R. pt. 201) [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 Deputy Administrator alleges that Timothy R. Baumert: (1) purchased livestock and failed to pay the full purchase price of the livestock within the time period required by the Packers and Stockyards Act, in willful violation of sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) and (2) engaged in business as a dealer without maintaining an adequate bond or bond equivalent, in willful violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and section 201.30(b) of the Regulations (9 C.F.R. § 201.30(b)) (Compl. ¶¶ II-IV).

The Hearing Clerk served Mr. Baumert with the Complaint, the Rules of Practice, and a service letter on September 15, 2007.[1] Mr. Baumert failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Mr. Baumert a letter dated October 10, 2007, stating Mr. Baumert had not filed a timely response to the Complaint. Mr. Baumert failed to file a response to the Hearing Clerk's October 10, 2007, letter.

On May 2, 2008, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Deputy Administrator filed a Motion for Decision Without Hearing By Reason of Default [hereinafter Motion for Default Decision] and a Proposed Decision. The Acting Hearing Clerk

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[1]United States Postal Service Domestic Return Receipt for Article Number 7004 2510 0003 7023 1838.

served Mr. Baumert with the Deputy Administrator's Motion for Default Decision and the Deputy Administrator's Proposed Decision on May 15, 2008.[2] Mr. Baumert failed to file objections to the Deputy Administrator's Motion for Default Decision and the Deputy Administrator's Proposed Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On August 13, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Mr. Baumert purchased livestock and failed to pay the full purchase price of the livestock within the time period required by the Packers and Stockyards Act, in willful violation of sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b); (2) concluding Mr. Baumert engaged in business as a dealer without maintaining an adequate bond or bond equivalent, in willful violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)) and section 201.30(b) of the Regulations (9 C.F.R. § 201.30(b)); (3) ordering Mr. Baumert to cease and desist from failing to pay the full purchase price of livestock within the time period required by the Packers and Stockyards Act and from purchasing livestock without an adequate bond or its equivalent; (4) assessing Mr. Baumert a $9,000 civil penalty; and (5) suspending Mr. Baumert as a registrant under the Packers and Stockyards Act until he demonstrates that he has obtained and filed an adequate bond or its equivalent.

On September 18, 2008, Mr. Baumert filed a timely appeal petition. On October 6, 2008, the Deputy Administrator filed a response to Mr. Baumert's appeal petition. On October 17, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Initial Decision; except that, for the reason discussed in this Decision and Order, *supra*, I modify the ALJ's sanction to eliminate the suspension of Mr. Baumert as a registrant under the Packers and Stockyards Act.

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[2]United States Postal Service Domestic Return Receipt for Article Number 7007 0710 0001 3858 9943.

## DECISION

### Statement of the Case

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

### Findings of Fact

1. Timothy R. Baumert is an individual whose business address is RR 1, Box 29, Dairy Road, Dalmatia, PA 17017.

2. Timothy R. Baumert is and at all times material to this proceeding was:

(a) Engaged in the business of a dealer, buying and selling livestock for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock for his own account.

3. Timothy R. Baumert, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, within the time period required by the Packers and Stockyards Act, the full purchase price of such livestock.

| Livestock Seller | Purchase Date | Date Payment Due Per § 409(a) | No. of Head | Livestock Amount | Sales Invoice Amount* | Payment. Check Amount | Date Issued | No. of Days Late |
|---|---|---|---|---|---|---|---|---|

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| New Holland | 7/07/05 | 7/08/05 | 39 | $2,796.20 | $ 2,776.98 | | | 6 |
| Sales | 7/11/05 | 7/12/05 | 103 | $7,412.70 | $ 7,398.97 | | | 2 |
| Stables, Inc. | | | | | $10,175.95 | $10,175.95 | 7/14/05 | |
| New Holland | 7/21/05 | 7/22/05 | 31 | $ 2,711.30 | $ 2,696.73 | | | 7 |
| Sales | 7/25/05 | 7/26/05 | 39 | $12,591.80 | $12,562.34 | | | 3 |
| Stables, Inc. | 7/28/05 | 7/29/05 | 11 | $ 717.50 | $ 725.37 | | | 0 |
| | | | | | $15,984.44 | $15,984.44 | 7/29/05 | |
| New Holland | 8/04/05 | 8/05/05 | 38 | $ 2,460.85 | $ 2,452.91 | | | 6 |
| Sales | 8/08/05 | 8/09/05 | 246 | $20,503.50 | $20,461.18 | | | 2 |
| Stables, Inc. | | | | | $22,914.09 | $22,914.09 | 8/11/05 | |
| Beegle's | 7/13/05 | 7/14/05 | 28 | $1,859.66 | $1,859.66 | | | 7 |
| Livestock | 7/18/05 | 7/19/05 | 8 | $ 810.19 | $ 810.19 | | | 2 |
| | 7/20/05 | 7/21/05 | 7 | $ 570.53 | $ 570.53 | | | 0 |
| | | | | | $3,240.38 | $3,540.38 | 7/21/05 | |
| Beegle's Livestock | 8/17/05 | 8/18/05 | 78 | $7,925.88 | $7,925.88 | $7,925.88 | 8/25/05 | 7 |
| Shannon | 7/13/05 | 7/14/05 | 544 | $41,584.23 | $42,128.23 | $20,000.00 | 7/21/05 | 7 |
| Banbury | 7/19/05 | 7/20/05 | 38 | $ 2,246.30 | $ 2,284.30 | $24,412.53 | 7/21/05 | 1 |
| | | | | | $44,412.53 | $44,412.53 | | |
| Shannon Banbury | 8/17/05 | 8/18/05 | 489 | $35,931.79 | $36,601.79 | $36,601.79 | 8/24/05 | 6 |
| Doug Boehne | 7/25/05 | 7/26/05 | 101 | $7,535.70 | $5,327.70 | $5,327.70 | 8/2/05 | 7 |
| Doug | 7/25/05 | 7/26/05 | 10 | $1,067.42 | $ 1,067.42 | | | 9 |
| Boehne | 7/31/05 | 8/01/05 | 237 | $15,088.87 | $13,861.56 | | | 3 |
| | | | | | $14,928.98 | $14,928.98 | 8/4/05 | |

*Adjustments have been made on some of these sales invoices for freight and for lamb check off credits.

4. In a certified letter dated February 2, 1998, served upon Mr. Baumert on February 6, 1998, Lawrence D. Poss, acting regional supervisor of the Lancaster, Pennsylvania, regional office of the Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter GIPSA], informed Mr. Baumert that a recent investigation had disclosed that he was hand-delivering checks issued in payment for livestock purchases to a market 7 to 9 days after purchase instead of before the close of the next business day, as required by section 409 of the Packers and Stockyards Act (7 U.S.C. § 228b).

5. In a certified letter dated June 6, 2003, served upon Mr. Baumert on June 12, 2003, Creig F. Stephens, resident agent supervisor of the

Atlanta, Georgia, regional office of GIPSA, informed Mr. Baumert that a recent investigation had disclosed that he was hand-delivering checks issued in payment for livestock purchases to a market up to 11 days after purchase instead of before the close of the next business day, as required by section 409 of the Packers and Stockyards Act (7 U.S.C. § 228b).

6. In a certified letter dated February 13, 2003, which was served on Mr. Baumert on February 21, 2003, Creig F. Stephens, resident agent supervisor of the Atlanta, Georgia, regional office of GIPSA, informed Mr. Baumert that a recent investigation of his records disclosed that his $20,000 bond coverage needed to be increased to $40,000.

7. In a certified letter dated January 4, 2004, served upon Mr. Baumert on January 10, 2004, John Rollins, Trade Practices supervisor of the Atlanta, Georgia, regional office of GIPSA, informed Mr. Baumert that, based upon the volume of business shown in his last annual report, which was filed for the year ending December 31, 2002, his $20,000 bond coverage needed to be increased to $40,000.

8. In a certified letter dated November 22, 2005, served upon Mr. Baumert on November 25, 2005, Herple A. Ellis, IV, Trade Practices supervisor of the Atlanta, Georgia, regional office of GIPSA, informed Mr. Baumert that, based upon the volume of business shown in his last annual report, which was filed for the year ending December 31, 2004, his $20,000 bond coverage needed to be increased to $45,000.

9. Despite the written notices described in Findings of Fact numbers 6 through 8, at the time of the filing of the Complaint, Mr. Baumert had not increased the amount of his bond coverage above $20,000.

10. On April 14, 2006, Mr. Baumert signed an annual report for the year ending December 31, 2005, in which he reported making livestock purchases totaling $4,922,860.57 as a dealer. A continuation of livestock purchases at this volume would require Mr. Baumert to file a $40,000 bond or bond equivalent to comply with the Regulations.

**Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts found in Findings of Fact numbers 3

through 5, Mr. Baumert willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b).

3. By reason of the facts found in Findings of Fact numbers 6 through 10, Mr. Baumert willfully violated section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)), and section 201.30(b) of the Regulations (9 C.F.R. § 201.30(b)).

**Mr. Baumert's Appeal Petition**

Mr. Baumert argues on appeal that the ALJ erred because two facts, which Mr. Baumert asserted for the first time in his appeal petition, demonstrate that he did not willfully violate the Packers and Stockyards Act. Mr. Baumert was required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer within 20 days after service of the Complaint; namely, no later than October 5, 2007. Mr. Baumert's assertion of facts in his appeal petition, filed September 18, 2008, 11 months 13 days after Mr. Baumert was required to file an answer comes far too late to be considered. As Mr. Baumert failed to file a timely answer, Mr. Baumert is deemed to have admitted the material allegations of the Complaint, and I reject his argument that the ALJ's conclusions are error.

**Modification of the ALJ's Order**

The ALJ suspended Mr. Baumert as a registrant under the Packers and Stockyards Act until he has demonstrated that he has obtained and filed a bond or approved bond equivalent in the full amount required under the Regulations (Initial Decision at 5). The Deputy Administrator asserts that he received a fully executed bond rider on the proper form from Mr. Baumert, after Mr. Baumert filed his appeal petition, and requests that I modify the ALJ's Initial Decision by eliminating the suspension of Mr. Baumert as a registrant under the Packers and Stockyards Act (Complainant's Opposition to Respondent's Appeal at 6-7). As the requested modification to the ALJ's Initial Decision benefits Mr. Baumert, I grant the Deputy Administrator's request without providing Mr. Baumert a prior opportunity to respond to the

request. In the unlikely event that Mr. Baumert objects to this modification, he may, of course, raise that objection in any petition to reconsider.

For the foregoing reasons, the following Order is issued.

**ORDER**

1. Timothy R. Baumert, directly or through any corporate or other devise, in connection with his operations as a dealer, shall cease and desist from:

(a) Failing to pay, within the time period required by the Packers and Stockyards Act, the full purchase price of livestock; and

(b) Purchasing livestock without filing and maintaining a bond or its equivalent in the full amount determined to be adequate by GIPSA in accordance with the Packers and Stockyards Act and the Regulations.

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

2. Timothy R. Baumert is assessed a $9,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "USDA-GIPSA" and sent to:

USDA-GIPSA
P.O. Box 790335
St. Louis, MO 63179-0335

Payment of the civil penalty shall be sent to the USDA-GIPSA within 30 days after service of this Order on Mr. Baumert. Mr. Baumert shall state on the certified check or money order that payment is in reference to P. & S. Docket No. D-07-0190.

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## MISCELLANEOUS ORDERS

**In re: NEWMAN LIVESTOCK, INC.**
**P&S Docket No. D-08-0061.**
**Miscellaneous Order.**
**Filed October 22, 2008.**

**PS – Dismissal.**

Charles L. Kendall for GIPSA.
Respondent Pro se.
*Miscellaneous Order by Administrative Law Judge Jill S. Clifton.*

### Order Dismissing Complaint Without Prejudice

Complainant requests that the complaint filed in this case be dismissed without prejudice for the reason that the stockyard is now operated by different owners who were not implicated in the violations alleged in the Complaint filed February 15, 2008 signed by Alan R. Christian, Deputy Administrator, Packers & Stockyards Program.

Accordingly, this case is **DISMISSED**, without prejudice.

Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

———————

**In re: TODD SYVERSON, d/b/a SYVERSON LIVESTOCK BROKERS.**
**P&S Docket No. D-05-0005.**
**Stay Order.**
**Filed October 3, 2008.**

**PS – Stay of action.**

Charles S. Spicknall and Gary F. Ball, for GIPSA.
E. Lawrence Oldfield, Oak Brook, IL, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
*Order issued by William G. Jenson, Judicial Officer*.

On August 27, 2008, I issued a Decision and Order: (1) concluding that Todd Syverson violated the Packers and Stockyards Act; (2) ordering Todd Syverson to cease and desist from failing to comply with section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)); (3) ordering Todd Syverson to cease and desist from failing to produce for examination, when asked, all of the accounts, records, and memoranda as are required to be kept under section 401 of the Packers and Stockyards Act (7 U.S.C. § 221); and (4) suspending Todd Syverson as a registrant under the Packers and Stockyards Act.[1] On September 18, 2008, Todd Syverson filed a motion for a stay of the Order in *In re Todd Syverson*, 67 Agric. Dec. ___ (Aug. 27, 2008), pending the outcome of proceedings for judicial review. On September 30, 2008, the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, filed a response to the motion for stay stating he had no objection to the requested stay.

In accordance with 5 U.S.C. § 705, Todd Syverson's request for a stay is granted.

For the foregoing reasons, the following Order is issued.

## ORDER

The Order in *In re Todd Syverson*, 67 Agric. Dec. ___ (Aug. 27, 2008), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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[1] *In re Todd Syverson*, __ Agric. Dec. ___ (Aug. 27, 2008).

**PACKERS AND STOCKYARDS ACT**

**DEFAULT DECISIONS**

**NAZEM SAAD, d/b/a AL BADR SLAUGHTER HOUSE.**
**P&S-Docket D-08-0052**
**Default Decision.**
**Filed August 1, 2008.**

**PS– Default.**

Tracey Manoff for GIPSA.
Respondent Pro se
*Default Decision by Administrative Law Judge Peter M. Davenport.*

## DECISION WITHOUT HEARING BY REASON OF DEFAULT

### Preliminary Statement

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 and Notice of Hearing filed on January 24, 2008, by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (hereinafter "Complainant"), alleging that Respondent willfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq*.; hereinafter "Regulations").

The Complaint and Notice of Hearing 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 February 26, 2008. 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 Notice of Hearing and a

waiver of the right to an oral hearing.

Respondent was also informed in a letter from Complainant's attorney, which was sent by certified mail and received by Respondent on April 5, 2008,[1] that Complainant would seek the assessment of a civil penalty in the case in the amount of $16,000.00 against Respondent. After waiting an additional four weeks after service of the notice letter, Complainant then filed a motion for decision without hearing based on Respondent's default.

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 and Notice of Hearing, 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. Nazem Saad, d/b/a Albadr Slaughter House (hereinafter "Respondent"), is an individual whose business mailing address was 1826 Adelaide Street, Detroit, Michigan 48207. Respondent's current mailing address is 47231 Glenhurst Drive, Canton, Michigan 48187.

2. At all times material herein, Respondent was:

(a) Engaged in the business of buying livestock in commerce for the purpose of slaughter, and of manufacturing or preparing meats or meat food products for sale or shipment in commerce; and

(b) A packer within the meaning of, and subject to the provisions of, the Act.

3. Respondent's average annual purchases of livestock exceeded $500,000.00.

4. Respondent was notified by letter addressed to Nasser Saad, Respondent's president, dated May 5, 2004, that the Act requires all packers whose average annual purchases exceed $500,000.00 to file and

[1] United States Postal Service Domestic Return Receipt for Article No. 7000 1670 0011 8977 6228.

maintain a surety bond or bond equivalent, and that based on the information that Respondent submitted in form P&SP 132, Packer Inquiry, Respondent was required to be bonded. The letter informed Respondent that he must obtain a condition 4 bond or bond equivalent of at least $15,000.00 and notified Respondent of his obligation to file proof of the bond or bond equivalent with the Packers and Stockyards Program.

5. Respondent was notified by certified letter addressed to Seymour Shapiro, Respondent's general manager, dated October 28, 2004, and served on or between November 1, 2004, and November 4, 2004,[2] that Respondent had failed to furnish the requested bond coverage and that a continuation of livestock operations as a packer without a properly filed bond or bond equivalent was a violation of the Act and the Regulations. The letter referenced 7 U.S.C. § 203 and 9 C.F.R. §§ 201.10, 201.27-201.34 and informed Respondent that violation of the bonding provisions of the Act and Regulations could subject him to disciplinary or court action. The letter further notified Respondent of his obligation to file proof of the bond or bond equivalent with the Packers and Stockyards Program.

6. Respondent, on or about the dates and in the transactions set forth below, purchased livestock for the purpose of slaughter without maintaining an adequate bond or bond equivalent.

[2] The return receipt was signed and returned to the Packers and Stockyards Program, but was not dated by the recipient. The United States Postal Service stamped the return receipt on November 1, 2004. The Packers and Stockyards Program stamped the return receipt on November 4, 2004.

| Seller | Purchase Date | No. of Head | Livestock Amount |
|---|---|---|---|
| | 8/13/06 | 313 | $24,051.55 |
| | 8/20/06 | 210 | $15,847.87 |
| Tjernagel | 9/4/06 | 152 | $16,953.33 |
| Brothers P.O. Box | 9/6/06 | 55 | $4,169.48 |
| 87 | 9/13/06 | 209 | $16,898.67 |
| Story City, | 9/20/06 | 248 | $23,201.80 |
| Iowa | 9/26/06 | 225 | $21,118.90 |
| 50248 | 10/4/06 | 125 | $11,956.18 |
| | 10/15/06 | 238 | $23,911.23 |
| | 10/22/06 | 192 | $21,608.13 |
| | 7/18/06 | 52 | $15,267.13 |
| | 7/25/06 | 98 | $23,277.90 |
| | 7/30/06 | 55 | $4,252.52 |
| | 8/1/06 | 28 | $17,186.08 |
| | 8/7/06 | 20 | $17,384.53 |
| | 8/23/06 | 18 | $8,832.63 |
| | 8/23/06 | 37 | $15,133.47 |
| | 8/23/06 | 71 | $3,719.44 |
| | 8/28/06 | 29 | $18,379.20 |
| | 9/4/06 | 54 | $10,391.76 |
| | 10/1/06 | 164 | $55,193.39 |
| | 10/2/06 | 63 | $21,017.88 |
| Mark A. | 10/6/06 | 30 | $2,203.00 |
| Oberly | 10/10/06 | 15 | $4,301.35 |
| 3223 | 10/16/06 | 75 | $13,240.92 |
| Dennison | 10/23/06 | 36 | $17,070.96 |
| Road | 10/30/06 | 66 | $3,460.33 |
| Dundee, | 10/30/06 | 45 | $13,602.81 |
| Michigan | 11/6/06 | 66 | $18,255.38 |
| 48131 | 11/14/06 | 139 | $21,202.03 |
| | 11/18/06 | 117 | $7,861.66 |
| | 11/27/06 | 123 | $14,506.51 |
| | 12/4/06 | 140 | $12,035.01 |
| | 12/4/06 | 142 | $24,723.85 |

| | | | |
|---|---|---|---|
| | 12/5/06 | 9 | $2,772.66 |
| | 12/11/06 | 45 | $2,958.20 |
| | 12/11/06 | 6 | $5,692.36 |
| | 12/20/06 | 147 | $18,750.49 |
| | 12/20/06 | 54 | $3,868.65 |
| **TOTAL** | | 3,911 | $576,259.24 |

7. Respondent, in connection with his operations subject to the Act, in the transactions set forth in Appendices A and B and incorporated herein by reference, failed to pay the full amount of the purchase price for livestock within the time period required by the Act, with the total amount remaining unpaid of $119,019.41.

## Conclusions

By reason of the facts found in Finding of Fact 4 through 6, Respondent willfully violated section 202(a) of the Act (7 U.S.C. § 192(a)), and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 7, Respondent has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

## Order

Respondent Nazem Saad, d/b/a Albadr Slaughter House, as an individual, and his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Act and the Regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the Regulations; and

2. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act.

Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), Respondent is assessed a civil penalty in the amount of Sixteen Thousand Dollars ($16,000.00).

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: TIMOTHY R. BAUMERT.**
**P. & S. Docket No. D-07-0190.**
**Default Decision.**
**Filed August 13, 2008.**

**PS – Default.**

Eric Paul for GIPSA.
Respondent, Pro se.
*Default Decision by Administrative Law Judge Peter M. Davenport.*

## DECISION AND ORDER

### Preliminary Statement

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq*.), hereinafter "the Act", by a Complaint filed by the Deputy Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent wilfully violated the Act. Copies of the Complaint and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, ("Rules of Practice")(7 C.F.R. § 1.130 *et seq*.) were sent to Respondent by the Hearing Clerk by certified mail transmittal dated September 12, 2007. Respondent signed a receipt acknowledging service of the Complaint, but failed to file an answer with the Hearing Clerk. By letter dated

October 10, 2007, Respondent was notified that he had failed to file an answer with the Hearing Clerk within the allotted time.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the allegations of the Complaint, which are admitted by Respondent's failure to file an answer (7 C.F.R. § 1.136(c)), are adopted and set forth herein as findings of fact.

## Findings of Fact

1. Timothy R. Baumert, hereinafter Respondent, is an individual whose business address is RR 1, Box 29, Dairy Rd., Dalmatia, PA 17017.

2. Respondent is and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock for his own account; and

(b) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock for his own account.

3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, within the time period required by the Act, the full purchase price of such livestock.

| Livestock Seller | Purch. Date | Payment Due per § 409a | No. of Head | Livestock Amount | Sales Invoice Amount * | Payment Check Amount | Date issued | No. of Days Late |
|---|---|---|---|---|---|---|---|---|
| New Holland | 7/07/05 | 7/08/05 | 39 | $2,796.20 | $ 2,776.98 | | | 6 |
| Sales Stables, | 7/11/05 | 7/12/05 | 103 | $7,412.70 | $ 7,398.97 | | | 2 |
| Inc. | | | | | $10,175.95 | $10,175.95 | 7/14/05 | |
| New Holland | 7/21/05 | 7/22/05 | 31 | $ 2,711.30 | $ 2,696.73 | | | 7 |
| Sales Stables, | 7/25/05 | 7/26/05 | 39 | $12,591.80 | $12,562.34 | | | 3 |
| Inc. | 7/28/05 | 7/29/05 | 11 | $ 717.50 | $ 725.37 | | | 0 |
| | | | | | $15,984.44 | $15,984.44 | 7/29/05 | |
| New Holland | 8/04/05 | 8/05/05 | 38 | $ 2,460.85 | $ 2,452.91 | | | 6 |
| Sales Stables, | 8/08/05 | 8/09/05 | 246 | $20,503.50 | $20,461.18 | | | 2 |
| Inc. | | | | | $22,914.09 | $22,914.09 | 8/11/05 | |
| Beegle's | 7/13/05 | 7/14/05 | 28 | $1,859.66 | $1,859.66 | | | 7 |
| Livestock | 7/18/05 | 7/19/05 | 8 | $ 810.19 | $ 810.19 | | | 2 |
| | 7/20/05 | 7/21/05 | 7 | $ 570.53 | $ 570.53 | | | 0 |
| | | | | | $3,240.38 | $3,540.38 | 7/21/05 | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Beegle's Livestock | 8/17/05 | 8/18/05 | 78 | $7,925.88 | $7,925.88 | $7,925.88 | 8/25/05 | 7 |
| Shannon | 7/13/05 | 7/14/05 | 544 | $41,584.23 | $42,128.23 | $20,000.00 | 7/21/05 | 7 |
| Banbury | 7/19/05 | 7/20/05 | 38 | $ 2,246.30 | $ 2,284.30 | $24,412.53 | 7/21/05 | 1 |
| | | | | | $44,412.53 | $44,412.53 | | |
| Shannon Banbury | 8/17/05 | 8/18/05 | 489 | $35,931.79 | $36,601.79 | $36,601.79 | 8/24/05 | 6 |
| Doug Boehne | 7/25/05 | 7/26/05 | 101 | $7,535.70 | $5,327.70 | $5,327.70 | 8/2/05 | 7 |
| Doug | 7/25/05 | 7/26/05 | 10 | $1,067.42 | $ 1,067.42 | | | 9 |
| Boehne | 7/31/05 | 8/01/05 | 237 | $15,088.87 | $13,861.56 | | | 3 |
| | | | | | $14,928.98 | $14,928.98 | 8/4/05 | |

* Adjustments have been made on some of these sales invoices for freight and for lamb check off credits.

4. In a certified letter dated February 2, 1998, served upon Respondent on February 6, 1998, Lawrence D. Poss, Acting Regional Supervisor of the Lancaster, Pennsylvania regional office of Complainant, informed Respondent that a recent investigation had disclosed that Respondent was hand delivering checks issued in payment for livestock purchases to a market seven to nine days after purchase instead of before the close of the next business day as required by section 409(a) of the Act.

5. In a certified letter dated June 6, 2003, served upon Respondent on June 12, 2003, Creig F. Stephens, Resident Agent Supervisor of the Atlanta, Georgia regional office of Complainant, informed Respondent that a recent investigation had disclosed that Respondent was hand delivering checks issued in payment for livestock purchases to a market up to eleven days after purchase instead of before the close of the next business day as required by section 409 of the Act.

6. In a certified letter dated February 13, 2003, which was served on Respondent on February 21, 2003, Creig F. Stephens, Resident Agent Supervisor of the Atlanta, Georgia regional office of Complainant, informed Respondent that a recent investigation of his records disclosed that Respondent's $20,000.00 bond coverage needed to be increased to $40,000.00.

7. In a certified letter dated January 4, 2004, served upon Respondent on January 10, 2004, John Rollins, Trade Practices Supervisor of the Atlanta, Georgia regional office of Complainant, informed Respondent that based upon the volume of business shown in his last annual report, which was filed for the year ending December 31, 2002, that Respondent's $20,000.00 bond coverage needed to be increased to $40,000.00.

8. In a certified letter dated November 22, 2005, served upon Respondent on November 25, 2005, Herple A. Ellis, IV, Trade Practices Supervisor of the Atlanta, Georgia regional office of Complainant, informed Respondent that based upon the volume of business shown in his last annual report, which was filed for the year ending December 31, 2004, that Respondent's $20,000.00 bond coverage needed to be increased to $45,000.00.

9. Despite the above written notices, Respondent has not increased the amount of his bond coverage above $20,000.00.

10. On April 14, 2006, Respondent signed an annual report for the year ending December 31, 2005, in which he reported making livestock purchases totaling $4,922,860.57 as a dealer. A continuation of livestock purchases at this volume will require Respondent to file a $40,000 bond or bond equivalent to comply with the regulations.

## Conclusions

By reason of the facts found in Findings of Fact Nos. 3 through 5, Respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Findings of Fact Nos. 6 through 10, Respondent has willfully violated section 312(a) of the Act (7 U.S.C. §§ 213(a)), and section 201.30(b) of the regulations (9 C.F.R. § 201.30(b)).

## Order

Respondent Timothy R. Baumert, directly or through any corporate or other devise, in connection with his operations as a dealer, shall cease and desist from:

1. Failing to pay, within the time period required by the Act, the full purchase price of livestock; and

2. Purchasing livestock without filing and maintaining a bond or its equivalent in the full amount determined to be adequate by the Packers and Stockyards Programs, GIPSA, in accordance with the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is assessed a civil penalty in the amount of $9,000.00. Respondent's payment shall be made out to "USDA-GIPSA" and sent to USDA-GIPSA, P.O. Box 790335, St. Louis, Missouri 63179-0335.

Respondent is suspended as a registrant until he has demonstrated that he has obtained and filed a bond or approved bond equivalent in the full amount required under the regulations. Jurisdiction is retained for the issuance of a Supplemental Order terminating Respondent's suspension following such demonstration to Packers and Stockyards Program.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

_____

**In re: BILLY MIKE GENTRY.**
**P&S Docket No. D-07-0152.**
**Default Decision.**
**Filed October 7, 2008.**

**PS – Default.**

Eric Paul for GIPSA.
Respondent, Pro se.
*Default Decision by Administrative Law Judge Jill S. Clifton.*

**Decision and Order**
**By Reason of Default**

The Complaint, filed on June 25, 2007, alleged that the Respondent willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) ("the Act" or "the Packers and Stockyards Act").

**Parties and Counsel**

The Complainant is the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration ("GIPSA"), United States Department of Agriculture (frequently herein "Complainant" or "Packers and Stockyards"). Eric Paul, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue, SW, Washington, D.C. 20250-1413, represents the Complainant.

The Respondent is Billy Mike Gentry, an individual who does business under the name Mike Gentry, and the trade name B&M Farms or B & M Farms, and whose business address is P.O. Box 667, Houston, MS 38851-3020 (frequently herein "Respondent Gentry" or "Respondent". The Respondent has not appeared.

**Procedural History**

No answer to the Complaint has been received. The time for filing an answer expired in mid-August 2007. Copies of the Complaint and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice") (7 C.F.R. § 1.130 *et seq*.), were served on Respondent Gentry by the Hearing Clerk by mailing them to Respondent at his last known business address by ordinary mail on July 25, 2007, in accordance with section 1.147(c)(1) of the Rules of Practice after the return of a June 26, 2007 certified mailing marked by the U.S. Postal Service, "Return to Sender - UNCLAIMED". By letter dated August 21, 2007, Respondent was

notified that he had failed to file an answer with the Hearing Clerk within the allotted time.

The Complainant's Motion for Decision without Hearing by Reason of Default, filed April 16, 2008, is before me. Respondent Gentry's copy was marked by the U.S. Postal Service, "Returned to Sender - UNCLAIMED," and thereafter remailed by ordinary mail on June 3, 2008. Respondent Gentry failed to respond.

The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

**Findings of Fact**

1. Billy Mike Gentry is an individual who does business under the name Mike Gentry, and the trade name B&M Farms or B & M Farms, and whose business address is P.O. Box 667, Houston, MS 38851-3020.

2. Respondent is and at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock for his own account, and of a market agency, buying livestock on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer, buying and selling livestock for his own account, and as a market agency buying livestock on commission under the name Mike Gentry.

(c) Not authorized to conduct business under any trade name under his current registration.

3. In a consent decision signed by Respondent Gentry and issued on July 5, 1991 (*In re: Billy Mike Gentry*, P. & S. Docket No. D-91-24), Respondent Gentry agreed to cease and desist from, among other things, engaging in business in any capacity for which bonding is required under the Act and regulations without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the

regulations. Respondent was assessed a $4,000.00 civil penalty.

4. In a Decision Without Hearing by Reason of Default issued on July 25, 2002 (*In re: Billy Mike Gentry*, 61 Agric. Dec. 789), a finding was made that "Respondent was served with a letter of notice on March 13, 2000, informing him that the $10,000.00 surety bond he maintained was inadequate, and that a $75,000.00 surety bond was required to secure the performance of his livestock obligations. Notwithstanding this notice, Respondent continued to engage in the business of a market agency and a dealer without maintaining an adequate bond or its equivalent." Respondent Gentry was again ordered, by the Decision which became final and effective on November 2, 2002, to cease and desist from engaging in business in any capacity for which bonding is required under the Act, without filing and maintaining an adequate bond or its equivalent. Respondent was assessed a $5,000.00 civil penalty.

5. In a certified letter dated December 4, 2003, which was served on Respondent Gentry by regular mail on January 12, 2004, after the certified mail transmittal was returned "UNCLAIMED", Robert L. Schmidt, Financial Unit Supervisor of the Atlanta, Georgia regional office of Complainant, informed Respondent Gentry that a recent investigation of his records disclosed that Respondent's current $10,000.00 bond coverage needed to be increased to $65,000.00. Respondent was also notified that he must not use the trade name B&M Farms in his business, unless he submitted an amended application to include the trade name in his registration and a trust fund agreement rider to cover the trade name on his bond equivalent.

6. In a certified letter dated June 22, 2006, served upon Respondent Gentry on June 30, 2006, Creig F. Stephens, Resident Agent Supervisor of the Atlanta, Georgia regional office of Complainant, informed Respondent Gentry that a recent investigation of his records disclosed that Respondent's $10,000.00 bond coverage needed to be increased to $70,000.00.

7. Despite the above orders and written notices, Respondent has neither increased the amount of his bond coverage above $10,000.00, nor sought to amend his registration to include the trade name and modify the trust fund agreement that he maintains as a bond equivalent to cover operations conducted under the trade name B&M Farms or B

& M Farms.

8. During the third quarter of 2006, Respondent made livestock purchases totaling $4,749,337.43 as a market agency buying on commission at four posted stockyards. Respondent was paid buying commissions as Mike Gentry, and as B & M Farms, in these transactions. A continuation of livestock purchases at this volume will require Respondent to file a $85,000 bond or bond equivalent to comply with the regulations.

9. On June 4, 2007, Respondent Gentry filed his Annual Report of Dealer or Market Agency Buying on Commission (Annual Report) covering the 2006 calendar year. On page 1 of the Annual Report, Respondent reported that the total cost of livestock that he had purchased as a dealer and as a market agency buying on a commission during 2006 was $3,544,463.00. More specifically, Respondent reported that during the third quarter of 2006, he purchased 1028 head of livestock with a total purchase cost of $223,571.00 as a dealer for his own account; and that he purchased an additional 2120 head of livestock with a total purchase cost of $850,120.00 for the account of others. Respondent's figures were incorrect, as an investigation conducted in the spring of 2007 has documented that during the third quarter of 2006, in addition to an undetermined amount of livestock that Respondent purchased for his own account as a dealer, Respondent purchased 9,639 head of cattle having a total livestock cost of $4,749,337.43 on a commission basis at four posted stockyards.

**Conclusions**

Respondent Billy Mike Gentry has wilfully violated section 312(a) of the Act (7 U.S.C. §§ 213(a)), and section 201.30(b) of the regulations (9 C.F.R. § 201.30(b)). Findings of Fact Nos. 3 - 8.

Respondent Billy Mike Gentry has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)) by filing an Annual Report that did not accurately reflect the total cost of livestock that Respondent purchased during calendar year 2006, and in the third quarter of that year. Findings of Fact No. 9.

## Order

Respondent Billy Mike Gentry, directly or through any corporate or other device, in connection with his operations as a dealer and a market agency buying livestock on commission, including operations under the name "Mike Gentry", and the trade name "B&M Farms" or "B & M Farms", shall cease and desist from:

1. Purchasing livestock without filing and maintaining a bond or its equivalent in the full amount determined to be adequate by the Packers and Stockyards Programs, GIPSA, in accordance with the Act and the regulations; and

2. Operating under any trade name that he is not authorized to use under his registration, and on his bond or approved bond equivalent.

Respondent Billy Mike Gentry is suspended as a registrant for the period of thirty days, and thereafter until he has demonstrated that he has obtained and filed a bond or approved bond equivalent in the full amount required under the regulations, and filed an application for amended registration. Jurisdiction is retained for the issuance of a Supplemental Order terminating Respondent's suspension following such demonstration to Packers and Stockyards Program.

## Finality

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

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**VALLEY STOCKYARDS, INC., ROBERT C. ELLIOT, AND MELISSA J. ELLIOT.**
**P&S Docket No. D-08-0117.**
**Default Decision.**
**Filed October 8, 2008.**

**PS – Default.**

Jonathan D. Gordy for GIPSA.
Respondent, Pro se.
*Default Decision by Administrative Law Judge Jill S. Clifton.*

## Decision and Order by Reason of Default

The Complaint, filed on May 9, 2008, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.) (the "Act" or the "Packers and Stockyards Act").

## Parties and Counsel

The Complainant is the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration ("GIPSA"), United States Department of Agriculture (frequently herein "Complainant" or "Packers and Stockyards"). Packers and Stockyards is represented by Jonathan D. Gordy, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue SW, Washington, D.C. 20250-1413.

The Corporate Respondent, Valley Stockyards, Inc. ("Respondent Valley" or "Corporate Respondent"); and the Individual Respondents, Robert C. Elliot and Melissa J. Elliot ("Individual Respondents"), have all been served and all failed to appear.

**Respondents' Failures to Answer**

No answers to the Complaint have been received. The time for filing answers expired in late June 2008. The Complainant's Motion for Decision Without Hearing by Reason of Default, filed July 2, 2008, is before me.

Copies of the Complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) ("Rules of Practice") were mailed to the Respondents via certified mail on May 12, 2008. Respondent Robert C. Elliot signed the certified mail return receipt card for his copy of the Complaint on June 3, 2008. The Hearing Clerk's initial mailing to Respondent Melissa J. Elliot was returned as "not deliverable as addressed." Accordingly, Complainant's counsel provided a substitute mailing address for Respondent Melissa J. Elliot, and the Hearing Clerk sent a copy of the Complaint to that address via certified mail. Melissa J. Elliot signed the certified mail return receipt card for her copy of the Complaint on June 2, 2008. Because both Individual Respondents are officers of Respondent Valley, proof of delivery on Individual Respondents is delivery on Respondent Valley under 7 C.F.R. § 1.147(c)(3)(ii).

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 Respondents' default, are adopted and set forth herein as Findings of Fact. This Decision, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

**Findings of Fact**

Valley Stockyards, Inc. ("Respondent Valley") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Its last known mailing address was P.O. Box 231,

Athens, Pennsylvania 18810.

Respondent Valley, at all times material to this Decision, was:

Engaged in the business of conducting and operating the Valley Stockyards Inc. stockyard, a posted stockyard subject to the provisions of the Act;

Engaged in the business of a market agency buying and selling livestock in commerce on a commission basis;

Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for its own account and as a market agency to buy and sell livestock on a commission basis.

Respondent Valley no longer operates a posted stockyard.

Individual Respondents, at all times material to this Decision, each owned 50% of the issued stock of Respondent Valley, and were responsible for the management, direction, and control of Respondent Valley.

Respondent Valley, under the direction, management and control of the Individual Respondents, misused custodial funds by writing a check to cash for $6,500.00 from its Custodial Account for Shipper's Proceeds ("custodial account") with Citizens & Northern Bank, for which there was no consigned livestock. This amount was deposited in a livestock purchaser's account at Citizens & Northern Bank. After Respondents' deposit, Citizens & Northern Bank honored a check drawn on the purchaser's account in the amount of $37,891.25. Using the funds from this check, Respondent Valley then obtained a cashier's check from Citizens & Northern Bank for the $37,891.25 and deposited the cashier's check in its custodial account. When Citizens & Northern Bank discovered that a stop payment order had been issued for the purchaser's check, the bank rescinded the cashier's check and closed Respondent Valley's custodial account. Shortly thereafter, Respondents opened a new custodial account in Peoples State Bank.

In part due to Respondent Valley's misuse of custodial account funds in its Citizens & Northern Bank custodial account, as described in finding of fact 5 above, Respondent Valley, under the direction,

management and control of the Individual Respondents, during the period February 15, 2006, through April 20, 2006, and thereafter failed to maintain and use properly Respondent Valley's custodial account with Peoples State Bank, thereby endangering the faithful and prompt accounting of the custodial account and the payment of portions of the custodial account due the owners and consignors of livestock, in that:

> As of February 15, 2006, Respondent Valley had outstanding proceeds due shippers in the amount of $168,798.28 that had been due from custodial account with Citizens & Northern Bank and expense items remaining in the account in the amount of $10,423.71 and had to offset those proceeds due shippers and expense items against a balance in its custodial account with Peoples State Bank of $60,388.54, which resulted in a deficiency of $118,833.45.
>
> As of April 20, 2006, Respondent Valley had outstanding checks drawn on its custodial account with People's State Bank in the amount of $21,333.55, outstanding proceeds due shippers in the amount of $126,940.86 that had been due from its closed custodial account with Citizens & Northern Bank and expense items remaining in the account in the amount of $8,145.71 and had to offset those amounts against a balance in the custodial account with People's State Bank of $32,285.47, which resulted in a deficiency of $124,134.65.

Such shortages were also due, in part, to the failure of the Respondents to deposit in the custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock.

Respondent Valley, under the direction, management, and control of the Individual Respondents, on or about the dates and in the transactions set forth below, issued checks in payment for livestock purchases which checks 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.

| Sale Date | Payee | Amount |
|---|---|---|
| 01/02/06 | Vicke Kibbe | $562.40 |
| 01/02/06 | R. Hidden Valley Farm | $4,691.38 |
| 01/02/06 | Lantland Farms | $615.09 |
| 01/09/06 | Norman Allen | $6,327.66 |
| 01/09/06 | R. Hidden Valley Farm | $548.38 |
| 01/09/06 | Iva-Jen Farms | $1,295.31 |
| 01/09/06 | Donald Brooks | $446.39 |
| 01/09/06 | Mundy Brook Farm | $1,009.63 |
| 01/11/06 | Donald Brooks | $597.50 |
| 01/11/06 | Paul Winch | $166.50 |
| 01/16/06 | Terry Grant | $1,242.20 |
| 01/16/06 | Jeffery Klossner | $822.50 |
| 01/16/06 | Merle Lawton | $418.91 |
| Total | | $18,743.85 |

Respondent Valley, under the direction management and control of the Individual Respondents, on or about the dates and in the transactions set forth below, issued checks in payment for livestock purchases which checks were returned unpaid by the bank upon which they were drawn because Respondents' custodial account had been closed by Citizens & Northern Bank due to Respondents' misuse of custodial account funds as more fully described above.

| Sale Date | Payee | Amount |
|---|---|---|
| 11/02/05 | Ed Traver | $9,174.81 |
| 01/02/06 | Glenn Warren | $885.28 |
| 01/09/06 | Robert Rubenstein | $47.90 |
| 01/09/06 | Cold Creek Farm | $345.20 |
| 01/16/06 | Duane Wilcox | $239.40 |
| 01/16/06 | Vaughn Jennings, Jr. | $373.62 |
| 01/16/06 | Corey Miles | $513.20 |

| | |
|---|---|
| Total | $11,579.41 |

On or about the dates and in the transactions set forth in findings of fact 8-9 and in the transactions set forth in Appendix A to the Complaint, Respondent Valley, under the direction, management, and control of the Individual Respondents, failed to remit, when due, the net proceeds of the sales of livestock to the consignors of the livestock, by failing to timely deliver the net proceeds from the sale to those consignors.

Respondent Valley, under the direction, management, and control of the Individual Respondents, failed to maintain adequate records which fully and correctly disclosed all the transactions involved in their business in that: Respondents failed to keep records which correctly disclosed the date checks were written and correctly disclosed dates that sales were held, and Respondents failed to maintain copies of invoices and copies of checks.

**Conclusions**

The Individual Respondents maintained complete ownership of Respondent Valley, and Respondent Valley was under their direction, management, and control.

By writing a check from their custodial account for $6,500.00 without a lawful purpose and by permitting a shortage in their custodial account, Respondents willfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213(a)) and sections 201.42(c) and 201.42(d) of the regulations (9 C.F.R. § 201.42(c)-(d)).

Respondents have wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213), by writing checks which were returned by the bank for insufficient funds.

Because Respondents did not timely remit the net proceeds to livestock consigned to their market, Respondents have wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. §§ 208, 213) and section 201.43(a) of the regulations (9 C.F.R. § 201.43(a)).

Because Respondents failed to maintain records which correctly

disclosed the date checks were written and correctly disclosed dates that sales were held and also failed to keep documents that supported Respondents' transactions, Respondents failed to maintain records as required by section 401 of the Act (7 U.S.C. § 221) and willfully violated section 312(a) of the Act as a result (7 U.S.C. § 213(a)).

**Order**

Respondents, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Act, shall cease and desist from failing to remit the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

Respondents, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Act, shall cease and desist from misuse of their custodial account for reasons other than for payment of (1) the net proceeds to the consignor or shipper, or to any person that Respondents know is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the Respondents shall, in their capacity as agent, are required to pay, and (3) to obtain any sums due Respondents as compensation for their services.

Respondents, their agents and employees, directly or through any corporate or other device, in connection with their activities subject to the Act, shall cease and desist from failing to properly maintain their custodial accounts for shippers' proceeds.

Respondents, their agents and employees shall keep such accounts, records and memoranda which fully and correctly disclose all transactions conducted subject to the Act, including, but not limited to, records which correctly disclosed the date checks were written and correctly disclosed dates that sales were held, and maintain copies of invoices and copies of checks.

Respondents are suspended as registrants under the Act for 5 years, *provided*, however, that the 5-year period of suspension may be terminated by the issuance of a supplemental order at any time after the first 300 days of the suspension have been served upon Respondents'

demonstration to the Packers and Stockyards Administration of facts and circumstances warranting the termination of the suspension.

**Finality**

This Decision will become final and effective without further proceedings 35 days after it is served unless a party to the proceeding files with the Hearing Clerk an appeal to the Judicial Officer 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). See attached Appendix A, containing 7 C.F.R. § 1.145).

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

* * *

**APPENDIX A**

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) Filing of petition. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days

after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) Response to appeal petition. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) Transmittal of record. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) Oral argument. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing

a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) Scope of argument. Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) Notice of argument; postponement. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) Order of argument. The appellant is entitled to open and conclude the argument.

(h) Submission on briefs. By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) Decision of the [J]udicial [O]fficer on appeal. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a

petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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**In re: STEVE ROSE.**
**P. & S. Docket No. D-08-0158.**
**Default Decision.**
**Filed October 27, 2008.**

**PS – Default.**

Charles L. Kendall for GIPSA.
Respondent, Pro se.
*Default decision by Administrative Law Judge Peter M. Davenport.*

**Decision Without Hearing by Reason of Default**

**Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.)(hereinafter referred to as the "Act"), instituted by a Complaint filed on July 31, 2008, by the Deputy Administrator, Packers and Stockyards Program, GIPSA, United States Department of Agriculture. The Complaint alleged that on or about March 14, 2007, Respondent Steve Rose (hereinafter "Respondent") purchased 88 head of cattle from Joplin Regional Stockyards, Inc. and failed to pay the amount due for the livestock, and also alleged that as of the date of the filing of the complaint, Respondent owed payment in the amount of $49,175.75.

The Complaint additionally alleged that during the period March 3, 2007, through March 7, 2007, Respondent issued five (5) checks to four

(4) sellers in purported payment for livestock purchases valued at $228, 095.29, which were returned unpaid by the bank upon which they were drawn because Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay them when presented; thus, Respondent failed to pay, when due, the full purchase price of such livestock.

In addition, the Complaint alleged that, during the period February 2, 2006 through May 17, 2006, Respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock, in a total amount of $825,479.64, to five (5) sellers for 43 transactions; Respondent's payments for these transactions ranged from one (1) to 62 days late.

The Complaint further alleged that Respondent continued to engage in the business of a dealer buying and selling livestock on his own account without maintaining an adequate bond or its equivalent notwithstanding having received notice that it was necessary to increase his surety bond to secure his livestock operations under the Act before continuing in such operations.

The Complaint also alleged that Respondent has failed to keep and maintain records that fully and correctly disclose all transactions involved in Respondent's business subject to the Act, as required by section 401 of the Act, in that Respondent has failed to maintain a complete check register, maintain a complete livestock purchase journal, create sales invoices or record ledger, or maintain a livestock sales journal.

A copy of the Complaint, mailed by certified mail, was received by Respondent on August 15, 2008. Respondent has not answered the Complaint. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

## Findings of Fact

1. Steve Rose (hereinafter "Respondent") is an individual whose mailing address is 16519 County Road 130, Carthage, Missouri 64836.

2. Respondent at all times material to this Complaint was engaged in the business of buying and selling livestock in commerce as a dealer for his own account and was registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce and as a market agency buying livestock in commerce on a commission basis.

3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

4. As set forth in paragraph II of the Complaint, Respondent purchased 88 head of cattle from Joplin Regional Stockyards, Inc., and failed to pay the amount due for the livestock; as of the date of the filing of the complaint, Respondent owed payment in the amount of $49,175.75.

5. As set forth in paragraph III of the Complaint, during the period March 3, 2007, through March 7, 2007, Respondent issued five (5) checks to four (4) sellers in purported payment for livestock purchases valued at $228, 095.29, which were returned unpaid by the bank upon which they were drawn; thus, Respondent failed to pay, when due, the full purchase price of such livestock. As further set forth in paragraph III of the Complaint, during the period February 2, 2006 through May 17, 2006, Respondent purchased livestock and failed to pay, when due, the full purchase price of such livestock, in a total amount of $825,479.64, to five (5) sellers for 43 transactions; Respondent's payments for these transactions ranged from one (1) to 62 days late.

6. Respondent continued to engage in the business of a dealer buying and selling livestock on his own account without maintaining an adequate bond or its equivalent notwithstanding having received notice that it was necessary to increase his surety bond to secure his livestock operations under the Act before continuing in such operations.

7. Respondent failed to keep and maintain records that fully and correctly disclose all transactions involved in Respondent's business subject to the Act, as required by section 401 of the Act, in that Respondent failed to maintain a complete check register, maintain a complete livestock purchase journal, create sales invoices or record ledger, or maintain a livestock sales journal.

## Conclusions

Respondent's failures to make full payment promptly with respect to the transactions set forth in Findings of Fact Nos. 4 and 5 above constitute willful violations of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Respondent engaged in the business of a dealer buying and selling livestock on his own account without maintaining an adequate bond or its equivalent as set forth in Finding of Fact No. 6 above, a willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)) and section 201.29 of the regulations (9 C.F.R. § 201.29).

Respondent's failure to keep and maintain records that fully and correctly disclose all transactions involved in Respondent's business subject to the Act, as required by section 401 of the Act, constitutes a willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)) .

## Order

Respondent Steve Rose, 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:

1. Failing to pay the full purchase price of livestock;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent Steve Rose, in connection with his operations as a dealer buying and selling livestock in commerce for its own account, shall keep and maintain such accounts, records, and memoranda as fully and correctly disclose its transactions subject to the Act and the regulations, including a complete check register, a complete livestock purchase journal, sales invoices or record ledger, and a livestock sales journal.

In accordance with 7 U.S.C. § 204, the registration of Respondent Steve Rose is suspended for a period of five (5) years.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

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**In re: RICK BALDWIN.**
**P. & S. Docket No. D-08-0159.**
**Default Decision.**
**Filed October 28, 2008.**

**PS – Default.**

Charles Kendall for GIPSA.
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 Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.)(hereinafter referred to as the "Act"), instituted by a Complaint filed on July 31, 2008, by the Deputy Administrator, Packers and Stockyards Program, GIPSA, United States Department of Agriculture. The Complaint alleged that Rick Baldwin (hereinafter "Respondent") continued to engage in the business of a market agency buying livestock in commerce on a commission basis without being properly registered and without maintaining an adequate bond or its equivalent, notwithstanding having received notice that it was necessary to be properly registered and to file a surety bond to secure his livestock operations under the Act before continuing in such operations.

A copy of the Complaint, mailed by certified mail, was received by Respondent on August 21, 2008. Respondent has not answered the Complaint. The time for filing an answer having expired, and upon motion of the Complainant for the issuance of a Default Order, the following Decision and Order shall be issued without further procedure pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

## Findings of Fact

1. Rick Baldwin (hereinafter "Respondent") is an individual whose mailing address is 37087 Kgal Drive, Lebanon, Oregon 97355-9642.
2. Respondent at all times material to this Complaint was engaged in the business of a market agency buying livestock in commerce on a commission basis and registered with the Secretary of Agriculture as a dealer and as a market agency buying on commission. Respondent requested that his registration be made inactive on May 30, 2001.
3. The Secretary has jurisdiction over Respondent and the subject matter involved herein.
4. As set forth in paragraph II of the Complaint, Respondent was duly notified that a livestock dealer and/ or market agency who resumes operations with an inactive registration must provide updated information for his or her registration and file an appropriate bond or bond equivalent for that level of operation.
5. As set forth in paragraph III of the Complaint, during the period March 31, 2007, through May 16, 2007, Respondent engaged in the business of buying livestock (cattle) in commerce on a commission basis without being properly registered or maintaining an adequate bond or bond equivalent.

## Conclusions

Respondent's engaging in the business of a market agency dealer buying livestock on a commission basis without being properly registered and maintaining an adequate bond or its equivalent, as set forth in Findings of Fact Nos. 4 and 5 above constitutes a willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)) and sections

201.10, 201.29, and 201.30 of the Regulations (9 C.F.R. §§ 201.10, 201.29, 201.30).

**Order**

Respondent Rick Baldwin, 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 engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without being properly registered and filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with 7 U.S.C. § 204, the registration of Respondent Rick Baldwin is suspended for a period of 40 days.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

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**Consent Decisions**
Date Format [ YY/MM/DD]

**Packers and Stockyards Act**

Mahan Packing Co., Inc., PS-D-08-0138, 08/07/08.

D.A. Upton, PS-D-08-0034, 08/07/17.

Triple K Cattle Dealers, Inc. and George N. Kittle, PS-D-08-0041, 08/07/17.

Christopher J. Bartels d/b/a Bartels Packing, PS-D-07-0179, 08/08/04.

Kelly Cattle Co. Inc. d/b/a Wright County Livestock Auction, PS-D-08-0087, 08/08/04.

Honey Creek Cattle Co. d/b/a Peace Livestock, James L. Thurn, and Deryl D.Hines, PS-D-08-0144, 08/08/29.

Pasqual A. Leone d/b/a P.A. Leone Livestock, PS-D-08-0033, 08/09/11.

Doyle Harms d/b/a Harms Livestock, PS-D-08-0100, 08/09/17.

Kyzer Plants and Produce, Inc., PQ 08-0015, 08/09/17.

Marie Stagno d/b/a Stockton Livestock Auction Yard, PS-D-03-0004, 08/10/02.

Evans & Evans Farms, Inc. a/k/a Evans and Evans, Inc and Peterson Farms, Inc., PS-D-08-0082, 08/10/09.

Hanson and Morgan Livestock, Inc. d/b/a Greenbrier Valley Livestock Market, and W. Dean Hanson, PS-D-08-0067, 08/10/20.

Alan Titsworth, PS-D-08-0166, 08/10/31.

Meadowbrook Farms Cooperation, PS-D-0123, 08/11/06.

John (Jack) W. McGuinness, PS-D-08-0024, 08/11/21.

Hatfield Quality Meats, Inc., PS-D-08-0091, 08/11/25.

John Connery and Mississippi Valley Livestock, Inc., PS-D-08-0023, 08/12/16.

John Rife, PS-D-08-0020, 08/12/18.

Swift and Company d/b/a Swift Beef Company, PS-D-08-0141, 08/12/18.

# AGRICULTURE DECISIONS

**Volume 67**

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Part Three (PACA)
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# AGRICULTURE DECISIONS

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## PERISHABLE AGRICULTURAL COMMODITIES ACT

## COURT DECISIONS

**DONALD R. BEUCKE v. USDA.**
**Nos. 06-75358, 07-70033.**
**Court Decision.**
**Filed August 6, 2008.**
**(Cite as: 314 Fed.Appx. 10).**

**PACA – Responsibly connected – Payment, failure to make prompt – Corporate actions deemed responsibly connected – Presumptions statutory, if greater than 10% ownership – Suspension, delayed application – "Jencks" evidence error not controlling to decision.**

Before: W. FLETCHER and TALLMAN, Circuit Judges, and BERTELSMAN, FN* District Judge.

FN* The Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

Donald Beucke petitions for review of the decisions of the Secretary of Agriculture affirming the administrative law judge's decision that he was "responsibly connected" to Garden Fresh Produce and to Bayside Produce. The Secretary had found that those companies had violated 7 U.S.C. § 499b(4), a provision of the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a499s, by failing to pay produce suppliers. Beucke also alleges a series of procedural errors by the Secretary over the course of the administrative hearings.

We " 'review final decisions in PACA cases under the deferential standard of the [APA]. Under that standard, we must "uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." ' " *Kleiman & Hochberg, Inc. v. Dep't of Agric.*, 497 F.3d 681, 686 (D.C.Cir.2007) (citations omitted). Agency factual

findings are reviewed under the substantial evidence test. *Citizens To Preserve Overton Park v. Volpe,* 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). This review means that the record must support an agency determination in the form of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938).

We review for abuse of discretion agency decisions regarding the production of a report pursuant to the Jencks Act. *Blackfoot Livestock Comm'n v. Dep't of Agric.,* 810 F.2d 916, 923 (9th Cir.1987). We review de novo due process claims relating to administrative proceedings. *Carpenter v. Mineta,* 432 F.3d 1029, 1032 (9th Cir.2005).

We first conclude that the Judicial Officer's ("JO") decision that Beucke was "responsibly connected" to Bayside Produce was supported by substantial evidence; Beucke did not rebut the presumption created by his 33-1/3 percent ownership of the company. *See* 7 U.S.C. § 499a(b)(9)(B) (providing that an individual is presumed to be responsibly connected if serving as an "officer, director, or holder of more than 10 per centum of the outstanding stock" of the violating company). First, Beucke did not "demonstrate by a preponderance of the evidence that [he] was not actively involved in the activities resulting in" the PACA violation. *Id.* § 499a(b)(9). Instead, he purchased produce on more than 30 occasions during the violations period. Second, Beucke did not demonstrate that he was only "nominally a partner, officer, director, or shareholder" of Bayside Produce. *Id.* Instead, Beucke had a stock certificate issued in his name; attended the formal Bayside Produce meetings; was authorized to draw funds on Bayside Produce's bank accounts; and signed 20 checks for Bayside Produce during the violations period.

In contrast, we conclude that the JO's decision that Beucke was responsibly connected to Garden Fresh Produce was not supported by substantial evidence. Instead, Beucke successfully rebutted the presumption created by his 20 percent ownership interest in the

company. Beucke demonstrated that he was not "actively involved" in the transactions forming the basis for the PACA violation. *See Maldonado v. Dep't of Agric.,* 154 F.3d 1086, 1087-88 (9th Cir.1998). The JO found that "[t]he record does not contain evidence that Petitioner was directly involved in any of the transactions" for which Garden Fresh had been held liable. Indeed, the produce suppliers consistently testified that Beucke had an impeccable reputation in the produce business. Further, Beucke demonstrated that he was only nominally an officer of Garden Fresh and "lacked any 'actual, significant nexus with the violating company [.]' " *Id.* at 1088 (citations omitted). Beucke had no duties or responsibilities in his named roles; did not attend the organizational meeting or subsequent formal company meetings; received only nominal pay ($1,500) in the company's first year; and signed no checks within the violations period. Because we so hold, we need not address Beucke's contention that the agency violated his due process rights when using evidence from another individual's hearing to support its finding that Beucke was responsibly connected to Garden Fresh.

We also conclude that the JO did not abuse its discretion in holding that the licensing and employment restrictions on Beucke pursuant to 7 U.S.C. §§ 499d(b) and 499h(b) did not begin running upon the ALJ's decision in his case or in the related underlying cases against Garden Fresh and Bayside. The JO relied on sources such as PACA Rule, 7 C.F.R. § 1.142(c)(4) (providing that ALJ decisions are not final if there is an appeal to the Judicial Officer), and on the remedial purposes of the PACA. The fact that the agency potentially could have chosen to make the date retroactive does not mean that it was required to do so, given the Secretary's discretion to "fashion [ ] ... an appropriate and reasonable remedy[.]" *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973); *see also Frank Tambone, Inc. v. Dep't of Agric.,* 50 F.3d 52, 54-56 (D.C.Cir.1995).

Beucke also objects to the agency's refusal to provide him with a copy of a report referred to during one of his administrative hearings. He relies on the PACA Rules of Practice for Disciplinary Hearings, 7 C.F.R.

§ 1.141(h)(1)(iii), which requires the production of certain documents in conformity with the Jencks Act, 18 U.S.C. § 3500. *Norinsberg Corp. v. Dep't of Agric.*, 47 F.3d 1224, 1228 n.3 (D.C.Cir.1995). We do not reach the question of whether the agency abused its discretion in not compelling the production of the investigative report. Even if there were a Jencks Act error, it was harmless, because the Secretary did not base its responsibly connected decision on information in the report. *Blackfoot,* 810 F.2d at 923.

Beucke points to other due process violations, but he had no right to any of the procedures to which he points. *Cf. Kleiman,* 497 F.3d at 691 n. 7.

The petition for review is **DENIED** in Case No. 07-70033 and **GRANTED** in Case No. 06-75358. Each party shall bear its own costs.

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**B.T. PRODUCE CO., INC. v. USDA.**
**Nos. 07-1240 - 07-1242.**
**Court Decision.**
**Filed September 15, 2008.**
**Rehearing En Banc Denied Dec. 5, 2008.**

**(Cite as: 296 Fed.Appx. 78).**

**PACA – Responsibly connected – Failure to not control bribery – Revocation of license.**

Responsibly connected parties appeal a increase in the penalty imposed when Judicial Officer (JO) found that there was a duty to not bribe governmental officials. Even thought the bribes were secretive and not within the scope of employment, the JO found that the responsibly connected parties are liable for the acts of their employees. The *Kleiman & Hotchberg Inc.,* (497 F.3d 681) decision is controlling.

**United States Court of Appeals,**
**District of Columbia Circuit.**

Before: SENTELLE, Chief Judge, and HENDERSON and KAVANAUGH, Circuit Judges.

**JUDGMENT**

This appeal was considered on the record of the United States Department of Agriculture and on the briefs filed by the parties. *See* Fed. R.App. P. 34(a)(2); D.C.Cir. Rule 34(j).

For the reasons set forth in the attached memorandum, it is **ORDERED AND ADJUDGED** that the decision of the Department of Agriculture be affirmed.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc. See* Fed. R.App. P. 41(b); D.C.Cir. R. 41.

**MEMORANDUM**

In 1999, the United States Department of Agriculture ("USDA" or "Agency") uncovered widespread corruption in the USDA produce inspection system at Hunts Point Terminal, a wholesale produce market in the Bronx. As part of the investigation, a USDA inspector-previously arrested for taking bribes-cooperated with the Agency and conducted inspections while wearing recording devices to document the bribes he received. During the five months he worked undercover, the inspector reported receiving 42 bribes from the produce buyer for B.T. Produce. As a result, the Agricultural Marketing Service of the USDA ("AMS") brought a complaint against B.T. Produce, alleging that the company failed, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce, in violation of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §

499b(4). The AMS also determined that Nat Taubenfeld and Louis Bonino, the company's president and vice president, respectively, were responsibly connected to B.T. Produce while the company violated the PACA, making them subject to individual discipline. *See* 7 U.S.C. §§ 499a(b)(9), 499h(b).

The Chief Administrative Law Judge ("CALJ") held a ten-day hearing on the three consolidated cases. After hearing all the evidence, the CALJ concluded that B.T. Produce committed 42 willful and flagrant violations of section 499b(4) by paying bribes to the USDA inspector. Although this conclusion authorized the CALJ to revoke B.T. Produce's PACA license, the judge instead imposed a civil penalty of $360,000. The CALJ also held that Taubenfeld and Bonino were responsibly connected to the company. All parties appealed the CALJ's decision to the Judicial Officer ("JO"), to whom the Secretary of Agriculture has delegated final authority in adjudicative proceedings. *See* 7 C.F.R. § 2.35. The JO affirmed the CALJ on every issue except the sanction against B.T. Produce, which the JO increased to the maximum sanction of license revocation. B.T. Produce, Taubenfeld, and Bonino petitioned this court for review of the JO's decision that the company violated the PACA and that the officers were responsibly connected to the company.

Before us, B.T. Produce argues that it did not violate the PACA because the Agency may not interpret section 499b(4) to include a duty not to bribe the USDA inspector, the implied duties clause of section 499b(4) applies only between parties to a contract, the Agency was required to proceed under section 499n(b) and prove actual falsification of specific inspection certificates, and the bribes were secretive and not in the scope of employment. Each of these issues is governed by our decisions in *Kleiman & Hochberg, Inc. v. USDA,* 497 F.3d 681 (D.C.Cir.2007) and *Coosemans Specialties, Inc. v. USDA,* 482 F.3d 560 (D.C.Cir.2007), which require us to reject B.T. Produce's arguments. Taubenfeld and Bonino argue that they were not responsibly connected to the company because of the secret nature of the produce buyer's bribes, and Taubenfeld argues that the USDA violated the

Administrative Procedure Act by not giving him notice and opportunity to halt the illegal conduct before it brought sanctions against him. As with the other issues in this case, *Kleiman & Hochberg* and *Coosemans Specialties* govern and reject these arguments. Finally, Taubenfeld and B.T. Produce argue that holding them responsible violates the Fifth Amendment to the Constitution, but *Kleiman & Hochberg* and *Coosemans Specialties* also dispositively decide this issue against them.

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## PERISHABLE AGRICULTURAL COMMODITIES ACT

## DEPARTMENTAL DECISIONS

**In re: PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATIONS, INC. and PERFECTLY FRESH SPECIALTIES, INC.**
**PACA Docket No D-05-0001-3.**
**and**
**JAIME O. ROVELO; JEFFREY LON DUNCAN; and THOMAS BENNETT.**
**PACA-APP Docket No 05-0010-15.**
**Decision and Order.**
**Filed October 28, 2008.**

**PACA – Willful, repeated and flagrant – Responsibly connected – Full payment, failure to make.**

Chris Young-Morales for AMS.
Respondent, pro se.
*Decision and Order by Chief Administrative Law Judge Marc R. Hillson.*

### DECISION

In this decision involving nine consolidated cases, I find that Perfectly Fresh Consolidation, Inc., Perfectly Fresh Farms, Inc., and Perfectly Fresh Specialties, Inc., each committed willful, repeated and flagrant violations of the Perishable Agricultural Commodities Act. I further find that Jaime Rovelo was responsibly connected with each of the above three companies; that Jeffery Lon Duncan was responsibly connected to Perfectly Fresh Consolidation, Inc., but was not responsibly connected to Perfectly Fresh Specialties, Inc.; and that Thomas Bennett was responsibly connected to Perfectly Fresh Farms, Inc.

**Procedural History**

On October 1, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant"), filed separate disciplinary complaints against Perfectly Fresh Consolidation, Inc. ("Consolidation"), Perfectly Fresh Farms, Inc. ("Farms"), and Perfectly Fresh Specialties, Inc, (Specialties"). Each complaint alleged that the respondent had committed willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act ("Act"), 7 USC §§ 499a et seq. by failing to make full payment promptly to sellers of perishable agricultural commodities. Each respondent had received a PACA license which had expired subsequent to the date of the alleged violations. Each respondent had filed a voluntary bankruptcy petition after the date of the alleged violations and before the filing of the complaints.

In particular, the three separate complaints alleged that Consolidation, during the period November 17, 2002 through February 15, 2003, failed to make full payment of the agreed purchase prices promptly to 24 sellers in the total amount of $373,944.19 for 286 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce; that Farms, during the period October 27, 2002 through February 21, 2003, failed to make full payment of the agreed purchase prices promptly to 14 sellers in the total amount of $442,023.12 for 142 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce; and that Specialties, during the period November 1, 2002 through February 20, 2003, failed to make full payment of the agreed purchase prices promptly to 28 sellers in the total amount of $263,801.40 for 796 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

The complaints were finally served on each of the three respondents on May 22, 2006.[1] Each respondent answered on June 8, 2006, denying

[1] Judge Peter M. Davenport granted Complainant's motions for default decisions with respect to Consolidations and Specialties on March 31, 2005, and subsequently (continued...)

the commission of any alleged violations.

Meanwhile, on June 1, 2005, Bruce W. Summers, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, USDA, issued six letters informing three individuals that he was finding that they were responsibly connected to one or more of the respondent corporate entities at the time the alleged violations that were the subject of the disciplinary complaints were committed. Thus, Jaime O. Rovelo was found by the PACA Chief to have been responsibility connected to each of the three corporate entities, Thomas Bennett was found to be responsibly connected to Farms, and Jeffery Lon Duncan was found to be responsibly connected to Consolidation and Specialties. Rovelo, Bennett and Duncan each filed a Petition for Review of each of the PACA Chief's responsibly connected determinations. Eventually, the three disciplinary cases and the six responsibly connected cases were consolidated for hearing pursuant to Rule 1.137 of the Rules of Practice. Following the deployment of Judge Davenport to Iraq, I re-assigned the matter to myself.

I conducted a hearing in these consolidated cases in Los Angeles, California, on September 24-27, 2007. Christopher Young-Morales, Esq. and Tonya Keusseyan, Esq. represented Fruit and Vegetable Programs, AMS, Complainant in the disciplinary proceedings and Respondent in the responsibly connected proceedings. Christopher S. Bryan, Esq., represented the respondents in the disciplinary proceeding and Petitioner Duncan in his responsibly connected hearing. Douglas B. Kerr, Esq., represented Petitioner Bennett in his responsibly connected hearing[2]. Petitioner Jaime O. Rovelo did not respond to any motions or orders after filing his initial petitions, and did not appear at the hearing.

Eight witnesses, including Petitioners Duncan and Bennett, testified at the hearing. Over 120 exhibits, as well as the six "official agency

[1](...continued)
vacated his decision via an order dated April 19, 2006 upon discovery that the original complaints with respect to those two parties were not properly served. Pursuant to his order, the three respondents were served/re-served.

[2] Subsequent to the hearing, Jonathan Barry Sexton also appeared on behalf of Petitioner Bennett.

records" in the responsibly connected cases, were received in evidence. The parties filed simultaneous opening and reply briefs, with the final brief being filed on March 7, 2008.

**Statutory and Regulatory Background**

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of

section 499b of this title" the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

> (aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
>
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, that the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

The Act also imposes on every licensee the duty to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business." 7 U.S.C. § 499i.

In addition to penalizing the violating merchant, dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who

was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

## Facts

### The Investigation

Upon receiving notification that four related companies, Specialties, Farms, Consolidated, and Perfectly Fresh Marketing, Inc. (which was also known as Perfectly Fresh Florals, LLC), had filed for bankruptcy, the PACA Branch assigned Senior Marketing Specialist Mary Kondora to investigate whether violations of the PACA had occurred. By the time she began her investigation in April 2003, the companies had all ceased doing business, and much of the assets of the companies had been purchased by another company, Hidden Villa. In late April Ms. Kondura spoke to Phil Brundt, the chief financial officer of Hidden Villa and he informed her that Hidden Villa was in possession of all documents of the four companies. Tr. 33-35, 163. Ms. Kondura faxed him a Notice of Investigation (CX-5) and traveled to Los Angeles in early May to meet with Mr. Brundt. He directed her to 50 boxes of records stacked on two pallets in the corner of a cold room, Tr. 43, and she proceeded to review and copy the accounts payable for the four companies. *Id*. She conducted an exit interview with Gary and Erin

Tice, who were officers in each of the corporations, and Gary Tice indicated to her that the companies owed a total of about $1.2 or $1.3 million in produce debt. Tr. 46-48.

Ms. Kondura examined a large number of invoices and matching vouchers, which generally indicated that one of the three respondent companies had purchased the produce in question.[3] She prepared a "no-pay" table for each of the three companies.[4] According to her tables, Farms owed 14 creditors a total of $442.123.12 for 142 lots of perishable agricultural commodities (CX-01-7); Consolidation owed 24 creditors a total of $373,944.19 for 286 lots of perishable agricultural commodities (CX-02-07); and Specialties owed 28 creditors a total of $263.801.40 for 796 lots of perishable agricultural commodities (CX-03-7). She also compared her lists to Schedule F of the consolidated voluntary bankruptcy filing made on behalf of those companies, and found that the amounts in the Schedule F were generally equal to or greater than the amounts included in her list with respect to those creditors. Tr. 131-132.

Ms. Kondura also secured written sworn statements from a number of the creditors to document that the transactions she cited were sold in interstate or foreign commerce. Tr. 189-195. She verified with these creditors that the amounts listed in the vouchers were still unpaid before she prepared her no-pay list. Tr. 186-187. She also indicated that these creditors generally believed they were dealing with an entity they called "Perfectly Fresh" and did not realize the existence of the individual corporate entities. Tr. 184-186.

Ms. Kondura also testified that each of the three respondents had its own PACA license and each filed its own separate tax return.

A follow-up investigation conducted by Senior Marketing Specialist Josephine Jenkins confirmed that as of July 25, 2007, each of the three entities still owed significant amounts of produce debt to the creditors listed in the complaint, and that approximately 52% of the amount recognized and owed at the time of the approval of the order allowing

[3] The large majority of the Complainant's exhibits consist of these paired invoices and vouchers.

[4] There were no apparent unpaid invoices under the name of Marketing/Florals.

the PACA Trust Claims at the conclusion of the bankruptcy proceedings remained unpaid.

**Formation and Organization of the Perfectly Fresh Companies**

In June 2001, Gary Tice, who had a long and successful career in the produce industry, started Perfectly Fresh Marketing, LLC (Marketing) with Jeffery Lon Duncan, who had been in the produce business for about fifteen years. Tice had expertise in managing and owning businesses, and had more recently helped other companies he worked for with strategic planning and with modernizing their business techniques. Tr. 295-300. In 2000-2001 he worked as a consultant for Fresh Point, where he met Respondent Duncan, whose principal job involved servicing the produce needs of cruise lines. Tr. 300-301. They worked together on special projects involving inventory and purchasing. While Tice had been a manager for many years, Duncan did not, in Tice's opinion, perform managerial duties, although he thought Duncan's managerial skills were "quite adequate." Tr. 305-307. Tice wanted Duncan as a partner to take advantage of his sales skills with cruise lines, while Tice was working on developing a relationship supplying tomatoes to Taco Bell. Tr. 307-309. Marketing's PACA license indicated that 51% was owned by Tice, Inc., which was a company developed by Tice and his wife, Erin Tice, and that 49% was owned by Duncan. Tice testified that he managed the day to day accounts payable and receivable with Duncan. Tr. 309.

In July 2002, the operating agreement of Marketing was amended and three new related companies were created. RX 13. The allocation of ownership shares was changed to reflect the addition of a new partner, Perfectly Fresh, LLC, with a 50% equity share in Marketing, while Tice, Inc. now owned 30% and Duncan now owned 20%.[5] Perfectly Fresh, LLC was owned by John Norton, who was planning to invest approximately $2 million in the new operation, principally to make improvements on the facility and to fund the new companies until they became profitable. Tr. 317-320, 330. John Norton was granted

[5] However, documents filed with the four companies' bankruptcy documents indicated that Duncan owned 49% of Marketing/Florals.

preferred member status, in that his capital investment would be returned to him before capital was returned to the other investors. RX 13, p. 5, paragraph 3.4, Tr. 328. Gary Tice testified that the plan to set up the three operating companies was devised by himself, Duncan, and attorney Steve Calvello. Tr. 325.

Specialties was formed on July 18, 2002 and received PACA license 021539. CX-03-3. That license indicates that Marketing owned 90% of Specialties. The license does not account for the remaining 10% ownership. Respondent Duncan is listed as the Chief Financial Officer and as a director, Gary Tice is listed as Secretary and director, and Erin Tice is listed and President and director. Specialties was set up to sell produce directly to supermarkets, including large supermarket chains such as Ralph's and Safeway. Tr. 336-338.

Consolidation was the second company formed on July 18, 2002 and received PACA license 021540. CX-02-3. The license indicates that Respondent Duncan owned 10% of the stock in Consolidation, and was President and a director; that Marketing owned 90% of the stock, with Gary Tice as the Secretary and a director, and Erin Tice as the Chief Financial Officer and a director. The purpose of Consolidation was basically to sell to cruise lines, carrying on and expanding the same type of business that was Duncan's forte.

Farms was the third company formed on July 18. 2002 and received PACA license 021541. That license indicated that Marketing owned 90% of Farms, and that Tom Bennett owned the remaining 10%, and was the President and a director. Gary Tice was listed as Secretary and director, and Erin Tice was listed as Chief Financial Officer and director. Farms was particularly involved in establishing grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride. Tr. 615.

There was a general understanding that the four companies were to be run as one entity, with Marketing essentially managing the overall operations, and the three other entities handling sales, each in its own sphere of specialization. Tr. 320-322. Tice indicated that the management of Marketing was generally under his control, although Norton had some control. Tr. 413-414. Tice, Bennett and Duncan all considered that the three respondents were sales entities, with Marketing

handling all the operations including the purchasing; Marketing would buy all the produce and transfer it to the appropriate company; Marketing leased all the warehouse space; and Marketing handled the receiving when produce arrived at the warehouse. Tr. 354-358. None of the entities ever held a board meeting. Tr. 387.

It appears that customers knew of the companies as "Perfectly Fresh" and were not aware that in reality four different companies existed. The accounting and payment systems were designed by Rovelo with input from Tice, and generally checks from customers went first into the individual companies bank accounts, but were then transferred into Marketing's account to keep the other accounts at a virtual zero balance. Tr. 366-369. According to Tice all the purchasing was done by Marketing, even though the accounts payable documents examined by Ms. Kondura and admitted into evidence generally linked each purchase to a specific company, and even though the produce payables listed in the schedules filed with the bankruptcy court generally matched up with those same records, in terms of which company purchased which lot of produce. Tr. 354.

Shortly after John Norton entered the scene and the new companies were formed, Norton placed Jaime A. Rovelo as the head of the accounting department and Chief Financial Officer for all four entities. Tr. 372-377. Although the PACA licenses indicate otherwise, Tice testified there was no CFO before Rovelo, and that Rovelo wrote all the checks for the companies on a day-to-day basis, and that Rovelo reported to Tice, not to Duncan or Bennett. *Id.* Until the businesses began to collapse in December, Rovelo made the decisions on who to pay; subsequent to that date those decisions were made by Tice.

Apparently John Norton, the principal financial resource supporting the expansion of the companies, was seeking to compete against Reddy-Pac, a large supplier of produce to chain stores. Norton apparently had some issues with Reddy-Pac and its CEO, and apparently getting back at Reddy-Pac was a significant aspect of his motivation for investing in Perfectly Fresh. Tr. 317-320, 330. Further, Erin Tice, the spouse of Gary Tice, was an officer with Reddy Pac and came over to Specialties (and became a co-owner of all four companies as a result of her co-ownership of Marketing with her husband) with the idea of using her

personal relationships with Reddy-Pac clients to bring those customers over to Specialties. Tr. 336-338. When she joined Specialties, Reddy-Pac became concerned that the employees she had managed there would move with her, and attempted to get them to sign contracts. Specialties ended up hiring 15 or 16 Ready-Pac employees to work this aspect of the business, even though they had planned to hire employees at a much slower rate as the business expended. Tr. 336-338.

At around the same time, the entire warehouse where Marketing had rented a small amount of space became available, and Marketing took that over. Much of the money Norton invested was devoted to improving the warehouse. Tr. 331-333.

**The Short Road to Bankruptcy**

The collapse of the Perfectly Fresh entities was swift, barely 5 months having elapsed between the time the respondent companies starting doing business and the bankruptcy filing. Ready Pac filed suit against Norton and the Tices for tampering with their employees. [6] According to Tice, the CEO of Ready-Pac was seeking to bankrupt Perfectly Fresh, Tr. 343. During the litigation, which was settled in November, 2002, Norton decided that he wanted to be treated as a lender, rather than as an owner/shareholder. Tr. 343-345.

With funding from Norton stopped as of November, Tice began an effort to attract additional investors. Tr. 349. He was never able to get to the point of serious negotiations. He felt the companies were still in good financial condition at the end of November, with Consolidation doing particularly well. Tr. 349-350. However, in December, with no new funding coming in and Farms having significant problems due to issues with Hawaii Pride, it became difficult to pay debts. *Id.* Tice testified that at first Rovelo made the decisions as to which creditors should be paid, but that sometime in December he made all those decisions on his own. Tr. 380-381. He further testified that Respondents Bennett and Duncan had no role in deciding who would be paid. *Id*.

[6] The litigation, while frequently mentioned, was never officially documented in the record, so the descriptions are solely based on the testimony at the hearing.

With no funding immediately at hand, Tice retained bankruptcy counsel on behalf of all four Perfectly Fresh entities on January 31, 2003 (RX 2), and the companies filed for bankruptcy a few days later[7]. The same day (February 3), the four companies moved that their separate bankruptcy petitions be consolidated for "joint administration." RX 4. There is no evidence that Bennett or Duncan participated in any aspect of the bankruptcy filings, and most of the bankruptcy documents were signed either by Gary Tice or Jaime Rovelo.

As part of the bankruptcy filing, Farms, Specialties and Consolidation each filed a "Schedule F, Creditors Holding Unsecured Nonpriority Claims." These schedules included both produce and non-produce payables. Every one of the creditors listed in the three disciplinary complaints is listed in the corresponding Schedule F, in an amount equal to or less than that alleged in the complaint to be unpaid.

In filing for bankruptcy, Tice indicated that he thought all the creditors would be paid off from the proceeds of the bankruptcy auction, but the attorneys representing the creditors negotiated for a 60% cash payment of the amounts owed. Tr. 405-409. Tice also stated, in a letter to Ms. Kondora (RX 1, p. 5):

> The employees of our company and our other principals should not be held responsible for the results of not paying for our produce within terms, it was not their decision as I had taken control. Lon Duncan, Erin Tice, Tom Bennet[t], and our employees conducted business as I directed and it would be very unfair if actions where [sic] taken against them as individuals. The only other persons having a final say in the ultimate outcome of Perfectly Fresh was John Norton and the attorneys of Rynn & Janowsky.

**The Petitioners in the Responsibly Connected Cases**

1. Jaime Rovelo—After filing his three petitions to review the determination of the PACA Branch Chief that he was responsibly connected to each of the respondents in the disciplinary cases, Mr.

[7] Shortly before filing for bankruptcy, Marketing transferred its operations to Florals, based on advice from counsel. Tr. 354.

Rovelo had no further contact with the Hearing Clerk's office and did not file any other documents in this matter. After he filed his petitions, Rovelo apparently relocated without notifying the Hearing Clerk, and without leaving a forwarding address. He did not participate further in the proceedings. Since the petitioner carries the burden of proof in a responsibly connected proceeding, and since no evidence was presented that would indicate that Rovelo was not responsibly connected to the three companies, I must find, if I find in favor of Complainant in the disciplinary cases, that Respondent Rovelo was responsibly connected to the three companies. In any event, the evidence demonstrated clearly that he was: the Chief Financial Officer of each of the three respondents in the disciplinary case; the individual who set up and administered the accounting system and signed the great majority of checks; a participant in many of the decisions as to whom to pay when money became tight; and he was the signatory of many of the bankruptcy related documents. Tr. 372-381.

2. Jeffery Lon Duncan—Respondent Duncan is a high school graduate who has been working in the produce industry since 1986. Tr. 703-706. He had a variety of jobs in the industry and gradually became a specialist in cruise line sales, a very exacting business given that ships are in port for a very short time, and are more demanding than other customers. Tr. 708-710. He testified that he had no managerial responsibilities before he joined up with Tice. Tr. 706. He was a participant in Perfectly Fresh Marketing, LLC, when it was first organized, and was an officer, director and 49% shareholder in the company. After the operating agreement was amended in July 2002, Duncan's ownership share was reduced to 20%. He testified that even though he was listed as supplying capital for several companies, he did not actually put up any money. Tr. 898. He basically indicated that his work at Perfectly Fresh, both when it was only Marketing, and then later when he was put in charge of Consolidation, was the same work that he had been doing earlier—selling to cruise lines. Tr. 850-851.

Duncan indicated that he had many discussions with Tice before they decided to join forces and form their own company, and that he was impressed with Tice's vast knowledge and success in the produce industry. Tr. 715, He stated he was not involved in filing for the PACA

licenses, either for Marketing or Consolidation, and that basically he was not involved with keeping the books or managing the warehouse or the employees. He did write some checks, but most of the check-writing was handled by Tice. Tr. 833-840.

Duncan did not have any role in bringing Norton into the picture, although the modified business plan, including the decision to set up the three new corporate entities was discussed with him. Tr. 833-834. He understood that Norton was going to invest substantial funds in the companies and become a partner in Marketing. *Id*. He did not recall being involved in any discussions concerning the amended operating agreement that he signed in July, 2002, stating that he probably perused it. Tr. 846. He did not have any role in the plan to take over the Ready-Pac business, but he did know about it. Tr. 853-854. When Ready-Pac filed suit, neither Duncan nor Bennett was a party to the litigation. Tr. 856-857.

While he testified that his role in Consolidation was not managerial, but was essentially to continue the cruise produce sales business he had been working on before he came to Perfectly Fresh, he would have received more money, as a partial owner, if Consolidation was profitable. Tr. 865. In fact, it appears that his end of the business was profitable, and that Consolidation's profits were used in effect to subsidize the other companies. Tr. 899-900. He did have check signing authority, but apparently signed only one check in October 2002, prior to the period covered by the complaint, probably because no one else was around. Tr. 951.

Duncan first became aware that his suppliers were not getting paid in a timely manner in December 2002 or January 2003. Tr. 890. He said when he received a call about late payment, he would get the invoice and bring it to Rovelo and tell Rovelo to take care of it. He did not write the checks himself. Rovelo told him that creditors were not getting paid due to lack of money caused by overhead, and that Gary Tice told him that he was working on other investors and reassured him that he would find the investors. Tr. 890-892. He had no role with respect to the decision to file for bankruptcy or the actual filing of bankruptcy papers.

3. Thomas Bennett—Respondent Bennett had been in the produce industry for 42 years at the time of the hearing. He had known Gary

Tice on a professional level for 25 years. Tr. 1085-1086. When Bennett was running Francisco Distributing as General Manager, Tice (actually Marketing) was renting some office space from Francisco. Tr. 1037-1039. When Fresh America, the company that owned Francisco, decided to close down the Los Angeles Division, and Bennett was basically told to shut down the company, he told Tice that the building was going to be available, and Tice successfully negotiated with the landlord for lease of the warehouse space. Tr. 1037-1038. After that, Tice offered him the position as President of Farms, along with a ten percent ownership interest in the company. Tr. 1039. Bennett did not pay anything for the shares, and stated that he was basically just involved in sales, and that the title of President was just to allow him to deal with a higher level of personnel at the companies to which he would be selling. Tr. 1039.

He said he considered the Tices to be his immediate supervisors, Tr. 1042. When the Farms corporation was being formed, he basically signed all the documents that he was told to sign, without negotiating. Tr. 1044. He did not believe he had check signing authority and testified that he had never signed a check on behalf of Farms[8]. Tr. 1045. When he saw empty cooler space at the warehouse, he started a storage facility where outside shippers could bring their produce to Los Angeles and store it in the warehouse, and spent most of his time working with the rental clients. Tr. 1041-1042.

He stated that he did not recall having any involvement in the obtaining of the PACA license for Farms, did not know of Norton's involvement until a few months after he began working for Farms, and did not really understand how the accounting system worked or how the vouchers and invoices were coordinated. Tr. 1048-1049. He began hearing about slow payment issues from his salesmen in December; when he would go to Tice or Rovelo. He was told not to worry and that the receivables would catch up. Tr. 1049-1050. He thought he could probably have found out more about the financial condition of the company had he asked, although he did not have access to the accounts of the entities other than Farms and was not told about them. Tr. 1050.

[8] However, he did in fact sign a card authorizing him to write checks. Bennett RC 23.

When it became evident to him that the business was not doing well, he sensed that it was time to leave. Tr. 1055. He suggested to Tice in early January that it was time for him (Bennett) to resign. Tr. 1056-1057. He stated that he resigned orally but that he subsequently wrote a letter to Tice attorney asking that his name be removed from all corporate documents.[9] Tr. 1058. He stated that he was concerned for his reputation and did not want to be part of a sinking ship. Tr. 1056-1057.

## Discussion

### I. Each of the three Respondents has violated the Act by failing to make full payment promptly to sellers of perishable agricultural commodities.

With respect to the disciplinary counts, Complainant has introduced numerous documents Ms. Kondura discovered in well-organized boxes clearly identified as payables, and which generally contained matching invoices and vouchers confirming the existence of each of the debts alleged in the complaint. Further, Complainant introduced bankruptcy schedules, prepared by the three disciplinary respondents, which confirmed that these (and other) debts existed at the time they filed for bankruptcy. In each of their answers, respondents admitted that they filed the bankruptcy scheduled referred to by the complaints, but also denied each and every allegation that they had failed to make full payment promptly to the sellers of the produce. The respondent companies contend that the allocation of debts among the companies was essentially an artifice and that all the debts were actually incurred by Marketing/Florals, which is not a party to this action. For the reasons discussed below, I reject the notion that the debts were not incurred by each of the respondent companies, and find that Farms, Consolidation and Specialties each violated the PACA by failing to make full payment promptly for produce as listed in the three complaints.

1. The companies' own records clearly establish the unpaid debts. Each of the respondent companies had clearly marked accounts payable files containing linked invoices and vouchers establishing the purchase

[9] However, he testified that he did not have a copy of that letter.

of produce. While the invoices generally indicated that the produce was sold to "Perfectly Fresh," the corresponding vouchers identified which of the entities was considered the purchaser of the produce. In most cases, the quantities of the produce and the dollar amounts involved matched up. Respondents are put in the peculiar position of denying the validity of their own records.

Gary Tice, who was clearly the single person most responsible for setting up and operating the three Perfectly Fresh respondents, admitted in a May 16, 2003 letter to Ms. Kondura that from September 1, 2002, when the operations of the three respondent companies started, Marketing did none of the actual buying and selling of produce. RX 1. This was inconsistent with his attempts at the hearing to explain away this statement, and his contention that Marketing did all the buying and the other operations did all the selling. No explanation for this glaring inconsistency was offered other than Tice's blanket statement that in reality Marketing "incurred all debts." Since this statement is flatly inconsistent with Tice's letter and the documentary evidence gathered by Ms. Kondura, it is not entitled to much credibility. Indeed, the written statement, prepared a month after Tice met with Ms. Kondura, is more consistent with the large majority of evidence received at the hearing.

The testimony of both Respondents Bennett and Duncan also supports the contention that the entities they ran were not making full prompt payments. Thus, Respondent Bennett testified that he was made aware by his salesman in early December that some of Farms' customers were not getting paid on time; he inquired of Tice, and sometimes Rovelo, and was told not to worry, and that receivables would catch up with payables. Tr. 1049-1050. Similarly, Respondent Duncan began receiving calls from the creditors that he dealt with complaining about slow payments in December and January; he would get the invoice and give it to Rovelo and tell him to take care of it. Tr. 890-892.

One of the principal arguments made by counsel for the respondents, and for Petitioners Duncan and Bennett, is that the law firm handling the bankruptcy advised Tice and Rovelo to associate payables with receivables for each of the three entities, Tr. 402-403, because they could not have "one company with nothing but debt and three

companies with nothing but assets, and it was just as I recall, it was a way to be able to put the asset to the debt." Tr. 461. Tice's testimony in this regard is simply not credible. Other than his unsupported statements, the evidence shows that the bankruptcy law firm was retained on Friday, January 31, 2003, and that the bankruptcies were filed three days later. If Respondents are trying to imply that over that weekend an entire voucher system was created along with the more than one thousand vouchers that were linked with the pre-existing invoices, they are entirely unpersuasive. Tice's uncertain and entirely unconvincing testimony in this regard is directly contradicted by the existence of these linked documents, which clearly establish that for each unpaid invoice there is a voucher that indicates which of the three respondent entities purchased the produce for which full timely payment was not forthcoming.

Thus, the accounts payable documents of each of the three respondent companies establishes that, at the time of the investigation conducted by the PACA Branch, each company had outstanding produce debts as alleged in the complaint.

2. The bankruptcy filings, while not necessarily dispositive, constitute persuasive evidence of the validity of Complainant's claims, particularly when they are confirmed by the voucher/invoice system of each respondent. The filings were signed under penalty of perjury. Respondents' arguments that the bankruptcy filings, particularly Schedule F, do not constitute admissions of the existence of the listed debts, or that they indicate that Marketing and not the entity filing the Schedule F actually incurred the debt are unconvincing and inconsistent with what the documents demonstrate in black and white and under oath. Moreover, these arguments are inconsistent with established Agency precedent holding that documents filed in bankruptcy proceedings may constitute an admission against the interest of the filing party.

The fact is that the creditors listed as holding unsecured claims in each of the Schedule F's are remarkably similar to the creditors listed in the accounts payable. Further, in each of their answers, Respondents admitted the allegations of paragraph IV of the complaint, which alleged, e.g., that "Respondent admits in its bankruptcy schedules that all 28 sellers listed in paragraph III of this complaint . . . hold unsecured

claims for unpaid produce debt totaling of $263,801.40. In the case of each of the 28 sellers listed, the amounts identified in the bankruptcy schedules for unpaid produce debt are greater than or equal to the amounts alleged in paragraph III of this complaint[10]. . .” While this would appear to present an open and shut case,[11] Respondents, in their answer, also denied the allegations that they failed to make full payment promptly. Although Respondents contend otherwise, I find that the admissions in the bankruptcy filings do constitute an admission that these debts for produce did exist at the time of the filings, and that their denial in their answers of the allegations regarding making full payment promptly are in fact inconsistent with their admissions.

Documents filed in bankruptcy cases which list creditors holding unsecured nonpriority claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings. *In re: Samuel S. Napolitano Produce, Inc*., 52 Agric. Dec. 1607, 1610 (1993); *In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 8894 (1997), *In re: Coronet Foods, Inc.*, 65 Agric. Dec. 474 (2006). Respondents contend that these and other cases cited by Complainant are distinguishable because only a single entity was involved in the cited cases, and do not apply when there are multiple entities involved, and that application of these rulings to a situation where multiple entities have allocated their debt would be an unwarranted “dramatic extension of the law.” (reply br., pp. 3-5). However, I agree with Complainant that the cases actually do support a finding that when a bankruptcy filer acknowledges the existence, under oath, of certain debts, then they have admitted that those debts exist and generally cannot deny them in subsequent proceedings.

Likewise, I reject the notion, raised by respondents and Petitioner Duncan in their reply brief (pp. 3-6) that the statement in each Schedule F that “Creditors listed on the attached sheets with an asterisk are creditors who may have statutory trust interests in the receipts generated

[10] I am quoting the Specialties complaint, but the same language, other than the number of sellers and the total indebtedness, is in all three complaints, and the response is the same for all three answers.

[11] Complainant filed a Motion for Expedited Decision Without Hearing in the consolidated cases on this issue.

by the operation of the debtor's business pursuant to . . . [the PACA]" constitutes "clear" evidence that the produce creditors listed in the schedule were not creditors of the respondent who listed them as a creditor. Just because those who sold produce to the various entities generally thought they were selling to "Perfectly Fresh" and might not have known there were separate entities does not change the fact that the purchases were in fact made by the specific entities and recorded as such in the entities own books. Similarly, the fact that the cases were consolidated at respondents request for ease in administration in the bankruptcy court was obviously nothing more than a procedural matter; if the court considered it an indicator that the bankruptcy schedules filed with by respondents meant something other than they plainly indicated, such a finding by the bankruptcy court is not anywhere in the evidence submitted in these consolidated matters.

3. I also find that there is considerable merit to the assertion, raised by Complainant in its reply brief, that respondents should be estopped from claiming that their own records, and particularly their own bankruptcy filings, have a meaning quite the opposite of what they indicate on their face. "The doctrine of judicial estoppel bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position "either as a preliminary matter or as part of a final disposition." *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir.1990). Judicial estoppel is an "equitable doctrine meant to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Id.* Judicial estoppel, however, should be applied with caution to "avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." *Id*.

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the United States Supreme Court laid out the three principal factors a court must examine to determine whether judicial estoppel should apply. "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.*, at 750. I find that the respondents' position in the disciplinary

case—that all the debts were incurred by Marketing—is inconsistent with the bankruptcy filings where each of the companies acknowledged its produce debts. "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *Id*., citing *Edwards v. Aetna Life Insurance*, 690 F. 2d 595, 599 (C.A. 6, 1982). Here, if I find that all the debts were only owed by Marketing, and that the other entities are debt free, I would be making a finding utterly inconsistent with the documents respondents filed with the bankruptcy courts, as well as with the decision of the bankruptcy court itself. "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*. Here, if I were to find that each respondent in fact did not owe creditors for purchases of produce, then they would not be liable for violations of the PACA, a position that would make it difficult for Complainant to ensure that it carries out its statutory mandate of policing the produce industry. Respondents cannot be allowed to list one set of creditors in the bankruptcy courts and totally repudiate that list in the current proceedings. This would undermine the integrity of the judicial process.

4. The violations were willful, flagrant and repeated. Respondents vigorously contend that even if there were violations, they were not willful or flagrant. However, the long-standing case law interpreting these terms makes it clear that the violations do meet the criteria of being willful and flagrant, as well as obviously being repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. *In re: Frank Tambone, Inc*., 53 Agric. Dec. 703, 714-15 (1994). *In re: Scamcorp*, 57 Agric. Dec. 527, 549 (1998). From the time it became apparent that they were having trouble timely paying their creditors in full, until they closed their doors for good, the fact that each of the three respondents continued to order and receive, and not pay for, produce, putting

numerous growers and sellers at risk, establishes they were "clearly operat[ing] in disregard of the payment requirements of the PACA," *Id.*, and have committed willful violations. Principals of the companies involved, including Tice, Bennett and Duncan, knew that payments were not being made in a timely fashion. Bennett and Duncan in particular did little more than inquire of Rovelo and Tice concerning the status of their creditors, and took no actions to correct the situation. The fact that the companies were attempting to acquire a new investor, and appeared to be sincerely concerned about paying the creditors back in full does not alter the fact that their conduct, particularly the continued purchase of produce when they were already facing financial uncertainty, meets the definition of "willful" as previously construed under the Act.

Likewise, the conduct of respondents was flagrant as that term is used in the Act. In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re: N. Pugatch, Inc*., 55 Agric. Dec. 581 (1995), *In re: Scamcorp,* 57 Agric. Dec. 527 (1998). The number of violations (142 for Farms, 286 for Consolidation, and 796 for Specialties), the amount unpaid (over $442,000 for Farms, over $373,000 for Consolidation, and over $263,000 for Specialties) and the multi-month period over which these violations occurred establish that the violations were flagrant. Likewise, the large number of violations establishes that they were repeated.

5. The investigation was conducted in a proper fashion. Respondents attacked some aspects of the investigation, both in terms of methodology and thoroughness. The government investigation in this case followed the same general methodology employed in numerous other non-payment cases, and has been approved at the Agency level in Judicial Officer decisions as well as by the courts. Receipt by the PACA Branch of either bankruptcy or reparation filings is frequently a trigger for the commencement of an investigation. Respondents' contended in their reply brief that it was "amazing" for complainant to rely on Ms. Kondura's findings to establish that the various respondents had entered into the transactions that are the subject of these consolidated matters because she had no first-hand knowledge of the companies' operations

(reply br. at 8). Of course, such first-hand knowledge would have been somewhat difficult to obtain, given that the companies had ceased doing business by the time the investigation was commenced. Instead, Ms. Kondura ascertained the location of the records of the companies, painstakingly reviewed and copied records, determined that each unpaid invoice was linked with a voucher identifying the specific Perfectly Fresh company that purchased the produce, interviewed both Gary and Erin Tice, received letters from Gary Tice, contacted and prepared affidavits for a number of the creditors who confirmed that the purchases were made in interstate commerce and were still unpaid, and prepared no- pay tables indicating which creditors were not paid by the respective entity and in what amount. That the creditors she talked with did not necessarily know which Perfectly Fresh entity they were dealing with, or that they generally did not even know that there was more than one Perfectly Fresh entity, does not alter the fact that they confirmed that the particular Perfectly Fresh entity that they dealt with owed them money. This information, combined with each entity's own voucher and invoice records, and the filings made under oath with the bankruptcy court, strongly support the no-pay tables she created. There is no basis for a finding other than that Ms. Kondura's investigation was appropriate.

## II. The Responsibly Connected Cases

**A. Petitioner Rovelo was responsibly connected to each of the three Respondent companies.** Jaime Rovelo was notified by the PACA Branch Chief that he was found to be responsibly connected to each of the three Respondent companies. In June 2005 he filed a Petition challenging all three determinations. Subsequent to that filing, Mr. Rovelo had no further participation in these proceedings, and did not notify the Hearing Clerk or any other participants in the proceeding. Since the burden of proof is on the petitioner in a responsibly connected case, and since Mr. Rovelo did not put on any evidence that would refute the PACA Branch Chief's determinations, I find that Mr. Rovelo was responsibly connected to Farms, Consolidation and Specialties.

B. **Petitioner Jeffrey Lon Duncan was responsibly connected to Perfectly Fresh Consolidation.** Petitioner Duncan, who was President,

a board member and 10% direct shareholder in Consolidation (he was also a 20% shareholder in Marketing/Florals, which owned 90% of Consolidation, making him effectively a 28% shareholder in Consolidation) has not met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 10% shareholder of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies with Mr. Duncan.

Mr. Duncan is a high school graduate who has spent his entire career, beginning in 1986, in the produce business. He was initially involved as a 49% owner of Marketing when that company was established, and signed off on the Amended Operating Agreement that changed the organization of that company on July 28, 2002 and reduced his share of ownership to 20%, with the addition of John Norton to the ownership team. In joining with Marketing, and in the decision to form the three additional companies, Duncan relied heavily on the expertise and experience of Gary Tice. Both Petitioner and Mr. Tice portrayed Petitioner as somewhat naïve in the area of founding and managing a business. Petitioner testified that he signed whatever documents that Tice or Tice's attorney told him to sign, and that all he really did with Consolidation was to continue the business he was most familiar with—servicing the needs of cruise lines. He stated that he might have perused the amended agreement, but that he believed Tice and his attorney would not take advantage of him. Tr. 846-849. He was in his office most days, and basically managed the cruise business.

Under the new operating agreement, Duncan was appointed President of Consolidation, and a director, and was made 10% owner of the company. He testified that he never made any capital investment in Consolidation (or in Marketing), so that any documentation indicating that he had paid for his shares would be incorrect. He stated he would share in the profits once Consolidation became profitable. Tr. 865.

James Hinderer, a department head at Produce International who sold produce to Perfectly Fresh and dealt almost exclusively with Duncan, understood that Duncan was taking care of his own cruise accounts, and stated that Duncan had his own strong customer base. Hinderer also

speculated that his company quit selling to Perfectly Fresh relatively early, but that he thinks they still got paid in full because Duncan "took care of us." Tr. 801. He speculated that Duncan "exerted pressure somehow" to keep the payments coming. Tr. 802.

When Consolidation creditors began complaining about slow payments in December or January Petitioner Duncan would get the invoices and give them to Rovelo and tell him to take care of the customer. Tr. 890-892. Even though he knew the company was not making payments promptly he continued working on his sales. Tr. 893-894. He indicated that he did not decide which creditors should be paid, but he did go to Rovelo with individual invoices and ask him to take care of things. No evidence was introduced at to whether Rovelo did in fact pay the customers that Duncan requested.

I find that Jeffery Lon Duncan was actively involved in matters resulting in violations of the Act. While he clearly was not principal decision maker for Consolidation, his participation in the day-to-day management of Consolidation, particularly including continuing to order produce after he knew Consolidation's creditors were not getting paid either fully or promptly, is sufficient to constitute active involvement. In *In re: Michael Norinsberg*, 58 Agric. Dec. 604, 608-609 (1999), the Judicial Officer held:

> 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.

In particular, the buying and selling of produce at a time when creditors were not getting paid pursuant to the requirements of the Act has been held to constitute involvement in matters resulting in a

violation of the Act. *In re: Janet S. Orloff, et al*., 62 Agric. Dec. 281 (2003). That Duncan had employees working under his direction who continued to carry on the business of ordering produce for Consolidation during this period, as evidenced by Consolidation's own invoice/voucher system and the filings in bankruptcy court, is further evidence of his participation in activities resulting in a violation of the Act. Basically, each of the unpaid obligations listed in Consolidation's own records and in their bankruptcy filing constituted a debt incurred when Duncan was managing the sales operations of Consolidation. In this position, Duncan inherently exercised "judgment, discretion, or control" as those terms are used in *Norinsberg*. This is more than enough to constitute active involvement under the Act.

Even if Petitioner Duncan were to be found not actively involved in the matters that constituted violations of the Act, he failed to meet his burden of proving that he was only a nominal President, director and 10% owner of Consolidation. Respondent, whose entire 15 year career (as of the time Marketing was formed) was in the produce industry, voluntarily entered a business relationship with Gary Tice, an experienced businessman with expertise in the produce business, and elected to rely substantially on Tice's judgment and expertise. Duncan was hardly a novice in the business, and although much has been made of Tice's dominance in decision making matters, I find that Petitioner Duncan was not in the position of someone who is given a title with no expectation of working in the business. Someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation or experience in the produce business may be found to be nominal. *Minotto v. USDA,* 711 F. 2d 406, 409 (D.C. Cir. 1983). However, Petitioner Duncan was an experienced operator who entered partnership with Tice in order to earn more money when the business became profitable.

While originally a 49% owner of Marketing, Petitioner Duncan acquiesced in amending the operating agreement after Tice enlisted Norton's financial support to set up and fund the three new entities. As a result of the amended operating agreement, Duncan's share of Marketing was reduced to 20%, plus he was made President of Consolidation with a 10% ownership stake. That he elected to rely

totally on the representations of Tice and the attorney who drafted the amended agreement, only electing to peruse it rather than to fully inform himself of his potential rights and obligations, indicates that perhaps he was too trusting and naïve, but does not reflect on whether his ownership was nominal. Clearly, he could have objected to the new arrangement, or opted out of it, or at least attempted to have some say in the matter, particularly with respect to Consolidation where he was effectively a 28% owner. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re: Joseph T. Kocot*, 57 Agric. Dec. 1544, 1545 (1998) and cases cited thereunder. Here, Petitioner knew he was a 28% stockholder in Consolidation, through his 10% direct ownership and his 20% ownership of Marketing, which in turn owned 90% of Consolidation. That he chose not to exercise the authority inherent in his three positions of President, director, and shareholder does not relieve him of the duty to do so, and does not sustain his claim that his position was nominal. He was no mere figurehead, but in fact ran the cruise business that Consolidation was set up to conduct. He had the authority to sign checks, although it is clear that with the exception of one check he signed shortly before during the violative period, he did not handle the check-writing duties[12].

C. **Petitioner Jeffrey Lon Duncan was not responsibly connected to Perfectly Fresh Specialties.** Unlike with Consolidation, where Duncan basically ran the day-to-day operations of the cruise supply business, Respondent Duncan had no apparent day-to-day involvement in Specialties. Specialties was considered the business of Erin Tice, who left her prior position with Ready-Pac to engage in a similar business running Specialties. Duncan had no direct ownership in Specialties, and owned 18% of Specialties indirectly through his 20% ownership in Marketing which owned 90% of Specialties. While he is listed as the Chief Financial Officer and a Director on the PACA application, it is undisputed that Jaime Rovelo acted as Chief Financial

[12] He did not, contrary to the suggestion of Complainant, attend any meetings as a director.

Officer during the periods when the violation was taking place, and that no board of directors meetings of Specialties ever occurred. There is no evidence that Duncan was even aware he was a director or the CFO of Specialties and, other than his indirect 18% ownership of the company, he appears to be truly a nominal owner as that term has been recognized in PACA decisions.

There is no evidence that Duncan ordered any produce on behalf of Specialties, and the record is overwhelmingly clear that he had no expertise in this specialized aspect of the produce business. Unlike the business of supplying cruise ships, where Duncan was unquestionably the expert and manager of the business, and where Duncan or those under his direction continued to order produce well after it was known to them that produce suppliers were not being paid fully and promptly, Specialties presents a situation where Duncan had no control over pertinent events. The employees at Specialties were all brought over by Erin Tice and had no demonstrable connection whatsoever with Duncan.

While Duncan did not oppose the creation of Specialties and was aware that many of Erin Tice's Reddy Pack employees were coming over to Specialties, he clearly had no power or authority over the situation given the fact that Gary Tice and Norton wielded the majority vote of Marketing, and that he had no knowledge or planned role in the business. Basically, the fact that Duncan was only an indirect shareholder in Specialties, coupled with the fact that he never acted as, nor was aware of, his listed titles as CFO and director of Specialties, and the fact that he had absolutely no discernible role in the operation of that business supports a finding that he was only a nominal director, shareholder and officer in that company.

D. **Thomas Bennett was Responsibly Connected to Perfectly Fresh Farms**. Petitioner Bennett, who was a 10% shareholder, President and a director of Perfectly Fresh Farms, has not met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 10% shareholder of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies

with Mr. Bennett.

Petitioner Bennett had been in the produce industry for 42 years at the time of the hearing. He had built and sold a restaurant chain, had been a produce buyer for 11 years at Cisco, and then ran Francisco distributing for 11 years. He had known Gary Tice on a professional level. Tice (actually Perfectly Fresh Marketing) was leasing space from Francisco when Bennett was told that Francisco was closing down; Bennett told Tice that the whole building would be available, and Tice offered a position to him and some of the sales force that he had managed at Francisco. He was offered the position of President of Perfectly Fresh Farms, along with a 10% ownership share in the new company. He never actually put up any money nor did he ever see any physical manifestation of the shares he owned. He did sign a number of corporate documents when Farms started up, basically signing whatever documents Tice and Tice's attorney told him to sign. He signed a card authorizing him to sign checks, although he had no recollection of that fact and there is no evidence that he ever signed a check.

While he classified his work at Farms as "kind of a glorified babysitting job," Tr. 1041, it is evident that he had a major role in the day-to-day business of Farms. He came in most mornings at 5 and checked the markets, mostly with regard to citrus, Hawaiian papayas and chilies. He stated that he was given the title of President to give him the apparent authority to call higher officials of potential clients. He did not generally contact clients, but the sales staff who worked for him did. When he realized that Farms had excess storage space, he started an outside storage business on behalf of Farms on his own, and spent more time working on that then on Farms' produce business. Tr. 1041-1042. He stated that he first heard about slow payments from his salesmen in December, and that he would go to Tice or Rovelo who told him not to worry. He testified that he probably could have found out more about the financial condition of Farms and the other companies had he asked. Tr. 1049-1050. David Hewitt, one of Farms former employees, confirmed that Bennett hired him (he was one of the Francisco employees that Bennett brought over) and was his manager, and oversaw the operations of Farms, although he also stated that Bennett apparently reported to others. Tr. 604-607, 612.

I find that Thomas Bennett was actively involved in matters resulting in violations of the Act. As the President of Farms, he managed the significant aspects of the business, as well as the outside storage business which he apparently pursued on his own initiative. While some of the transactions that resulted in failure to pay occurred after his apparent resignation,[13] a significant number of these purchases were made while he was serving as President of Farms. Like Petitioner Duncan, he allowed his employees to continue ordering produce even after he became aware that his customers were getting paid slowly, if at all. This, in itself, would constitute active involvement.

Even if Petitioner Bennett could be found not to be actively involved in matters resulting in violations of the Act, he would only avoid responsibly connected status if his positions as President, director and 10% shareholder in Farms were nominal. I find that his positions as President and 10% shareholder were not nominal as that term is used and interpreted in the PACA case law; I make no ruling on his position as director since it is not clear whether he even knew he was a director and there were no meetings of the board of directors while he was affiliated with Farms.

With his lifetime of experience in the produce business, Bennett was a knowledgeable and seasoned veteran, who should have understood the obligations that the PACA imposes upon a significant shareholder and officer in a produce company. Like, Duncan, he was hardly the type of unknowledgeable, powerless individual the court was contemplating in the *Minotto* decision. In fact, he alerted Tice that the building that Marketing was leasing some office space in was going to be vacated by Francisco, his then current employer. As a result of ensuing discussions with Tice, Bennett ended up as the President and 10% shareholder in Farms, and found immediate employment for many of the people who worked for him at Francisco, who would otherwise be terminated when that operation ceased. Such was the extent of his participation in the operation of Farms that, on his own, he sub-leased space on behalf of Farms to other produce businesses that were looking for storage space. This action in itself belies that he was acting in a nominal capacity for

[13] He stated he resigned in early January 2003 but there is no evidence supporting a specific date.

Farms.[14] In addition, as a 10% shareholder, he was presumably in line to get a percentage of profits once Farms became profitable.

I am mindful that Petitioner Bennett played a lesser overall role with respect to Farms than Petitioner Duncan did with respect to both Consolidation and Marketing/Florals and that both Petitioners were rather gullible and trusting for individuals with their years of experience in the produce industry. However, neither Petitioner was able to demonstrate that they were not actively involved in the violative matters. And neither Petitioner was able to demonstrate that their roles as President and 10% shareholder (more, in Duncan's case) were nominal.

**Findings of Fact**

1. Perfectly Fresh Marketing, LLC (Marketing) was a California corporation established in June 2001 to engage in the produce business. Initially, 51% of the company was owned by Tice, Inc (which was owned by Gary and Erin Tice), and 49% was owned by Petitioner Jeffery Lon Duncan.

2. In July 2002, the operating agreement of Perfectly Fresh Marketing was amended so that 50% of the company was owned by Perfectly Fresh, LLC, a holding company controlled by John Norton, 30% was owned by Tice, Inc. and 20% was owned by Jeffery Lon Duncan. Gary Tice, John Norton and Jeffery Lon Duncan each signed the amended agreement on July 18, 2002.

3. Respondent Perfectly Fresh Farms, Inc. (Farms), a California corporation 90% owned by Perfectly Fresh Marketing and 10% owned by Petitioner Thomas Bennett, was the holder of PACA license 20021541 from August 2002 until the license expired on August 21, 2003.

4. Between October 27, 2002 and February 21, 2003, Farms failed to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $442,023.12.

5. Respondent Perfectly Fresh Consolidation, Inc. (Consolidation),

[14] In some areas, Bennett did not have much leverage, as when he tried to convince Tice to cease Farms' relationship with Hawaii Pride.

a California corporation 90% owned by Perfectly Fresh Marketing and 10% owned by Petitioner Jeffery Lon Duncan, was holder of PACA license 20021540 from August 2002 until the license expired on August 21, 2003.

6. Between November 17, 2002 and February 15, 2003, Consolidation failed to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $373,944.19.

7. Respondent Perfectly Fresh Specialties, Inc. (Specialties), a California corporation 90% owned by Perfectly Fresh Marketing (and whose PACA license did not account for the remaining 10% ownership) was holder of PACA license 20021539 from August 2002 until the license expired on August 21, 2003.

8. Between November 1, 2002 and February 20, 2003, Specialties failed to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $263, 801.40.

9. Thomas Bennett was President and a 10% shareholder in Farms during much of the time period when Farms' was ordering produce and failing to fully and promptly pay for such produce. As of the date of the hearing he had been employed in the produce industry for 45 years. He was actively involved in the day-to-day operations of Farms throughout the period he was employed there. He signed numerous corporate documents and was involved in decisions consistent with a position of responsibility.

10. Petitioner Jeffery Lon Duncan was President and a 10% shareholder in Consolidation from the time the company was created through the time it filed for bankruptcy. He was also an owner of an additional 18% of Consolidation through his 20% ownership in Perfectly Fresh Marketing, LLC. As of the date of the hearing he had been employed in the produce industry for over 20 years. He was actively involved in the day-to-day operations of Consolidation throughout the period of its existence, signing numerous corporate documents, including the Amended Operating Agreement, occasionally signing checks, and was involved in decisions consistent with a position of

responsibility.

11. Petitioner Jeffery Lon Duncan was not actively involved in the operations of Perfectly Fresh Specialties, Inc. during the time that entity committed violations of the PACA. Even though the PACA license application listed him as CFO and a director of Specialties, his role with that company, if any, was purely nominal.

**Conclusions of Law**

1. Respondent Perfectly Fresh Farms, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities in the amount of $442,023.12 between October 2002 and February 2003.

2. The appropriate sanction for Perfectly Fresh Farms, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Respondent Perfectly Fresh Consolidation, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities in the amount of $373,944.19 between November 2002 and February 2003.

4. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

5. Respondent Perfectly Fresh Specialties, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities in the amount of $263,801.40 between November 2002 and February 2003.

6. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

7. Petitioner Jaime Rovelo was responsibly connected to Perfectly Fresh Farms, Inc., Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc., during the time those three entities committed violations of the PACA. As such, he is subject to the licensing and

employment restrictions of the PACA.

6. Petitioner Thomas Bennett was responsibly connected to Perfectly Fresh Farms, Inc., during the time Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

7. Petitioner Jeffery Lon Duncan was responsibly connected to Perfectly Fresh Consolidation, Inc., during the time Consolidation committed violations of the PACA. As such he is subject to the licensing and employment restrictions of the PACA.

8. Petitioner Jeffery Lon Duncan was not responsibly connected to Perfectly Fresh Specialties, Inc., during the time Specialties committed violations of the PACA.

## Order

The facts and circumstances of the violations committed by Perfectly Fresh Farms, Inc., Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc. shall be published. Jaime Rovelo, Thomas Bennett and Jeffery Lon Duncan are each found to be responsibly connected to one or more Perfectly Fresh Respondents and are subject to the employment restrictions imposed by the Act.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

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**In re: TUSCANY FARMS, INC., d/b/a GENOVAS.**
**PACA Docket No. D-04-0015.**
**In re: JOE GENOVA & ASSOCIATES, INC.**
**PACA Docket No. D-04-0016.**
**In re: GENCON CONSULTING, INC.**
**PACA Docket No. D-06-0017.**
**In re: JOE A. GENOVA.**
**PACA-APP Docket No. 06-0005.**
**In re: NICOLE WESNER.**
**PACA-APP Docket No. 06-0006.**
**Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova.**
**Decision and Order.**
**Filed October 15, 2008.**

**PACA – PACA-APP – Willful, flagrant, and repeated violations – Facts and circumstances published – Responsibly connected – Licensing restrictions – Employment restrictions – Preponderance of evidence – Failing to make full payment promptly.**

Eric Paul and Jonathan Gordy, for Associate Deputy Administrator and Acting Chief, AMS.
Douglas B. Kerr and Jonathan Barry Sexton for Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova.
Marc R. Hillson, Chief Administrative Law Judge.
*Decision and Order issued by William G. Jenson, Judicial Officer.*

## DECISION AND ORDER AS TO TUSCANY FARMS, INC.; JOE GENOVA & ASSOCIATES, INC.; AND JOE A. GENOVA

On June 2, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Associate Deputy Administrator], issued a Complaint against Tuscany Farms, Inc., d/b/a Genovas [hereinafter Tuscany Farms], alleging that, during the period August 2002 through November 2002, Tuscany Farms committed willful violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly to three sellers of the agreed purchase

prices, in the amount of $336,200.76 for 65 lots of perishable agricultural commodities, which Tuscany Farms purchased, received, and accepted in interstate commerce. Tuscany Farms filed an Answer denying the alleged violations.

On June 3, 2004, the Associate Deputy Administrator issued a Complaint against Joe Genova & Associates, Inc. [hereinafter Joe Genova & Associates], alleging that, during the period February 2002 through November 2002, Joe Genova & Associates committed willful violations of the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of $315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce. Joe Genova & Associates filed an Answer denying the alleged violations.

On January 12, 2006, Karla D. Whalen, Acting Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, United States Department of Agriculture [hereinafter the Acting Chief], informed Douglas B. Kerr, counsel to Nicole Wesner, that she had determined that Ms. Wesner was responsibly connected with Tuscany Farms during the period when Tuscany Farms violated the PACA. On that same day, the Acting Chief issued a similar determination with respect to Joe A. Genova. Both Ms. Wesner and Mr. Genova filed timely Petitions to review the Acting Chief's January 12, 2006, determinations.

Also, on January 12, 2006, counsel for the Associate Deputy Administrator and the Acting Chief moved to set the matters for a consolidated hearing. On April 11, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] consolidated the two disciplinary proceedings with the two responsibly connected proceedings, as required under the rules of practice applicable to the proceedings.[1]

On July 13, 2006, the Associate Deputy Administrator issued a

[1]The rules of practice applicable to these proceedings are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Chief ALJ consolidated the two disciplinary proceedings with the two responsibly connected proceedings in accordance with 7 C.F.R. § 1.137(b).

Notice to Show Cause to Gencon Consulting, Inc. [hereinafter Gencon], providing Gencon with an opportunity to show cause why it should not be denied a license under the PACA. The Notice to Show Cause alleged that Joe Genova, Jr., the principal of Gencon, was the same individual who was a 100 percent owner of Joe Genova & Associates at the time Joe Genova & Associates violated the PACA and was the secretary, the treasurer, a director, and a 24 percent shareholder of Tuscany Farms at the time Tuscany Farms violated the PACA. Gencon filed a timely response. While the PACA provides that the license applicant shall be given an opportunity for hearing within 60 days from the date of the license application to show cause why the license should not be refused,[2] the parties agreed to consolidate the Gencon hearing with the other four consolidated cases.

The Chief ALJ conducted a hearing on the five consolidated cases in Santa Ana, California, from September 12-15, 2006. Eric Paul and Jonathan Gordy represented the Associate Deputy Administrator and the Acting Chief. Douglas B. Kerr and Jonathan Barry Sexton represented Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova. The Associate Deputy Administrator and the Acting Chief called seven witnesses. These witnesses were David Studer, the lead Agricultural Marketing Service investigator, and six industry witnesses who testified they had engaged in transactions covered by the PACA with Tuscany Farms and Joe Genova & Associates without receiving full payment promptly. Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova called three witnesses, including Joe A. Genova. The Associate Deputy Administrator and the Acting Chief then called John Koller as a witness concerning what sanctions would be appropriate.

During the hearing, counsel for Nicole Wesner stipulated that she was responsibly connected with Tuscany Farms. (Tr. 689.)

On August 24, 2007, the Chief ALJ issued a Decision addressing the five consolidated cases. In the Decision, the Chief ALJ concluded: (1) Tuscany Farms and Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly for produce it purchased; (2) Nicole Wesner and Joe A.

[2]7 U.S.C. § 499d(d).

Genova were responsibly connected with Tuscany Farms during the time Tuscany Farms violated the PACA; and (3) Gencon failed to show cause why the Secretary of Agriculture should not refuse Gencon a PACA license. On October 26, 2007, Tuscany Farms, Joe Genova & Associates, and Joe A. Genova filed a timely appeal of the Chief ALJ's Decision.[3]

I have carefully reviewed the Chief ALJ's Decision and the filings submitted by all parties. I have read the transcript of all four days of the hearing and examined each document placed into evidence. Based on my review of the record, I find the Chief ALJ's Decision is supported by the evidence and well reasoned. Therefore, I adopt the Chief ALJ's Decision as my own decision in its entirety. I write to address the issues raised on appeal.

## APPEAL ISSUES

In their Appeal Petition, Tuscany Farms, Joe Genova & Associates, and Joe A. Genova raise two issues. First, they argue that no credible evidence was presented to show that Tuscany Farms and Joe Genova & Associates violated the PACA. (Appeal Pet. at 2.) I find this argument without merit. Tuscany Farms and Joe Genova & Associates correctly note that the Associate Deputy Administrator must prove the allegations that Tuscany Farms and Joe Genova & Associates violated the PACA by a "preponderance of the evidence" standard. (Appeal Pet. at 2.)

> **Preponderance of Evidence**. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not. [Citation omitted.] With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.

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[3]Neither Nicole Wesner nor Gencon appealed the Chief ALJ's Decision. Therefore, the Decision of the Chief ALJ, regarding Ms. Wesner and Gencon, is final.

Black's Law Dictionary 1064 (5th ed. 1979). To apply this standard, I balance the weight of the evidence entered into the record by the Associate Deputy Administrator with the weight of the evidence entered by Tuscany Farms and Joe Genova & Associates.

The Associate Deputy Administrator entered evidence into the record demonstrating that Tuscany Farms and Joe Genova & Associates owed significant debt to produce suppliers. This evidence included:

> A list, provided by counsel for Tuscany Farms and Joe Genova & Associates, that identified all of Tuscany Farms' and Joe Genova & Associates' vendors, including the amount of money owed to these vendors by Tuscany Farms and Joe Genova & Associates. (CX 7.)
>
> The accounts payable printout for Tuscany Farms and Joe Genova & Associates. (CX 8-CX 9.)
>
> Copies of invoices and other documents evidencing transactions in produce between Tuscany Farms and three different vendors and between Joe Genova & Associates and nine different vendors. (CX 10-CX 21.)
>
> The testimony of six representatives of produce companies owed money by Tuscany Farms and Joe Genova & Associates. (Tr. 133-250, 307-69, 457-531, 691-721.)

Tuscany Farms and Joe Genova & Associates called two witnesses to testify regarding accounts payable for Tuscany Farms and Joe Genova & Associates. First, Salvatore Mangano, the comptroller at Joe Genova & Associates, testified that, due to a failure in the software program designed to track the finances of Tuscany Farms and Joe Genova & Associates, including the payables and receivable, huge numbers of exception reports[4] were generated that indicated that Tuscany Farms and Joe Genova & Associates owed far less money than alleged.

[4]The exception reports are documents that would list purported adjustments to invoices.

(Tr. 614-15.) However, no such exception reports were provided to the Agricultural Marketing Service investigator. (Tr. 907.) Furthermore, during the hearing, no exception reports or any other documents supporting Mr. Mangano's claim that the amounts owed by Tuscany Farms and Joe Genova & Associates were lower than the amounts shown in invoices and accounts payable statements were offered into evidence by Tuscany Farms or Joe Genova & Associates.

Second, Paul Roper, a business consultant "retained to create reliable data for the financial statements" (Tr. 724), stated that "the raw data from which the accounting firm was trying to prepare financial statements and balance the books was simply incomprehensible." (Tr. 725.) Mr. Roper discussed the existence of exception reports but found that "it wasn't a complete and accurate list." (Tr. 727.) Mr. Roper also indicated that he found the exception reports "unreliable." (Tr. 762-63.) Neither Mr. Mangano nor Mr. Roper testified that produce suppliers were not owed money by Tuscany Farms and Joe Genova & Associates.

Tuscany Farms and Joe Genova & Associates raise three points in arguing their appeal. First, they state that Tuscany Farms and Joe Genova & Associates "had ceased operations before the Government's investigation." (Appeal Pet. at 2.) The cessation of the operation of the two companies before the Agricultural Marketing Service commenced its investigation into the failure of the companies to make full payment promptly for produce, is not relevant to the decision whether the companies violated the PACA. Cessation of operations does not exempt a company from the statutory requirements of the PACA. Furthermore, Tuscany Farms and Joe Genova & Associates' contention that, prior to shutting down, the companies "reached accord and satisfactions on each and every debt" (Appeal Pet. at 3) offers them no solace.[5] An accord is:

> An agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing is entitled to accept.

[5]Tuscany Farms and Joe Genova & Associates' claim that there were "genuine disputes due to discrepancies" in documentation is belied by testimony from their vendors. *See, e.g.*, testimony of Lawrence Heidecker (Tr. 475).

Black's Law Dictionary 16 (5th ed. 1979). I have long held, even though the creditor is willing to accept less than owed from a debtor, such an agreement does not meet the requirements of full payment promptly under the PACA. *See In re Kanowitz Fruit and Produce Co.*, 56 Agric. Dec. 917, 928 n.7 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999).)

Tuscany Farms and Joe Genova & Associates' second point is that "Government witness testimony was unreliable." (Appeal Pet. at 4.) I read the entire hearing transcript and examined each document in relation to the testimony concerning that document. The testimony of Tuscany Farms and Joe Genova & Associates' witnesses, Mr. Mangano and Mr. Roper, showed a dysfunctional, poorly run company. I found the testimony of Joe A. Genova to be very evasive and unreliable. Based on my review of the transcript and exhibits, I find the testimony of the government witnesses to be reliable. Therefore, I relied on the testimony of the government witnesses significantly more than Tuscany Farms and Joe Genova & Associates' witnesses.

Tuscany Farms and Joe Genova & Associates' final point was that "[t]he evidence collected by the Government was incomplete." (Appeal Pet. at 7.) The Agricultural Marketing Service could only collect documents to which it was given access. Tuscany Farms and Joe Genova & Associates are more likely to have documents to support their position than the government. The Associate Deputy Administrator presented his case using invoices and testimony of creditors to make a prima facie case. Tuscany Farms and Joe Genova & Associates then had the opportunity to rebut the prima facie case with their own evidence. Here the rebuttal evidence could have been the exception reports mentioned above, credit memoranda, or any other evidence demonstrating Tuscany Farms and Joe Genova & Associates owed no money to their produce suppliers. Tuscany Farms and Joe Genova & Associates failed to present any such evidence.

Balancing the evidence in the record, both testimony and documents, and taking into account the claims that some evidence was not accurate, the weight of the evidence causes me conclude that it is more probable than not that Tuscany Farms and Joe Genova & Associates failed to make full payment promptly to companies that sold them perishable

agricultural commodities. Therefore, I conclude that Tuscany Farms and Joe Genova & Associates each violated the PACA.

I deny the appeal, and I find that, during the period August 2002 through November 2002, Tuscany Farms willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of $336,200.76 for 65 lots of perishable agricultural commodities which Tuscany Farms purchased, received, and accepted in interstate commerce. I further find that, during the period February 2002 through November 2002, Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of $315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce.

The second issue raised on appeal is whether Joe A. Genova was responsibly connected with Tuscany Farms during the time when Tuscany Farms committed willful, flagrant, and repeated violations of the PACA. The Chief ALJ found that Mr. Genova was responsibly connected and I agree. Mr. Genova's arguments on appeal raise no issues that were not addressed by the Chief ALJ. As I stated above, I adopt the Chief ALJ's well-reasoned decision as my own. However, I take a moment to discuss the concept of responsibly connected and the standard applied for making the determination whether an individual is responsibly connected with a company that violated the PACA.

The PACA imposes licensing and employment restrictions on any person found to be responsibly connected with a licensee who violated the PACA. (7 U.S.C. §§ 499d(b), 499h(b).) "The term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (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).)

In 1995, Congress amended the definition of "responsibly connected." (Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 424.) The amendment now gives an individual who is found to be responsibly connected the

opportunity to demonstrate that he is "not responsible" for the violation of the PACA. (H. R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.)

> 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 reviewed my first application of the revised definition. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), *final decision on remand*, 58 Agric. Dec. 604 (1999). The Court articulated the test for determining if an individual is responsibly connected. First, the United States Department of Agriculture makes an initial determination whether the individual is "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).) The evidence in the record amply supports a finding that Mr. Genova was an officer and holder of 24 percent of the outstanding stock of Tuscany Farms.

Next, the Court held, if the individual fits the statutory 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 a violation of the PACA and that the individual was a nominal officer, nominal director, and nominal shareholder of the violating company. In the alternative to proving that the individual was only a nominal officer, nominal director, and nominal shareholder of the violating company, 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.

In the *Norinsberg* remand decision, I presented 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. 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.

*In re: Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999).

Applying this standard to Joe A. Genova, he is responsibly connected with Tuscany Farms and subject to the licensing and employment restrictions, unless he demonstrates by a preponderance of the evidence that: (1) he was not actively involved in any of the activities resulting in Tuscany Farms' PACA violations; and (2) he was either a nominal shareholder and nominal officer of Tuscany Farms or he was not an owner of Tuscany Farms which was the alter ego of its owners.[6]

The Chief ALJ's discussion of prong one, the actively involved test, is complete and needs no expansion. I only add that Mr. Genova's claims of ignorance of, and lack of involvement with, the operations of Tuscany Farms are significantly discounted because his testimony lacked credibility.

"In order to prove that one was only a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company[.]'" *Hart v. Department of Agric.*, 112 F.3d 1228,

[6]The two prongs of the test are joined by the conjunctive "and." If Joe A. Genova fails to show that he was not actively involved, he cannot meet his burden and he will be deemed responsibly connected. Equally so, if his ownership interest and his position as corporate officer are not nominal, even if he could prove that he was not actively involved, he would fail the statutory test and be deemed responsibly connected with Tuscany Farms.

1231 (D.C. Cir. 1997), quoting *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983). It is important to note that under the PACA, no court has found an individual who owns more than 10 percent of a violating company to be a "nominal" shareholder. In fact, the United States Court of Appeals for the District of Columbia Circuit noted that for such substantial shareholders, "the likelihood of their being found 'nominal' was remote." *Bell v. Department of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994). I agree with the United States Court of Appeals for the District of Columbia Circuit and hold that under the PACA, absent rare and extraordinary circumstances, ownership of more than 10 percent of the outstanding shares of a licensed entity preclude a finding that the holder of that substantial of an interest in the PACA licensee is a nominal shareholder.

Joe A. Genova owned 24 percent of Tuscany Farms.[7] There is no dispute about that. Therefore, as the owner of more than 10 percent of the outstanding stock of Tuscany Farms, a company that willfully, flagrantly, and repeatedly violated the PACA, Joe A. Genova is responsibly connected with Tuscany Farms and subject to the licensing and employment restrictions under the PACA.

## CONCLUSIONS

1. During the period August 2002 through November 2002, Tuscany Farms willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of $336,200.76 for 65 lots of perishable agricultural commodities which Tuscany Farms purchased, received, and accepted in interstate commerce. The appropriate sanction for Tuscany Farms, since it is no longer in business, is publication of the facts and circumstances of its violations.

2. During the period February 2002 through November 2002, Joe Genova & Associates willfully, flagrantly, and repeatedly violated the

[7]This ownership interest bars Mr. Genova from utilizing the "alter ego" defense. I have consistently held that the "alter ego" defense is not available to individuals who have an ownership interest in the violating company. *See In re: Benjamin Sudano and Brian Sudano*, 63 Agric. Dec 388, 411 n.5 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005).

PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of $315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce. The appropriate sanction for Joe Genova & Associates, since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Joe A. Genova was responsibly connected with Tuscany Farms during the time Tuscany Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

## ORDER

1. Tuscany Farms 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 the violations committed by Tuscany Farms shall be published, effective 60 days after service of this Order on Tuscany Farms.

2. Joe Genova & Associates 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 the violations committed by Joe Genova & Associates shall be published, effective 60 days after service of this Order on Joe Genova & Associates.

3. I affirm the Acting Chief's January 12, 2006, determination that Joe A. Genova was responsibly connected with Tuscany Farms during the time Tuscany Farms willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Joe A. Genova 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 Joe A. Genova.

## RIGHT TO JUDICIAL REVIEW

Tuscany Farms, Joe Genova & Associates, and Joe A. Genova have

the right to seek judicial review of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Tuscany Farms, Joe Genova & Associates, and Joe A. Genova must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova.[8] The date of entry of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova is October 15, 2008.

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[8]28 U.S.C. § 2344.

**PERISHABLE AGRICULTURE COMMODITIES ACT**

**REPARATIONS**

**DEPARTMENTAL DECISIONS**

**EVANS SALES, INC. D/B/A HORIZON MARKETING, INC. v. WEST COAST DISTRIBUTING, INC.**
**PACA R-04-070.**
**Decision and Order.**
**Filed June 3, 2008.**

**Proof, Burden of**
Complainant, who submitted invoices for grapes from Complainant to Respondent, corresponding bills of lading, and corresponding work orders for 30 grape transactions occurring between August 20, 2002 and November 26, 2002, as *prima facie* evidence of a sale between Complainant and Respondent as to the 30 grape transactions, failed to rebut evidence from Respondent that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full. Accordingly, Complainant did not meet its burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract.

**Proof, Burden of-**
Respondent, who provided evidence from the informal and formal stages of the proceeding that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full, met its burden of establishing through a preponderance of the evidence an affirmative defense to Complainant's claims that it was owed money from Respondent for the 30 transactions.

**Evidence-**
Invoices, in and of themselves, are not conclusive evidence of existence of a contract or sale, particularly where Respondent has provided evidence that no sale existed, and Complainant has failed to rebut Respondent's evidence.

**Evidence-**
Where Respondent failed to object to invoices sent by Complainant and received in the normal course of business, Respondent provided a credible explanation for its lack of

objection and provided evidence that the sale did not take place, the failure of Respondent to object to the invoices did not create a sale between Complainant and Respondent.

**Fees, Attorney's-**
Where Respondent's attorney made a claim for fees and expenses relating to travel to the hearing in California from New Jersey, the state where the attorney's office is located, and back, fees for time spent on travel were disallowed.

**Fees, Attorney's-** Where Respondent's attorney made a claim for fees and expenses relating to travel within the state of California during the hearing for the purpose of interviewing witnesses scheduled to testify at hearing the following day, fees for time spent on travel were disallowed.

**Fees, Attorney's-**
Where Respondent's attorney made a claim for fees and expenses relating to time spent preparing a post trial brief, fees for time spent in preparation of the brief were disallowed as they were not in connection with the oral hearing, and would have been incurred had the case been decided by documentary procedure.

**Fees, Attorney's-**
Fees and expenses of Respondent's non-attorney representative who appeared as a voluntary witness at hearing were reasonable and allowed.

**Fees, Attorney's-**
Fees and expenses of an attorney who appeared voluntarily as a personal attorney of certain of Respondent's witnesses, and who served no real purpose at hearing other than to protect the personal interests of his clients, were not reasonable, and therefore disallowed.

**SYLLABUS:**

Complainant provided at hearing, as evidence of a sale by Complainant to Respondent, invoices for grapes from Complainant to Respondent, corresponding bills of lading, and corresponding work orders for 30 grape transactions occurring between August 20, 2002 and November 26, 2002. Complainant argued that this was *prima facie* evidence of a sale between Complainant and Respondent as to the 30 grape transactions, and *prima facie* evidence that Respondent owed Complainant for the 30 transactions. Respondent argued, *inter alia*, that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent had already paid the actual grower and rightful owner of the grapes identified in each transaction, in full. Based on the aggregate of evidence in the case, including evidence from the informal and formal stages of the proceeding, and the testimony of all witnesses who testified at hearing, Complainant failed to meet the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a

contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. Respondent met its burden to prove its claim that payment in full for the grape transactions identified in the Complaint was made to the grower and owner of the grapes. Attorney's fees and expenses were awarded to Respondent as the prevailing party to the extent that they were reasonable.

Christopher Young-Morales, Presiding Officer
Complainant, *Thomas R. Oliveri*
Respondent, *Mark C.H. Mandell*
*Decision and Order issued by William G. Jenson, Judicial Officer*

## Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. ¶ 499a et seq.) (hereinafter, "PACA"). A timely Complaint was filed with the Department on January 19, 2004, in which Complainant sought a reparation award against Respondent in the amount of $103,693.57, which was alleged to be past due and owing in connection with thirty (30) shipments[1] of grapes sold to Respondent in the course of interstate commerce.

A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability and requesting an oral hearing.

An oral hearing was held in Bakersfield, California, on February 23-25, 2007. At the hearing, Complainant was represented by Thomas R. Oliveri, of the Western Growers Association in Irvine, California. Respondent was represented by Mark C.H. Mandell, Esq., of the law office of Mark C.H. Mandell in Annandale, New Jersey. Christopher Young-Morales, Esq., Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. Complainant submitted thirty-two exhibits into evidence, CX 1,a,b through CX 30,a,b and CX

[1] We note that the Formal Complaint references 31 shipments of grapes; however, this is an error. Complainant tallied up the shipments incorrectly when it attached its exhibits to the Complaint. The correct number of shipments is 30.

31. Respondent submitted twelve exhibits into evidence, RX A-L. Additional evidence is contained in the Department's Report of Investigation (hereinafter, "ROI").

At the hearing, two witnesses testified for Complainant and six witnesses testified for Respondent. A transcript of the hearing was prepared (hereinafter, "Tr."). The parties filed post-hearing briefs and responses to the briefs. The parties also filed claims for fees and expenses, and objections to the claims.

**Findings of Fact**

1. Complainant, Evans Sales, Inc., d/b/a Horizon Marketing Corporation (hereinafter "Horizon"), is a corporation whose business mailing address is or was P.O. Box 2738, Visalia, California 93279. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.[2] (*See* Complaint).

2. Respondent, West Coast Distributing, Inc. (hereinafter "West Coast"), is a corporation whose business address is 350 Main Street and whose business mailing address is P.O. Box 847974, Boston, Massachusetts 02284-7974.[3] At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA. (Tr. II, p. 376; *See* Answer, CX 1-30).

3. Horizon created invoices, dated between August 17, 2002, and November 23, 2002, reflecting the sale of numerous lots of various types of grapes to West Coast. Each invoice states that the various lots of grapes were shipped from Terra Bella, California, to various destinations on an FOB basis. (CX 1-30). Horizon Marketing owned and ran a cold

[2] Norm Evans signed the Formal Complaint as an owner of Complainant; however, he was not listed on the 2002 PACA license. The PACA license for the year 2002 indicates that Sara Evans and June Anderson are owners and officers of Complainant. (Tr I, p.113). Testimony at hearing indicated that Sara Evans was president of Horizon Marketing in name only, and that she had no knowledge of Horizon's business. For all practical purposes, Norm Evans ran Horizon. (Tr. II, p. 318, 320).

[3] West Coast also has an office in Bakersfield, California, that dealt with Horizon. (Tr. I, p. 72; Tr. II, p. 360, 376).

storage facility in Terra Bella. (Tr. II, p. 582).

4. Each Horizon invoice has an accompanying bill of lading. The "letterhead" of Marroking Sales, 17802 Ave 56, Earlimart, California, appears at the top of each bill of lading. The bills of lading list Horizon as the grower and West Coast as the buyer. Each bill of lading contains a description of the grapes being shipped, and next to each description there appears the notation "AMC". (CX 1a- 30a).

5. During the period indicated by the dates shown on the invoices and bills of lading in CX 1 through CX 30, between August 2002 and November 2002, Amanda Marroquin was the sole owner of AMC Produce sales, located in Earlimart, California. (Tr. I, p. 229-30, Tr. III, p. 406, 431, 505).

6. During the period indicated by the dates listed on the invoices and bills of lading, *i.e.,* between August 2002 and November 2002, Amanda Marroquin of AMC Produce Sales and West Coast were the sole parties to a "Produce Distributing Agreement" for grapes grown by AMC Produce Sales, located in Earlimart, California. (Tr. I, p. 229-30, Tr. III, p. 406, 431).

7. The grapes covered in the agreement between Amanda Marroquin and West Coast were to be grown exclusively on a ranch owned by Lawrence Chroman, called the "Chroman" or "Sunrise" ranch. (Tr. II, p. 229-231, Tr. II, p. 505-509, 522-3; RX A, RX C).

8. During the period indicated by the dates listed on the invoices and bills of lading, i.e., between August 2002 and November 2002, Gilbert Marroquin, Amanda Marroquin's father, was a grower of grapes who owned two grape ranches, "Globe King" and "El Shaddai". (Tr. II, p. 435, 571-72).

9. Gilbert Marroquin also owned and ran the Marroking Sales cold storage facility, the "cooler", in Earlimart, CA, where grapes harvested from "Globe King", "El Shaddai", and "Sunshine Ranch" were stored and packed for sale and distribution. (Tr. II, p. 511, 515). All "AMC" grapes went exclusively through the Marroking Sales cooler in Earlimart. (Tr. I, p. 94-98, 186-7, Tr. II, p. 511-517, 574; CX1a-30a).

10. Horizon was involved in running the Marroking Sales Cooler in Earlimart. (Tr. II, p. 464, 466, 511-515, 589, Tr. III, p. 715; CX1a,b-

CX30a,b).

11. All of the subject transactions listed in the Complaint (CX1-30) were processed through the Marroking Cooler in Earlimart. (Tr. I, p. 65).

12. Gilbert Marroquin filed for Chapter 11 Bankruptcy on November 20, 2000. On March 7, 2002, the United States Bankruptcy Court for the Eastern District of California, Fresno Division, issued an Order whereby Gilbert Marroquin was authorized to borrow up to $350,000.00 from Horizon, "which loan shall be secured by a crop lien on the 2002 crop to be grown on the real property" owned by Gilbert Marroquin. This real property consisted of the "Globe King" and "El Shaddai" grape ranches owned by Gilbert Marroquin, and the crop lien was for crops grown exclusively on those ranches. (RX-H1).

13. Based on the Order issued by the Bankruptcy Court, Horizon loaned Gilbert Marroquin $350,000 for a "crop loan". Horizon also made an agreement to "purchase" grapes in 2002 grown by Gilbert Marroquin, on his ranches, for a total price of $1,009,281.13.[4] (RX H1). This agreement was made between Horizon and Gilbert Marroquin, and provided that Horizon would deduct from the purchase price "cultural advances" made to Gilbert Marroquin by Horizon. (RX H1).

14. At the time that the crop loan and agreement to purchase was made, Horizon and Gilbert Marroquin entered into a Marketing Agreement, whereby the parties agreed that Horizon would market and ship all of Gilbert Marroquin's grapes delivered to the Marroking Sales cold storage facility during the 2002 season. (Tr. I, p. 88, 123-4, 141, 186, Tr. II, p. 590; RX H3).

15. On February 12, 2003, a Motion for Payment of Administrative Claims was made by Horizon in the bankruptcy case for amounts unpaid by Gilbert Marroquin of the $350,000.00 crop loan and the $1,009,281.13 grape purchase. (Tr. I, p. 141-2, 186; RX H1). A Declaration in support of the administrative claim was made by June Anderson, Horizon's controller. (RX H2). An accounting for the

[4] This amount was later revised to $880,934.91, after adjustments were made for condition problems. (RX H2, p. 4).

$350,000.00 crop loan[5] and for the purchases pursuant to the purchasing agreement were included in support of the Declaration. The accounting sets forth all transactions associated with Horizons purchase of Gilbert Marroquin's 2002 grape crop. (Tr. I, p. 145-7, 164-8, 172; RX H2).

16. In 2003, Horizon settled all amounts owed to it by Gilbert Marroquin, and Norm Evans of Horizon signed a general release of any and all claims against Gilbert Marroquin. The release included any and all current and future claims against Amanda Marroquin/AMC Produce. This document was filed with the Bankruptcy Court. (Tr. I, p. 197, 200, Tr. II, 438-445; RX J).

17. During the period indicated by the dates listed on the invoices and bills of lading, i.e., between August 2002 and November 2002, no agreement for purchase of grapes existed between Horizon and Amanda Marroquin. (Tr. I, p. 89, 124).[6]

18. Although Horizon Marketing asserted that during the period indicated by the dates listed on the invoices and bills of lading, it only engaged in "f.o.b." and "delivered" sales transactions (Tr. I, p. 29; Report of Investigation (ROI) EX 13), several transactions that are the subject of this reparation are neither "f.o.b." nor "delivered"; specifically, nine out of the thirty subject transactions are price after sale transactions (PAS). (Tr.I, p. 91, 204, 210; CX18, 19, 20, 22, 23, 24, 28, 29, 30).

19. During the period indicated by the dates listed on the invoices and bills of lading, West Coast did business with Horizon, and purchased numerous loads of produce from Horizon (other than the loads that are the subject of this reparation), including at least two grape orders, and

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[5] We note that the accounting consisted of fifteen checks totaling $350,728.00 made payable to AMC Produce Sales, the company owned by Amanda Marroquin, and not to Gilbert Marroquin. (RX H2). No explanation of this discrepancy was specifically provided by Complainant; however, Norm Evans did testify that he believed Gilbert Marroquin owned or was involved in running AMC Produce Sales. (*See infra* at 8-9).

[6] There is evidence, however, that some form of agreement existed between Amanda Marroquin and Norm Evans/Horizon to operate the Marroking cooler owned by Gilbert Marroquin. (Tr. II, p. 464, 466, 511-515, 589; CX1a,b through CX30a,b).

West Coast paid in full for each of those loads. (Tr. I., p. 131-138, Tr. I, p. 215; RXG).

20. Norm Evans of Horizon called West Coast in early 2003 and complained that the invoices in CX 1-30 had not yet been paid. He was told by a representative of West Coast that they did not owe Horizon for the invoices because they had already paid the "grower", AMC Produce Sales, in full, for the invoices contained in CX 1-30. (Tr. I, p. 72-74, 214).

21. By checks dated May 23, 2002, July 2, 2002, and June 11, 2003, West Coast paid AMC Produce Sales $100,948.11 for purchases and cultural advances that were made or to be made pursuant to the Produce Distributing Agreement between Amanda Marroquin (AMC Produce Sales) and West Coast. (Tr. II, p. 506-7, p. 522, p. 530; RXA, RX E).

**Conclusions**

Complainant alleges that Respondent is liable in the amount of $103,693.57, which was alleged to be past due and owing in connection with thirty (30) shipments of grapes sold to Respondent in the course of interstate commerce. Norm Evans of Complainant described the purchase process as to the 30 shipments during his testimony at hearing. Norm Evans was the head salesman at Horizon. (Tr. I, p. 18). Chris Tantau and Mike Crookshanks were also salesmen employed by Horizon. (Tr. I, p. 175-6, 179). According to Norm Evans, Mike Crookshanks[7] did "most" of the sales to West Coast during the dates indicated on the invoices for the 30 shipments, but during that period, all Horizon salesmen dealt with West Coast in some fashion. (Tr. I, p. 176, 180). Jeff Case of West Coast in Bakersfield, CA, did the majority of the purchasing between West Coast and Horizon. (Tr. I, p. 19-20).

Norm Evans stated at hearing that as to each of the thirty shipments, Jeff Case, or another representative from West Coast, would agree to an amount to be paid for each commodity based on discussions between the

[7] We note that while Norm Evans stated that Mike Crookshanks did most of the business with West Coast, Mr. Crookshanks did not appear as a witness at the hearing, and Mr. Evans claimed that for many of the transactions in CX 1- CX 30, Mr. Evans himself was the salesman.

representative from West Coast in Bakersfield and a salesman at Horizon in Visalia, CA. (Tr. I, p. 22, 23-24). The agreement for each transaction, according to Mr. Evans, was "f.o.b."[8]. (Tr. I, p. 21; CX-1-30; ROI, EX 13). Mr. Evans stated that the West Coast representative, for each transaction, would also agree by phone when the price of the commodity was agreed upon to a $1.85 charge for pre-cooling and palletization. (Tr. I, p. 21).

According to Mr. Evans, once the agreement was made by phone between Horizon and West Coast for an order, a work order would be generated by Horizon, which would be sent by fax to the Marroking Cooler in Earlimart, CA. The Marroking cooler would create a bill of lading and fill the order. The Marroking cooler would fax the bill of lading to Horizon as evidence that the order had been filled. Horizon would then forward the bill of lading to West Coast in Bakersfield to confirm that the shipment had been made and to confirm the price. (Tr. I, p. 23). The work order and bill of lading would then be given to Horizon's accounting department to generate an invoice. (Tr. I. p. 62). Mr. Evans stated that he invoiced West Coast for the 30 transactions in this case, because he was entitled to the proceeds from the grapes from the Marroking cooler. (Tr. I, p. 73-79, 87). Mr. Evans stated that he had an agreement with Gilbert Marroquin, whereby Mr. Evans/Horizon would loan Gilbert Marroquin money, and then Gilbert Marroquin would "pay down" the loan with advances of grapes. (Tr. I, p. 73-79). Mr. Evans stated that "AMC" Produce Sales was cc'd on each bill of lading, and that "Marroking", "AMC", and "Gilbert" appear written on the bills of lading because Mr. Evans believed that Gilbert owned both

[8] The regulations (7 C.F.R. § 46.43 (I)), in relevant part, define F.O.B. as meaning " that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the...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". *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991). In this case, Norm Evans stated at hearing that West Coast would arrange for transportation for the grapes, pick them up and load them, and that at that point, the grapes belonged to West Coast and Horizon had no more dealings with them on that transaction, other than to request payment at a later date. (Tr. I, p. 28-29)

Marroking Sales and AMC Produce Sales[9]. (Tr. I, p. 73-79, 87). Mr. Evans also stated that the AMC label was one of the labels used by Gilbert Marroquin. (Tr. I, p. 94-95).

Complainant claims that the issue in this case is a simple one: Complainant Horizon provided at hearing as evidence the invoices to Respondent West Coast, the corresponding bills of lading, and the corresponding work orders for 30 transactions occurring between August 20, 2002 and November 26, 2002. Therefore, Complainant argues, Respondent owes Complainant for the invoices that are the subject of this proceeding.

Respondent argues, *inter alia*, that Complainant did not own or have any rights to the grapes that make up the 30 transactions in this proceeding, and that West Coast has already paid the grower and rightful owner of the grapes identified in each transaction, Amanda Marroquin/AMC Produce Sales, in full.

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. *Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc*. 47 Agric. Dec. 581 (1988). *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533 (1975). In this case, based on the aggregate of evidence adduced at hearing, we find that Complainant has not met its burden.

Complainant argues, in its brief, that the invoices in CX1-30, on their face, are in essence *prima facie* evidence that the grapes identified in each transaction were sold to Respondent, and that Respondent therefore owes Complainant for the grapes identified in the invoices.

However, various factors may be considered when assessing the credibility of a party's allegations, *(R.L. Burden Produce Services v. Taylor Produce,* 50 Agric. Dec. 1009 (1991)), and on their face, each invoice contains information that cannot be reconciled with Norm Evans' own testimony at hearing, or with information provided in the

[9] Mr. Evans stated that the name "Mandy" appeared on many of the bills of lading for the 30 transactions, and that this notation was to Amanda Marroquin. Mr. Evans stated that her name appeared on many of the bills of lading because she worked in the sales office of Marroking Sales. (Tr. I, p. 86).

informal stages of this proceeding.

Every invoice clearly states that Norm Evans was the salesman for the transaction (CX1-CX30), but at hearing, Mr. Evans testified that this was not the case. (Mr. Evans stated at one point during the hearing that he was the salesman in every transaction, then later said that he was not)(Tr. I, p. 115, 118)). In the transactions for which Norm Evans was not the salesman, he could not say who the salesman was, or provide any other information about the sale. (Tr. I, p. 139).

Further, every invoice states that the grapes were sold f.o.b. (CX1-CX30). Norm Evans testified that all of the subject transactions were f.o.b. (Tr. I, p. 21, 29). Mr. Evans also testified that Horizon only does two types of sales: f.o.b. and delivered. (Tr. I, p. 29). Mr. Evans specifically stated by letter submitted in the informal stage of this proceeding that all of the subject transactions were f.o.b. (ROI, EX13[10]). However, as is clearly "written in" on the face of many of the invoices, and stated on many of the bills of lading in this case, several of the subject transactions were sold price after sale (PAS). At hearing, Norm Evans could not remember the specific PAS transactions. (Tr. I, p. 92). Mr. Evans stated that if the transactions were PAS, West Coast would have provided Horizon with an accounting, yet no such accounting was provided as evidence at any stage of the proceeding, and Mr. Evans could provide no explanation as to why Horizon had no accounting for the transactions. Finally, all invoices state that the product was shipped from Terra Bella, CA, yet all of the corresponding bills of lading indicate that the product contained on the invoice was shipped from the Marroking cooler in Earlimart, CA[11]. (CX1a-CX30a). Thus, Mr. Evans testimony is inconsistent with Complainant's own evidence.

Other evidence, provided by Respondent at hearing, calls into

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[10] Unsworn evidence may be treated as evidentiary pursuant to 7 C.F.R. § 47.7 if contained within the Department Report of Investigation. *Tanita Farms, Inc. v. City Wide Distributors, Inc*., 44 Agric. Dec. 1738 (1985).

[11] Mr. Evans stated at hearing that this was merely a computer error. (Tr. I, p. 26).

question whether the transactions in this proceeding were "simple" f.o.b sales between Complainant Horizon and Respondent West Coast. As noted *supra*, Respondent claimed that it has already paid in full for the transactions identified in the Complaint, and that payment was made to Amanda Marroquin/AMC Sales pursuant to the Produce Distributing Agreement between AMC and Respondent. (Tr. II, p. 506-7, p. 522, p. 530; RXA, RX E).

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co*., 46 Agric. Dec 893 (1987). The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). In this case, Respondent has met its burden to prove its claim that payment in full for the transactions identified in the Complaint was made to Amanda Marroquin/AMC Sales pursuant to the Produce Distributing Agreement between AMC and Respondent.

During the period indicated by the dates listed on the invoices and bills of lading, between August 2002 and November 2002, Amanda Marroquin of AMC Produce Sales and West Coast were the sole parties to a "Produce Distributing Agreement" for grapes grown by AMC Produce Sales located in Earlimart, California. (Tr. I, p. 229-30, Tr. III, p. 406, 431). By checks dated May 23, 2002, July 2, 2002, and June 11, 2003, West Coast paid AMC Produce Sales $100,948.11 for purchases and cultural advances that were made or to be made pursuant to the Produce Distributing Agreement between Amanda Marroquin (AMC Produce Sales) and West Coast. (Tr. II, p. 506-7, p. 522, p. 530; RXA, RX E).

Benjamin Foss, the controller of West Coast in Massachusetts at the time of the hearing and at the time of the subject transactions, testified at hearing that he had personal knowledge of the transactions in this case, and of the Produce Distributing Agreement between Amanda Marroquin/AMC Produce Sales. He stated that (presumably at the time of the agreement), he discussed the agreement with Jeff Case, a salesman with West Coast (Tr. II, p. 635-642), and that in the "latter stages" of the agreement, Mr. Foss conducted a full audit of the transactions between West Coast and AMC Produce Sales and generated

accountings to AMC. (Tr. II, p. 325-345).

Mr. Foss stated that an "advance" of $100,000.00 dollars was made to AMC Produce Sales pursuant to the Produce Distributing Agreement. (Tr. II, p. 325-345). Mr. Foss also stated that during the life of the agreement, 44 transactions, which included the 30 transactions that are the subject of this proceeding, occurred between West Coast and AMC, and that the amounts of each of the 44 transactions were then "credited" against the amount that had been originally advanced. (Tr. II, p. 335-337;RXD, RXE, RXF). After the amounts in the 44 transactions had been "credited" against the amount advanced to AMC pursuant to the agreement, West Coast remitted a final check to AMC in the amount of $948.11. (Tr. II, p. 325-345; RX D, RXE, RXF). Mr. Foss stated that once the demand for payment by Complainant was made (several months after the transactions in CX 1 through CX 30 took place), he conducted a personal review of all files and accountings between West Coast and AMC, and discussed the issue with the accounts payable staff at West Coast and with Jeff Case. (Tr. II, p. 385-391). Based on his review and discussions, Mr. Foss determined that the transactions claimed as outstanding and upaid by Complainant[12] were transactions West Coast considered to be contained within the agreement between West Coast and AMC, and that West Coast had already paid AMC for the transactions. (Tr. II, p. 340 357-362, 364, 387-391; RX D, RX E, RX F).

Mr. Foss also testified that during the period indicated by the dates listed on the invoices and bills of lading in CX1-CX30, between August 2002 and November 2002, West Coast did business with Horizon, purchased numerous loads of produce from Horizon (other than the loads that are the subject of this reparation), including at least two grape orders, and West Coast paid in full for each of those loads. (Tr. II, p.

[12] While Mr. Foss stated that the work orders and bills of lading (which notably stated "AMC" and "Marroking" on their face) were received by Respondent at the time each transaction occurred (RX F 1-44), he stated that the invoices submitted as evidence by Complainant as CX 1- CX 30)(which notably did not state "AMC" or "Marroking" anywhere on their face), were not received until after the Complaint was made in this case. (Tr. II, p. 383-5).

369-381; RXG). Norm Evans of Horizon acknowledges this fact. (Tr. I., p. 131-138, Tr. I, p. 215). Respondent provided evidence of roughly 63 transactions of various perishable agricultural commodities that were purchased by West Coast from Horizon during roughly the same time period as the transactions shown in CX1-30 (the subject of the proceeding), and were paid for in full by West Coast to Horizon. (RXG[13]).

We note that the two grape orders purchased by West Coast from Horizon during this period were paid for in full, and that the grape orders that were paid for did not go through the Marroking cooler, but rather through Norm Evans/Horizon cooler in Exeter, CA. (Tr. I, p. 215, RX K, RX L). We also note that of the 44 transactions that were paid for by West Coast to Amanda Marroquin/AMC Produce Sales, many produced negative returns. (Tr. II, p. 394; RX D). Respondent urges us to find that Complainant engaged in some form of fraud in "cherrypicking" the transactions that produced positive returns and creating false invoices to support Complainant's false claim. (Respondent points out that such fraud would be possible, because Horizon was involved in running the Marroking cooler, and Horizon saw, at the time they were generated, all of the bills of ladingB which included prices agreed onB created in the transactions between AMC and West Coast). We agree that Horizon and Norm Evans were involved in some fashion in the Marroking cooler, and that Horizon and Norm Evans viewed much of the "paperwork" on orders that came through the Marroking cooler. We also agree that it is interesting that the transactions in CX1-CX30 are contained within the 44 transactions paid for by West Coast to AMC, and that all of the 30 transactions claimed by Complainant as owed coincidentally produced positive returns. However, we decline to conclude that fraud on the part of Complainant was involved in this case (we find it more likely that Complainant's claim was a result of confusion caused by the agreements reached between Gilbert Marroquin and Horizon and Horizon's

[13] We note that the last check for these transactions was paid to Horizon on June 11, 2003, the same date as the last "disbursement" check paid to AMC Produce. (Tr. II, p. 381).

involvement in both the Marroking cooler and AMC Produce). *See infra*. Respondent called Amanda Marroquin, the owner of AMC (Tr. II, p. 406, 431), as a witness at the hearing. Ms. Marroquin testified that AMC and West Coast entered into a Produce Distributing Agreement for grapes grown by AMC during the 2002 season. (Tr. II, p. 503; RX A). Ms. Marroquin also testified that the grapes identified in the agreement were to be grown on Lawrence Chroman's ranch, also called the "Sunrise" ranch. (Tr. II, p. 503-4, 522). Ms. Marroquin stated that pursuant to the agreement, West Coast made advances to AMC for 2002 grapes, and that AMC "consigned" the grapes to West Coast for sale. Ms. Marroquin stated that she was paid in full by West Coast pursuant to the agreement, and that the payment consisted of the three checks paid to AMC on May 23, 2002, July 2, 2002, and June 11, 2003, totaling $100,948.11. (Tr. II, p. 505-510, 522, 530; RX E). Ms. Marroquin also stated that she and AMC had a verbal agreement with Norm Evans and Horizon to run the Marroking cooler, which was owned by her father, Gilbert Marroquin. (Tr. II, p. 512, 542-3, 550).

Respondent called Merl Ledford, an attorney who represented both Amanda Marroquin and Gilbert Marroquin in 2002 and 2003 (Tr. III, p. 430-436), as a witness to testify at hearing. Mr. Ledford testified that during the period indicated by the dates listed on the invoices and bills of lading in CX 1 through CX 30, between August 2002 and November 2002, Amanda Marroquin of AMC Produce Sales and West Coast were the sole parties to a "Produce Distributing Agreement" for grapes grown by AMC Produce Sales located in Earlimart, California. (Tr. III, p. 431, RX A). Mr. Ledford also testified that during that same period, Gilbert Marroquin, Amanda Marroquin's father, was a grower of grapes who owned two grape ranches, "Globe King" and "El Shaddai". (Tr. II, p. 435). Mr. Ledford stated that Gilbert Marroquin also owned and ran the Marroking Sales cold storage facility, the "cooler", in Earlimart, CA, where harvested grapes were stored and packed for sale and distribution. (Tr. II, p. 463-467).

Mr. Ledford testified that Norm Evans and Horizon were involved in running the Marroking Sales Cooler in Earlimart. Tr. II, p. 464, 466. Mr. Ledford also testified that Gilbert Marroquin filed for Chapter 11

Bankruptcy on November 20, 2000.

On March 7, 2002, the United States Bankruptcy Court for the Eastern District of California, Fresno Division, issued an Order whereby Gilbert Marroquin was authorized to borrow up to $350,000.00 from Horizon, "which loan shall be secured by a crop lien on the 2002 crop to be grown on the real property" owned by Gilbert Marroquin. This real property consisted of the "Globe King" and "El Shaddai" grape ranches owned by Gilbert Marroquin, and the crop lien was for crops grown exclusively on those ranches. (Tr. II, p. 439-470; RX-H1,RX-H2, RX-H 4, RX I, RX J). Based on the Order issued by the Bankruptcy Court, Horizon loaned Gilbert Marroquin $350,000 for a "crop loan". Horizon also made an agreement to "purchase" grapes in 2002 grown by Gilbert Marroquin, on his ranches, for a total price of $1,009,281.13.[14] This agreement was made between Horizon and Gilbert Marroquin, and provided that Horizon would deduct from the purchase price "cultural advances" made to Gilbert Marroquin by Horizon. (Tr. II, p. 439-470; RX-H1,RX-H2, RX-H 4, RX I, RX J).

Mr. Ledford testified that at the time that the crop loan and agreement to purchase was made, Horizon and Gilbert Marroquin entered into a Marketing Agreement, whereby the parties agreed that Horizon would market and ship all of Gilbert Marroquin's grapes delivered to the Marroking Sales cold storage facility during the 2002 season. (Tr. II, p. 453-457, 466-467; RX H3).

Mr. Ledford also testified that on February 12, 2003, a Motion for Payment of Administrative Claims was made by Horizon in the bankruptcy case for unpaid amounts by Gilbert Marroquin of the $350,000.00 crop loan and the $1,009,281.13 grape purchase. A Declaration in support of the administrative claim was made by June Anderson, Horizon's controller. An accounting for the $350,000.00

[14] This amount was later revised to $880,934.91, after adjustments were made for condition problems. (RX H2, p. 4).

crop loan[15] and for the purchases pursuant to the purchasing agreement were included in support of the Declaration. The accounting sets forth all transactions associated with Horizon's purchase of Gilbert Marroquin's 2002 grape crop. (Tr. II, p. 436-455; RX H1 RX H2). The transactions at issue in this proceeding, CX 1-CX 30, were not included in the Declaration in support of the administrative claim.[16] (Tr. II, p. 481- 483).

Mr. Ledford stated that in 2003, Horizon settled all amounts owed to it by Gilbert Marroquin, and Norm Evans of Horizon signed a general release of any and all claims against Gilbert Marroquin. The release included any and all current and future claims against Amanda Marroquin/AMC Produce. This document was filed with the Bankruptcy Court. (Tr. II, 438-445, 477; RX J). Mr. Ledford testified that Norm Evans and Horizon were aware of the Produce Distributing Agreement between AMC and West Coast, and that the general release was drawn up because during mediation of the bankruptcy proceeding, Norm Evans attempted to assert a claim against Amanda Marroquin for the net proceeds of the West Coast sales under the agreement between AMC and West Coast. (Tr.II, p. 483). Mr. Ledford also testified that

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[15] We note that the accounting consisted of fifteen checks totaling $350,728.00 made payable to AMC Produce Sales, the company owned by Amanda Marroquin, and not to Gilbert Marroquin. (RX H2). No explanation of this discrepancy was specifically provided by Complainant; however, Norm Evans did testify that he believed Gilbert Marroquin owned or was involved in running AMC Produce Sales. (*See supra* at 8-9)

[16] We note that at hearing and during the informal stage of this proceeding, Norm Evans claimed that he had paid the grower, Gilbert Marroquin, for purchases of grapes, that he had then sold to West Coast on an f.o.b. basis. Mr. Evans also testified that his "purchases" from Gilbert Marroquin were made on the basis of his loan and purchase agreement stated in the bankruptcy proceeding. If this is the case, it follows that the accounting in the Declaration should include any West Coast transactions, as the Declaration purports to set forth all transactions associated with Horizon's purchase of Gilbert Marroquin's 2002 grape crop, including sales thereof. (Tr. II, p. 436-455; RX H1 RX H2). However, the Declaration conspicuously does not include any West Coast transactions. (RX H2).

Norm Evans was aware[17] that West Coast had accounted to Amanda Marroquin/AMC under the Produce Distributing Agreement, and that West Coast had paid AMC in full under the agreement. (Tr. II, p. 483-484).

Respondent called Gilbert Marroquin as a witness to testify at hearing. Gilbert Marroquin corroborated the testimony of Amanda Marroquin and Merl Ledford as to both the bankruptcy issues and the relationship between Gilbert Marrroquin and Norm Evans, and Amanda Marroquin/AMC and West Coast. (Tr. II, p. 568-585). Mr. Marroquin testified that Horizon had a hand in "running" Marroking Cold Storage (Tr. II, p. 585), and that all "AMC" grapes went through the Marroking Sales cooler in Earlimart. (Tr. II, p. 584-587). Mr. Marroquin stated that "AMC" grapes belonged to West Coast, and that Mr. Marroquin took orders for purchases of "AMC" grapes. (Tr. II, p. 594).

Mr. Marroquin also testified that during the mediation in bankruptcy, he had a conversation with Norm Evans wherein Mr. Evans specifically stated that he had "an issue" with West Coast. (Tr. II, p. 578). According to Mr. Marroquin, Mr. Evans described the "issue" as West Coast's lack of payment of two loads of "seedless Thompsons", which were not grown on Mr. Marroquin's land (Globe King or El Shaddai), nor on the Chroman (or "Sunrise") ranch pursuant to the AMC agreement with West Coast. (Tr. II, p. 578).[18] According to Mr. Marroquin, Mr. Evans also specifically told Mr. Marroquin that he had no dispute with West Coast concerning the grapes grown on any of the three ranches, Globe King, El Shaddai, or Sunrise (Tr. II, p. 580), and that the seedless Thompsons were grown on Mr. Evan's own ranch. (Tr. II, p. 603, 606). Finally, according to Mr. Marroquin, Mr. Evans

[17] Norm Evans has repeatedly, at hearing and during the informal stages of this proceeding, denied that he was aware of any agreements between West Coast and AMC.

[18] We note that RX K, which is evidence of a grape transaction paid to Horizon by West Coast, is for seedless Thompsons. We also note that "AMC" conspicuously does not appear on this bill of lading, and that the cooler listed on this bill of lading is that of Norm Evans/Horizon in Exeter, CA. (RX K).

specifically told him that he was angry at West Coast, and that Mr. Evans was going to make a false claim against West Coast for numerous loads, as leverage to collect on the two loads actually owed to him by West Coast. (Tr. II, p. 578-580, 604-607).

Respondent called Jeff Case, a salesman for West Coast's Bakersfield office (Tr. III, p. 642), as a witness to testify at hearing. Jeff Case testified that he "put together" the Produce Distributing Agreement between West Coast and Amanda Marroquin/AMC Produce Sales (Tr. III, p. 643-645), and that he was involved in every transaction involving AMC grapes and West Coast. (Tr. III, p. 651-654). Mr. Case stated all AMC grapes went through the Marroking cooler, and that because Horizon was involved in running the Marroking cooler, a Horizon "number" was assigned to every file that went through the Marroking cooler. (Tr. III, p. 657-658, 715). Mr. Case also stated that he had examined the transactions in Respondent's exhibits RX F 1 through 44, and that none of those transactions, including the transactions in CX1-30 that are the subject of this proceeding, were purchased from Horizon Marketing. (Tr. III, p. 659). Mr. Case stated that he knew that West Coast did not purchase the grapes identified in CX 1-30, because he specifically recalled the individual transactions, because he recalled that during the 2002 season, West Coast got most of its grapes pursuant to the agreement with AMC, and because during the 2002 season, West Coast simply did not purchase that many grape loads from Horizon. (Tr. III, p. 726-728, 735, 743). Finally, Mr. Case stated that even when he made purchases of any type of produce from Horizon, he never talked to Norm Evans,[19] and that instead he either talked to "Chris" or Mike Crookshanks at Horizon. (Tr. III, p. 743).

At hearing, Complainant did not produce any witnesses or evidence to rebut the testimony of Benjamin Foss, Amanda Marroquin, Merl Ledford, Gilbert Marroquin, or Jeff Case, who all stated, *inter alia*, that

[19] We note that this testimony is in direct contradiction to the portion of Norm Evan's testimony (which Norm Evans himself later contradicted) that Jeff Case purchased the grapes identified in CX 1-CX 30 directly from him , and that Jeff Case called in the orders by phone to Norm Evans. (Tr. I, p. 1)

West Coast paid Amanda Marroquin/AMC Produce Sales in full for the transactions identified in CX 1- CX 30, which are the subject of this reparation.[20] Accordingly, and based on the evidence adduced by Respondent at hearing, we find that Complainant did not meet its burden to prove its case, and that Respondent did meet its burden to prove its own assertion and defense.

We note that while Respondent appears to argue that it was impossible that Horizon could have sold any AMC grapes to West Coast in 2002, because all AMC grapes were to be sold to West Coast by AMC Produce under the Produce Distributing Agreement, such a transaction *could* have occurred. The Produce Distributing Agreement stated only that AMC agreed to supply West Coast with "at least 25%" of AMC's 2002 grape crop. (RX A). Several witnesses stated that it was possible that Horizon sold AMC grapes to West Coast during 2002. (Tr. II, p. 425, 529, 532, 583-588, 628, 721, 724). However, Complainant has produced no credible evidence that it purchased the grapes in CX1-CX30 from AMC Produce, other than to provide the explanation that the grapes were "given" to him pursuant to, and as credit against, his loans to Gilbert Marroquin. (Tr. I, p.88, 123, 124, 127,141). Mr. Evans also testified that his "purchases" from Gilbert Marroquin were made on the basis of his loan and purchase agreement stated in the bankruptcy proceeding. (Tr. I, p. 141-150). If this be the case, it follows that the accounting in the Bankruptcy Declaration in support of Mr. Evans/Horizon's administrative claim in bankruptcy should include any West Coast transactions, as the Declaration purports to set forth all transactions associated with Horizon's purchase of Gilbert Marroquin's 2002 grape crop (including the parties to whom Horizon sold the grapes). (Tr. II, p. 436-455; RX H1 RX H2). However, the Declaration conspicuously does not include any West Coast transactions. (RX H2). As Complainant has offered no other evidence that Horizon purchased the grapes identified in CX1- CX30 from either AMC Produce Sales or Gilbert Marroquin and then sold them to West Coast, while we find that such an instance was possible, there is no evidence that it occurred in

[20] In fact, Norm Evans, Complainant's representative in this case, left the proceedings shortly after his testimony was concluded.

this case.

Complainant argued at hearing and in its brief that the invoices themselves were sent to Respondent, and that Respondent did not object to the invoices. Complainant claims that the invoices, particularly because they were not objected to by Respondent when first sent to Respondent, are evidence of a sale, for which Respondent owes Complainant. However, Respondent's witnesses provided the explanation, which we find credible, that it was known that Horizon was "running" the cooler through which the AMC grapes came, and that it was therefore unremarkable that Horizon was sending copies of invoices and bills of lading for AMC grapes to Respondent's office in Bakersfield (Respondent in Massachusetts did not see the invoices until sometime in 2003). Mr. Case stated all AMC grapes went through the Marroking cooler, and that because Horizon was involved in running the Marroking cooler, a Horizon "number" was assigned to every file that went through the Marroking cooler, including those sent to Respondent in Bakersfield. (Tr. III, p. 657-658, 715). The failure of a party to object to an invoice received in the normal course of business does not create a sale which is otherwise non-existent. *Floriza Sales Co., Inc. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328 (1988). In this case, we find that there was no existence of a sale between Complainant and Respondent for the 30 invoices claimed in the proceeding, and that Respondent provided an explanation for the lack of objection to the invoices and bills of lading sent to Respondent's office in Bakersfield (Respondent in Massachusetts did object to the invoices when they were presented in 2003, *see supra*, Finding of Fact No. 21). Therefore, the invoices and bills of lading are not conclusive evidence of a contract in this case.

Based on the foregoing, we find that Complainant has not met its burden of proving by a preponderance of the evidence all of the material allegations of its complaint, and we find for Respondent in this case.

**Fees and Expenses**

We find that Complainant has not carried its burden necessary to prove its case. Fees and expenses will be awarded to the prevailing

party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc*., 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (2003).

Each party made claims for fees and expenses in this case. Complainant claimed $6,896.92 in fees and expenses in connection with attendance at hearing. Respondent claimed $31,425.00 for attorney's hours spent on the case and work performed in preparation for hearing, as well as $1,863.82 in costs and expenses. Attorney's hours were calculated by Respondent as 125.70 hours at $250 per hour. The total for all fees and expenses claimed by Respondent's Attorney was $33,288.82. Respondent provided a detailed itemization of its various attorney expenses in its Claim for Fees and Expenses. Respondent also submitted an affidavit, in which Benjamin Foss, West Coast's controller, representative at the hearing, and witness for Respondent at hearing, claimed fees and expenses in connection with the hearing totaling $3,262.57. Benjamin Foss also submitted a bill for $1,550.00 for the Marroquin's attorney, Mr. Fitzgerald, who attended the hearing with the Marroquins.

In this case, we find that since Complainant has failed to prove its case by a preponderance of the evidence, it is not the prevailing party and is not entitled to fees and expenses. Respondent is the prevailing party, and fees and expenses can be awarded to Respondent to the extent that they are reasonable. *Mountain Tomatoes, Inc. v. Patapanian & Son,* 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieir Co., 38 Agric*. Dec. 269 (1979). In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes,* 48 Agric. Dec. 707 (1989).

We find that certain of the expenses claimed by Respondent's attorney in this case are not reasonable, and therefore will be disallowed. First, in examining the affidavit submitted by Respondent's attorney, it appears that he miscalculated the total hours spent on the case. Adding the hours provided on the affidavit (83.70 plus 3.4 plus 7 plus 30.6 ), the correct total claimed should be 124.70, instead of 125.70. Of those

124.70 hours claimed, we disallow item number 21 of the itemized breakdown attached to the affidavit, eleven (11) hours of travel to Bakersfield, California, from Annandale, New Jersey. We also disallow a portion of item number 25, specifically, the portion which includes (based on the eleven hours claimed in item number 21) eleven hours of travel to Annandale, New Jersey from Bakersfield, California. Finally, we disallow a portion of item number 22, specifically, the portion which includes travel from Bakersfield, California to Visalia, California, in preparation for hearing (Respondent's attorney states in the affidavit that this trip was made for the purpose of preparing witnesses who were to testify at hearing the following day). The distance between Bakersfield and Visalia is 80.13 miles, thus we estimate the time spent traveling from Bakersfield to Visalia and back to be 3 hours, 1.5 hours each way. The attorneys fees claimed for time spent in travel in this case, a total of 25 hours, are disallowed. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (1979). *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (2000).

Second, we disallow the 30.6 hours claimed by Respondent's attorney for preparation of Respondent's Proposed Findings and Conclusions. The fees and expenses provision under section 7 (a) of the PACA has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *Mountain Tomatoes, Inc. v. Patapanian & Son,* 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son,* 36 Agric. Dec. 24 (1977); *East Produce, Inc. v. Seven Seas Trading Co., Inc.,* 59 Agric. Dec. 853 (2000). Accordingly, we deny the claim of Respondent's attorney for hours expended on the post hearing brief, and find that such activity is not connected to the oral hearing. This activity takes place entirely after the hearing is completed. While it is true that in preparing a post hearing brief, time spent in review of the transcript and citation to same would not occur had the case been decided under the documentary procedure (as there would be no transcript to review and cite when preparing the brief), in this case, Respondent's attorney has given no indication of the portion of time

preparing the post hearing brief that was actually spent reviewing and citing to sections of the transcript in the brief. Therefore, we disallow the entire 30.6 hours claimed by Respondent's attorney for preparation of Respondent's Proposed Findings and Conclusions. However, we will allow the expense of the transcript, $180.00 claimed by Respondent's attorney, as that amount was incurred as a direct result of the hearing, and the expense would not have been incurred had the case been decided by documentary procedure. Based on the foregoing, the allowable amount of expenses claimed by Respondent's attorney is $1,863.82. The allowable amount of attorney's fees, based on time spent in connection with the oral hearing, is $17,275.00 (124.70 hours minus 25 hours travel minus 30.6 hours on the post trial brief ' 69.1 hours times $250.00 an hour). The total allowable amount for Respondent's attorney fees and expenses is $19,138.82 ($17,275.00 plus $1,863.82).

As for the fees and expenses claimed in Benjamin Foss' affidavit, we find that the portion relating to Mr. Foss, $3,262.57, are reasonable, and will be allowed. Fees are awarded to non-attorney representatives, as Mr. Foss was in this case. *See O.P. Murphy Produce Co. v. Genbroker Corp.*, 37 Agric. Dec. 1780 (1978). Moreover, fees for voluntary non-subpoenaed witnesses are allowable. *Watson Distributing v. Fruit Unlimited, Inc.,* 42 Agric. Dec. 1613, 1618 (1983). As for the portion of fees and expenses claimed by Mr. Foss relating to Mr. Fitzgerald, the personal attorney of Amanda and Gilbert Marroquin, we find that they are not reasonable, and therefore they are disallowed in this case. Mr. Fitgerald accompanied his clients, who appeared as witnesses on behalf of Respondent at the hearing, of his own accord (purportedly to "protect" his clients), and quite frankly, Mr. Fitzgerald seemed to serve no real purpose at the hearing, other than to serve his clients personal interests. Therefore, Respondent is not entitled to any fees it may have incurred due to Mr. Fitzgerald's presence at the hearing.

**Order**

The Complaint in this case is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent, the prevailing party, the amount of $22,401.39 in attorney's

fees and expenses.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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**PEARL RANCH PRODUCE, LLC v. DESERT SPRINGS PRODUCE, LLC.**
**PACA Docket No. R-07-051.**
**Decision and Order.**
**Filed July 10, 2008.**

**Contract - evidence of**
The proponent of the contract has the burden to prove the elements of contract, whether established by a writing, an oral agreement, or through a course of dealing. Even where enforcement of an agreement does not require that the agreement be written, a written agreement is strong evidence of both a contract and the contract terms.

**Agent - contract**
When determining the contractual relationship between principals and their agents, the principles of apparent agency do not apply.

**Agent - authority**
Mere negotiation of contracts is inadequate to support agent's claims for commission against its principals. Agent must first demonstrate that the principal authorized the agent to act on the principal's behalf.

**Equity - evidence required**
Equity is not automatically available whenever plaintiff perceives a subjective unfairness in the legal outcome; equity grants relief when the law will not make plaintiff whole. Equity cannot be supported without adequate evidence of loss.

**Agency - proof of contract**
When evidence showed that a licensed grower and its former agent failed to reach an agreement on a grower's agent contract negotiated during the fall of 2005 for the 2006 growing season, evidence of prior course of dealing from 2000-2005, the grower's publication of the agent's name in association with the grower's entries in the Bluebook and the Redbook in the spring and fall of 2006, and written contracts with third parties that did not identify the agent as an agent for grower, were inadequate to show that grower contracted with agent for the 2006 growing season.

**Agency - proof for equitable relief**
An agent's mere assertion that his principal had promised to compensate him for principal's decision to contract with a different agent was inadequate to support the first agent's claims for equitable relief.

Jonathan Gordy, Presiding Officer
Bart M. Botta, Complainant's representative
David P. Lutz, Respondent's representative
*Decision and Order issued by William G. Jenson, Judicial Officer*

## Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA). Pearl Ranch Produce, LLC (Complainant) timely filed a Complaint which seeks a reparation award from Desert Springs Produce, LLC (Respondent) in the amount of $249,361.74 in connection with transactions in interstate commerce involving a grower's agent agreement between Complainant and Respondent for the negotiation and sale of Respondent's onions for the 2006 growing season.

The Department did not prepare a Report of Investigation in this proceeding. A copy of the formal Complaint was served on Respondent, and Respondent timely filed an Answer denying the claims in the Complaint.

The amount in controversy exceeds $30,000 and Respondent requested an oral hearing. An oral hearing was held before Jonathan Gordy, of the Office of the General Counsel, U.S. Department of Agriculture, on September 12, 2007, in Las Cruces, New Mexico. At the hearing and in the post hearing briefs, Bart M. Botta of Rynn & Janowski LLP represented Complainant. At the hearing, Complainant presented the testimony of David Hicks,[1] who is the owner of Complainant, and Jennifer Russell, who is a former employee of Complainant. Complainant offered 19 exhibits (CX #) into evidence. James A. Roggow and David P. Lutz of Martin, Lutz, Roggow, Hosford & Eubanks, P.C., have represented Respondent throughout this

[1] David Hicks is variously identified as "Dave Hicks" in the exhibits and testimony.

proceeding; David P. Lutz represented Respondent at the hearing and on the post hearing briefs. At the hearing, Respondent presented the testimony of Dale Gillis and Mary Gillis, who are part owners of Respondent, and Monica Culpepper, who was a former bookkeeper for Respondent. Respondent offered 12 exhibits (RX #) into evidence.

Both parties filed briefs. Both parties filed requests for fees and expenses in connection with the hearing, and neither party filed objections to those requests.

## Findings of Fact

Complainant Pearl Ranch Produce, LLC, is a licensed commission merchant, license no. 2002-0812 with a business mailing address of P.O. Box 720, Dona Ana, New Mexico 88032. David Hicks owns and operates Complianant Pearl Ranch Produce.

Respondent Desert Springs Produce, LLC, is an onion grower and licensed wholesale dealer, license no. 2005-0831, with a business mailing address of P.O. Box 279, Arrey, New Mexico 87930. The Gillis family owns and operates Desert Springs Produce.

Complainant was Respondent's agent for the sale of onions from 2001 to 2005. Respondent paid Complainant an 8% commission on sales for every year except 2005. In 2005, Respondent paid 6% commission on sales where Respondent billed the buyers and Respondent paid 8% commission on sales that Complainant billed the buyers. The parties never had written agreements.

During the fall of 2004 and the summer of 2005, Respondent became increasingly unhappy with Complainant's services. Respondent's unhappiness resulted from several events including: the failure of a bankrupt buyer to pay Respondent for over $100,000.00 in onions, the prices that Complainant negotiated with buyers, Complainant's use of brokers, and some buyers' failures to promptly pay Respondent.

After a tense 2005 season, Respondent attempted to negotiate a new relationship with David Hicks in the fall of 2005. Respondent offered to make David Hicks an employee with a 4% commission on sales. Under this contract, David Hicks would no longer operate Complainant

Pearl Ranch Produce. David Hicks refused.

The parties did not reach a written agreement after David Hicks refused the fall 2005 contract. Complainant negotiated contracts for the sale of Respondent's 2006 onion crop in January of 2006. Respondent did not authorize Complainant to negotiate contracts on its behalf.
On March 17, 2006, Gillis Farms, Inc., another company the Gillis family owned and operated, signed an agreement with Duda Farm Fresh Foods ("Duda Farms"). Under the agreement, Duda Farms would market the onions the Gillis family had grown and packed as Desert Springs Produce, LLC. Later, in the first week of April 2006, Respondent informed Complainant that Respondent was making arrangements to sell its onion crop through Duda Farms. The following week, Respondent informed Complainant that it would not market onions through Complainant.

In the following months Complainant and Respondent remained in contact concerning their relationship. By August 2006, however, Complainant and Respondent failed to settle their differences concerning the 2006 onion crop.

Complainant filed an informal complaint with the PACA Branch on September 25, 2006, which is within nine months of when the cause of action accrued.

**Discussion**

Complainant alleges that in the winter of 2005-2006, Complainant contracted with Respondent to be Respondent's agent for the sale of onions for the 2006 season. Complainant alleges that Respondent breached this agreement when Respondent chose to market onions through another grower's agent, Duda Farms. Respondent counters that Complainant did not have a contract with Respondent to represent Respondent for the 2006 growing season.

Complainant further alleges that during the winter of 2005-2006, Complainant negotiated contracts for Respondent that covered approximately 30% of the Respondent's 2006 onion crop. (Complainant's Opening Brief at 7.) In addition, Complainant pleads that it would have negotiated the remaining open market onion sales

during the summer of 2006. (*Id.*) Ultimately, however, no onions were delivered under the contracts Complainant negotiated, and Complainant did not negotiate any open market sales for Respondent during the summer of 2006. Further, David Hicks testified that Respondent promised to compensate David Hicks for its change to Duda Farms. (See TR 85; 227.) The parties agree that Complainant did not negotiate any sales after the end of April 2006.

For the reasons outlined below, Complainant has failed to prove that it entered into an enforceable contract with Respondent for the 2006 onion growing season, and Complainant has failed to show that equity would otherwise warrant reparation from Respondent.

PACA reparation decisions have often determined the terms of contract when a written agreement did not exist. Oral contracts that would not be enforceable under state statutes of frauds are sometimes enforceable in reparation.[2] In addition, the terms of a contract may be established by a course of dealing. *See Sousa v. San Joaquin Tomato Growers, Inc.*, 46 Agric. Dec. 709, 715 (1987). For instance, in *Sousa*, we determined the terms of the disputed contract based on the parties' prior course of dealing and the prior written contracts between the parties. *Sousa*, 46 Agric. Dec. at 715. In other cases, reference to the prior course of dealing between the parties has established that agents had apparent authority sufficient to bind their principals to contracts. *See, e.g., Nash de Camp Co. v. Albertson Co.*, 13 Agric. Dec. 283, 288 (1954). However, Complainant has the burden to prove the elements of contract, whether established by a writing, an oral agreement, or through a course of dealing.[3]

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[2] *See Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 526-27 (3d Cir. 1950) (enforcing an oral contract for the sale of produce that would have been unenforceable under the Pennsylvania statute of frauds).

[3] *See Howell v. Scott*, 44 Agric Dec. 1281, 1282 (1985) ("As the proponent that there has been a breach of contract in this case, Complainant has the burden to prove the essential elements of the contract."); *Six L's Packing Co. v. Barnett*, 44 Agric. Dec. 1313, 1314 (1985) ("As the proponent that the transactions involve a sale of produce to Respondent, Complainant has the burden of proof to show the essential elements of the (continued...)

The parties in this case never had a written contract, not for 2006, nor for prior years for which the parties agree that they did have an agreement. The PACA regulations require grower's agents to obtain a written agreement, or deliver written terms to growers, on or before the first shipment of produce. 7 C.F.R. § 46.32. Thus, from 2001 to 2005 Complainant violated this regulation by failing to have a written agreement or terms with Respondent. However, because no onions were delivered in 2006, Complainant did not violate the regulation in 2006.

While not a violation of the regulations, the absence of a written agreement for 2006 does not improve Complainant's position, because a written agreement would be strong evidence of both a contract and the contract terms.

Proceeding to prove its claim without a written agreement, Complainant presented unconvincing evidence that it had an oral contract with Respondent. David Hicks, Complainant's owner and manager, did not indicate in his testimony when, or with whom, he discussed the final resolution of the agreement Complainant has alleged. In contrast, Respondent presented at the hearing a written contract offered to David Hicks in the fall of 2005 that he declined. (See RX 1, TR 53-54, 307-308, 341-42, 388-89.) Dale Gillis, one of Respondent's owners, recalled that he spoke with Mr. Hicks on very few occasions between October 2005 to August 2006; only once on the telephone and once in person. (TR at 349.) Moreover, Dale Gillis credibly testified that Respondent did not expect Complainant to do anything for Respondent after October 19, 2005. (TR 365.) Respondent's other witnesses, Monica Culpepper and Mary Gillis, agreed that Complainant never reached agreement with Respondent in the fall of 2005. (TR 323;

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[3](...continued)
contract."); *Victor D. Bendel Co. v. Prange Foods Corp.*, 43 Agric. Dec. 1655, 1657 (1984) (finding that a broker that was seeking a 3% commission had the burden of showing that a contract was entered into and what the terms of the contract were); *Hatcher v. C. H. Robinson Co.*, 42 Agric. Dec. (1983) (finding that the proponent of a claim of breach has the burden of proof); *Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002, 1004 (1981)(finding the burden of proving conflicting contract terms on the proponents of the terms); *Preferred Tomato Corp. v. Columbus Fruit Co.*, 39 Agric. Dec. 1563, 1566 (1980) (finding that the burden of proving modification of a written contract through course of dealing was on the proponent of the modification).

387-89.)

Complainant has presented no direct evidence, besides the empty assertions of its owner, that there was a contract between Complainant and Respondent for the 2006 onion growing season. Instead, Complainant presented three kinds of circumstantial evidence to show the existence of an agreement: testimony and evidence on the prior course of dealing between the parties, Bluebook and Redbook listings from 2006, and purported written contracts that Complainant negotiated on Respondent's behalf.

First, Complainant argues that the evidence of the prior course of dealing between these parties from 2000 to 2005 showed that the parties had a contract in 2006. Complainant cites cases that have used evidence of course of dealing to prove agency, or otherwise prove the terms of an established contract.[4] Primarily, Complainant cities cases establishing that agents have apparent authority to act on behalf their principals, because the agents had previously been agents of their principals and the principals failed to tell the injured third party that the agency had terminated. *E.g. Nash de Camp Co. v. Albertson Co.*, 13 Agric. Dec. 283, 288 (1954).[5] The other cases that Complainant cites use course of dealing evidence to establish contract terms, not to establish the contract itself. In *Sousa*, for instance, the existence of a contact was undeniable

[4] Some of these cases include: *Phillips A. Hawman v. G&T Terminal Packing Co.*, 19 Agric. Dec. 1544 (1987) (finding that a prior course of dealing demonstrated that a broker had the authority to negotiate for the produce purchaser); *Woodrow Johns Co. v. Sikeson Fruit & Produce*, 19 Agric Dec. 547 (1960) (finding that a respondent produce purchaser could not to deny agency when the agent had previously negotiated a purchased for the purchaser from the complaining produce seller); *Nash de Camp Co. v. Albertson Co.*, 13 Agric. Dec. 283 (1954) (finding that the prior instances where an agent had inspected fruit for the produce purchaser demonstrated that the agent had at least the apparent authority to inspect fruit for the respondent produce purchaser).

[5] Complainant has also argued that "at a minimum there was an implied agency relationship" between complainant and respondent. (Complainant's Opening Brief at 25.) From this argument, we suppose that Complainant wishes us to draw an inference from the facts available, and not actually invoke the doctrine of "implied authority."

because there was a consignment of onions, and the only issue to be settled through prior course of dealing was the contract's terms. *Sousa*, 46 Agric. Dec. at 715. Complainant's case is distinguishable.

David Hicks testified that Respondent wanted to change the contract in the fall of 2005, and that he entered into contract negotiations with Respondent's owners. (TR 53, 58.) David Hicks testified that, unlike past years, he did not negotiate onion sales in October because he was negotiating with Respondent "what we were going to do for the next year." (TR 53.) He also testified that he had refused Respondent's initial contract offer because that contract would have ended Complainant's existence as an entity separate from Respondent. (TR 54.) David Hicks further testified that contract negotiations continued until January. (TR 102-103.) Respondent has presented more than sufficient evidence that it proposed a new written contract to Complainant in the fall of 2005 that David Hicks refused. (RX 1, TR 307-308, 341-42, 388-89.) Whatever course of dealing the parties maintained before October 2005, that course of dealing ended when the negotiations began.[6] Because the parties began negotiating a new contract, the terms of a contract for 2006 cannot be implied from the prior course of dealing between the parties before October 2005.

Second, Complainant introduced evidence that the Redbook and Bluebook listings in 2006 showed that Respondent held Complainant out to the produce industry as its agent. For instance, the October 2006 Bluebook lists Complainant's cell phone number under Respondent's entry, and the March 2006 Redbook listing for Respondent lists "Dave

[6] Complainant argued in its brief: "[Respondent] did nothing to officially terminate the relationship with Pearl until approximately April of 2006." (Complainant's Opening Brief at 23.) Complainant also argues: "The evidence showed that [Respondent] did nothing to terminate the relationship with [Complainant] until April of 2006." (Complainant's Opening Brief at 4.) There are two errors in this argument. First, this argument is inconsistent with Complainant's burden to show that a contract existed between Respondent and Complainant. It is not Respondent's responsibility to demonstrate that it cancelled the contract with Complainant. Instead, Complainant must demonstrate it entered into a contract with Respondent. Second, the beginning of negotiations is a clear indicator of the termination of the prior course of dealing. Accordingly, it is Complainant's burden to show that the contract negotiations resulted in a contract, rather than Respondent's burden to show that the contract negotiations ended the prior course of dealing

Hicks" as Respondent's sales contact. (CX 14, CX 15.)

Complainant supports its arguments by citing *George Arakelain Farms, Inc. v. O'Day*, 31 Agric. Dec. 1395 (1972). (Complainant's Opening Brief at 23-24.) In that case, a lettuce seller sued the purchaser of the lettuce for the acts of the purchaser's agent. The purchaser denied an agency relationship. We held, however, that the purchaser created an apparent agency because the purchaser had not notified the seller that it had terminated the relationship with its agent. We decided *George Arakelain Farms* on the basis of apparent agency. Apparent agency is intended to remedy injury caused to third parties when the principal has held out someone as an agent by words or conduct. *See Jacobson Produce, Inc. v. Best Potato Products Company*, 37 Agric. Dec. 1743, 1746 (1978).

Complainant has cited other cases that discuss apparent authority, as described in the Restatement (Third) of Agency § 2.03 (2006), where agents have apparent authority when third-parties reasonably believe that the agents have authority to act on behalf of the principals and that belief is traceable to the principals' manifestations. (Complainant's Brief at 25-26; Complainant's Reply Brief at 9.) Also, Complainant has cited cases that estopped principals from denying the existence of an agency relationship, as described in Restatement (Third) of Agency § 2.05, where principals are held liable for intentionally or carelessly causing the third-parties to rely on individuals to their detriment, because the third-parties justifiably believe the transaction was on the principals' account. (Complainant's Brief at 26; Complainant's Reply Brief at 10.) In both instances, the focus is on the harm done to third-parties because of the principals' actions. In this case, the issue is not whether a third-party was injured, but whether the agent had a contract with the principal.

For this reason, Complainant may not rely on the Bluebook and the Redbook listings as proof of an "apparent agency" between Complainant and Respondent. Apparent agency doctrines do not apply. At best, the listings show Respondent was advertising a relationship. One might draw an inference that Respondent had a relationship with Complainant because Respondent chose to advertise it. In this instance, however, we

decline to imply an agency contract based on the advertisements in the Bluebook and the Redbook. Communications to the produce industry do not form contracts between principals and agents.

Third, Complainant introduced evidence that Dave Hicks negotiated contracts for Respondent. (CX 2 at 3-7, 9; TR 105-20, 185-86, 188.) One of these contracts, with C. H. Robinson, was allegedly an oral agreement. (TR 185-86, 188.) Two contracts with Hillcrest Produce Co., list Complainant as the seller. (CX 2 at 3-4.) And the fourth contract with Michael Cutler Co. and signed by Dale Gillis of Respondent, has neither price terms nor quantity terms. (CX 2 at 5-7. [7]) No shipments were made under any of these four contracts. (TR 185-86.)

Complainant asserts that because it negotiated these contracts, Respondent owes it compensation. (See Complainant's Opening Brief at 34.) Complainant suggests, under the general rule in *D. L. Piazza Co. v. Cook Produce Co.*, 16 Agric. Dec. 360, 362-63 (1957), its right to compensation accrued when it completed negotiations and there was a meeting of the minds of the principals whom it brought together. (See Complainant's Opening Brief at 34.) Complainant further asserts that the failure to honor the agreements is irrelevant. (*Id.*) *D. L. Piazza Co.* is a case where, after the broker had negotiated the sale of lettuce, the parties to the contract had difficulty in reaching a final settlement on the value of the delivered lettuce. *D. L. Piazza Co.* at 362. There were written communications from the principal to the broker that demonstrated the principal authorized the broker to act as agent. *Id.* Those communications showed that the principal refused to pay the broker until the principal reached a final settlement on the delivered lettuce. *Id.*

Merely negotiating contracts is not enough. Complainant must demonstrate that Respondent authorized Complainant to negotiate these contracts. Unlike the communications in *D. L. Piazza Co.*, the contracts at issue here fail to demonstrate that Complainant was Respondent's

[7] There were also some e-mails showing that Complainant assisted Respondent with lost reusable pallets in January of 2006. (CX 6-10.) It is readily apparent from the context of the e-mails, the pallets were from onion shipments made in 2005. The e-mails do not show that Complainant contracted with Respondent to be its agent in 2006.

agent when Complainant negotiated them. Complainant produced no contract that identified Complainant as Respondent's agent. Moreover, there is no evidence that Respondent and the purported contracting buyers had a meeting of the minds. No onions were delivered under the contracts, and the purported contract with Michael Cutler Co., which only Dale Gillis signed, did not include price or quantity terms. (CX 2, 5-7.)

Taking all of the evidence in the aggregate, Complainant has failed in its burden to show by a preponderance of the evidence that it had a contract with Respondent. David Hicks's testimony fails to convince us that Complainant and Respondent assented to a grower's agent contract for the 2006 growing season. No other witness corroborated a contract and the available written evidence does not establish a contract. [8]

Besides Complainant's contract claims, Complainant also asserts that it should be compensated under many different equitable theories: "equitable estoppel, implied agency, unjust enrichment, detrimental reliance, and plain equity." (Complainant's Opening Brief at 33.) Complainant cites no authorities for the applicability of these equitable doctrines.

Equity is not automatically available whenever plaintiffs perceive a subjective unfairness in the legal outcome; equity grants relief when the law will not make plaintiffs whole. *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.*, 511 F.Supp. 2d 1, 12 (D.D.C. 2007). Complainant's request for equitable relief is a hodgepodge of doctrines that Complainant failed to support with evidence. David Hicks's mere assertion that Respondent purportedly promised to give Complainant compensation for Respondent's decision to contract with Duda Farms (see TR 85; 227) is inadequate to support equitable relief. Complainant presented no evidence that it lost customers, lost opportunities, or incurred costs because of Respondent's purported promises. Equity disfavors Complainant.

Complainant has failed to prove by a preponderance of the evidence that it had a contract to act as Respondent's agent in 2006 for which it was not compensated or that it is entitled to equitable relief under any

theory of recovery. Therefore, Complainant does not prevail on its claim. The Complaint should be dismissed.

Under section 7 of the PACA (7 U.S.C. 499f), "The Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any [reparation] hearing." Respondent filed a proper request for fees and expenses, and Complainant was given an opportunity to object to that request. Complainant did not file an objection. Fees and expenses will be awarded to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 864 (2000). The Secretary determines the reasonableness of the requested fees and expenses. *Id.* Expenses which would have been incurred under the documentary (shortened) procedure are not recoverable under section 7(a) of the Act; this includes the preparation of findings of fact, conclusions of law and post hearing briefs. *Id.*

As the prevailing party, Respondent is due its reasonable fees and expenses. Respondent has requested $10,763.92 in attorney's fees and associated expenses as costs associated with the hearing. Reasonable attorney's fees in the total amount of $6,256.00 appear to have been incurred in connection with the hearing. Those charges include witness interviews, a motion to quash a subpoena, hearing preparation, and counsel's review of the transcript. Also, $95.82 in miscellaneous costs for copying, receiving and sending faxes, and Federal Express packages appear to be associated with preparation for the hearing, and will be allowed as reasonable costs associated with the hearing. Respondent's claimed costs and attorney's fees that appear associated with the preparation of exhibits, post hearing briefs and Fed Ex delivery of those briefs, all of which would be ordinarily part of the documentary procedure, are specifically disallowed. The cost of the hearing transcript, $116.80 is reimbursed. In total, Respondent will be allowed to recover $6,468.62 as reasonable fees and expenses incurred in connection with the oral hearing.

**Order**

Complainant's Complaint in this matter is hereby dismissed. Within 30 days from the date of this Order, Complainant shall pay Respondent, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $6,468.62.
Copies of this Order shall be served upon the parties.
Done at Washington, DC.

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**FRESH KIST PRODUCE, LLC. v. SUPERIOR SALES, INC.**
**PACA Docket No. R-08-070.**
**Decision and Order.**
**Filed December 11, 2008.**

**F.O.B. – Acceptance Final – Warranty of Merchantability.**

Where the parties agree to f.o.b. acceptance final terms, the buyer's only recourse is to prove a material breach of contract by the seller. For the buyer to establish a breach by the seller of the implied warranty of merchantability in such a case, the buyer must establish that the produce was not merchantable at the time of shipment. While the destination inspection of the romaine in question disclosed significant defects (73 percent average condition defects, including 42 percent average decay), the inspection was performed seven days from the date of shipment and was found, on that basis, to be too remote from the time of shipment to establish that the romaine was not merchantable when shipped. It was also noted that the tape from the temperature recorder placed on the truck was not submitted in evidence by Respondent to establish that the romaine was held at proper temperatures between the time of shipment and the time of inspection. Without proof of proper temperatures during transit, it is possible that the defects found upon inspection were caused by high transit temperatures and not unmerchantability at the time of shipment.

Patrice H. Harps, Presiding Officer
Leslie Wowk, Examiner
Western Growers' Association, Complainant's Representative
Respondent, Pro Se
*Decision and Order issued by William G. Jenson, Judicial Officer*

## Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $15,153.90 in connection with one truckload of romaine 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 Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the 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 ("ROI"). 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. Neither party submitted a Brief.

## Findings of Fact

1. Complainant, Fresh Kist Produce, LLC, is a limited liability company whose post office address is P.O. Box 3617, Salinas, California, 93908. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Superior Sales, Inc., is a corporation whose post office address is P.O. Box 159, Hudsonville, Michigan, 49426. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about January 9, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of California, to a receiver located in Jersey City, New Jersey, 1,040 cartons of 24-count naked romaine. On the same date, Complainant

issued invoice number 428623, billing Respondent for 165 cartons of 24-count "outside purchase" naked romaine at $14.56 per carton, or $2,402.40, and 875 cartons of 24-count Pacific Coast naked romaine at $14.56 per carton, or $12,740.00, plus $11.50 for a temperature recorder, for a total f.o.b. acceptance final contract price of $15,153.90.

4. On January 16, 2007, at 9:53 a.m., a U.S.D.A. inspection was performed on the 1,040 cartons of romaine mentioned in Finding of Fact 3 at the place of business of Ambrogi Food Dist., in Thorofare, New Jersey, the report of which disclosed, in pertinent part, as follows:

| **LOT A (CON) – ROMAINE** | | | | | |
|---|---|---|---|---|---|
| **Temperatures:** 35 to 37ºF | | **NUMBER OF CONTAINERS:** 1040 CARTON(S) | | | **ORIGIN:** OT |
| **Markings:** BRAND: PACIFIC COAST PRODUCE MARKINGS: PACIFIC COAST PRODUCE, ROMAINE LETTUCE, PACKED & SHIPPED BY: PACIFIC COAST PRODUCE, SANTA MARIA, CA, 2 DOZEN HEADS, PRODUCE OF U.S.A. | | | | | |
| **PLI:** NONE | | | | | **OTHER ID:** XXXXXXXXXXXXXXX |
| **INJURY** | **DAM** | **SER. DAM** | **V.S.DAM** | **OFFSIZE/DEFECTS** | |
| NA | 28 | 11 | NA | MARGINAL BROWNING (17 to 42%) | |
| NA | 3 | 0 | NA | DOWNY MILDEW (0 to 6%) | |
| NA | 42 | 42 | NA | DECAY (21 to 83%) | |
| NA | 73 | 53 | NA | CHECKSUM | |
| **GRADE:** | | | | | |
| **LOT DESC:** | INSPECTION: RESTRICTED TO CONDITION ONLY AT APPLICANT'S REQUEST STAGES OF DECAY: GENERALLY EARLY, FEW MODERATE | | | | |

5. On March 2, 2007, Respondent's Rich Kim sent a letter to Complainant's Denny Donovan stating:

This letter is in reference to Fresh Kist# 428623 / Superior Sales# 07361063.

The return was $4.00 delivered to Superior Sales, Inc. The charges incurred are as follows:

Freight $4,450.00
Re-Delivery $150.00
Inspection $109.00
Unloading $277.5
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$4986.50 total charges incurred / $4.79 per case freight incurred

We are requesting Fresh Kist to remit payment of $821.60 for losses and damages caused by the excessive decay in the romaine.

If you have any questions, please feel free to contact me.

6. Respondent has not paid Complainant for the subject load of romaine.
7. The informal complaint was filed on May 25, 2007, which is within nine months from the accrual of the cause of action.

**Conclusions**

Complainant brings this action to recover the agreed purchase price for one truckload of romaine sold to Respondent. Complainant states Respondent accepted the romaine in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price of $15,153.90. Respondent asserts, to the contrary, that the romaine shipped by Complainant did not meet the contract requirements, as a result of which Respondent states it incurred damages that exceeded the contract price by $821.60. Respondent did not, however, submit a counterclaim seeking to recover this amount.

There is no dispute that the subject load of romaine was sold under f.o.b. acceptance final terms.[1] The Regulations (7 C.F.R. § 46.43(m)) define this term as meaning:

… that the buyer accepts the produce at shipping point and has

[1] See Complaint ¶4 and Answer ¶4.

> no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer's remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.

Since under the f.o.b. acceptance final terms of the contract there is no right of rejection, Respondent is liable to Complainant for the romaine it accepted at the agreed purchase price thereof, less any damages resulting from any material breach of contract by Complainant. The burden to prove both a breach and damages rests with Respondent. *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).

While the f.o.b. acceptance final term negates the suitable shipping condition that normally applies when goods are sold f.o.b., the implied warranty of merchantability nevertheless remains intact.[2] See U.C.C. § 2-314(1). For goods to be merchantable they must pass without objection in the trade under the contract description. U.C.C. § 2-314(2)(a). Respondent maintains that the U.S.D.A. inspection of the romaine, which disclosed 73 percent average defects, including 28 percent marginal browning, 3 percent downy mildew and 42 percent

[2] The merchantability warranty can be excluded by specific agreement between the parties through the use of such terms as "as is" or "with all faults;" however, there is no indication that it was the intent of the parties to exclude the warranty of merchantability here. While Complainant's passing includes a statement that reads, in pertinent part, "THIS CONTRACT ALSO EXCLUDES THE IMPLIED WARRANTY OF MERCHANTABILITY AND SUITABLE SHIPPING CONDITION ASSOCIATED WITH FIELD FREEZE SUCH AS BUT NOT LIMITED TO BLISTERING, PEELING, FEATHERING, AND DISCOLORATION" (see ROI Exhibit 3D) this is an exclusion that is commonly included in contracts for the sale of lettuce and other leafy greens that pertains to the defects listed only, and does not otherwise relieve the shipper of the responsibility to ship goods that are merchantable.

decay, establishes that the romaine was not merchantable.[3]

The common law warranty of merchantability is applicable only at shipping point. *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982); and *J. D. Bearden Produce Company v. Pat's Produce Company,* 12 Agric. Dec. 682 (1953). Therefore, when we look at a destination inspection to establish a breach of the warranty of merchantability, the defects disclosed by the inspection must be sufficiently severe so as to allow us to conclude with reasonable certainty that the produce was non-conforming at shipping point. See *Martori Bros. Distributors v. Houston Fruitland, Inc.*, 55 Agric. Dec. 1331 (1996).

In *Garren-teed Co., Inc. v. Mo-Bo Enterprises, Inc*., 51 Agric. Dec. 811 (1992), a destination inspection performed two days after shipment that disclosed an average of 76 percent wilted and flabby in wax beans was considered sufficient evidence to establish that the beans were not merchantable at shipping point. However, in the *Martori* decision cited above, an inspection performed the day after shipment that disclosed 32 percent average condition defects (including 11 percent black mold and 9 percent decay) was found not to furnish sufficient proof to establish that the cantaloupes in question were not merchantable at the time of shipment.[4] Notably, both of these decisions involve inspections that were performed not more than two days after the goods were shipped. In the instant case, however, a full seven days elapsed between the time of shipment and the time of inspection.

Moreover, while the record shows that a temperature recording device was loaded with the romaine,[5] Respondent did not submit a copy of the recorder tape to establish that proper temperatures were maintained from the time of shipment to the time of inspection. Although the pulp temperatures noted on the inspection certificate are in accordance with the temperature instructions noted on the bill of

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[3] See Answering Statement ¶4.

[4] While it was stated that such defects made it improbable that the cantaloupes were merchantable at shipping point, it was held that the standard that must be met is reasonable certainty, not probability. See 55 Agric. Dec. 1331, at 1339.

[5] See Complaint Exhibit Nos. 1 and 2.

lading,[6] the record shows that the romaine was stored in the consignee's warehouse overnight pending inspection.[7] It is therefore possible that the product arrived showing temperatures indicative of abnormal transit, but that the consignee was able to bring the temperatures back to the desired range between the time of arrival and the time of inspection. Our purpose in mentioning this is to determine whether the standard of reasonable certainty has been met.

As we look at the destination inspection results to determine whether the warranty of merchantability has been breached, it is also important to note that for a coast to coast shipment of romaine, 15 percent average defects, including 4 percent decay, are allowable under the warranty of suitable shipping condition. Therefore, 15 percent average defects, including 4 percent decay, would not indicate a breach of the warranty of merchantability. In other words, the romaine in question could have up to 15 percent average defects, including 4 percent decay, at shipping point and still be considered merchantable. Any number of circumstances could have occurred in the seven days that elapsed between the time of shipment and the time of inspection that would have allowed defects averaging only 15 percent, including 4 percent decay, to progress to the 73 percent average defects, including 42 percent decay, disclosed by the U.S.D.A. inspection of the romaine in question.[8] Moreover, we should also note that the decay disclosed by the inspection is described as being in "mostly early, few moderate" stages, which further supports the possibility that the decay developed during the

[6] See ROI Exhibits 1B and 1C.

[7] See ROI Exhibit 3P, a copy of an e-mail message from Respondent's Richard Kim to Complainant's Denny Donovan advising that the inspection would be delayed due to the Martin Luther King, Jr. holiday. See, also, ROI Exhibit 3C, a copy of the U.S.D.A. inspection certificate showing that the romaine was unloaded at the consignee's warehouse at the time of the inspection

[8] Aside from the decay, the other defect most prevalent in the romaine at the time of arrival was marginal browning, and while the conditions leading to marginal browning have not been clearly identified, it is known that this defect can be aggravated by long transit periods or undesirably high transit temperatures. Source: Canadian Food Inspection Agency, Vegetable Inspection Manuals, accessed on the Internet on July 8, 2008, at http://www.inspection.gc.ca/english/fssa/frefra/vegman/lettue/lettue.shtml

seven days that the romaine was in transit. Therefore, under the circumstances, we are unable to conclude with reasonable certainty that the romaine was not merchantable at the time of shipment. Since Respondent accepted the romaine under the f.o.b. acceptance final terms of the contract, it was entitled to attempt to show a material breach of contract. Based on the evidence submitted, we find that Respondent has failed to establish the existence of a material breach.

While we note that Respondent asserts in its sworn Answer that the f.o.b. acceptance final terms agreed upon excluded epidermal peel and blistering but did not exclude decay,[9] we hasten to point out that Respondent was free to fashion whatever agreement it desired at the time of contracting, *i.e.*, if Respondent intended to exclude only epidermal peel and blistering from Complainant's warranty, then Respondent should have negotiated a contract that contained only this exclusion.[10] Instead, Respondent agreed to purchase the romaine under f.o.b. acceptance final terms, which meant that the product could contain any number of defects, including decay, as long as the defects were not present to a sufficient degree to render the product unmerchantable at the time of shipment, thereby constituting a material breach of contract. Respondent accepted the romaine and has not sustained its burden to prove a material breach. Respondent is therefore liable to Complainant for the romaine it accepted at the full purchase price of $15,153.90.
Respondent's failure to pay Complainant $15,153.90 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.*

[9] See Answer ¶4.

[10] It appears, in fact, that this exclusion was included in the contract. See Note 2.

*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.,* 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 $15,153.90, with interest thereon at the rate of 0.69% per annum from February 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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## MISCELLANEOUS ORDERS

**In re: THE MILES SMITH FAMILY CORP. d/b/a CAL FRESH PRODUCE.**
**PACA Docket No. D-03-0005.**
**Miscellaneous Order.**
**Filed October 28, 2008.**

**PACA**.

Christopher Young-Morales for AMS.
Respondent, Pro se.
*Miscellaneous Order by Administrative Law Judge Jill S. Clifton.*

### Order Dismissing Case

The Complaint was filed on October 30, 2002, under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (herein frequently, "the PACA" or "the Act"). The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently, "AMS" or "Complainant"), is represented both here and in the two responsibly connected cases,[1] by Christopher P. Young-Morales, Esq. (and was previously represented by Andrew Y. Stanton, Esq.), with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

AMS's Motion for Withdrawal of Disciplinary Complaint, filed October 27, 2008, is before me. I conclude that the Complaint never was served as required by 7 C.F.R. § 1.147(c) upon the Respondent The Miles Smith Family Corp., d/b/a Cal Fresh Produce, and that AMS's Motion for Withdrawal should be and hereby is GRANTED. Accordingly, this case is **DISMISSED**.

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[1] The two responsibly connected cases are PACA-APP Docket No. 03-0019, regarding Brian O'D. White, also known as Brian O White; and PACA-APP Docket No. 04-0002, regarding Mark R. Laramie. Petitioners in both cases are represented by Luis A. Toro, Esq.

Copies of this Order Dismissing Case shall be served by the Hearing Clerk upon each of the parties, and Respondent shall be served (by regular mail), at all three addresses:

Cal Fresh Produce
2705 5th Street, Ste 5
Sacramento, California 95818

and

The Miles Smith Family Corp., d/b/a Cal Fresh Produce
385 Inverness Drive South, Suite 380
Englewood, Colorado 80112

and

The Miles Smith Family Corp., d/b/a Cal Fresh Produce
c/o CrossPoint Foods Corporation
1050 17th Street, Suite 195
Denver, Colorado 80265

The dismissal of this case, PACA Docket No. D-03-0005, In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce, Respondent, impacts the two responsibly connected cases, PACA APP 03-0019 White, and PACA APP 04-0002 Laramie, so the Hearing Clerk is requested also to send a courtesy copy (by regular mail) to counsel for Mssrs. White and Laramie.

Luis A. Toro, Esq.
1801 California St 4300
Denver Colorado 80202-2604

Done at Washington, D.C.

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**In re: KOAM PRODUCE, INC.**
**PACA Docket No. D-01-0032.**
**Order Lifting Stay Order.**
**Filed November 24, 2008.**

**PACA.**

Christopher Young-Morales, for the Acting Associate Administrator, AMS
Paul T. Gentile, NY, for Respondent.
*Order issued by William G. Jenson, Judicial Officer*.

## Order

On June 2, 2006, I issued a Decision and Order concluding KOAM Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and ordering publication of the facts and circumstances of KOAM Produce, Inc.'s violations.[1] On July 17, 2006, KOAM Produce, Inc., filed a "Petition to Reconsider," which I denied.[2]

On October 19, 2006, KOAM Produce, Inc., filed a petition for review of *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re: KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006), 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.," requesting a stay of *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re: KOAM*

[1] *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006).

[2] *In re: KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006).

*Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006), pending the outcome of proceedings for judicial review, which I granted.[3]

On March 12, 2008, the United States Court of Appeals for the Second Circuit issued a summary order affirming the Secretary of Agriculture's decision,[4] and on May 8, 2008, the Court entered final judgment of its summary order. KOAM Produce, Inc., did not file a petition for a writ of certiorari.

On October 27, 2008, Complainant filed a "Motion to Lift Stay Order as to Respondent KOAM Produce, Inc." KOAM Produce, Inc., failed to file a timely response to the Complainant's motion to lift stay, and on November 21, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Complainant's motion to lift stay.

Proceedings for judicial review are concluded. Therefore, the November 14, 2006, Stay Order is lifted; and the orders issued in *In re: KOAM Produce, Inc.*, 65 Agric. Dec. 589 (2006), and *In re: KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470 (2006), are effective, as follows.

## ORDER

KOAM Produce, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of KOAM Produce, Inc.'s violations shall be published. The publication of the facts and circumstances of KOAM Produce, Inc.'s violations shall be effective 60 days after service of this Order on KOAM Produce, Inc.

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[3] *In re: KOAM Produce, Inc.* (Stay Order), 66 Agric. Dec.930 ( 2006).

[4] *KOAM Produce, Inc. v. United States*, 269 F. App'x 35 (2d Cir. 2008).

**PEARL RANCH PRODUCE, LLC. v. DESERT SPRINGS PRODUCE, LLC.**
**PACA Docket No. R-07-051.**
**Order on Reconsideration.**
**Filed December 4, 2008.**

**PACA**.

Jonathan Gordy Hearing Officer for AMS.
Barrt M. Botta for Petitioner.
Donald P. Lutz for Respondent.
*Order issued by William G. Jenson, Judicial Officer*.

## Order

On July 10, 2007 a Decision and Order was issued dismissing the Complaint and awarding the Respondent in this reparation proceeding $6,468.62 as reasonable fees and expenses incurred in connection with the oral hearing in this matter. Complainant filed a timely Motion for Reconsideration on August 4, 2008, before the Decision and Order became final. For the reasons stated below, we find that Complainant's arguments are without merit, and conclude that the Motion for Reconsideration should be denied.

In the Motion for Reconsideration, Complainant has argued that there are three errors in the Decision and Order. Complainant first asserts that we erred by concluding that "since there was no written agreement, Complainant has not proved its case." (Motion for Reconsideration at 2.) Complainant's second alleged error is that we erroneously ignored or minimized the importance of the bulk of the evidence. (Motion for Reconsideration at 4.) Finally, Complainant has argued that it was error to deny equitable relief in this case. (Motion for Reconsideration at 11.) Complainant's first and second assignments of error are without merit. The proper weight was given to the absence of a written agreement in the original Decision and Order, and the failure to enter into a written contract was not dispositive. In the Decision and Order, we were careful to examine all the available evidence of contract including the circumstantial evidence of a written contract, the course of dealing,

Respondent's listings in trade publications, and the contracts that Complainant negotiated with third parties. The prior course of dealing was inapposite, because the evidence clearly showed that the prior course of dealing was terminated. Four witnesses testified that contract negotiations in October of 2005 failed to result in an agreement. (TR 53-54 (Hicks), 307-308 (Culpepper), 341-42 (Dale Gillis), 388-89 (Mary Gillis).) Only Mr. Hicks testified that he had reached an agreement with Respondent after October 2005. As the Decision and Order explained, Complainant's remaining evidence failed to show that Respondent had agreed that Complainant would represent Respondent in 2006. (Decision and Order at 6-11.)

However, some additional clarification is warranted. Complainant claims that we contradictorily concluded that there was no contract, and yet also concluded that the parties remained in contact concerning their relationship. Complainant argues that Finding of Fact 8,[1] and the contacts between the parties after January 2006 until the informal complaint was filed, show that a contract did exist. (Motion for Reconsideration at 3.) We will clarify our reasoning for Finding of Fact 8: Complainant stayed in contact with Respondent based on Complainant's unreasonable expectation of compensation without an agency agreement. In the prior years, Complainant had managed to obtain an unwritten agreement to act as Respondent's agent, (see TR 228-29; 297) which was a violation of the regulations and the source of unhappiness for Respondent's owners and employees during the 2005 growing season (see TR 249; 259-60). Complainant apparently hoped for a similar unwritten agreement in 2006. This hope was misplaced given the failed negotiation in the fall of 2005 was based on a written offer that Complainant cease operations and Mr. Hicks work for Respondent as an employee.

Moreover, Complainant has misunderstood the evidentiary value of the contracts that Complainant presented at the hearing and our

[1] Finding of Fact 8 states: "In the following months Complainant and Respondent remained in contact concerning their relationship. By August 2006, however, Complainant and Respondent failed to settle their differences concerning the 2006 onion crop."

discussion of those contracts in the Decision and Order. (Decision and Order at 10-11). Complainant states that "[i]t is the lining up of the contracts that is compensable." (Motion for Reconsideration at 7.) Complainant cites to *Victor D. Bendel Co. v. A Peltz & Sons, Inc.*, 39 Agric. Dec. 311 (1980) and *Clement Jones Co.* v. *Cherry Foods, Inc.*, 34 Agric. Dec. 677 (1975) as support for this position. (Motion for Reconsideration at 10.) However, Complainant has greatly confused the factual findings and legal holdings of those cases. In fact, those cases stand for the general legal proposition that a broker is entitled to his fee when negotiations are completed and thereby a valid and binding contract is created. *See Victor D. Bendel*, 39 Agric. Dec. at 313; *Clement Jones Co.*, 34 Agric. Dec. at 679-80, *citing D. L. Piazza Co. v. Cook Produce Co.*, 16 Agric. Dec. 360, 362-63 (1957).

Those brokerage cases are factually distinguishable from the agency agreement at issue here for two reasons. First, in those cases the broker was unquestionably an agent of the principal. In this case, the principal has denied an agency relationship. Second, in those cases, the principals had ratified the contracts negotiated by the broker for the purchase and sale of produce. In this case, there is considerable doubt that Respondent and the purchasers ever agreed to the written contracts that Complainant has presented in CX 2. Neither the purchasers nor Respondent ever attempted to enforce these contracts. Two of the three purported contracts make no mention of Respondent (CX 2, pg. 3-4), and the remaining contract, with Michael Cutler Company, makes no mention of Complainant (CX 2, pg. 7). The Michael Cutler Company contract has no price or quantity terms. (Id.)

Complainant's argument that the contracts show "actual performance" evidence misses the point (see Motion on Reconsideration at 9-10) – Complainant must show that it had authority to act as Respondent's agent. Those contracts did not show Respondent had granted Complainant that authority. The contracts were considered and rejected in the Decision and Order for this reason. (Decision and Order at 10-11.)

Complainant's third assignment of error is that we failed to invoke equity when "this is an ideal case to do so." In its post-hearing brief in this matter, Complainant asserted that it should be compensated under

many different equitable theories: "equitable estoppel, implied agency, unjust enrichment, detrimental reliance, and plain equity." (Complainant's Opening Brief at 33.) Complainant cited no authorities on these equitable doctrines. Complaint's assertion that equity should be done in this case was soundly rejected. (Decision and Order at 12.) Now, in Complainant's Motion for Reconsideration, Complainant asserts that "the overwhelming facts showing how Respondent led Complainant on . . . demands equity." (Motion for Reconsideration at 13.) For a second time, Complainant has failed to cite any authority for this proposition. We will respond more specifically to Complainant's arguments.

Implied agency, to the extent that Complainant intends this to mean apparent agency or agency by estoppel, is inapposite; Complainant is not an aggrieved third party who is seeking recourse from a principal based on the actions of the principal's purported agent.[2]

Moreover, unjust enrichment occurs when the law implies a quasi-contract that requires a party who is unjustly enriched to make restitution *in quantum merit*. *See In re: Foreman Enterprises, Inc.*, 281 B.R. 600, 608 (W.D. Penn. 2002). Respondent did not benefit from Complainant's purported contract negotiations; Respondent never honored the contracts, never delivered onions, and never received payment under any of the contracts in evidence. Unjust enrichment is not applicable, because there was no enrichment.

Under the doctrine of equitable estoppel, when an individual makes factual statements to a person who reasonably relies on those statements, that individual may not deny the statement when the person who relied upon it is damaged. See Williston, *Contracts* § 8:3 (4th ed. supp. 2007). Similarly, promissory estoppel incorporates elements of equitable estoppel. In promissory estoppel, a promisor makes a gratuitous promise upon which the promisee reasonably relied upon by acting (or not acting) based on the promise. The promisee's action must be of a definite and substantial character in reliance, which the promisor should

[2] Complainant has rehashed its earlier arguments concerning apparent agency in the Motion for Reconsideration on pages 5-6. Those arguments are rejected for the reasons stated in the Decision and Order at pages 8-10.

have been able to foresee,[3] and the enforcement of the promise is necessary to avoid injustice. *See* Williston, *Contracts* § 8:5 (4th ed. supp. 2007); Calamari and Perillo, *Contracts* § 6.1 (4th ed. 1998).

Complainant's estoppel claims fail first because they lack factual support for the main element of promissory estoppel: a promise. "[O]ne of the elements of the promise is that it be communicated in such a manner to a promisee that he [or she] may justly expect performance and may reasonably rely thereon." *Granfield v. Catholic University of America*, 530F.2d 1035, 1040 (DC Cir. 1976). There was no corroborated evidence presented at the hearing that Respondent made a statement of fact or a definite promise to David Hicks upon which David Hicks reasonably relied. In his testimony, David Hicks fails to identify any specific statements or definite promises from Respondent that Complainant would be Respondent's agent for the 2006 season. In January 2006, David Hicks believed that there was an agreement (TR 104; 232), but his testimony never indicated with precision when an agreement was reached or who lead him to believe that an agreement was reached. In fact, the testimony of other witnesses (See Tr. 172; 324; 364-65) and the rejected written offer for David Hicks' employment (RX 1)[4] showed that Respondent did not intend to utilize Complainant as an agent after October 19, 2005.

Mr. Hicks did testify that Mr. Gillis promised to buy Complainant out of its "agreement" with Respondent in April 2006. (TR 85-86.) This testimony was specifically discounted in the Decision and Order at page 12. Moreover, Mr. Gillis failed to corroborate Mr. Hicks testimony concerning the purported promise. (See TR 351.) Complainant alleges that Respondent "strung him along" and that Respondent "never compensated Complainant one cent for the services he performed in the

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[3] The authorities are not all in agreement on the precise requirements of the foreseeability doctrine. Calamari and Perillo, *Contracts* § 6.1 (4th ed. 1998) (contrasting Corbin's and Williston's views on foreseeability). However, we do not need to discuss this issue in detail because Complainant has failed to demonstrate promissory estoppel on other grounds.

[4] RX 1 states: "Contract agreement must be signed and returned by Wednesday, October 19, 2005, in order to be secured for the October 2005 through October 2006 season."

year at issue" and that those actions should cause Respondent to be liable. (Motion for Reconsideration at 12-13.) Those vague allegations are not a substitute for evidence of a definite promise upon which Complainant reasonably relied. Without a promise, there can be no promissory estoppel.

As the Decision and Order noted at page 12, Complainant's equity claims also fail for lack of evidence of equitable losses. There is no evidence Complainant lost opportunities. The evidence fails to show that Complainant took a different course of action based on a purported promise in April of 2006, and it is not clear that Mr. Hicks would have been unable to seek employment as a grower's agent for others prior to April 2006.[5]

Ultimately, Complainant has not shown he lost money, except in the sense that he didn't have income from his failed legal claim that he had an agency agreement. His work with Michael Cutler Company, on which the Motion for Reconsideration relies for an estimate of his losses, was arranged prior to April 2006. (See TR 210.) His testimony implies that he received considerable income in 2005, but that testimony is inadequate evidence to support equitable damages because Mr. Hicks himself was uncertain:

> Q: Let me ask you this, do you know what your gross income was for the 2005 growing season? In other words on the eight per --
> A: It was probably -- gosh, I – I haven't looked -- these are not numbers I was -- I've -- I've gone over recently. I don't know. I would say maybe $160 to $180,000. I don't know.
> (TR 193.)

Complainant asserts that we should estimate damages, like we did in *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773

[5] There was testimony that in prior years Complainant had worked as an agent for other onion growers. (TR 92-93; 217; 357.) Complainant was not restricted in his employment to only Respondent. In addition, Complainant failed to show that he could reasonably have considered himself Respondent's agent after the failed negotiations in September and October 2005. At minimum, he could have pursued additional employment in October, November and December. There was no evidence that he attempted to find other work.

(1981). (Motion for Reconsideration at 12.) This case is completely different from *Arkansas Tomato, Co.*, in which we reluctantly estimated damages to do equity. In that case, the buyer had accepted and resold the tomatoes in question; an equitable estimation of damages was required because the buyer had misrepresented the value of the resold tomatoes. In contrast, Complainant seeks thousands of dollars in equitable damages for arranging "contracts" that did not result in the sale of any of Respondent's onions.

Complainant insists that Respondent relied on Complainant's services, and this should be compensable at equity. (Motion to Reconsider at 12-13.) The evidence does not support the allegation that Respondent relied on Complainant. Respondent was actively searching for a replacement after Mr. Hicks refused Respondent's offer in October 2006. (TR 324; 343.) Mr. Gillis testified that when he signed the contract with Michael Cutler Company, he believed he was eliminating Complainant from Respondent's sales to Michael Cutler. (TR 344.)

Far from being the perfect case to invoke principals of equity, Complainant failed to meet its burden of coming forward with evidence that would support an equitable award. To the extent that Complainant's other arguments on the law and the evidence have not been discussed in this opinion, those arguments have been considered and rejected.

For the foregoing reasons, Complainant's Petition for Reconsideration is denied. Therefore the stay of the original order in this proceeding is lifted and the following order is issued.

There shall be no further stays of this Order based on a new petition for reconsideration filed by Complainant. Complainant's right to appeal to federal district court is found in section 7 of the Act (7 U.S.C. §499g).

**Order**

The Complaint in this matter is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $6,468.62.

Copies of this Order shall be served upon the parties.

Done at Washington D.C.

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**EVANS SALES INC., D/B/A HORIZON MARKETING, INC. v. WEST COAST DISTRIBUTING, INC.**
**PACA Docket No. R-04-070.**
**Order Denying Complainant's Respondent Petition for Reconsideration.**
**Filed December 12, 2008**.

**PACA**.

Christopher Young-Morales - Hearing Officer - AMS.
Tom Oliveri for Petitioner.
Mark Mandel for Respondent.
*Order issued by William G. Jenson, Judicial Officer*.

## Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.§ 499a *et seq*.) (hereinafter, "PACA"). On June 3, 2008, a Decision and Order (D&O) was issued wherein the complaint was dismissed because the Presiding Officer found that Complainant failed to prove its case by a preponderance of the evidence, and that Complainant was not entitled to fees and expenses. On June 25, 2008, Complainant filed a Petition for Reconsideration, wherein Complainant requested that we reconsider the "important" evidence. (Petition, at 4). On July 22, 2008, Respondent filed an Objection To Petition For Reconsideration. We find that all relevant evidence has been considered exhaustively in this case, and therefore, the Petition For Reconsideration is denied.

## Discussion

Complainant made a claim against Respondent in the amount of $103,693.57, which was alleged to be past due and owing in connection with thirty (30) shipments of grapes sold to Respondent in the course of

interstate commerce. Respondent argued, *inter alia*, that Complainant did not own or have any rights to the grapes that made up the 30 transactions in this proceeding, and that Respondent has already paid the grower and rightful owner of the grapes identified in each transaction, Amanda Marroquin/AMC Produce Sales, in full.

Complainant argued at hearing, in its brief, and again in its Petition for Reconsideration that the invoices from Complainant to Respondent were sent to Respondent, and that Respondent did not object to the invoices. Complainant claims that the invoices, particularly because they were not objected to by Respondent when first sent to Respondent, are evidence of a sale, for which Respondent owes Complainant. We concluded in the D&O that no contract existed between Complainant and Respondent. It is this conclusion, and the facts supporting that conclusion, that Complainant requests be reconsidered.

At the hearing held in this case, in response to Complainant's claims, Respondent's witnesses provided the explanation, which we found to be credible, that it was known that Complainant was "running" the "Marroking" cooler, through which the AMC Sales grapes came, and that it was therefore unremarkable that Complainant was sending copies of invoices and bills of lading for AMC grapes (which Complainant did not own and had no right to sell) to Respondent's office in Bakersfield (Respondent in Massachusetts did not see the invoices until sometime in 2003). Witnesses stated all AMC grapes went through the Marroking cooler, and that because Complainant was involved in running the Marroking cooler, Complainant's "number" was assigned to every file that went through the Marroking cooler, including those sent to Respondent in Bakersfield. Therefore, Respondent had no reason to take issue with, or object to, the invoices. At hearing, Complainant did not produce any witnesses or evidence to rebut the testimony of Respondent's witnesses.

The failure of a party to object to an invoice received in the normal course of business does not create a sale which is otherwise non-existent. *Floriza Sales Co., Inc. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328 (1988). As stated in the Decision and Order, the 30 invoices at issue in this case do not prove the existence of a contract between Complainant and Respondent as claimed by Complainant, and

Respondent provided an explanation for the lack of objection to the invoices and bills of lading sent to Respondent's office in Bakersfield. Therefore, the invoices and bills of lading are not conclusive evidence of a contract in this case, particularly in light of other evidence produced by Respondent, which Complainant failed to rebut. (D&O at 21- 23). Accordingly, based on the evidence adduced by Respondent at hearing, Complainant did not meet its burden to prove its case, while Respondent did meet its burden to prove its own assertion and defense.

All relevant evidence was considered in this case, and from that evidence, we concluded that Complainant did not meet its burden of proving by a preponderance of the evidence all of the material allegations of its Complaint. Upon reconsideration of the evidence and for the reasons cited above, Complainant's Petition for Reconsideration should be denied.

This forum will entertain no further petitions for reconsideration. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. 499g).

**Order**

The Complainant's Petition for Reconsideration is denied.

The Complaint in this case is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent, the prevailing party, the amount of $22,401.39 in attorney's fees and expenses.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

## PERISHABLE AGRICULTURE COMMODITIES ACT

## DEFAULT DECISIONS

**In re: WU CHU TRADING CORPORATION d/b/a TROPICAL WHOLESALE PRODUCE.**
**PACA Docket No. D-07-0194.**
**Default Decision.**
**Filed October 7, 2008.**

**PACA – Default.**

Gary F. Ball for AMS.
Respondent, Pro se.
*Default Decision by Administrative Law Judge Jill S. Clifton.*

### Decision and Order by Reason of Default

The Complaint, filed on September 13, 2007, under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (the "Act" or the "PACA"), alleged that during November 27, 2005 through November 24, 2006, Respondent Wu Chu Trading Corporation, d/b/a Tropical Wholesale Produce ("Respondent Wu Chu" or "Respondent"), failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $376,711.50 for 142 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce.

### Parties and Counsel

Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS" or "Complainant"), is represented by Gary F. Ball, Esq., and was previously represented by Tonya Keusseyan, Esq., both with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue SW, Washington

D.C. 20250-1413.

Respondent Wu Chu is a corporation organized and existing under the laws of the state of Illinois. Respondent has not answered the Complaint.

**Respondent's Failure to Answer**

The time for filing an answer expired in mid-January 2008. Complainant's Motion for Decision Without Hearing by Reason of Default, filed May 23, 2008, 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. Accordingly, the material allegations in the Complaint, which are admitted by Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Wu Chu Trading Corporation, doing business as Tropical Wholesale Produce, is a corporation organized and existing under the laws of the state of Illinois. Respondent Wu Chu's business and mailing address at all times material herein was 2404 S. Wolcott Avenue, Unit 13, Chicago, Illinois 60608.

2. Respondent Wu Chu was licensed under the PACA at all times material herein. License number 1984-0953 was issued to Respondent on March 26, 1984. This license was suspended on December 21, 2006, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)) when Respondent failed to pay a reparation award. Subsequently, this license terminated on March 26, 2007, 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 November 27, 2005, through November 24, 2006,

Respondent Wu Chu failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $376,711.50 for 142 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce.

## Conclusions

Respondent Wu Chu's failure to make full payment promptly with respect to the transactions referred to in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the following Order is issued.

## Order

Respondent Wu Chu Trading Corporation, doing business as Tropical Wholesale Produce, is found to have committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

## Finality

This Decision will become final and effective without further proceedings 35 days after it is served unless a party to the proceeding files with the Hearing Clerk an appeal to the Judicial Officer 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). See attached Appendix A, containing 7 C.F.R. § 1.145).

Copies of this Decision 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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**In re: RLB GROWERS AND SHIPPERS, LLC.**
**PACA Docket No. D-08-0161.**
**Default Decision.**
**Filed December 1, 2008.**

**PACA – Default.**

Leah C. Battagioli 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 "PACA"), instituted by a Complaint filed on August 1, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter "Complainant"). The Complaint alleges that during the period July 5, 2006, through September 29, 2007, Respondent RLB Growers and Shippers, LLC, failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, in the total amount of $419,977.10 for 46 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

A copy of the Complaint was sent to Respondent's principal, Roger L. Burden, by certified mail on August 1, 2008, and it was returned to the Hearing Clerk on September 2, 2008, as "unclaimed." Accordingly, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151; hereinafter "Rules of Practice"), on September 3, 2008, the Hearing Clerk re-mailed the Complaint using regular mail. That mailing by regular mail is deemed to constitute service on Respondent pursuant to section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)). 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 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. RLB Growers and Shippers, LLC (hereinafter "Respondent"), is a limited liability company organized and existing under the laws of the State of Indiana. Its business and mailing address was 9951 Hedden Road, Evansville, Indiana 47725. Respondent ceased business operations in August 2007. Respondent's current mailing address is c/o Roger L. Burden, 2736 Sugar Cane Lane, Evansville, Indiana 47715.
2. At all times material to this decision, Respondent was licensed under the provisions of the PACA. License number 2007-0201 was issued to Respondent on November 24, 2006. This license was suspended on November 1, 2007, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), when Respondent failed to pay a reparation award. The license terminated on November 24, 2007, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period July 5, 2006, through September 29, 2007, failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, in the total amount of $419,977.10 for 46 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.
4. On August 20, 2007, a civil complaint was filed against Respondent in the United States District Court, Southern District of Indiana to enforce the trust provisions of the PACA (7 U.S.C. § 499e(c)). The civil complaint was designated case number 3:07-cv-00110-RLY-WGH. On January 15, 2008, an Order and Judgment was issued as to the validity and amount of the PACA claims. The Order and Judgment deemed as valid all the PACA claims of the sellers listed in paragraph III of the Complaint and found that the amounts owed to the sellers were greater than or equal to the amounts alleged in this complaint.

## Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly to 23 sellers in the total amount of $419,977.10 for 46 lots of perishable agricultural commodities, constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

## Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

_____

**In re: FJB, INC., d/b/a EMPIRE PRODUCE.**
**PACA Docket No. D-08-0189.**
**Default Decision.**
**Filed December 16, 2008.**

**PACA – Default.**

Leah C. Battagioli 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 "PACA"), instituted by a Complaint filed on September 25, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter "Complainant"). The Complaint alleges that during the period May 1, 2006, through March 30, 2007, Respondent FJB, Inc., d/b/a Empire Produce (hereinafter "Respondent"), failed to make full payment promptly to 63 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,325,025.50 for 501 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

A copy of the Complaint was served on Respondent's principal, Robert Garsha, by certified mail on October 4, 2008. A copy of the Complaint was also served on Respondent's attorney, Mark Mandell, Esq., by certified mail on September 27, 2008. Respondent failed to file an answer as prescribed by section 1.136 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136; hereinafter "Rules of Practice"). Pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), Respondent's failure to file an answer constitutes an admission of the allegations in 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 of the Rules of Practice (7 C.F.R. § 1.139).

### Findings of Fact

1. FJB, Inc., d/b/a Empire Produce, is a corporation organized and existing under the laws of the State of New York. Its business and mailing address was 337 Row C, New York City Terminal Market,

Bronx, New York 10474. Respondent ceased business operations on March 2, 2007. Respondent's current mailing addresses are through its attorney, Mark Mandell, Esq., 42 Herman Thau Road, Annandale, New Jersey, 08801, and through its principal, Robert Garsha, in the State of California.

2. At all times material to this decision, Respondent was licensed under the provisions of the PACA. License number 2007-0742 was issued to Respondent on April 30, 2004. The license terminated on April 30, 2007, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period May 1, 2006, through March 30, 2007, failed to make full payment promptly to 63 sellers of the agreed purchase prices, or balances thereof, in the total amount of $1,325,025.50 for 501 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

4. On February 6, 2007, a civil complaint was filed against Respondent, and Respondent's principal, Robert Garsha, in the United States District Court, Southern District of New York to enforce the trust provisions of the PACA (7 U.S.C. § 499e(c)). The civil complaint was designated case number 1:07-cv-00898-CM-DFE. Final judgments have been entered as to the PACA claims of 25 of the 63 sellers listed in paragraph III of the Complaint. In all instances, the court found that Respondent was liable to the 25 sellers to the extent of their PACA claims. The amounts found to be due and owing to 23 of the 25 sellers in the PACA trust case were greater than or equal to the amounts in the Complaint. The chart below compares the amounts due per the Complaint to the amounts found to be due and owing in the PACA trust case by the New York district court.

| **Seller Name** | **Complaint** | **PACA Trust Case** |
|---|---|---|
| Hintz Reiman, Inc., d/b/a River City Produce | $27,890.50 | $27,913.00 |
| Team Produce International, Inc. | $12,025.50 | $12,025.50 |
| Natural Selection Foods, LLC, d/b/a Earthbound Farms | $26,867.45 | $28,143.45 |

| | | |
|---|---|---|
| William Consalo & Sons Farms, Inc. | $24,262.55 | $24,332.55 |
| Classic Salads, LLC | $55,548.25 | $58,136.62 |
| Eco Farms Sales, Inc. | $14,824.00 | $14,824.00 |
| Stellar Distributing, Inc. | $18,316.80 | $18,316.80 |
| John Vena Specialties, LLC | $3,709.50 | $3,836.50 |
| Ger-Nis International, LLC | $89,733.65 | $85,910.65 |
| Church Brothers, LLC | $75,519.85 | $79,562.40 |
| Calavo Growers, Inc. | $153,841.60 | $153,841.60 |
| J. Marchini & Son, Inc. | $18,156.50 | $18,396.50 |
| Fresh Directions International, Inc. | $58,957.50 | $59,514.00 |
| Nasiff International, Inc. | $6,416.00 | $6,416.00 |
| Gourmet Veg-Paq, Inc. | $56,639.00 | $56,639.00 |
| Robert Masha Sales, Inc. | $84,953.75 | $81,332.15 |
| Consolidated Farms, Inc., d/b/a Crystal Valley Foods | $79,365.75 | $90,683.50 |
| Top Banana, LLC | $10,236.25 | $10,236.25 |
| Nathel & Nathel, Inc. | $11,782.00 | $12,745.50 |
| Pio Enterprises, Inc. | $13,593.50 | $13,593.50 |
| Maurice A. Auerbach, Inc. | $9,673.50 | $9,673.50 |
| A.J. Trucco, Inc. | $980.00 | $980.00 |
| G&V Farms, LLC | $82,507.50 | $82,607.50 |
| Del Monte Fresh Produce N.A., Inc. | $58,699.00 | $58,699.00 |
| Moog Marketing, Inc. | $11,173.00 | $11,173.00 |

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent's failure to make full payment promptly to 63 sellers in the total amount of $1,325,025.50 for 501 lots of perishable agricultural commodities constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the order below is issued.

**Order**

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This order shall take effect on the 11th day after this decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

_____

**Consent Decisions**
Date Format [YY/MM/DD]

**Perishable Agricultural Commodities Act**

David W. Theodore d/b/a Consolidated Farms PACA-D-0195
08/07/08.

# AGRICULTURE DECISIONS

**Volume 67**

July - December 2008
Part Four
List of Decisions Reported (Alphabetical Listing)
Index (Subject Matter)


THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

# AGRICULTURE DECISIONS

*Agriculture Decisions* is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions*. However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) 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 individual cases may be available upon request. Gross downloading of the scanned pre-1999 cases will not be available due to Personal Identity Information (P.I.I.) concerns. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 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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