AGRICULTURE DECISIONS

Volume 68

January – June 2009

UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

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AGRICULTURE DECISIONS

Volume 68

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Part One (General)
Pages 1- 437

THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISIONS

HEIN HETTINGA v. UNITED STATES.
No. 07-5403.
Decided April 3, 2009.

[Cite as: 560 F.3d 498.]

AMA – Milk – Producer-handler – Pricing and pooling requirements – Failure to state a claim upon which relief may be granted – Bill of Attainder, when not – Equal protection - Failure to exhaust administrative remedies.

United States Court of Appeals
District of Columbia Circuit

Before: ROGERS, TATEL, and KAVANAUGH, Circuit Judges.

Opinion

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

Hein and Ellen Hettinga, owners of Sarah Farms, and co-owners with their son Gerben of GH Dairy, appeal the dismissal of their complaint challenging the constitutionality of two amendments to the Agricultural Marketing Agreement Act ("AMAA"). The Hettingas alleged that the amendments, which subjected certain large producer-handlers of milk to contribution requirements applicable to milk handlers, were invalid as a bill of attainder and a violation of equal protection and due process. The question on appeal is whether the Hettingas were required to exhaust administrative remedies before filing suit against the United States. We hold that exhaustion was neither jurisdictionally nor prudentially required. The plain text of the exhaustion requirement in the AMAA does not apply to constitutional challenges to the AMAA itself,

as distinct from challenges to regulatory orders and attendant obligations. Because the Hettingas' objections do not involve an alleged defect in a marketing order and the Secretary lacks the power to provide a remedy, requiring exhaustion as a prudential matter would not protect administrative agency authority or advance judicial efficiency. Accordingly, we reverse.

I.

The milk business is highly regulated by the Secretary of Agriculture pursuant to the AMAA, 7 U.S.C. §§ 601-674. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 779 (D.C.Cir.2006). The Secretary issues milk marketing orders that regulate payments made from milk handlers (processors and distributors) to milk producers (farmers). *Id.* In order to protect producers from variations in prices, handlers are required to pay into a pool for milk bought from producers; the funds in the pool are distributed on a pro rata basis to the producers. *Id.*; *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 341-43, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984).

Until 2005, the Secretary had exempted "producer-handlers"-i.e., dairy farms that produce, process, and distribute milk within a single vertically-integrated operation-from the pooling requirements and pricing restrictions of milk marketing orders. *See Edaleen Dairy,* 467 F.3d at 780. This gave market power to the producer-handlers who could afford to undercut the prices charged by participants in the pooling system, but most producer-handlers were small family operations that had little effect on the market. *Id.* Some producer-handlers grew quite large, however, and the Secretary initiated a formal rulemaking to determine whether to change the status of producer-handlers in two regions, including the Arizona-Las Vegas marketing area in which Sarah Farms is located. *Id.* As a result, in 2006 the Secretary promulgated a rule requiring producer-handlers that produced over 3 million pounds of fluid milk per month within a marketing area to pay into the producer settlement fund if they sold milk at a price higher than that paid by handlers to producers. *Id.*; *Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas: Order Amending the Orders,* 71

Fed.Reg. 9430 (Feb. 24, 2006) (codified at 7 C.F.R. §§ 1124.10, 1124.71, 1131. 10, 1131.71).

Sarah Farms is a producer-handler. Its owners, the Hettingas, are also partners with their son, Gerben, in GH Dairy, a handler dairy in Arizona that sells milk exclusively in California. On March 15, 2006, the Hettingas sought an injunction from the district court in the Northern District of Texas against enforcement of the new rule, alleging that it was arbitrary and capricious and that the Secretary lacked authority over producer-handlers that sell only milk produced from their own cows. Another large producer-handler sought an injunction from the district court of the District of Columbia, alleging the Secretary lacked authority to promulgate the rule, and on appeal this court held the producer-handler must first exhaust administrative remedies. *Edaleen Dairy,* 467 F.3d at 783. Before the Texas district court heard arguments in the Hettingas' case, Congress amended the AMAA.

The Milk Regulatory Equity Act of 2005, Pub.L. No. 109-215, 120 Stat. 328 (2006) (codified at 7 U.S.C. § 608c) ("MREA"), codified the Secretary's revocation of the exemption for large producer-handlers in the Arizona-Las Vegas marketing area, but not the Pacific Northwest area, and also made subject to regulation producers like GH Dairy that are located in the marketing area and sell milk to areas that are unregulated by marketing orders, such as California. 7 U.S.C. § 608c(5)(M), (N), note (2006) ("the Amendments").[1] On September 22, 2006, the Hettingas filed a complaint in the district court here alleging

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[1]The MREA amended section 608c(5) of the AMAA to add, as relevant here, subparagraphs M and N. Subparagraph M, "Minimum Milk Prices for Handlers," provides:

> (i) Application of minimum price requirements.-Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

that the Amendments are unconstitutional as a bill of attainder and a denial of due process and equal protection because only the Hettingas are subject to them. The district court dismissed the complaint for lack of subject matter jurisdiction upon ruling that "any challenge to the validity of the [Amendments] is essentially a challenge to [an] order by the Secretary," and the Hettingas were therefore required to exhaust administrative remedies. *Hettinga v. United States,* 518 F.Supp.2d. 58, 61 (D.D.C.2007). The Hettingas appeal, and our review is *de novo. Munsell v. Dep't of Agric.,* 509 F.3d 572, 578 (D.C.Cir.2007).

II.

1 2 3 Parties have long been required to exhaust administrative remedies before seeking relief from federal courts, *McCarthy v. Madigan,* 503 U.S. 140, 144-45, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), either as a matter of congressional command or to protect the authority of the agency and to promote judicial efficiency, *id*. at 145, 112 S.Ct. 1081. "Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy,* 503 U.S. at 144, 112 S.Ct. 1081 (1992) (citations omitted). "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) (citation omitted).

4 5 6 Where exhaustion is required, there still is a separate question whether the requirement is jurisdictional, and thus nonwaivable, or non-jurisdictional. In *Avocados Plus Inc. v. Veneman,* 370 F.3d 1243 (D.C.Cir.2004), this court, in observing that the distinction between jurisdictional and non-jurisdictional exhaustion "is purely a question of statutory interpretation," *id.* at 1247, set a high bar for determining that a statute requiring exhaustion is jurisdictional: "In order to mandate exhaustion, a statute must contain ' "[s]weeping and direct" statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim.' " *Id.* at 1248 (quoting *Weinberger v. Salfi,* 422 U.S.

749, 757, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)). This court will "presume exhaustion is non-jurisdictional unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.' " *Id.* (quoting *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.,* 727 F.2d 1204, 1208 (D.C.Cir.1984)).

7 Prudential exhaustion, in turn, "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy,* 503 U.S. at 145, 112 S.Ct. 1081. Prudential exhaustion is not required where: (1) it would occasion undue prejudice to subsequent assertion of a court action, for example through excessive delay; (2) an agency may not be empowered to grant relief, for example "because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute" or because "an agency may be competent to adjudicate the issue presented, but still lack authority to grant the type of relief requested"; or (3) the agency is biased. *Id.* at 146-49, 112 S.Ct. 1081.

A.

8 9 10 Section 608c(15)(A)[2] of the AMAA imposes a mandatory administrative exhaustion requirement on milk handlers "seeking to challenge the provisions of a milk marketing order." *Edaleen Dairy,* 467 F.3d at 782; *see Block,* 467 U.S. at 343, 104 S.Ct. 2450; *United States v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946). There is no similar requirement for producers because the AMAA affords them no administrative remedy. *See Stark v. Wickard,* 321 U.S. 288, 309, 64

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[2]The AMAA provides in relevant part:
(A) Any handler subject to a[ ] [milk marketing] order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A).

S.Ct. 559, 88 L.Ed. 733 (1944); *see also Ruzicka,* 329 U.S. at 295, 67 S.Ct. 207. Where a producer-handler sues in its capacity as a handler, as it does in challenging the Secretary's order subjecting it to price-pooling obligations, it must exhaust. *Edaleen Dairy,* 467 F.3d at 783. Thus, were the Hettingas challenging the Secretary's milk marketing order for the Arizona-Las Vegas area, they would be required to exhaust administrative remedies before filing a lawsuit challenging those orders. *Block,* 467 U.S. at 346, 104 S.Ct. 2450; *Ruzicka,* 329 U.S. at 290, 67 S.Ct. 207; *Edaleen Dairy,* 467 F.3d at 782. The Hettingas' complaint, however, is directed at the Amendments to the AMAA, not a milk marketing order. The complaint alleges that "[t]he MREA, as adopted, contained provisions that singled out and punished the Hettingas," citing subparagraphs M and N. Compl. ¶ 27.

The government advances two arguments that the Hettingas are nonetheless challenging a milk marketing order rather than the MREA, but neither is persuasive. First, the government maintains that only such orders, and not the MREA, impose affirmative obligations to pay fees. The MREA, in fact, provides that large producer-handlers located in states regulated by milk marketing orders that sell milk in unregulated states "shall be subject" to the price and pooling obligations of the marketing orders. 7 U.S.C. § 608c(5)(M). It further provides that "no" large producer-handler in Arizona "shall be exempt" from the relevant milk marketing order. *Id.* § 608(5)(N). The price and pooling obligations for large handlers in the Arizona-Las Vegas milk marketing area preexisted enactment of the MREA, and the MREA imposed those obligations on large producer-handlers. To suggest, as the government offers, that the MREA does not subject formerly exempt producer-handlers to such obligations ignores the inexorable consequences of the Amendments. The district court suggested that those consequences are not inexorable because the Secretary could relieve such obligations for the entire milk marketing area by terminating the relevant order. Putting aside the unrealistic nature of the premise, the Secretary could only repeal the marketing order upon determining it no longer tends to effectuate the policy of the AMAA. *See* 7 U.S.C. § 608c(4). There is nothing to indicate that the Secretary considers the marketing order to have outlived its purpose. Instead the

Secretary's promulgation of a rule abolishing prior exemptions is consistent with imposing the marketing order obligations on more producers, not fewer. In any event, the Hettingas are not asserting that the marketing order is not effective in most instances, only that they should be exempted from it. Under the MREA, the Secretary no longer has authority to provide such an exemption. It follows that the Hettingas are challenging provisions of the MREA amending the AMAA and not the underlying marketing order.

Second, the government maintains the MREA requires implementation by the Secretary in order to become effective, and therefore the Hettingas are challenging the Secretary's administrative action in effecting this implementation, rather than provisions of the MREA. Section 2(d) of the MREA provides:

EFFECTIVE DATE AND IMPLEMENTATION.-The amendments made by this section take effect on the first day of the first month beginning more than 15 days after the date of the enactment of this Act. To accomplish the expedited implementation of these amendments, effective on the date of the enactment of this Act, the Secretary of Agriculture shall include in the pool distributing plant provisions of each Federal milk marketing order ... a provision that a handler described in subparagraph (M) of such section ... will be fully regulated by the order in which the handler's distributing plant is located.

7 U.S.C. § 608c note. As an initial matter, the MREA only requires addition of "a provision" in marketing orders with regard to subparagraph (M), not subparagraph (N), which the Hettingas also challenge. More importantly, section 2(d) does not demonstrate that to become effective the MREA requires the Secretary first to issue an order. Instead, its text provides that the MREA took effect on a precise date shortly after its enactment. *Id.* Congress included the requirement that the Secretary add "a provision" to marketing orders making clear that large producer-handlers are subject to the orders in order to "accomplish the expedited implementation of the [ ] amendments," and not to make those amendments take effect. *Id.* Hence, the statutory text

does not suggest the MREA has no force and effect on its own. Rather, section 2(d) reflects that large producer-handlers were automatically subject to the marketing order on a date certain, and that the Secretary was to ensure the rapid and smooth implementation of the MREA by making clear to affected parties the obligations created by operation of law upon enactment of the MREA.

Although the AMAA exhaustion requirement is mandatory, *see Block,* 467 U.S. at 344, 104 S.Ct. 2450; *Ruzicka,* 329 U.S. at 290, 67 S.Ct. 207, and the court has refused to excuse it, *see Edaleen Dairy,* 467 F.3d at 782, the court has never decided whether exhaustion is a jurisdictional requirement inexcusable under any circumstances or merely a mandatory requirement inexcusable under most. *See generally Munsell,* 509 F.3d at 579. The court's opinion in *Avocados Plus,* 370 F.3d at 1248-50, holding that similar text in a different statute failed to create a jurisdictional requirement, perhaps suggests that AMAA exhaustion is best described only as mandatory and not as something more. We need not reach that question, however, because it is clear that the AMAA does not create a jurisdictional exhaustion requirement for challenges to the AMAA itself.

11 The AMAA's exhaustion requirement, *supra* n. 2, plainly is aimed only at marketing orders and attendant obligations, not at challenges to the statute. The government's suggestion that the MREA is an "obligation imposed in connection" with an order is resourceful but unpersuasive. The context of the reference to "any obligation imposed in connection" with marketing orders indicates Congress was referring to obligations imposed by the Secretary in the marketing orders, not a more general statutory obligation to be subject to such administrative orders. In *Ruzicka,* 329 U.S. at 289, 67 S.Ct. 207, for example, a handler challenged the amount set by an order of the Secretary directing payment into the producer settlement fund, according to terms in a marketing order, as distinct from a challenge to the marketing order itself. That is the situation captured by the phrase "obligation imposed in connection" with a milk marketing order. By contrast, the Hettingas challenge neither a marketing order nor an attendant obligation but rather Congress's determination of which entities shall be subject to the

preexisting administratively determined obligations. Because the AMAA's exhaustion requirement does not apply to such statutory challenges "in clear, unequivocal terms," *Avocado Plus,* 370 F.3d at 1248, the Hettingas' constitutional challenges to the Amendments were not subject to exhaustion as a jurisdictional matter.

B.

12 13 Whether exhaustion should be required as a prudential matter depends on "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block,* 467 U.S. at 345, 104 S.Ct. 2450. Moreover, "[n]otwithstanding [the institutional interests in exhaustion], federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy,* 503 U.S. at 146, 112 S.Ct. 1081 (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-818, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

14 15 Requiring exhaustion of the Hettingas' statutory challenges would neither "protect[ ] administrative agency authority" nor "promot[e] judicial efficiency." *Id.* at 145, 112 S.Ct. 1081. As the Supreme Court has observed, it would make little sense to require exhaustion where an agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute" or where "an agency may be competent to adjudicate the issue presented, but still lack[s] authority to grant the type of relief requested." *Id.* at 147-48, 112 S.Ct. 1081. Both conditions apply here. The Secretary lacks the power either to declare provisions of the MREA unconstitutional, or to exempt the Hettingas from the requirements of the milk marketing order as imposed by the MREA. A constitutional challenge to a statute "has generally been thought beyond the jurisdiction of administrative agencies," even if courts have sometimes made exceptions to that rule. *Thunder Basin,* 510 U.S. at 215, 114 S.Ct. 771. Although the government suggests administrative proceedings would provide the court with the benefit of the Secretary's expertise in the technical arena of milk pricing and develop an appropriate

administrative record, it is unclear what benefit the Secretary could provide. The Hettingas' complaint relies on the structure of the MREA and its legislative history. The discrete factual question of whether other parties are subject to the Arizona-Las Vegas marketing order could as easily be addressed in the district court. And whatever insight the Secretary could provide regarding how the MREA furthers the AMAA's purposes does not directly address Congress's goals in enacting the MREA.

16 A remand for the district court to conduct the "intensely practical" balancing inquiry outlined in *McCarthy* is unnecessary, for unlike in *Avocados Plus* and the cases it cited, 370 F.3d at 1251 (citing *Montgomery v. Rumsfeld,* 572 F.2d 250, 254 (9th Cir.1978); *Ogden v. Zuckert,* 298 F.2d 312, 317 (D.C.Cir.1961)), the issue of exhaustion has been briefed by the parties and the suggestions favoring exhaustion are unpersuasive. Accordingly, we reverse and remand the case to the district court for further proceedings on the Hettingas' complaint.

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AGRICULTURAL MARKETING AGREEMENT ACT

DEPARTMENTAL DECISIONS

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.
Decision and Order.
Filed October 30, 2008.

[*Editor's Note: We regret that this case was not published in Vol. 67 Jul. - Dec. (2008)*]

AMA – Milk – Producer-handler – Pricing and pooling requirements – Failure to state a claim upon which relief may be granted.

Sharlene Deskins for the Administrator, AMS.
Alfred W. Ricciardi, Phoenix, AZ, for Petitioners.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

BACKGROUND

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], empowers the Secretary of Agriculture to regulate persons who handle agricultural commodities, including milk, in order to establish and maintain orderly marketing conditions for those agricultural commodities, to protect consumers of agricultural commodities, and to avoid unreasonable fluctuations in supplies and prices by maintaining an orderly supply of agricultural products.[1] The AMAA authorizes the Secretary of Agriculture to issue milk marketing orders to regulate geographic regions of the country. Generally, pricing and pooling requirements established by federal milk marketing orders do not apply to entities that process their own milk because these entities, which are referred to as "producer-handlers," are

[1] 7 U.S.C. § 602(1)-(2), (4).

typically small and have little impact on the milk market.[2]

On February 24, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], issued a final rule amending the federal orders regulating the handling of "Milk in the Pacific Northwest Marketing Area" (7 C.F.R. pt. 1124 (2006)) and "Milk in the Arizona-Las Vegas Marketing Area" (7 C.F.R. pt. 1131 (2006)) to subject large producer-handlers in the two milk marketing areas to pricing and pooling obligations.[3] As a result of that final rule, Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms, who operate a large dairy business in Arizona, were required to comply with the pricing and pooling obligations that applied to other dairy businesses in the Arizona-Las Vegas marketing area.

On April 11, 2006, Congress enacted the Milk Regulatory Equity Act of 2005 [hereinafter the MREA], which amended and supplemented the AMAA.[4] The MREA places volume limits on the applicability of the producer-handler exemption and requires the Secretary of Agriculture to issue a final rule regulating the sale of fluid milk into geographic regions with state-law minimum prices for milk by handlers located in federally-regulated milk marketing areas. Under this provision, milk handlers which import milk into a region governed by state minimum milk prices shall be subject to all the minimum and uniform price requirements of a federal milk marketing order applicable to the county

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[2] *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 780 (D.C. Cir. 2006). *See also Stew Leonard's v. Glickman*, 199 F.R.D. 48, 50 (D. Conn. 2001) (stating, typically, a producer-handler conducts a small family-type operation, processing, bottling, and distributing only his own farm production and the rationale for exempting the producer-handler from the pricing pool is that producer-handlers are so small that they have little or no effect on the pool), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002).

[3] 71 Fed. Reg. 9430 (Feb. 24, 2006).

[4] Section 2(a) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 328-29, is codified at 7 U.S.C. § 608c(5)(M)-(O); section 2(b) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 329, amends 7 U.S.C. § 608c(11)(C) and adds a new provision, 7 U.S.C. § 608c(11)(D); and section 2(c)-(d) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 330 is set forth in 7 U.S.C. § 608c note.

in which the plant of the handler is located. On May 1, 2006, the Secretary of Agriculture issued a final rule amending the 10 federal milk marketing orders to implement the MREA.[5] As a result of that final rule, GH Dairy, d/b/a GH Processing, a partnership whose partners are Hein Hettinga, Ellen Hettinga, and Gerben Hettinga, were required to comply with the pricing requirements of the Arizona marketing area.[6]

Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms, and GH Dairy, d/b/a GH Processing [hereinafter the Hettingas], brought an action against the United States in the United States District Court for the District of Columbia: (1) asserting that the MREA violates the Bill of Attainder Clause, the Due Process Clause, and the Equal Protection Clause; (2) seeking a declaration that two provisions of the MREA are unconstitutional; and (3) requesting the issuance of a permanent injunction against the application of the MREA to them.

The United States moved to dismiss for lack of subject matter jurisdiction arguing that the Hettingas' claims are barred because the Hettingas did not exhaust administrative remedies available through petition to the Secretary of Agriculture. The AMAA specifically provides that handlers may petition the Secretary of Agriculture for modification of, or exemption from, an order, as follows:

> **§ 608c. Orders**
>
> . . . .
>
> **(15) Petition by handler and review**
>
> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or

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[5] 71 Fed. Reg. 25,495 (May 1, 2006).

[6] Pursuant to the MREA, the Administrator removed Clark County, Nevada, from the Arizona-Las Vegas milk marketing area (71 Fed. Reg. 25,495, 25,502 (May 1, 2006)). Subsequently, the Administrator published a final rule changing the name of the federal milk marketing order from "Milk in the Arizona-Las Vegas Marketing Area" to "Milk in the Arizona Marketing Area" and changing the name of the milk marketing area from the "Arizona-Las Vegas marketing area" to the "Arizona marketing area" (71 Fed. Reg. 28,248, 28,249 (May 16, 2006)).

> any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A).

On July 31, 2007, the United States District Court for the District of Columbia issued a Memorandum Opinion: (1) finding the MREA requires an order by the Secretary of Agriculture to be effective; (2) concluding, because the MREA cannot be implemented as to the Hettingas without an order by the Secretary of Agriculture, any challenge to the validity of the MREA is essentially a challenge to the order issued by the Secretary of Agriculture; therefore, the mandatory exhaustion requirement of 7 U.S.C. § 608c(15)(A) applies; (3) granting the motion to dismiss filed by the United States; and (4) dismissing the case. *Hettinga v. United States*, 518 F. Supp.2d 58 (D.D.C. 2007). The Hettingas appealed to the United States Court of Appeals for the District of Columbia Circuit and that appeal is currently pending.

PROCEDURAL HISTORY

On March 7, 2008, the Hettingas instituted this administrative proceeding by filing a Petition[7] pursuant to 7 U.S.C. § 608c(15)(A) and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. The Hettingas allege the MREA violates the Bill of Attainder Clause, the Due Process Clause, and the Equal Protection Clause (Pet. ¶¶ 71-90) and seek a declaration that section 2(a) of the MREA is unconstitutional (Pet. at 19-20).

On April 7, 2008, the Administrator filed "Answer of Respondent" in which the Administrator: (1) denies the material allegations of the Petition; (2) states the Petition fails to state a claim upon which relief can be granted; (3) states the AMAA and the federal order regulating

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[7]The Hettingas entitle their Petition "Petition For Declaratory Relief From Application Of The Milk Regulatory Equity Act And For Restitution" [hereinafter Petition].

"Milk in the Arizona Marketing Area" (7 C.F.R. pt. 1131), as interpreted by the Administrator, are fully in accordance with law and binding on the Hettingas; and (4) requests denial of the relief requested by the Hettingas and dismissal of the Petition.

On July 15, 2008, the Hettingas filed a Motion for Judgment on the Pleadings: (1) stating the Petition is a facial constitutional challenge to the MREA and the Secretary of Agriculture has no authority to relieve the Hettingas from the operation of the MREA and (2) requesting dismissal of the Petition and certification of the Hettingas' right to have their claims reviewed by a court pursuant to 7 U.S.C. § 608c(15)(B). On August 11, 2008, the Administrator filed a response to Petitioners' Motion for Judgment on the Pleadings in which the Administrator requested dismissal of the Hettingas' Petition with prejudice because the Hettingas failed to state a claim upon which relief can be granted.

On August 26, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order dismissing the Petition for failure to state a claim upon which relief can be granted. On September 26, 2008, the Hettingas filed an "Appeal to the Judicial Officer and Request for Oral Argument" [hereinafter Appeal Petition]. On October 15, 2008, the Administrator filed "Respondent's Response to Appeal to the Judicial Officer and Request for Oral Argument." On October 20, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 27, 2008, the Hettingas filed "Petitioners' Response To Department Request To Decide This Petition Without Oral Argument."

CONCLUSIONS BY THE JUDICIAL OFFICER

The Hettingas' Appeal Petition

The Hettingas state their Petition presents only a facial constitutional challenge to the MREA, and the statutory provision under which the Hettingas instituted the instant administrative proceeding, 7 U.S.C. § 608c(15)(A), is not applicable to this facial constitutional challenge (Appeal Pet. at 2). Moreover, the Hettingas agree with the ALJ's legal conclusion that the Secretary of Agriculture cannot provide the relief

requested by the Hettingas (Appeal Pet. at 1). The Administrator states that the Hettingas' facial constitutional challenge to the MREA is a claim that cannot be raised administratively and urges, in his response to the Hettingas' Appeal Petition, that I affirm the ALJ's Memorandum Opinion and Order dismissing the Hettingas' Petition.

I agree with the Hettingas, the Administrator, and the ALJ. The Hettingas' March 7, 2008, Petition fails to state a claim upon which relief may be granted in this forum. Therefore, I affirm the ALJ's August 26, 2008, Memorandum Opinion and Order and dismiss the Hettingas' March 7, 2008, Petition with prejudice.

The Hettingas' Request for Oral Argument

The Hettingas' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[8] is refused because the parties have thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

The Hettingas' Reply to the Administrator's Response to the Hettingas' Appeal Petition and Request for Oral Argument

On October 27, 2008, the Hettingas filed a reply to the Administrator's response to the Hettingas' Appeal Petition and the Hettingas' request for oral argument. The Rules of Practice do not provide for a reply to a response to an appeal petition or for a reply to a response to a request for oral argument, and the Hettingas did not request the opportunity to file such a reply. Therefore, I strike the Hettingas' October 27, 2008, supernumerary filing.

For the forgoing reasons, the following Order is issued.

ORDER

The Hettingas' March 7, 2008, Petition is dismissed with prejudice for failure to state a claim upon which relief may be granted.

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[8] 7 C.F.R. § 900.65(b)(1).

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In re: HEIN HETTINGA AND ELLEN HETTINGA, d/b/a SARAH FARMS.
AMA Docket No. M-08-0071.
Decision and Order.
Filed January 15, 2009.

AMA – Marketing orders – Pricing and pooling provisions – Producer-handler – Class I milk – Cancellation provision.

Sharlene A. Deskins, for the Administrator, AMS.
Alfred W. Ricciardi, Phoenix, AZ, for Petitioners.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On March 7, 2008, Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms [hereinafter the Hettingas], instituted this administrative proceeding by filing a Petition[1] pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. The Hettingas seek a determination that the Market Administrator misinterpreted and misapplied the federal order regulating the handling of "Milk in the Arizona-Las Vegas Marketing Area" (7 C.F.R. pt. 1131 (Apr. 1, 2006)) [hereinafter the Arizona-Las Vegas Milk Marketing Order] by imposing minimum price regulations upon the Hettingas for the month of April 2006; a determination that the imposition of the minimum price regulations on the Hettingas was not in accordance with

[1]The Hettingas entitle their Petition "Petition for Declaratory Relief and for Restitution of April 2006 Assessment" [hereinafter Petition].

the Arizona-Las Vegas Milk Marketing Order; a refund of the $324,211.60 assessment which the Hettingas paid under protest; interest, attorney fees, and costs; and all other relief to which the Hettingas might be entitled.

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], responded to the Petition by filing "Answer of Respondent" on April 7, 2008. On May 6, 2008, United Dairymen of Arizona, Shamrock Foods, Shamrock Farms, Parker Farms, and the Dairy Institute of California [hereinafter the Intervenors] filed a motion for leave to intervene in the proceeding pursuant to 7 C.F.R. § 900.57. On August 27, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] granted the motion to intervene.

On September 10, 2008, the ALJ conducted a hearing in Washington, DC. Alfred W. Ricciardi, of Aiken, Schenk, Hawkins & Ricciardi, P.C., Phoenix, Arizona, represented the Hettingas. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Two witnesses testified at the hearing: James R. Daugherty, the market administrator for the federal order regulating the handling of "Milk in the Pacific Northwest Marketing Area" (7 C.F.R. pt. 1124) and the federal order regulating the handling of "Milk in the Arizona Marketing Area" (7 C.F.R. pt. 1131),[2] and William Alan Wise, the assistant market administrator for the federal order regulating the handling of "Milk in the Pacific Northwest Marketing Area" (7 C.F.R. pt. 1124) and the federal order regulating the handling of "Milk in the Arizona Marketing Area" (7 C.F.R. pt. 1131).[3] Ten exhibits were introduced and received into evidence. The Hettingas, the Administrator, and the Intervenors

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[2]The Administrator removed Clark County, Nevada, from the Arizona-Las Vegas milk marketing area (71 Fed. Reg. 25,495, 25,502 (May 1, 2006)). Subsequently, the Administrator published a final rule changing the name of the federal milk marketing order from "Milk in the Arizona-Las Vegas Marketing Area" to "Milk in the Arizona Marketing Area" and changing the name of the milk marketing area from the "Arizona-Las Vegas marketing area" to the "Arizona marketing area" (71 Fed. Reg. 28,248, 28,249 (May 16, 2006)).

[3]See note 2.

each filed a post-hearing brief. Following the filing of the post-hearing briefs, the Hettingas sought leave to file a reply brief to address issues raised in the Intervenors' post-hearing brief. The ALJ granted the Hettingas' motion, and on November 13, 2008, the Hettingas filed Petitioners' Reply Brief.

On November 17, 2008, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded that the market administrator's imposition of minimum price regulations upon the Hettingas for the month of April 2006 was in accordance with law, denied the relief sought by the Hettingas, and dismissed the Hettingas' March 7, 2008, Petition with prejudice (Initial Decision at 7-8). On December 12, 2008, the Hettingas appealed to, and requested oral argument before, the Judicial Officer. On December 30, 2008, the Intervenors filed a response in opposition to the Hettingas' appeal petition, and on January 5, 2009, the Administrator filed a response in opposition to the Hettingas' appeal petition.

On January 9, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision denying the relief sought by the Hettingas and dismissing the Hettingas' March 7, 2008, Petition with prejudice.

DECISION

Background

The Hettingas, 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. 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 milk marketing area).

On February 24, 2006, the Administrator issued 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 that person had in-area route distributions of class I milk in excess of 3,000,000 pounds per month (71 Fed. Reg. 9430 (Feb. 24, 2006)). As a producer-handler of milk since 1994 and continuing until April 1, 2006, the Hettingas had been exempt from the minimum pricing and pooling provisions of federal milk marketing orders adopted by the Secretary of Agriculture under the AMAA. Acting under the newly adopted final rule, the market administrator assessed a pool payment of $324,211.60 on the Hettingas for milk processed in April 2006, based upon the Hettingas in-area route distributions of class I milk in excess of 3,000,000 pounds.

On April 11, 2006, Congress enacted the Milk Regulatory Equity Act of 2005 [hereinafter the MREA] which amended and supplemented the AMAA. The MREA statutorily affirmed the Secretary of Agriculture's determination to place volume limits on the applicability of the producer-handler exemption. On May 1, 2006, the Administrator issued a final rule amending the 10 federal milk marketing orders to implement the MREA.[4]

In asserting that the market administrator wrongfully assessed a pool payment of $324,211.60 against them for the month of April 2006, the Hettingas argue that May 2006 was the first month in which an assessment could properly be made and the assessment for April 2006 was not in accordance with law as their status as a producer-handler was not formally cancelled. The Hettingas cite as support for their argument 7 C.F.R. § 1131.10(c) which provides:

§ 1131.10 Producer-handler.

. . . .

(c) *Cancellation*. The designation as a producer-handler shall be canceled upon determination by the market administrator that any of the requirements of paragraphs (a)(1) through (5) of this

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[4]71 Fed. Reg. 25,495 (May 1, 2006).

> section are not continuing to be met, or under any of the conditions described in paragraphs (c)(1), (2) or (3) of this section. 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 not met or the conditions for cancellation occurred.

Further, the Hettingas 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 Hettingas had indeed qualified as a producer-handler prior to April 1, 2006, the definition of "producer-handler" was changed by the final rule which became effective on April 1, 2006 (71 Fed. Reg. 9430 (Feb. 24, 2006)). Included in the changes in the new definition is a requirement that, in order to become 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.[5] The cancellation provision relied upon by the Hettingas was another change that also became effective on April 1, 2006. The Administrator 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 the Hettingas ever applied for the producer-handler

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[5]Prior to the April 1, 2006, changes to the Arizona-Las Vegas Milk Marketing Order, a producer-handler self-determined the scope of his or her operation and the market administrator audited the information to verify its accuracy (Tr. 23-24). The pre-April 1, 2006, definition of the term "producer-handler" did not have any provision for designation of producer-handlers by the market administrator and contained no provision for the cancellation of the producer-handler designation by the market administrator (Tr. 64). *See* 7 C.F.R. § 1131.10 (2006); 64 Fed. Reg. 48,010 (Sept. 1, 1999).

designation[6] (even if they had been otherwise eligible, which they were not, as their class I route distribution exceeded the 3,000,000 pound threshold), *a priori*, the Hettingas could not have been a producer-handler within the post-April 1, 2006, definition.

Although the parties differ as to whether the amendments to the Arizona-Las Vegas Milk Marketing Order merely amend the old order, or create a new order, 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 Hettingas no longer eligible for the regulatory exemption afforded producer-handlers. Similarly, the Hettingas' argument regarding the 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 Hettingas' position as, in absence of a published definition of the terms, recourse falls upon the regulatory language contained in the Arizona-Las Vegas Milk Marketing Order. Last, the 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 applied to be designated as, or been designated as, a producer-handler after April 1, 2006, somehow still requires cancellation under the new cancellation provision effective April 1, 2006, is without merit.

Findings of Fact

1. The Hettingas, 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.

3. 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 milk marketing area).

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[6]Tr. 71-72.

4. On February 24, 2006, the Administrator issued 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 milk marketing orders if they had in-area route distributions of class I milk in excess of 3,000,000 pounds per month (71 Fed. Reg. 9430 (Feb. 24, 2006)).

5. From 1994 and continuing until April 1, 2006, the Hettingas, 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 of Agriculture under the AMAA.

6. Following adoption of the final rule, the market administrator assessed a pool payment of $324,211.60 on the Hettingas for milk processed in April 2006.

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

8. On April 11, 2006, Congress enacted the MREA which amended and supplemented the AMAA. The MREA statutorily affirmed the Secretary of Agriculture's determination to place volume limits on the applicability of the producer-handler exemption. On May 1, 2006, the Administrator issued a final rule amending the 10 federal milk marketing orders to implement the MREA.[7]

9. Commencing April 1, 2006, the Hettingas ceased to be eligible for the producer-handler exemption under the Arizona-Las Vegas Milk Marketing Order because the Hettingas' in-area route distributions of class I milk exceeded 3,000,000 pounds per month, because the Hettingas failed to apply for a producer-handler designation, and because the market administrator did not designate the Hettingas as a producer-handler.

Conclusions of Law

1. The Secretary has jurisdiction over this action.
2. The market administrator's assessment of $324,211.60 against the

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[7]See note 4.

Hettingas for the month of April 2006 was appropriate and in accordance with law based upon the April 1, 2006, revisions to the Arizona-Las Vegas Milk Marketing Order (71 Fed. Reg. 9430 (Feb. 24, 2006)).

3. Effective April 1, 2006, the definition of "producer-handler" was changed by final rule. Included in the changes to the new definition was a requirement that in order to become 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. (71 Fed. Reg. 9430 (Feb. 24, 2006).)

4. Cancellation of the designation as a producer-handler was not required for an entity which had not applied for designation as, and had not been designated as, a producer-handler after April 1, 2006.

5. The Hettingas' in-area route distributions of class I milk exceeded 3,000,000 pounds in April 2006 and precluded them from being eligible for designation as a producer-handler even had they applied.

The Hettingas' Request for Oral Argument

The Hettingas' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[8] is refused because the parties have thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

The Hettingas' Appeal Petition

The Hettingas raise four issues in their "Appeal to the Judicial Officer and Request for Oral Argument" [hereinafter Appeal Petition]. First, the Hettingas contend "the ALJ erred in concluding that the Market Administrator was not required to cancel the status of the Hettingas as a producer-handler in accordance with the provisions of 7 C.F.R. § 1131.10(c)." (Appeal Pet. at 1.)

The Administrator amended the definition of the term "producer-handler" in the Arizona-Las Vegas Milk Marketing Order

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[8] 7 C.F.R. § 900.65(b)(1).

effective April 1, 2006, to include provisions for the market administrator's designation of persons as producer-handlers and cancellation of the producer-handler designation. The market administrator never designated the Hettingas as a producer-handler under the April 1, 2006, definition of "producer-handler." The Arizona-Las Vegas Milk Marketing Order provides that the designation of producer-handler shall be cancelled by the market administrator under certain circumstances (7 C.F.R. § 1131.10(c) (2007)). Logically, the market administrator cannot cancel a designation that does not exist. Therefore, as the Hettingas were never designated as a producer-handler under the April 1, 2006, definition of "producer-handler," the ALJ correctly concluded that the market administrator could not cancel the producer-handler designation of the Hettingas.

Second, the Hettingas contend the ALJ's failure to decided whether the February 24, 2006, final rule (71 Fed. Reg. 9430 (Feb. 24, 2006)) amended the Arizona-Las Vegas Milk Marketing Order or created a new Arizona-Las Vegas Milk Marketing Order, is error. The Hettingas take the position that the Arizona-Las Vegas Milk Marketing Order was merely amended; hence, the Hettingas continued as a producer-handler until the market administrator cancelled their producer-handler status in accordance with 7 C.F.R. § 1131.10(c). (Appeal Pet. at 2.)

The ALJ found unnecessary the resolution of the issue of the whether the April 1, 2006, final rule amended the Arizona-Las Vegas Milk Marketing Order or created a new Arizona-Las Vegas Milk Marketing Order, as follows:

> 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 [Hettingas] no longer eligible for the regulatory exemption afforded producer-handlers.

Initial Decision at 5. I agree with the ALJ. The characterization of the

final rule (71 Fed. Reg. 9430 (Feb. 24, 2006)) does not affect the disposition of the instant proceeding. Whether the final rule is characterized as amendment to the Arizona-Las Vegas Milk Marketing Order or a new Arizona-Las Vegas Milk Marketing Order, the effect is the same: namely, prior to the effective date of the final rule, the Hettingas were a producer-handler under the Arizona-Las Vegas Milk Marketing Order; on and after the effective date of the final rule, the Hettingas, as a matter of law, were not a producer-handler. As the Hettingas had never been designated by the market administrator as a producer-handler, the market administrator had no designation to cancel.

Third, the Hettingas contend the ALJ erroneously "downplayed" the imprecision of the market administrator, his staff, and other United States Department of Agriculture employees in using the terms "status" and "designation" to simultaneously define a producer-handler (Appeal Pet. at 2).

The ALJ referenced the United States Department of Agriculture employees' interchangeable use of the terms "status" and "designation," as follows:

> 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 [Hettingas'] 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.

Initial Decision at 5. The purported imprecision of United States Department of Agriculture employees when using the terms "designation" and "status" is not relevant to the disposition of the instant proceeding. The final rule, which amended the definition of the term "producer-handler," requires that, in order for a person to be a "producer-handler," the market administrator must designate that person as a producer-handler after determining that all of the requirements of 7 C.F.R. § 1131.10 have been met. The Hettingas were never designated by the market administrator as a producer-handler. The purported imprecise language used by United States Department of

Agriculture employees does not change the fact that, as a matter of law, on and after April 1, 2006, the Hettingas were not a producer-handler under the Arizona-Las Vegas Milk Marketing Order.

Fourth, the Hettingas contend the ALJ's conclusion that an application for designation of as a producer-handler is required under the Arizona-Las Vegas Milk Marketing Order, is error (Appeal Pet. at 2).

The Arizona-Las Vegas Milk Marketing Order does not explicitly refer to an "application" for designation as a producer-handler. However, producer-handler status is an exception to the general regulatory scheme of the AMAA and must be established by the person seeking the exception.[9] The Arizona-Las Vegas Milk Marketing Order places the burden of establishing and maintaining producer-handler status on the handler. I find that, although 7 C.F.R. § 1131.10 does not explicitly use the word "application," the process by which a person must obtain producer-handler designation under 7 C.F.R. § 1131.10 constitutes an application to the market administrator for such designation.

For the forgoing reasons, the following Order is issued.

ORDER

1. The relief sought by the Hettingas is denied.

2. The Hettingas' March 7, 2008, Petition is dismissed with prejudice.

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[9] *In re Stew Leonard's*, 59 Agric. Dec. 53, 71 (2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); *In re Kreider Dairy Farms, Inc.,* 54 Agric. Dec. 805, 826-27 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 67 (1995); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 138 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 983 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 405 (1974); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763, 800 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd, United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973).

This Order is effective upon service on the Hettingas.

RIGHT TO JUDICIAL REVIEW

The Hettingas have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which the Hettingas have their principal place of business. The Hettingas must file a bill in equity for the purpose of review of the Order in this Decision and Order within 20 days from the date of entry of the Order in this Decision and Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[10] The date of entry of the Order in this Decision and Order is January 15, 2009.

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[10] 7 U.S.C. § 608c(15)(B).

ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: RONALD WALKER, ALIDRA WALKER AND TOP RAIL RANCH, INC.
A.Q. Docket No. 07-0131.
Decision and Order.
March 18, 2009.

AQ – Chronic wasting Disease – Destruction of herd – Compensation.

Darlene Bolinger for APHIS.
Brenda L. Jackson for Respondent.
Decision and order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision I find that Respondents did violate a "final premises" agreement with Complainant concerning restocking of their elk breeding facility. I find that Respondents did not violate the agreement by purchasing and breeding reindeer, as the reindeer were not penned in the area that was the subject of the agreement. I impose a civil penalty of $20,000 for the violations, but this penalty should be offset against the funds that Complainant has withheld pending completion of the depopulation of Respondent's elk hunting facility.

Procedural Background

This proceeding was initiated by the filing of a complaint on June 14, 2007, by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that Respondents Ronald Walker, Alidra Walker, and Top Rail Ranch violated the Animal Health Protection Act and the Chronic Wasting Disease Indemnification Program Regulations by restocking their

premises in violation of a herd plan agreed to by Complainant and Respondents. Respondents filed a timely answer on August 8, 2007. I conducted a hearing in this matter in Denver, Colorado on May 14-15, 2008. Complainant was represented by Lauren Axley, Esq. and Darlene Bollinger, Esq. of USDA's Office of General Counsel. Respondents were represented by Brenda Jackson, Esq. Complainant called four witnesses and Respondents called two, including Mr. Walker. The parties filed a "Joint Stipulations of Fact" which was admitted as Joint Exhibit 1. I admitted 36 exhibits at the behest of Complainant and 6 at the behest of Respondents.

Following the hearing, Complainant submitted its opening brief, including proposed findings of fact and conclusions of law, on July 11, 2008; Respondents filed their brief on August 18, 2008; and Complainant's reply brief was filed on September 11, 2008.

Statutory and Regulatory Background

In enacting The Animal Health Protection Act, 7 U.S.C. § 8301 et seq., Congress provided the Secretary of Agriculture the authority to take actions for "the prevention, detection, control and eradication of diseases and pests of animals." The Act is designed to protect, among other things, animal health, the health and welfare of the people of the United States, and the economic interests of the livestock industry. The powers of the Secretary include the seizure, quarantine, destruction, or disposal of disease carrying animals or animals exposed to animals carrying certain diseases. The Secretary also is generally required to compensate owners of animals required to be destroyed under the Act. 7 U.S.C. § 8306(d). The Secretary is also empowered with the authority to seek civil and criminal penalties for violations of the Act, 7 U.S.C. § 8313, and to promulgate regulations "as the Secretary determines necessary to carry out this chapter." 7 U.S.C. § 8315.

In accordance with these Congressional directives, the Secretary promulgated the regulations at 9 C.F.R. Part 55—Control of Chronic Wasting Disease. These regulations included setting up a Chronic Wasting Disease Indemnification Program, which provided for paying owners of herds to be destroyed as part of a CWD program up to 95% of each animal's value, with an upper limit of $3,000 per animal. The

regulations also provide for cleaning and disinfection of premises after cervid removal has been accomplished and for the creation of a herd plan and/or a premises management agreement whereby the USDA, the owner and the state representative agree on a plan for eradicating CWD from a herd, and preventing its future recurrence.

The regulations, at 9 CFR § 55.7, specify that claims that arise out of the destruction of cervids are only payable if the cervids have been appraised and the owners have signed the appraisal form indicating that they agree with the appraisal, and that the owners will agree to comply with a herd plan and will not introduce cervids onto the premises until after the date specified in the herd plan. "Persons who violate this written agreement may be subject to civil and criminal penalties."

Facts

Respondents Ronald Walker and Alidra Walker own Respondent Top Rail Ranch, which in 2004 consisted of an elk breeding herd on premises located at 2055 Highway 50, Penrose, CO and a hunting herd located on premises at 1000 Walker Way, Canon City, Colorado. JX 1, Stip. 1 and 2. The breeding herd premises is generally referred to as E71 and the hunting herd premises is generally referred to as E85. Id. Stip. 2. Mr. Walker was born and raised on a ranch and has hunted all his life. Tr. 529. He has been an elk rancher since 1996, and has served as president of both the Colorado Elk Breeders Association and the North American Elk Breeders Association. Tr. 557-559.

CWD is a disease of livestock that belongs to the family of diseases known as transmissible spongiform encephalopathy. Tr. 274-275. It is a fatal, progressive, degenerative neurological disease. It is transmissible from one animal to another through direct contact as well as through environmental contamination. Tr. 288-289. One of the difficulties in dealing with this disease is that there is currently no means of detecting the presence of the disease through testing a living creature—it can only be detected by testing the brain tissue of a deceased animal. Tr. 285. The State of Colorado requires that any elk

that dies must be tested for CWD. USDA works in cooperation with the state of Colorado to implement this program. JX 1, Stip. 4. Once CWD is discovered in a herd, the common practice is to quarantine the herd, and then to depopulate it, with each of the euthanized animals being tested for CWD. Tr. 303-310.

After a USDA representative collected samples from a hunter-killed elk at the E85 facility, test results released in January 2005 indicated that the 52-month old elk bull tested positive for CWD. JX 1, Stip. 5. As a result, and pursuant to their normal practices, the State of Colorado quarantined all elk on both the E71 and E85 premises. JX 1, Stip. 6, CX 2, Tr. 27-28, 584-586. Mr. Walker accepted the quarantine on February 2, 2005. At that point, no elk could enter or leave either the breeding herd or the hunting herd.

Several months later, the parties began discussions on how and when to depopulate the two herds. JX 1, Stip. 7-9, Tr. 31-36, 482-484, 588-591. Over a period of time, a plan was agreed to whereby the two herds would be euthanized and Respondents would be paid for a percentage of the appraised value of the herds, as per the regulations at 9 C.F.R. § 55.7(b). This Depopulation Agreement and Preliminary Premises Plan became effective after it was signed by Mr. Walker on August 22, 2005. CX 5. The herd at E71, consisting of 234 elk, was appraised at $429,637.50. JX 1, Stip. 11. The Plan provided for the appraised value to be paid after the E71 herd was depopulated, except that the parties agreed that 25% of the payment would be withheld until such time as the E85 herd was depopulated. CX 5, pp. 1-2. The parties agreed that 4 animals in the E71 herd, which were referred to as "bottle babies[1]" would be spared. CX 5, JX 1, Stip. 13. This was an exception to the usual rule where the entire herd would normally be depopulated, but the Walkers were adamant about the four elk. Tr. 37, 41-43, 185-186, 483-485, 588-589. The agreement to depopulate E71, CX 5, specifically mentioned the four animals as exempt from the program, with provisions that after they died they would each be tested for CWD. The Plan made it clear that only four animals from the herd would be

[1] Although they were referred to as "bottle babies" these four elk were not juveniles. Essentially, the term means that these were hand-raised and were regarded as family pets.

retained, and that restocking of E71 with any cervids would not be allowed until after the death of the four retained elk. The Plan referred to a future "final premises plan" with strong implications that such a plan would be developed after all elk were gone from the premises and certain cleaning measures were undertaken. However, the plan did not define the boundaries of E71, so it is unclear, particularly in terms of future uses of the property, as to the boundaries the document is intended to cover. This included whether the conditions imposed in the plan were confined to the corrals where the elk were kept, and the extent to which other areas of the property, such as corrals never used by the elk, were covered by future use restrictions. Both the withholding of 25% of the indemnity money and the allowance of the four bottle babies were exceptions to the normal depopulation agreement. Tr. 43-44, 83-84, 326-327, 407-410. APHIS viewed the withholding of the 24% as a form of leverage, as they had never allowed a split depopulation before. Tr. 83-84.

By the time the depopulation of E71 took place in September 2005, many of the females had calved. Although no compensation was paid for the 65 calves, they too were euthanized as part of the depopulation. Tr. 183-184. Two of the E71 elk tested positive for CWD. JX 1, Stip. 15, Tr. 66.

When this gruesome task was accomplished, APHIS personnel assumed that only the four bottle babies remained on E71. Tr. 56-58, 189. The bottle babies consisted of one bull and three cows. Tr. 185. APHIS was not aware that two of the bottle babies had calved and that there were actually six elk on E71 that had not been depopulated. Tr. 77, 110. Mr. Walker testified that the state personnel, particularly Dr. Cunningham, who had since retired and did not testify, knew of the two additional elk. Tr. 602-603. While not notifying federal officials of the existence of the two elk, Mr. Walker did follow state procedures, registering the newborn calves with the state brand board, and tattooing them as required. Tr. 612, 628-629. In the next few years six additional calves were born as a result of the bottle baby bull mating with the bottle baby cows. The bottle baby bull, Howard, died a few months before the

hearing. Tr. 610. At the time of the hearing, there were eleven elk on E71. Tr. 628-629.

The parties had negotiated to have the E71 depopulation occur before the E85 depopulation to allow, at Respondents' request, two hunting seasons to transpire before the final depopulation would be undertaken. Tr. 40-41. Since every elk in E85 was stated to have come from E71 and since there was no way for a living elk to depart from E85, the parties apparently agreed that it would do no harm, in terms of the spread of CWD, if Respondents were allowed to conduct hunts, as long as no new animals were introduced to E85. Tr. 40. That way, Respondents would have two more seasons to conduct profitable hunts, and the depopulation of the remaining elk would be less costly for APHIS, as there would be fewer elk to kill and thus much less indemnity to pay. All hunted elk would still be required to be tested as per the regulations. The agreement the parties entered into assumed that the withheld indemnity for 25% of the E71 herd would be paid by the end of 2006, by which time it was apparently presumed that the depopulation of E85 would have occurred.

On September 20, Mr. Walker signed the Final Premises Plan (FPP) for E71 on behalf of Respondents, and Dr. Roger Perkins, on behalf of APHIS, signed the plan the next day. CX 9, J. Ex. 1. Although it was normal practice for such a plan to also be signed by the state, and there was a signature line reserved for this purpose, the Colorado State Veterinarian did not sign this plan. The plan refers to an attached diagram of the premises, but no such diagram is attached to CX 9. However, Dr. Perkins indicated that the document admitted as CX 19 was the diagram referred to in CX 9. Tr. 164-165. This diagram is reasonably consistent with the aerial photographs admitted as RX 3.

The FPP specifically referred to the fact that the entire E71 herd had been euthanized "with the exception of 4 elk," CX 9, p. 1, so it is indisputable that by signing the document, Mr. Walker was unambiguously making a representation that he knew to be untrue. He admitted as much on his direct testimony, stating that the only way to get his money was to sign the FPP, even though he knew there were 6,

rather than 4, elk on the E71 premises. Tr. 636-637.[2]

Events did not transpire as planned. For a variety of reasons, the parties had considerable difficulty in agreeing on various aspects of the plan to depopulate E85. Mr. Walker insisted on a variety of conditions which APHIS thought made carrying out the plan exceedingly difficult, if not impossible, including such conditions as not allowing any motor vehicles to operate off the trails, thus requiring all killed elk to be manually carried off the premises, and severely limiting the duration of the operation. Tr. 87-120. Unlike E71, which was a series of corrals, E85 consisted of approximately 1500 acres of rough terrain. Tr. 542-544.

Eventually, APHIS agreed to Mr. Walker's insistence that hunters familiar with E85 be employed, and bids were solicited for this purpose. Tr. 112-121. However, the three bids that were submitted were deemed too costly by APHIS. Tr. 120. Finally, late in the winter of 2007, APHIS hired, with Mr. Walker's approval, Roger McQueen, an independent hunter known to Mr. Walker. Tr. 132-133. Interestingly, McQueen would be allowed to use motorized vehicles, including snowmobiles, rubber-tired all terrain vehicles, a 4 X 4 winch truck, a tractor and a backhoe in order to carry out the operation. Id. However, the fact that Mr. Walker went out of his way to make the E85 depopulation more difficult to accomplish is not material to any of my findings here, as an agreement was finally reached and was only not accomplished by the unilateral action of APHIS.

The E85 depopulation was scheduled to begin in mid-March 2007. Because conditions were good for hunting, Mr. McQueen began his work one day early and killed seven elk in that one day. Tr. 137-138. The following day, APHIS directed that the depopulation be suspended. Tr. 133-134, 410-411, 632-633. The apparent reason for the suspension of the operation was that APHIS had discovered that there was a

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[2] Although it is speculation, and not material to my findings, it is likely that Dr. Cunningham did not sign the Plan because he knew it was untrue with regards to the number of elk.

violation regarding E71, resulting from the procreative activities of the bottle babies, and because Respondents had purchased reindeer which were allegedly being housed in E71 in violation of the quarantine and the agreements that had been signed. Tr. 133-134, 410-411. APHIS reimbursed Respondents for the seven elk that McQueen killed. CX 37. No further depopulation efforts had been undertaken as of the date of the hearing.

Respondents admit purchasing reindeer, with the purpose of breeding them, subsequent to the date of signing the depopulation agreement. Tr. 642-645, JX 1, Stip. 24-25. Respondents even exhibited the reindeer as part of a Christmas pageant in Florence, Colorado. Tr. 250. Reindeers, like elk, are cervids, but there has never been a reported case of CWD in a reindeer. Tr. 324-325, 399. The depopulation plan included a ban on keeping cervids in E71, but there is disputed evidence as to what constitutes E71, and where the reindeer were kept. Mr. Walker did not dispute that he owned the reindeers, but rather contended that they were kept out of the area that he defined as E71. Tr. 643-645. There is a lack of specificity in the various documents signed by the parties, as well as the state representatives involved, in terms of defining exactly what was meant by E71. Mr. Walker contends that, with respect to the depopulation agreement, E71 consisted of the fenced elk enclosure, and that the portions of his property that were not previously inhabited by elk were not covered by the conditions of the agreement; while he knew cervids could not be brought on to a quarantined property, he testified that the reindeer were never situated in any portion of the property that was quarantined. Tr. 643-645. One witness, Tad Puckett, who had sold the reindeer cows to Respondents after the depopulation took place, testified that while he never saw the reindeer and the elk together, he saw them to the east or the north of Respondents' working barn, including in pen 1 or 2, both of which were part of the E71 property used by the depopulated elk. Tr. 453-454. However, Dr. Richard Brewster, who had been specializing in CWD in Colorado for the three or four years prior to his retirement in July 2007, testified that he did not see any reindeer when visiting E71 on December 27, 2006, Tr. 499,: Steve Rossi, a retired state employee who owned one of the four bottle babies testified that he visited many times and the reindeer were always kept in an area clearly separate from the 12 elk pens, Tr. 576-577; and

Elizabeth Kelpis, the area manager for APHIS's Investigations and Enforcement Branch, testified that even though she saw eight elk and 6 reindeer on the property, they were never penned together, and the reindeer may well have been in the same pen indicated by Mr. Walker and Mr. Rossi—that is, a pen that was not one that had previously been used to corral the E71 herd. Tr. 259-262.

Discussion

I find that Alidra Walker and Top Rail Ranch were properly named parties to this action, along with Ronald Walker. I find that both the Depopulation and Preliminary Premises Plan, and the FPP were legitimate exercises of regulatory authority by APHIS. In particular, I find that it was proper to include in the Plans withholding of 25% of the indemnification for the E71 depopulation to successful completion of the E85 depopulation. I also find that the failure of Respondents to notify APHIS representatives of the calves born to the bottle babies, and Mr. Walker's signing of the FPP when he knew that more than 4 elk were excluded from the depopulation was a violation warranting a civil penalty. I also find that there was absolutely no legitimate basis for APHIS to discontinue the depopulation of E85. Finally, I find that because neither of the Plans clearly defined the parameters of E71 to the extent that it was unclear whether cervids were banned from areas not specifically described as areas which the elk herd had occupied, that the starting of a reindeer herd did not constitute a violation of the Act, the underlying regulations, or the FPP.

1. Respondents contend that neither Alidra Walker nor Top Rail Ranch are proper parties to this matter. They contend that since only Ron Walker signed the various agreements at issue and that since there is no indication that he was acting on behalf of either his wife or Top Rail, that he should be the only respondent in this proceeding. They also contend that Top Rail had no ownership interest in the E71 herd. They state in their brief that Complainant only named all three as parties in order to increase the maximum penalty that could be assessed.

These contentions are belied by the Joint Stipulations of Fact, J. Ex. 1. The parties stipulated that "Ronald and Alidra Walker own and operate the Top Rail Ranch, Inc." and that "The ranch consists of an elk breeding herd . . .(E71) . . . as well as a hunting herd . . . (E85). (Stipulations 1 and 2). Stipulation 12 indicates that Mr. Walker's signature on the Depopulation Agreement was on behalf of both himself and his wife, which would likewise indicate that he was signing as the owner or authorized representative of both his wife and Top Rail, while the Plan itself purported to be "an agreement between Top Rail Elk Ranch owners Ron and Alidra Walker," APHIS and the State of Colorado. CX 5, paragraph 1. Thus, the evidence clearly supports a finding that Alidra Walker and Top Rail Ranch, Inc. are proper parties in this action, along with Ron Walker.[3]

2. Withholding 25% of the indemnity for the depopulation of E71, as an extra assurance that the depopulation of E85 would be accomplished, was not inconsistent with the regulations. Because of the unusual factors present in this case, principally the sparing of the four bottle babies (which eventually grew to a group of eleven), and the fact that Respondents negotiated for a two hunting season extension of time before the depopulation of E85 would occur, in order to allow Respondents to arrange the more-profitable elk hunts during that time, APHIS was certainly allowed to negotiate a quid pro quo in terms of withholding a portion of the proceeds. While there was no specific language in the regulations allowing such a withholding, the regulations also appear to contain no language that would allow excepting four elk from the depopulation, nor is there any language that would appear to allow a two-hunting season postponement of depopulation.

3. While the withheld 25% of the agreed upon indemnity was supposed to be paid on the completion of the E85 depopulation, and no later than December 2006, it is apparent that Mr. Walker was engaging in various obstructive actions to delay the depopulation, presumably to allow Top Rail to continue hunting operations. However, after the parties finally

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[3] Interestingly, the regulations only allow indemnity if "the owners" sign the appraisal agreement and the herd plan (emphasis added). Both these documents were only signed by Ron Walker, but neither Complainant nor Respondents are contending that the payment of the indemnity was unlawful.

reached agreement in February 2007, it was APHIS who unilaterally abrogated the agreement by electing to discontinue the depopulation of E85 just after it began because of its investigation into whether Respondents violated provisions of the depopulation agreement by restocking the elk (by allowing the bottle babies to breed and not reporting the information to APHIS) and by starting a herd of reindeer.

APHIS witnesses repeatedly testified to the importance of the CWD program and the need for prompt depopulation of herds where a positive test for CWD has occurred. Herd depopulation is certainly one of the more drastic remedies to animal disease that is permissible under USDA regulations. The imposition of quarantines, the creating of herd plans and final premises plans, the cleaning up and disinfection of the premises where the diseased animal had lived, all attest to the seriousness of the disease and the need to take prompt action. Complainant's decision to stop the depopulation of E85, due to what is effectively an unrelated series of events on E71, does not make sense. On the one hand, Complainant complains of the admittedly obstructionist role Mr. Walker played in terms of agreeing to conditions for depopulation of E85, and how APHIS was being extraordinarily lenient in allowing Respondents two extra hunting seasons before undertaking the final depopulation of E85. Yet after agreement was reached, APHIS unilaterally decided that because there was a pending investigation as to whether the agreements on E71 were violated that the depopulation should be entirely stopped, leaving possibly contaminated elk alive and putting the Respondents in a costly state of limbo. Even if there were violations of the provisions of the plans dealing with E71—and I find that there were—that is not a basis to stop the depopulation of E85. The record does not indicate if APHIS was concerned over the payment of the 25% of the indemnification that was withheld was a major motivating factor, but that could have been worked out after the fact. Not completing the depopulation or at least allowing Respondents to conduct hunts until the elk were entirely removed from E85 is simply unfathomable in light of the purposes of the

CWD eradication program.

4. Only the four specifically identified bottle babies were permitted to survive the E71 depopulation. The depopulation plan clearly contemplates only the four would be allowed to survive, and Respondents' failure to notify APHIS that two of the elk had calved by the time of the depopulation, and their subsequent signing of the FPP which represented that the four bottle babies were the only remaining elk in E71, constituted a deliberate misrepresentation of fact and was a violation of the depopulation plan.

Mr. Walker testified that the State veterinarian, Dr. Cunningham, saw the two calves that were kept with the bottle babies during the depopulation of E71, and told him to lock them in pen 7, where he stated the bottle babies were kept in clear view during the depopulation effort. Other witnesses testified that they did not see either the bottle babies or their two calves during the depopulation. It can reasonably be assumed that Dr. Cunningham's failure to sign the FPP was related to his knowledge that the representation that only the four bottle babies survived the euthanization that took place a few weeks earlier. It is certainly clear that neither Mr. Walker nor Dr. Cunningham informed APHIS officials about the two calves born to the bottle babies, and that the APHIS officials did not know about the two calves at the time of the signing of the FPP. While Mr. Walker apparently did inform the state brand board of the birth of the two calves, as well as the three calves that were born in the spring of 2006 (and presumably three more that were born in 2007, since there were eleven elk at the time of the hearing (Tr. 628-629), factoring in the fact that the bull had died), he never notified APHIS, presumably because he knew that he had specifically represented to them that only the four bottle babies were alive at the time of signing the FPP.

The addition of any elk, other than the four bottle babies, to the E71 property constitutes restocking in violation of the FPP. The motivation of the parties throughout the process was to reduce the elk population of E71 to zero, with the exception being made that the four bottle babies would be allowed to live out their lives but remaining quarantined. The FPP contemplated a reassessment of CWD risks on the property before allowing restocking with cervids, depending on the test results on the bottle babies after their deaths. The Plan clearly did not contemplate

additional elk living on E71, whether through intentional or inadvertent breeding, or through any other means, unless and until the four bottle babies died and were tested.

Respondents contend that the failure of the FPP to address the issue of breeding indicates that no violation occurred. They also contend that APHIS was at fault for not developing "cooperative lines of communication" with Colorado so that they would have known about the birth of calves which had been registered with the brand board. This does not change the fact that the plain language of the FPP limited the exceptions to the four bottle babies and that there were to be no additions to the elk herd until after they died and were tested. It is difficult to believe Mr. Walker's argument that he did not know that additions to the herd through breeding did not present a problem for APHIS, given his blatant misrepresentation when signing the FPP that he had just the four remaining elk on E71. He knew that having more than the four was inconsistent with his commitment in the depopulation plan and that being truthful would put his indemnity payments in jeopardy. While he maintained at hearing that they were visible in a pen during the depopulation, APHIS witnesses testified they did not see them; if they did see them and recognize them as bottle babies with two calves it is hard for me to believe that Dr. Perkins would have signed the FPP.

Mr. Walker also testified that the subsequent births were a surprise to him on two counts. First, the bull elk had a prolapsed sheath which should have made breeding difficult if not impossible. After three more calves were born, he then separated the bull from the cows during the next normal breeding season, but the cows became pregnant once again outside the normal elk birthing cycle. He continued to report the births to the state brand board, but never reported any information on the births to APHIS.

Even taking Respondents' word that the births were a surprise, and that they took reasonable precautions to prevent the births, it is difficult to escape a finding that the births were restocking as that term is generally understood. Neither agreement talks about whether breeding

or restocking would have to be intentional or unintentional, and the only possible interpretation of the agreements is that only the four bottle babies were to be on the premises of E71, and that upon and until their deaths, no additional cervids would be allowed on E71.

Respondents also contend that the FPP was not a "herd plan" as required by the regulation. However, Complainant has amply demonstrated that the difference between the FPP and a typical herd plan was a result of Respondents' insistence on keeping the bottle babies, and that provisions associated with a complete depopulation were not appropriate at the time of the signing of the FPP. The fact that Respondents were able to negotiate these more lenient conditions does not render the FPP unenforceable.

5. Respondents stocking and breeding of reindeer was not a violation of the FPP. While the FPP did ban all cervids from the premises of E71 until after the deaths of the four bottle babies, the premises of E71 were not clearly enough defined to warrant a finding that all the property owned by the Respondents located at 2055 Highway 50 in Penrose was covered by the ban of cervids. The FPP refers to an "attached diagram" which was not in fact attached to the copy of the FPP received in evidence. CX 9, p. 1. However, Respondents submitted a diagram that appears to be representative of the layout of the Penrose property, RX 3, as did Complainant, CX 19. These diagrams both indicate that the Penrose property covers substantially more area than the areas where the elk were kept, including the barn and feed storage areas. In CX 9, the parties agree that "[t]he facility is divided into 12 pens surrounding a central alleyway." If APHIS wanted to be sure that the entire Penrose property was subject to the agreement, rather than just the area inhabited by the elk, they could have so specified. In the face of what is at best characterized as an ambiguous definition of the property outside the 12 elk pens and the alleyway area, the stocking of reindeer for breeding purposes in other areas of the Penrose property cannot be deemed a violation of the FPP.

APHIS appears to contend that Respondents are in violation because the reindeer were in fact kept in the areas clearly specified in the FPP as being banned to cervids, other than the 4 bottle babies. The only testimony in support of this contention comes from Tad Puckett, who traded Ron Walker some reindeer cows in exchange for fencing

material. Mr. Puckett testified that he knew of the CWD problem and the subsequent depopulation of E71, and that he questioned Ron Walker as to whether it was legal for him to have reindeer on his property. He stated that Ron Walker replied that he thought it was legal and that he would keep them in the back of his property. Mr. Puckett also stated that he observed the reindeer on several later visits to the Penrose property, and that he thought he once saw them in pen 1 or 2, and that they were always to his left as he drove to the barn. Both Mr. Walker and Mr. Puckett testified that they bore each other considerable ill will due to some business transactions that turned sour.

Mr. Walker testified that he always kept the reindeer on a portion of the property that was never utilized by the elk. Dr. Brewster apparently did not see the reindeer on any of his visits to the Penrose property; when Ms. Kelpis was on the property shortly before the hearing she saw both elk and reindeer on the property, but they were not in the same pen. Ms. Kelpis indicated that the reindeer could have been in the area marked in blue in RX 3; i.e., outside the areas designated as pens for the elk.

While neither Mr. Puckett nor Mr. Walker are fully credible as to the location of the reindeer, the burden of proof is on APHIS to demonstrate, by a preponderance of the evidence, that a violation exists with respect to whether the reindeer were housed in an area completely separate from the elk pens. The FPP does not define the E71 premises, even with reference to the diagram that was presumably attached and separately received into evidence, with sufficient clarity for me to hold that it was intended to ban the introduction of cervids on every inch of the Penrose property. Indeed, if that was the intent of the FPP than there would have been no need to refer to the diagram at all. While some aspects of the FPP could be interpreted to apply to the entire property, the FPP is simply too ambiguous on this issue to hold Respondents liable for stocking reindeer, as long as the reindeer were not and are not utilizing any of the property that was utilized by the elk herd. Given the ambiguity of the FPP as to this subject, and the lack of convincing testimony concerning whether the reindeer ever utilized the E71

property as described in the FPP, I find that the stocking of reindeer did not violate the terms of the FPP.

6. The appropriate remedy is a civil penalty of $20,000. The breeding/restocking of elk via the unplanned pregnancies of the bottle babies is a serious violation of the FPP. However, because I find that the stocking of reindeer did not violate the terms of the FPP, and because I find that the subsequent actions of APHIS in cancelling the depopulation of E85 are inconsistent with the imposition of more significant civil penalties, the $110,000 civil penalty suggested by Complainant would be excessive for these violations. I am also directing that the civil penalty does not have to be paid directly by Respondents, but rather should be deducted from the indemnity funds that Complainants have been withholding from Respondents.

While my jurisdiction over this matter presumably does not include the authority to order APHIS to resume and finish the depopulation of E85, which undisputedly arose out of the unilateral actions of APHIS, it is clear that E85's depopulation is utterly unrelated to the violations alleged in the complaint, and that no valid reason exists for not completing that task. I am aware that completion of that task will generate an obligation on behalf of APHIS to indemnify Respondents for the remaining elk on E85 as well as generate the release of the withheld 25% of the indemnity (less the civil penalty of $20,000) for the E71 herd. I specifically do not speak to the fate of the elk born to the bottle babies, and leave that to the parties to sort out.

Findings of Fact

1. Respondents Ronald and Alidra Walker own and operate Respondent Top Rail Ranch. At the time of the occurrence of the violations alleged in the complaint, Respondents operated an elk breeding herd on premises located in Penrose, CO ("E71" or "Penrose") and an elk hunting herd on premises located in Canon City, CO ("E85").

2. The Penrose property consists of approximately 365 generally flat acres and includes 12 designated elk corrals as well as other property, including the residence of the Walkers.

3. The E85 facility is approximately 1500 acres with significant ranges in elevation, with thick woods, rocky outcroppings and a few roads for

access. Tr. 542-544. It is enclosed by fencing. All elk in E85 are transported from E71, and do not leave until they are hunted or otherwise killed.

4. After a hunt on during the 2004 hunting season, the required testing was performed on the killed elk on E85. The elk tested positive of chronic wasting disease (CWD). As a consequence of this test, the State of Colorado initiated discussions with Respondents, resulting in both the E85 and E71 herds being quarantined. Tr. 27-28. An order to this effect was issued on January 31, 2005. CX 2.

5. Respondent Ron Walker has been a hunter and rancher throughout his life. He is very knowledgeable about all aspects of raising and hunting elk. He is a past president of the Colorado Elk Breeders Association and the North American Elk Breeders Association.

6. Respondent Ron Walker, acting on behalf of his wife and Top Rail, signed a Depopulation Agreement and Preliminary Premises Plan for E71 and E85 on August 22, 2005. CX 5. The document had been signed on August 1 by Dr. Cunningham on behalf of the State of Colorado and Dr. Perkins on behalf of APHIS. This Preliminary Plan indicates that the E71 herd would be depopulated first with indemnity to be paid based on a percentage of the herd's appraised value, with 25% of that indemnity to be withheld pending the depopulation and signing of a Final Premises Plan for E85. The Preliminary Plan makes it absolutely clear that only the four specifically identified bottle babies would be exempt from the depopulation and that they would be kept "under permanent isolation and quarantine." Restocking of the E71 herd would not occur until have the four bottle babies had died and tested negative for CWD. The E85 herd would be hunted out through the end of the 2006 hunting season, at which point the remaining elk would be appraised and depopulated, with depopulation of E85 to be completed no later than December 31, 2006.

7. The depopulation of E71 was carried out on September 6-7, 2005. Two of the elk tested positive for CWD.

8. At the time of the E71 depopulation, two of the bottle babies had calves. Respondents did not make Complainant aware of this fact at that

time, although it appears that the State veterinarian, Dr. Cunningham, was aware of the calves.

9. In September 20-21, 2005, the parties signed a Final Premises Plan (FPP) for E 71. No one signed on behalf of the State of Colorado. In this plan, Respondents specified that only the four bottle babies remained on the premises of E71, and that they would be quarantined until their death. The FPP did not contain all the provisions normally associated with such plans, because this plan was exceptional due to the four elk being spared (normally a plan would describe measures to be taken before the empty premises could be used again). Respondent Ron Walker signed the FPP even though it categorically stated that only the four bottle babies remained on E71, when he in fact knew that there were two calves on the premises in addition to the bottle babies.

10. Although Respondents did not report the existence of the two elk calves to APHIS, they were reported to the Colorado State Brand Board.

11. In subsequent years, the bottle baby cows calved again after being impregnated by the baby bottle buck. Respondent Ron Walker indicated that he did not believe that the buck was capable of mating due to a prolapsed sheath. After the second series of births, Mr. Walker separated the bull from the cows during the normal mating season. The cows became pregnant out-of-season and calved anyway. All the calving activity was duly registered with the State, but no one informed APHIS.

12. Subsequent to the signing of the FPP, APHIS had difficulty in getting Respondent Ron Walker to agree to a reasonable plan for the depopulation of E85. However, an agreement was eventually reached in February, 2007 (over a month after the December, 2006 deadline imposed by the FPP) and a hunter was hired to conduct the depopulation, with indemnities to be paid for the killed elk.

13. The day after the hunter commenced the depopulation, which was one day earlier than he had told APHIS he would begin due to favorable weather conditions, APHIS unilaterally directed him to stop killing the elk. He had already killed seven elk, for which he was compensated and for which Respondents were paid indemnity. APHIS indicated to Respondents and reiterated at the hearing that the E85 depopulation was being suspended because of possible violations of the E71 FPP. Tr. 133-134.

14. No evidence was ever introduced which would explain how the discovery of a possible violation of the E71 FPP would justify suspending the depopulation of E85.
15. APHIS first became aware there were more than 4 elk on E71 in December 2006 but continued with plans to proceed with the E85 depopulation until March 2007.
16. Respondents began purchasing reindeer, with the idea of establishing a reindeer breeding herd in 2006 when he purchased five reindeer cows from Tad Puckett. The reindeer were kept on the Penrose property, but were never kept in the elk pens, or in any of the property that was designated as part of E71 in agreements between the parties, or in the diagrams attached thereto. Reindeer are cervids, but there is no recorded instance of a reindeer with CWD.
17. CWD is a transmissible spongiform encepalothopy which has a fatal effect on elk, deer and moose. Generally, it takes two to five years from exposure to the disease before death. The disease is transmissible from animal to animal, either through direct contact or through environmental contamination. Currently, the only way to test for CWD is through testing the brain stem tissue and tonsils of deceased animals. There is no treatment or preventative vaccine for CWD. Depopulation of the contaminated herd is the current best method to control the disease.

Conclusions of Law

1. Ron Walker, Alidra Walker and Top Rail Ranch are all proper parties to this action.
2. The Final Premises Plan (FPP) signed by Ron Walker on behalf of Respondents and Dr. Perkins on behalf of Complainant is a legitimate agreement under the regulations, and is binding on both parties.
3. By hiding from APHIS the existence of two calves at the time the FPP was signed, and by allowing the bottle babies to breed without notifying APHIS, Respondents violated the provisions of the FPP banning the restocking of cervids until after certain requirements were

met.

4. Respondents' establishment of a reindeer breeding herd at the Penrose property was not a violation of the FPP restocking ban, because the FPP's definition of the E71 premises did not clearly include property outside the vicinity of the elk pens and surrounding alleys, and because Complainant did not establish by a preponderance of the evidence that the reindeer were housed within the E71 premises.

5. Factoring in the severity of the violations, as well as the other statutory factors, I assess a civil penalty of $20,000 for the violation of the FPP's provisions. However, I direct that the civil penalty be collected by deducting it from the indemnity funds that are being held by Complainant for the E71 depopulation.

Order

Respondents have committed violations of the Animal Health Protection Act. Respondents are assessed a civil penalty of $20,000 which is to be offset from the indemnity funds owed to Respondents by APHIS.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

_____

In re: HOWARD OVERHOLT.
A.Q. Docket 08-0120.
Decision and Order.
Filed June 5, 2009.

AQ – Slaughter horse transportation – Unnecessary harm, stress, protection from.

Thomas Neil Bolick for APHIS.
Respondent, Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

I find that Respondent, Howard Overholt, committed four very serious violations of the Commercial Transportation of Equine for Slaughter Act along with two moderate violations of the Act. I also find that Respondent committed paperwork violations regarding many loads of horses and I am imposing civil penalties in the amount of $19,500 for these violations.

This administrative proceeding was instituted by the Complaint filed on May 16th, 2008, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, hereinafter APHIS, for Complainant.

The Complainant alleged that the Respondent violated the Commercial Transportation of Equine for Slaughter Act, 7 USC, Section 1901 Note (the Act) which is how I will refer to it generally and the regulations promulgated thereunder 9 CFR Section 88.

It's important to point out that 9 CFR 88.6(a) authorizes the Secretary of Agriculture to assess civil penalties up to $5,000 per violation or any violations of the regulation in this part.

9 CFR 88.6(b) states that each equine transported in violation of the regulation of this part will be considered a separate violation.

In the Complaint civil penalties authorized by Section 903(c)(3) of the Act, 7 USC 1901 Note and 9 CFR 88.6 and 88.6.

I conducted an Oral Hearing beginning June 4th, 2009, via audio/visual telephone links and teleconference links between the U.S. Attorney's Office in Lansing, Michigan, the U.S. Attorney's Office in Central Islip, New York, and USDA Headquarters in Washington, D.C.,

and on June 4th as I already stated.

Complainant was represented by Thomas Neil Bolick, Esq., Office of the General Counsel, USDA, Washington, D.C. 20250, and Respondent did not appear at the hearing. Complainant presented six witnesses and introduced approximately 88 exhibits.

The Complaint alleged that between early October 2004 to mid-July 2005, Respondent commercially transported 18 shipments of horses to slaughter in the course of which he committed approximately 23 violations of the Act and its accompanying regulations.

Specifically, the Complaint alleged that on three occasions the Respondent failed to handle horses as carefully and expeditiously as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma during commercial transportation to slaughter in violation of 9 CFR Section 88.4(c).

On another occasion, Respondent also either failed to obtain immediate veterinary assistance from an equine veterinarian for a horse that was in obvious physical distress during commercial transportation to slaughter or failed to notify the nearest APHIS office about a horse that died in route in violation of 9 CFR Section 88.4(b)(2).

The Complaint also alleged that on two occasions Respondent or his drivers delivered horses to a horse slaughter plant outside of the plant's normal working hours and failure to remain at the plant until a USDA representative had inspected the horses or to return to the slaughter plant to meet the USDA representative upon his arrival in violation of 9 CFR Section 88.5(b).

Finally, the Complaint alleged that Respondent failed to prepare complete and accurate owner/shipper of certificates, Veterinary Services Form 10-13 for 17 shipments of horses being commercially transported for slaughter in violation of 9 CFR Section 88.4(a)(3).

Respondent filed an answer on June 19th, 2008. In his answer, Respondent stated that "he did not know he was not doing right" and asked why he had not been "informed the first time?"

He also stated that he has "stopped hauling horses" and "has not hauled horses for a long time."

The witness testimony and documentary photographic and videographic evidence presented at the hearing clearly establishes that the Respondent was the owner/shipper of all of the commercial

shipments of horses to slaughter that are listed in the Complaint.

The evidence clearly establishes that on three different occasions, Respondent or his driver failed to commercially transport dying, injured or blind horses to slaughter as carefully and expeditiously as possible in a manner that did not cause these horses unnecessary discomfort, stress, physical harm or trauma. It also clearly establishes that on another occasion Respondent or his driver was aware that a horse was in obvious physical distress during commercial transportation to slaughter and that this horse died during said transportation but Respondent or his driver failed to obtain veterinary assistance as soon as possible from an equine veterinarian or to notify the nearest APHIS office about the dead horse.

The evidence presented at the hearing further establishes that on two occasions Respondent or the driver delivered shipments of horses to a horse slaughter plant outside of normal business hours but did not remain at the plant until a USDA representative examined the horses or returned to the plant to meet with a USDA representative upon his arrival.

Finally, the evidence clearly establishes that Respondent routinely failed to prepare a complete and accurate owner/shipper certificate for each shipment of horses. Therefore, pursuant to Section 1.142(c) of the Rules of Practice applicable to this proceeding [7 CFR Section 1.142(c)] I make the following finds of fact and conclusions of law and issue the following order.

Findings of Fact

1. Respondent, Howard Overholt, is a commercial slaughter horse buyer with a mailing address of 547 St. Joseph Road, Burr Oak, Michigan 49030.

2. On or about October 8, 2004, Respondent shipped 39 horses from Shipshewana, indiana, to Beltex Corporation in Ft. 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 filling of the form was deficient in that the time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section

88.4(a)(3)(ix).

3. On our about October 27, 2004, Respondent shipped 38 horses from Shipshewana, Indiana, 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 CFR 88.4(a)(3)(iv), and

(2) At the time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR 88.4(a)(3)(ix).

4. On or about October 30th, 2004, Respondent shipped 37 horses from Shipshewana, indiana, to Beltex for slaughter but did not properly fill ut 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 CFR Section 88.4(a)(3)(ix).

5. On or about November 2nd, 2004, Respondent shipped 36 horses from Shipshewana, Indiana, 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 CFR Section 88.4(a)(3)(vi), and

(2) The date on which the horses were loaded onto the conveyance was not listed properly in violation of 9 CFR Section 88.4(a)(3)(ix).

6. On or about November 3rd, 2004, Respondent shipped 88 horses from Shipshewana, Indiana, 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 CFR Section 88.4(a)(3)(iv), and

(2) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

7. On or about November 7, 2004, Respondent shipped 42 horse from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill ut 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 CFR Section 88.4(a)(3)(ix).

8. On or about November 14th, 2004, Respondent shipped 43 horses from Shipshewana, Indiana, 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 time when the horses were loaded onto the conveyance, it was listed in violation of 9 CFR Section 88.4(a)(3)(ix), and

(2) There was no statement that the horses had been rested, watered and fed for at least six consecutive hours prior to being loaded for the commercial transportation in violation of 9 CFR Section 88.4(a)(3)(x).

9 (a) On or about November 14th, 2004, Respondent shipped a second load of 38 horses from Shipshewana, Indiana, to Beltex for slaughter. One of the horses in the shipment with USDA back tag number USDA 0848 went down during transportation and it became apparent that it was in obvious physical distress and died on route to the slaughter plant. The Respondent and/or his driver did not obtain veterinary assistance as soon as possible from an equine veterinarian nor did they contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse in violation of 9 CFR Section 88.4(b)(2).

(b) On or about November 14th, 2004, Respondent shipped a second load of 38 horses from Shipshewana, Indiana, to Beltex for slaughter. One of the horses in shipment with USDA back tag number 0848 went down in transportation indicating it was in obvious distress and died in route to the slaughter plant. Respondent 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 CFR Section 88.4(c).

10. On or about November 20th, 2004, Respondent shipped 37 horses from Shipshewana, Indiana, 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 CFR Section 88.4(a)(3)(iv).

(2) At the time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

11. On or about November 20th, 2004, Respondent shipped a second load of 39 horses from Shipshewana, Indiana 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 place number of the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(iv).

(2) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

12. On or about November 27th, 2004, Respondent shipped a load of 42 horses from Shipshewana, Indiana 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 CFR Section 88.4(a)(3)(iv).

(2) The time that the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

13. On or about November 27th, 2004, Respondent shipped a second load of 45 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill ut 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 CFR Section 88.4(a)(3)(iv).

(2) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR 88.4(a)(3)(ix).

14. On or about December 11th, 2004, Respondent shipped a load of 29 horses from Shipshewana, Indiana, 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 CFR Section 88.4(a)(3)(iv).

(2) The boxes indicating the fitness of the horses that traveled at the time of loading were not checked off in violation of 9 CFR Section 88.4(a)(3)(vii).

(3) The time when the horses were loaded onto the conveyance was not listed in violation of 9 CFR Section 88.4(a)(3)(ix).

15(a) On or about June the 4th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter but did not properly fill out the required owner/shipped certificate, VS Form 10-13.

The form had the following deficiencies.

(1) The form did not indicate the breed, type and/or sex of the horses, physical characteristics that could be used to identify those horses in violation of 9 CFR Section 88.4(a)(3)(v), and

(2) There was no statement that the horses had been rested, watered and fed for at least six consecutive hours prior to being loaded on the conveyance for removal in violation of 9 CFR Section 88.4(a)(3)(x).

(b) On or about June 4th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter. One of the horses in the shipment, a quarter horse mare with bag tag number USDA 3287 had a severe gash on top of its left hip that appeared to have occurred during loading, transit or unloading.

Respondent and/or his driver thus failed to handle this horse as expeditiously and careful as possible in a manner that they're not causing unnecessary discomfort, stress, physical harm or trauma in violation of 9 CFR Section 88.4

(c) On or about June 4th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter. Respondent and/or his driver did not remain at Beltex until the horses had been examined by a USDA representative or in the alternative had delivered the horses out of Beltex' normal business hours and left the slaughter facility but they did not return to Beltex to meet the USDA

representative upon his arrival in violation of 9 CFR Section 88.5(b).

16(a) On or about June 18th, 2005, Respondent shipped a load of 39 horses From Shipshewana, Indiana, to Beltex for slaughter. One of the horses in the shipment, USDA Bag Tag USDA 3287 was blind in both eyes. The Respondent shipped it with the other horses. Respondent and/or his driver -- best way to handle a blind horse is expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma in violation of 9 CFR Section 88.4(c).

(b) On or about June 18th, 2005, Respondent shipped a load of 39 horses from Shipshewana, Indiana, to Beltex for slaughter. Respondent, and/or his driver did not remain at Beltex until the horses had been examined by a USDA representative or in the alternative they delivered the horses outside of Beltex' normal business hours and left the slaughter facility, but they did not return to Beltex to meet the USDA representative upon his arrival in violation of 9 CFR Section 88.5(b).

17. On or about July 15th, 2005, Respondent shipped a load of 45 horses from Shipshewana, Indiana, 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 form did not indicate the breed type and/or sex of a horse bearing USDA Bag Tag No. 3766. Physical characteristics that could be used to identify that horse in violation of 9 CFR Section 88.4(a)(3)(v).

Discussion

1(a) The most serious violations.

Complainant seeks the imposition of two $5,000 penalties with respect to the November 14th, 2004, loading and shipment of the clearly distressed mare who laid down at the time of loading, was urged to stand and was loaded onto the conveyance and who laid down again in route and who eventually died before arriving at Beltex.

Dr. Timothy Cordes, DVM, the national coordinator of equine programs at USDA convincingly testified that an adult horse that lays down is a sick horse and that the horse never should have been loaded under the Act and the regulations.

Dr. Cordes also stated that the failure of the driver to contact the

equine veterinarian or the nearest APHIS office as soon as possible after the distressed horse died, was also in violation.

While I have previously found in the William Richardson case that only one civil penalty can be imposed for violations committed in regard to a single horse. The Judicial Officer rules that multiple violations can be assessed.

Accordingly, I find that by loading a horse in obvious physical distress and transporting that horse, the Respondent violated the provisions of 9 CFR Section 88.4(c) by failing to transport this horse to slaughter as carefully and expeditiously as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma. This is one of the most significant violations that can occur under the Act and I impose the maximum penalty of $5,000.

The failure to take proper action upon the death of the mare is also significant but clearly involves less harm since the damage has already been done. I impose a penalty of $2,500 for the failure to contact a veterinarian or the nearest APHIS office after the mare died.

(b) A serious violation also occurred on June 4th, 2005, with respect to commercial transportation of a horse which arrived at Beltex with a severe gash on its left hip.

Joseph Astling who was an animal health technician at the time of the incident photographed the wound and testified as to its severity. He believed the wound must have been caused by contact with a sharp overhanging object in transit such as would be likely found in a trailer such as the one used to transport this horse.

Dr. Cordes fully concurred with Mr. Astling's conclusions based on his examination of the photographs. Because this is a clear and serious violation of the requirement that a horse be transported to slaughter as carefully and expeditiously as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, but does not involve the degree of knowledge present in the previously discussed violation, I impose a $3,000 civil penalty.

(c) A serious violation also occurred on June 18th, 2005, where Respondent transported a horse blind in both eyes. Video evidence was introduced, CX 82, Complaint's Exhibit 82, that establishes the fact that the horse in question with the Bag Tag No. USDA 3357 was, in fact,

blind.

The horse when not led bumped into the stall or another horse, had facial scars indicating a history of bumping into objects due to blindness.

Dr. Cordes was able to demonstrate through examination of the video evidence that this horse had impairments to the extent that it could not see. While there was no evidence that this harm was harmed in transit, the regulations require that a horse in order to be fit for transport must not be blind in both eyes. 9 CFR 88.4(a)(3)(vii). And by definition shipping it with other horses violated the prohibitions of 9 CFR 88.4(c).

In addition, a horseman with Respondent's 30 years experience could not help but notice that this horse was blind.

I impose a civil penalty of $4,000 for this violation.

2. The moderately serious violations.

Complainant also seeks to impose a $500 penalty for each of the two instances where Respondent or his driver dropped off horse outside normal working hours and the driver did not either remain at the facility or return to meet with AHT Astling as per 9 CFR 88.5(b).

I note that the two dates cited for these violations, June 4th, 2005, and June 18th, 2005, are the same days that the injured and blind horses were delivered to Beltex. This indicates to me in the absence of any evidence to the contrary, that respondent knew the status of these two horses and directed the driver to leave the premises to avoid contact with AHT Astling.

I find Respondent more culpable to these violations than Complainant's suggested penalty would warrant and I impose a $1,500 penalty for each of these two violations.

3. The paperwork violations.

Finally, I impose a $2,000 penalty for the combined paperwork violations.

While I did not believe it a violation to omit the full address or phone number of Beltex when that facility was clearly identified, properly filling out the other information required in the VS 10-13 is pivotal to the successful operation of this program.

Conclusions of Law

1. Respondent, Howard Overholt, was the owner/shipped of each shipment of horses that are the subject of the Complaint in this matter.

2. Respondent has violated the Commercial Transportation of Equine to Slaughter Act by committing the violations described above.

3. A civil penalty totaling $19,500 is appropriate for these violations.

ORDER

Respondent, Howard Overholt, is assessed a civil penalty of $19,500.

Respondent shall send a certified check or money order for $19,500 payable to the Treasurer of the United States to the United States Department of Agriculture, APHIS, Accounts Receivable, P.O. Box 3334, Minneapolis, Minnesota 55403, within 30 days of the effective data of this order. Certified check or money order should include the Docket Number of this proceeding.

This Order shall be final and effective 30 days after the date of service of this Order on Respondent, unless there is an appeal to the Judicial Officer pursuant to Section 1.145 of the Rules of Practice, 7 CFR Section 1.145.

_____

ANIMAL WELFARE ACT

COURT DECISIONS

LANCELOT KOLLMAN RAMOS v. USDA.
No. 08-10236.
Filed April 7, 2009.

[Cite as: 322 Fed.Appx. 814 (C.A.11)].

AWA- Default – Failure to answer – Admission to complaint – Fairness.

United States Court of Appeals
Eleventh Circuit

Court affirmed the Judicial Officer's (JO) Decision and Order, finding that he did not err in concluding that Petitioner failed to admit or deny any material allegations in the complaint and was thus deemed to have admitted all allegations and that the JO did not abuse his discretion by revoking Petitioner's AWA license on a finding of willfulness. By failing to answer all material allegations on the complaint, Petitioner admitted to all allegations, including that Petitioner's conduct was willful. The Court also found that the Judicial Officer's Decision and Order did not violate fundamental principles of fairness as embodied in the Fifth Amendment of the United States Constitution, the Administrative Procedures Act, the Animal Welfare Act, and the USDA's rules.

Judge COHILL, District Judge delivered the opinion of the court.

Opinion of the Court

Pending before this Court is a "Petition for Review" filed by former pro se Petitioner Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman ("Kollman"). Kollman seeks to have this court review and set aside a Decision and Order of a U.S. Department of Agriculture ("USDA") Judicial Officer rendered on October 2, 2007. He seeks remand of the matter for a full hearing on a Complaint filed against him and others for violations of the Animal Welfare Act (the "AWA"), as amended, 7 U.S.C. §§ 2131-2159, and the regulations and standards

issued under the AWA, 9 C.F.R. § § 1.1 et seq. (the "Regulations" and "Standards"). Congress enacted the AWA to ensure that animals intended for use in research facilities, for exhibition or for use as pets "are provided humane care and treatment." 7 U.S.C. § 2131. This Court has jurisdiction over the Petition pursuant to 28 U.S.C. §§ 2341-2350. For the reasons set forth below, we affirm the Judicial Officer's October 2, 2007 Decision and Order.

I. BACKGROUND

This case was initiated on April 26, 2005, when an Administrator with the Animal and Plant Health Inspection Service of the United States Department of Agriculture (the "Administrator") instituted a disciplinary administrative proceeding against Kollman, his father, Manuel Ramos, another individual named Peter Octave Caron ("Caron"), and a corporation, Octagon Sequence of Eight, Inc. ("Octagon") by filing a Complaint with the Secretary of Agriculture. Only Kollman remains in this case. Caron died; Manuel Ramos never responded, and a default decision was entered against him; Octagon timely answered and the proceedings against it eventually settled in April 2008.

In the Complaint, the Administrator alleged that Kollman willfully violated the AWA, the Regulations, and the Standards. More specifically, the Complaint alleged that Kollman had a small business; the gravity of his violations of the AWA, the Regulations, and the Standards was great; he knowingly operated as a dealer without a valid license; he caused injuries to two lions that resulted in the death of one of them, and he lied to investigators about his actions. Complaint, ¶ 6. The Complaint further alleged that between May 10, 2001 and the date of the filing of the proceeding against him, April 29, 2005, Kollman knowingly failed to obey a cease and desist order issued by the Secretary of Agriculture pursuant to section 2149(b) of the AWA, in In re Lancelot Kollman, aka Lance Ramos, respondent, 60 Agric. Dec. 190, AWA Docket No. 01-0012, which specifically provided that: "[r]espondent, his agents and employees, successors and assigns, directly or through any corporate device, shall cease and desist from violating the Act and the Regulations and Standards." Id. at ¶ 8. The

Complaint also alleged that on or about September 13, 2000, Kollman operated as a dealer, as that term is defined in the AWA and the Regulations, "by delivering for transportation, or transporting, two lions for exhibition, without having a valid license to do so, in willful violation of sections 2.1, 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1, 2.10(c), 2.100(a)." Id. at ¶ 9. The Complaint next alleged that on or about September 13, 2000, Kollman engaged in specified conduct which constituted willful violation of section 2.40 of the Regulations, which governs the provision of veterinary care to animals. Id. at ¶ 10. The Complaint then charged that on or about December 13, 2000, Kollman engaged in specified conduct which constituted willful violation of section 2.131(a)(1) and (a)(2)(I) of the Regulations. Id. at ¶¶ 12-16. Finally, the Complaint sought to have Kollman ordered to cease and desist from violating the Act and the Regulations and Standards issued thereunder, be assessed civil penalties, and have his license revoked or suspended. Id.

On May 2, 2005, a hearing clerk from the Office of Administrative Law Judges sent to Kollman by certified mail, return receipt requested, a copy of the Complaint, the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (the "Rules of Practice"), 7 C.F.R. §§ 1.130.151, and a letter which stated in pertinent part:

> [a]lso enclosed is a copy of the Rules of Practice, which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments, which follow, are not a substitute for their exact requirements.
>
> The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance on your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint.
>
> Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the

> material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.
> (emphasis in original).

Kollman received the Complaint, the Rules of Practice, and the service letter on July 5, 2005. Within the twenty days, he filed a response, dated July 15, 2005, which the USDA received on July 22, 2005.The response stated in pertinent part:

> I Lancelot Ramos Kollman am responding to a complaint In re: OCTAGON SEQUENCE OF EIGHT, INC., a Florida corporation doing bussiness [sic] as OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; PETER OCTAVE CARON an individual; LANCELOT KOLLMAN an individual and MANUEL RAMOS an individual: AWA DOCKET # 05-0016.
> I Lancelot Kollman as a individual am to [sic] requesting an oral hearing of this complaint. Please send any and all responses to this address....

Thus, he requested a hearing but did not offer any denial or defense. On July 25, 2005, Kollman received a letter from a hearing clerk at the Office of Administrative Law Judges. The letter stated:

> Respondents Answer has been received and filed on July 22, 2005, in the above-captioned proceeding.
> You will be informed of any future action taken in this matter.

Thereafter, the case lay dormant for almost two years. On April 12, 2007, the Administrator filed a "Motion for Adoption of Proposed Decision and Order as to Lancelot Ramos by Reason of Admission of Facts" (the "Motion for Default Decision") along with a "Proposed Decision and Order as to Lancelot Kollman Ramos by Reason of Admission of Facts" (the "Proposed Default Decision"). A hearing clerk from the Office of Administrative Law Judges then sent Kollman a letter, dated April 12, 2007, stating that she had enclosed copies of the Motion for Default Decision and the Proposed Default Decision and that "[i]n accordance with the applicable Rules of Practice, you will have 20

days from the receipt of this letter in which to file with this office an original and three copies of objections to the Motion for Decision." Kollman received this correspondence on April 18, 2007.

On May 9, 2007, twenty-one days after April 18, 2007, a hearing clerk from the Office of Administrative Law Judges sent Kollman a letter. The letter stated:

> [a]n objection to Complainant's Motion has not been received within the allotted time.
>
> In accordance with the applicable Rules of Practice, the file is being referred to the Administrative Law Judge for consideration and decision.

On that same day, May 9, 2007, the Administrative Law Judge (the "ALJ") issued his "Default Decision and Order as to Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman" (the "Default Decision"). In the Default Decision, the ALJ concluded, inter alia, that Kollman had violated various provisions of the Regulations as alleged in the Complaint and that these violations had been willful. The ALJ then ordered Kollman to cease and desist from violating the AWA and the Regulations and Standards, revoked Kollman's AWA license, and assessed a "civil penalty" of $43,500 against him. The ALJ did not explain how he arrived at the $43,500 penalty.

The Default Decision was mailed to Kollman on May 9, 2007, along with a letter that stated in part that Kollman had "30 days from the service of this decision and order in which to file an appeal to the Department's Judicial Officer." Kollman received the Default Decision on May 16, 2007.

On May 11, 2007, three days late and after the Default Decision had been mailed to Kollman, the Office of Administrative Law Judges received a letter from Kollman dated April 27, 2007, which stated: "I Lancelot Kollman hereby deny all charges and request a hearing on the allegations mentioned in the motion for adoption of proposed decision."

On June 6, 2007, the Office of Administrative Law Judges received another letter from Kollman, this time concerning the Default Decision. In the letter Kollman stated:

> I am in receipt of your response to my denial of charges/ Judges Orders.

> I continue to deny all the charges and have documentation that proves I am not guilty of the charges stated.
> I hereby request to appeal the decision and request an oral hearing with a judge where I can present evidence.
> The letter instructs me to refer to 7C.F.R.1.145. Where can I find this information?
> If this letter is not sufficient to request an oral hearing and file an appeal, Please send information as how to do so.

On July 2, 2007, the Office of Administrative Law Judges received another letter from Kollman, dated June 26, 2007. The Office of Administrative Law Judges treated this letter as a Request for a Hearing and forwarded it to the Judicial Officer assigned to the case. On July 9, 2007, the Judicial Officer entered an Informal Order wherein he determined that: (1) Kollman's June 6, 2007 "request to appeal" letter constituted a request for an extension of time within which to file an appeal petition, (2) Kollman's request was granted up to and including July 2, 2007; and (3) Kollman's June 26, 2007 letter, filed on July 2, 2007, constituted a timely filed appeal petition.

On July 30, 2007, Kollman, now represented by counsel, filed a "Motion to Set Aside Default Decision and Order as to Lancelot Kollman Ramos a/k/a Lancelot Ramos Kollman" ("Motion to Set Aside Default Decision and Order").

On October 2, 2007, the Judicial Officer filed a "Decision and Order as to Lancelot Kollman Ramos" ("the Decision and Order"). Relevant to the instant appeal, the Judicial Officer found as follows. First, he found that in Kollman's July 22, 2005 response, Kollman requested an oral hearing, but failed to deny or otherwise respond to any of the allegations in the Complaint filed against him. Therefore, the Judicial Officer concluded, pursuant to section 1.136(c) of the Rules of Practice, 7 C.F.R. § 1.136(c), Kollman was deemed to have admitted the allegations in the Complaint.

The Judicial Officer further found that Kollman failed to file objections to the Administrator's Motion for Default Decision and Proposed Default Decision by May 8, 2007, as required under section 1.139 of the Rules of Practice.

He also concluded that the July 30, 2007 "Motion to Set Aside Default Decision and Order" filing was an appeal petition, that pursuant to section 1.145(a) of the Rules of Practice a party may only file a single appeal petition, that Kollman did not request the opportunity to supplement or amend his July 2, 2007 appeal petition, and that the second appeal petition was filed 28 days after the expiration of the time for filing his appeal petition. On the basis of these conclusions, the Judicial Officer struck the July 30, 2007 "Motion to Set Aside Default Decision and Order" from the record and did not address any issues raised in the Motion.

The Judicial Officer also determined that Kollman's AWA license was to be revoked and assessed Kollman a civil penalty of $13,750 (as opposed to the $43,500 penalty previously imposed by the ALJ). For purposes of determining this penalty, the Judicial Officer considered, as required by 7 U.S.C. § 2149(b): (1) the size of Kollman's business; (2) the gravity of Kollman's violations; (3) Kollman's good faith; and (4) Kollman's history of previous violations. The Judicial Officer concluded: (1) Kollman operated a small business; (2) the gravity of Kollman's violations, operating as a dealer without an Animal Welfare license and causing injuries to two lions with one of the lions dying, was great; and (3) based upon Kollman having been a respondent in one previous Animal Welfare enforcement case, that Kollman lacked good faith and had a history of previous violations. Based upon his finding that Kollman was deemed to have admitted five violations of the Regulations and Standards and that Kollman could be assessed a maximum civil penalty of $2,750 for each of his five violations of the Regulations and Standards, the Judicial Officer determined Kollman's civil penalty to be $13,750.

On November 15, 2007, Kollman filed a Motion for Rehearing on the Default Decision, which the Judicial Officer treated as a Petition for Rehearing. On December 17, 2007, after consideration of the merits of the Petition for Rehearing, the Judicial Officer denied the Petition.

II. STANDARD OF REVIEW

Under the Administrative Procedures Act, we must set aside any agency action that is found to be arbitrary, capricious, an abuse of

discretion, in excess of statutory authority, or without observance of procedure as required by law, or is contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2). "Under this standard, we give deference to a final agency decision by reviewing for clear error, and we cannot substitute our own judgment for that of the agency." Sierra Club v. Johnson, 436 F.3d 1269, 1273 (11th Cir.2006), citing, Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1216 (11th Cir.2002) (internal citation omitted). Furthermore:

> [a]lthough the standard of review applied to final agency decisions is deferential, the matter is a little more complicated than that. Under the arbitrary and capricious standard, we must consider whether an agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir.1996) (quotation marks omitted). "This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." Id. (quotation marks omitted).

Sierra Club, 436 F.3d at 1273-74.

III. DISCUSSION

Preliminarily, Kollman raised two arguments on appeal that we find were not properly raised before the Judicial Officer, and were therefore waived. See U.S. v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952) ("[s]imple fairness ... requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."); McConnell v. U.S. Dept. of Agriculture, 198 Fed.Appx. 417, 424-25 (6th Cir.2006), citing, 7 C.F.R. § 1.145(a) (appellate court refused to consider due process arguments raised by appellants because they had failed to exhaust these arguments by presenting them to the Judicial Officer on administrative appeal); Excel Corp. v. U.S. Dept. of Agriculture, 397 F.3d 1285, 1296-97 (10th Cir.2005) (holding arguments waived on appeal from Judicial Officer's opinion where there was no indication in the record on appeal that the arguments had been presented to the

Judicial Officer). The first of the waived arguments is that the Judicial Officer abused his discretion, committed reversible error, and violated Kollman's due process rights when he failed to accept Kollman's April 27, 2007 letter either as an objection to the proposed default decision or as a timely filed amended answer. Second, Kollman argues that the Judicial Officer abused his discretion, committed reversible error, and violated Kollman's due process rights when he assessed a civil penalty against Kollman based in part on his determination that a May 2001 consent order entered into by Kollman established that Kollman lacked good faith and had a history of previous violations. Kollman argues that since the consent order was not in existence in September and December 2000, the time the events relevant to the Complaint took place, he could not be found to have violated it.

With respect to Kollman's argument concerning the monetary penalty issued against him, we specifically find, contrary to Kollman's contention, that Kollman did not properly raise this issue before the Judicial Officer when he stated in his June 26, 2007 letter "[s]o I ask please consider this I never willfully acted on what I am accused of." Moreover, with respect to Kollman's arguments about the April 27, 2007 letter, had we reviewed the issue on the merits, we would have found no error on the part of the Judicial Officer in his treatment of the letter; the letter was filed after the ALJ's Default Decision and Order had been issued and nothing in the letter established good cause for allowing an amendment of the answer as required by section 1.137(a) of the Rules of Practice, 7 C.F.R. § 1.137(a).

We now address three issues raised by Kollman on appeal: (1) whether the USDA reversibly erred in finding that Kollman defaulted and thereby admitted the allegations against him when in July 2005 he timely responded to the Administrator's Complaint and requested a hearing; (2) whether the Judicial Officer abused his discretion in striking and refusing to consider Kollman's motion to set aside default; and (3) whether the Judicial Officer abused his discretion in revoking Kollman's AWA license.[1] Underscoring all of these arguments is Kollman's contention that these actions by the agency violated principles of

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[1]We find any remaining arguments by Kollman lack significant merit and therefore, further discussion of the arguments is not needed.

fundamental fairness embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the AWA, and the USDA's own rules.

We turn first to the argument that since Kollman was acting pro se at the time he filed his July 22, 2005 letter, the ALJ should have construed the letter liberally and read it as Kollman denying the material allegations of the Complaint filed against him. It is well established that pro se pleadings are to be liberally construed. See Boxer X v. Harris, 437 F.3d 1107, 1110 (11th Cir.2006).

Section 1.136 of the Rules of Practice, a copy of which was provided to Kollman, states in pertinent part:

> § 1.136 Answer.
>
> (a) Filing and service. Within 20 days after the service of the complaint (within 10 days in a proceeding under section 4(d) of the Perishable Agricultural Commodities Act, 1930), or such other time as may be specified therein, the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding....
>
> (b) Contents. The answer shall:
>
> (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
>
> (c) Default. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

7 C.F.R. § 1.136. At the time Kollman was served with the Complaint,

a letter accompanied it explicitly explaining to Kollman that while "[y]our answer may include a request for an oral hearing," the "[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."

Even construing Kollman's letter liberally, the contents of his July 22, 2005 letter simply do not equate to a denial or other response to any of the allegations against him in the Complaint. Therefore, the USDA did not err when it concluded, pursuant to Rule of Practice 1.136(c), 7 C.F.R. § 1.136(c), that Kollman failed to deny or otherwise respond to any of the material allegations of the Complaint and thus was deemed to have admitted all those allegations.

We turn next to the argument that the Judicial Officer abused his discretion when he struck and refused to consider the "Motion to Set Aside Default Decision and Order" filed by Kollman's attorney on July 30, 2007. More specifically, Kollman's argument is that the Judicial Officer erred with respect to his treatment of Kollman's Motion to Set Aside Default Decision and Order since the USDA did not suffer any prejudice as a result of Kollman's procedural errors, the stakes involved (revocation of Kollman's license and a substantial monetary fine) were high, and Kollman's defenses were meritorious. What the Judicial Officer should have done, Kollman contends, is to have treated the Motion either: (1) as a supplement or amendment to his July 2, 2007 appeal petition, or (2) as a separate petition to reopen the proceedings pursuant to Rule 1.146(a)(2) of the Rules of Practice. In support of his position that the Judicial Officer should have treated the Motion to Set Aside Default Decision and Order as a motion to reopen the proceedings pursuant to Rule of Practice 1.146(a)(2), Kollman relies on the court's decision in Veg-Mix, Inc. v. U.S. Dept. of Agriculture, 832 F.2d 601 (D.C.Cir.1987).

We conclude that the Judicial Officer did not abuse his discretion when he failed to treat the Motion to Set Aside Default Decision and Order either as a supplement or amendment to his July 2, 2007 appeal petition. First, the Judicial Officer had already ruled that Kollman's June 26, 2007 letter was his appeal petition and section 1.145(a) of the Rules of Practice, 7 C.F.R. § 1.145(a), only allows for the filing of "an appeal petition," i.e. one appeal petition. Second, the Motion to Set Aside

Default Decision and Order was filed twenty-eight days after the expiration of the already extended date for filing an appeal petition. Finally, and perhaps most importantly, counsel never requested that the motion be treated as either a supplement or amendment to Kollman's appeal petition. Indeed, counsel basically ignored the fact that the Judicial Officer had already ruled that the June 26, 2007 letter was an appeal petition, attaching the June 26, 2007 letter to the Motion to Set Aside Default Decision and Order as Kollman's proposed Answer to the Complaint.

We also conclude that the Judicial Officer did not abuse his discretion when he failed to treat the Motion to Set Aside Default Decision and Order as a separate petition to reopen the proceedings pursuant to Rule 1.146(a)(2). Rule of Practice 1.146(a)(2) is entitled "[p]etition to reopen hearing" and states:

> [a] petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Neither the title of Kollman's document nor, more importantly, its contents would have put the Judicial Officer on notice that the Motion to Set Aside Default Decision and Order was, in fact, a request that the proceedings be reopened pursuant to Rule of Practice 1.146(a)(2).

Moreover, even if the Judicial Officer had erred in failing to consider that motion as a motion to reopen the proceedings pursuant to Rule of Practice 1.146(a)(2), we conclude the error was harmless and did not violate Kollman's due process rights. A request to reopen proceedings pursuant to Rule of Practice 1.146(a)(2) "shall set forth a good reason why such evidence was not adduced at the hearing." 7 C.F.R. § 1.146(a)(2). Here, none of the evidence attached to the Motion to Set

Aside Default Decision and Order was new evidence[2] and Kollman's Motion did not set forth a "good reason why such evidence was not adduced" earlier in the proceedings. Instead, Kollman simply stated

> "[t]hat this motion is brought upon the basis of excusable neglect and several meritorious defenses to the Complaint herein." Motion to Set Aside Default Decision and Order, ¶ 5.

Presumably the basis of excusable neglect was that Kollman had originally been pro se, a fact which we find does not constitute a "good reason" for a late filing. See Veg-Mix, Inc., 832 F.2d at 609 (holding that one of the requirements for allowing a proceeding to be reopened under Rule of Practice 1.146(a)(2) is that the party give a good reason for the late filing).

Next we address Kollman's argument that the Judicial Officer abused his discretion when he revoked Kollman's AWA license. Kollman argues that even if deemed admitted, the allegations in the Complaint did not support a finding of "willfulness" as required under 5 U.S.C. § 558(c) and therefore, he was entitled to notice and an opportunity to achieve compliance before his license could be revoked. Notably, the USDA argued that Kollman waived this argument by failing to present it to the Judicial Officer. Liberally construing Kollman's June 26, 2007 letter, which was filed while Kollman was pro se and which was treated by the Judicial Officer as an appeal of the ALJ's Decision, we find that the letter can be read to have raised the argument before the Judicial Officer that Kollman's conduct with respect to the lions and his acting as a dealer without a license was not willful and so he should not have had his license revoked. See June 26, 2007 letter ("[s]o I ask please consider this I never willfully acted on what I am accused of .").

5 U.S.C. § 558(c) provides in relevant part:

> [e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension,

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[2]The exhibits attached to the Motion to Set Aside Default Decision were as follows: (1) Exhibit A-the paperwork transferring the two lions dated September 19, 2000; (2) Exhibit B -Kollman's Application to USDA for license dated January 6, 2006; (3) Exhibit C-January 18, 2006 letter from USDA to Kollman approving him for a license under the AWA; and (4) Exhibit D-Kollman's June 26, 2007 letter to ALJ Davenport which was treated by the Judicial Officer as Kollman's Appeal Petition.

> revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given-
>
> (1) notice by the Agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Id. A violation is willful under this subsection " 'if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements'." *Coosemans Specialties, Inc. v. U.S. Dept. of Agriculture*, 482 F .3d 560, 567(D.C.Cir.), cert. denied, 128 S.Ct. 628, 169 L.Ed.2d 394 (2007), quoting, *Finer Foods Sales Co., Inc. v. Block*, 708 F .2d 774, 778 (D.C.Cir.1983)*; Potato Sales Co., Inc. v. U.S. Dept. of Agriculture*, 92 F.3d 800, 805 (9th Cir.1996) (same). For a revocation of license to be authorized, only one of the violations need be willful; the government need not show that all of the violations were willful. *Cox v. U.S. Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991).

The Judicial Officer found, by virtue of Kollman's failure to answer or otherwise respond to the Complaint as required under the Rules of Practice, that Kollman had admitted all of the material allegations in the Complaint, including that his relevant conduct was willful. We have already concluded that this finding by the Judicial Officer was correct. Accordingly, the Judicial Officer did not err when he found Kollman's various violations of the Standards and Regulations were willful and revoked Kollman's license without giving him an opportunity to cure.

Finally, we acknowledge Kollman's citations to cases wherein default decisions issued by the USDA and other administrative agencies were vacated on appeal based upon judicial determination that under the facts of those cases the default decisions were fundamentally unfair.

In support of his fundamental unfairness argument, Kollman cites primarily to *Oberstar v. FDIC*, 987 F.2d 494, 504 (8th Cir.1993) and *Lion Raisins, Inc. v. U.S. Dept. Agric.*, Case No. CV-F-04-5844 (E.D.Ca. May 12, 2005). These decisions, however, are distinguishable. First, the cases were in completely different procedural postures than the instant case. The default decision at issue in Oberstar came after the

parties had already litigated substantive issues in a related case, and were awaiting an appellate ruling. The default decision in Lion Raisins came after a substantive motion to dismiss had been filed and the case involved parties with whom a second action was already pending and was being vigorously defended by Lion Raisins. Indeed, in both cases the courts emphasized their displeasure with the agencies' attempt to "end run" around the merits of the case with procedural maneuvers. This simply was not the posture of the instant case, where the case sat idle with respect to Kollman for almost two years until the ALJ jump-started it with a sua sponte motion to show cause why the complaint should not be dismissed and stricken from the docket for failure to take further action in the case.

Second, in both Oberstar and Lion Raisins, the courts emphasized that good cause had been shown for the late filing of the respondents' answers such that the rendering of the default decision was unfair. In contrast, Kollman did not establish good cause for the insufficiency of his response to the Complaint which included neither denials nor defenses even after he had been given explicit directions as to how to respond to the complaint and the consequences of a failure to follow said directions. Nor did Kollman provide good cause for his failure to timely proffer evidence in an attempt to demonstrate his innocence of the charges.

The bottom line is that inquiry in these types of cases is fact intensive. Upon review of the overall fairness of the proceedings in this case, the Judicial Officer's Decision and Order did not violate the principles of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, the AWA, and the USDA's own rules.

Although we affirm the decision of the Judicial Officer, we must say that the actions of the agency were not above reproach. In fact, they were virtually glacial and hardly represent "best practice" by a government agency. The Complaint was not filed until April 29, 2005, approximately five years after the alleged violations pertaining to the two lions. Kollman filed his response to the Complaint on July 22, 2005. Thereafter, no action was taken by the agency with respect to Kollman until March 1, 2007 when it was presented with a February 1, 2007 sua sponte order from the ALJ. The order commanded the Agency to show

cause why the action should not be dismissed and stricken from the docket for failure to take further action in the case. Only then did this case begin to move along the judicial path, with the Decision and Order finally filed by the Judicial Officer on October 2, 2007, more than seven years after the conduct related to the two lions occurred.

IV. CONCLUSION

For the foregoing reasons, we affirm the Judicial Officer's October 2, 2007 Decision and Order.

AFFIRMED.

BROCK v. USDA.
No. 08-60247.
Filed June 24, 2009.

[Cite as: 335 Fed.Appx. 436.]

AWA – Transfer/movement of animals – Dealers.

United States Court of Appeals,
Fifth Circuit.

Before JOLLY, SMITH, and BENAVIDES, Circuit Judges.

Opinion

PER CURIAM:*

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*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

A judicial officer of the United States Department of Agriculture determined that the petitioners, Robert and Michelle Brock, had violated the Animal Welfare Act by acting as dealers of animals without being licensed to do so. The Brocks petition for review.

We have examined all of the submissions, including post-submission letter briefs that the attorneys were permitted to file.[1] We also have consulted pertinent parts of the record and the applicable law.

The decision of the judicial officer is sound. There is substantial evidence on all the elements needed for a finding of violation, including, *inter alia,* that the Brocks took part in the transfer of the subject animals; that the transfer was for compensation or profit; and that the Brocks were "dealers." The claim that the transactions had no effect on interstate commerce is without merit even if it was not waived.

Because there is no error of fact or law, the petition for review is DENIED.

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[1]Despite his diligent efforts to make alternate travel arrangements after experiencing airline and weather delays that were well beyond his control, petitioners' counsel was unable to appear for oral argument. We permitted both sides to submit letter briefs after the scheduled argument date, particularly to allow the absent attorney to supplement his other submissions. Especially given the steep standard of review, this is not a close case, and the petitioners were not prejudiced by the inability of their counsel to present oral argument.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: AMARILLO WILDLIFE REFUGE, INC., A TEXAS NON-PROFIT CORPORATION.
AWA Docket No. 07-0077.
Decision and Order.
Filed January 6, 2009.

AWA – License termination – License disqualification – Endangered Species Act – Sanction policy.

Bernadette Juarez for the Administrator, APHIS.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, 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 Administrator], instituted this proceeding on March 6, 2007, by filing an "Order to Show Cause as to Why Animal Welfare License 74-C-0486 Should Not Be Terminated" [hereinafter Order to Show Cause]. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges: (1) at all times material to the instant proceeding, Amarillo Wildlife Refuge, Inc. [hereinafter Amarillo Wildlife], operated as an "exhibitor" and a "dealer" as those terms are defined in the Animal Welfare Act and the Regulations; (2) at all times

material to the instant proceeding, Amarillo Wildlife held Animal Welfare Act license 74-C-0486; (3) at all times material to the instant proceeding, Carmel Azzopardi (also known as Charles Azzopardi) was the president, director, and agent of Amarillo Wildlife and managed, controlled, and directed Amarillo Wildlife's business activities; (4) on July 21, 2006, a United States Magistrate Judge convicted Carmel Azzopardi of selling and transporting in interstate commerce an endangered species of wildlife, on or about July 19, 2005, in violation of the Endangered Species Act (Order to Show Cause ¶¶ 1-2, 9). The Administrator seeks an order terminating Amarillo Wildlife's Animal Welfare Act license and disqualifying Amarillo Wildlife from obtaining an Animal Welfare Act license for 2 years (Order to Show Cause at 5).

On March 30, 2007, Carmel Azzopardi, on behalf of Amarillo Wildlife, requested an oral hearing. On April 2, 2007, Mr. Azzopardi, on behalf of Amarillo Wildlife, responded to the allegations in the Order to Show Cause: (1) admitting that Amarillo Wildlife holds Animal Welfare Act license 74-C-0486; (2) admitting that from 1995 through 2005 he was president, director, and agent of Amarillo Wildlife; (3) admitting that on July 21, 2006, he pled guilty to, and was convicted by a United States Magistrate Judge of, selling and transporting in interstate commerce an endangered species of wildlife, in violation of the Endangered Species Act; and (4) asserting mitigating circumstances that warrant denial of the Administrator's request for an order terminating Amarillo Wildlife's Animal Welfare Act license and disqualification of Amarillo Wildlife from obtaining an Animal Welfare Act license for 2 years.

On April 24, 2007, the Administrator filed "Complainant's Response to Respondent's Letter and Request for a Hearing," in which the Administrator argued that Amarillo Wildlife's request for a hearing should be denied because the license termination sought by the Administrator is based on Mr. Azzopardi's criminal conviction and there is no issue of material fact upon which to hold a hearing. Attached to Complainant's Response to Respondent's Letter and Request for a Hearing are: (1) a copy of the plea agreement executed by Mr. Azzopardi and the United States in which Mr. Azzopardi pled guilty to the Endangered Species Act, (2) a factual resume signed by Mr. Azzopardi and his attorney setting forth the facts relevant to

Mr. Azzopardi's violations of the Endangered Species Act, and (3) a judgment by United States Magistrate Judge Clinton E. Averitte finding Mr. Azzopardi guilty of violating the Endangered Species Act. The Deputy Clerk of the United States District Court for the Northern District of Texas certified that each of these documents is a "true copy of an instrument on file." In addition, the Administrator attached certified copies of Amarillo Wildlife's corporate documents obtained from the Texas Office of the Secretary of State, as well as Animal and Plant Health Inspection Service violation warnings and inspection reports.

On May 8, 2007, Administrative Law Judge Peter M. Davenport issued an order in which he denied Amarillo Wildlife's request for hearing and "granted leave to amend or supplement the pleadings to conform to the rules for the institution of proceedings, to provide documentation of compliance with 5 U.S.C. § 558 or in lieu thereof, authority for dispensing with the same, and any appropriate dispositive motion in this matter." (May 8, 2007, Order at 2.) On May 30, 2007, the Administrator responded explaining that a notice to show cause complies with the requirements of the Rules of Practice for initiating a proceeding (7 C.F.R. § 1.133(b)(1)) and arguing that the notice and opportunity to cure requirement of 5 U.S.C. § 558 is inapplicable because Mr. Azzopardi's violations of the Endangered Species Act were willful. Finally, the Administrator requested issuance of an order "allowing the case to proceed as filed."

On July 31, 2007, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued an Order in which he found that the Administrator's May 30, 2007, response lacked clarity. The ALJ suggested that the Administrator file a dispositive motion clarifying his position.

> It is uncertain whether APHIS desires that part of Judge Davenport's order denying [Mr. Azzopardi's] request for a hearing to be set aside in abandonment of the position it took in its response to Mr. Azzopardi's letter that a hearing is not needed. If APHIS is seeking instead to rely upon its position that an order

> should be entered to terminate the license without a hearing, it has still not filed an appropriate dispositive motion.

Order at 3.

The ALJ then noted that "[s]uch a motion would be akin to a motion for summary judgment." (Order at 3.) In response to the ALJ's July 31, 2007, Order, the Administrator filed, on January 15, 2008, a motion for summary judgment with a Declaration by Robert M. Gibbens, DVM, Animal and Plant Health Inspection Service, Animal Care, Regional Director – Western Region, explaining why Mr. Azzopardi's criminal conviction for violating the Endangered Species Act constitutes an appropriate cause for terminating the Animal Welfare Act license held by Amarillo Wildlife and disqualifying Amarillo Wildlife from obtaining a new Animal Welfare Act license for 2 years. Amarillo Wildlife requested and was granted an extension of time until March 18, 2008, to respond to the Administrator's motion for summary judgment, and on March 21, 2008, Amarillo Wildlife filed its response.

On March 24, 2008, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which, based on Mr. Azzopardi's criminal conviction, the ALJ terminated Amarillo Wildlife's Animal Welfare Act license and disqualified Amarillo Wildlife and its directors, officers, agents, and any legal entity in which they have a substantial interest from obtaining an Animal Welfare Act license for a 2-year period.

On April 24, 2008, Amarillo Wildlife appealed the ALJ's Initial Decision to the Judicial Officer, and on May 14, 2008, the Administrator filed a response to Amarillo Wildlife's appeal petition. On May 16, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Initial Decision granting the Administrator's motion for summary judgment, terminating Amarillo Wildlife's Animal Welfare Act license, and disqualifying Amarillo Wildlife and its directors, officers, and agents from obtaining an Animal Welfare Act license for 2 years.

DECISION

Discussion

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.[1] The Regulations 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). The Regulations provide 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.

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[1]In re Loreon Vigne, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

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 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 Administrator has determined that allowing Amarillo Wildlife to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act (Order to Show Cause ¶ 12; Complainant's Mot. for Summary Judgment, Memorandum of Points and Authorities at 8-10). The record supports the conclusions that: (1) Amarillo

Wildlife is unfit to retain its Animal Welfare Act license, and (2) the Administrator's determination that allowing Amarillo Wildlife to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.

Findings of Fact

1. Amarillo Wildlife is a Texas non-profit corporation (Answer at 1 ¶ 1).

2, Amarillo Wildlife is located at 4401 Reding Road, Amarillo, Texas 79108 (Answer at 1 ¶ 1).

3. Carmel Azzopardi, also known as Charles Azzopardi, resides at 4401 Reding Road, Amarillo, Texas 79108 (Answer at 1).

4. During the period 1995 through 2005, Carmel Azzopardi was the president, director, and agent of Amarillo Wildlife (Answer at 1 ¶ 3).

5. During the period 1995 through 2005, Carmel Azzopardi managed, controlled, and directed Amarillo Wildlife's business activities (Answer at 1 ¶ 3).

6. During the period 1995 through 2005, Carmel Azzopardi submitted annual renewal applications for Animal Welfare Act license 74-C-0486 on behalf of Amarillo Wildlife, and, at all times material to the instant proceeding, Amarillo Wildlife held Animal Welfare Act license 74-C-0486 (Answer at 1 ¶¶ 2, 4).

7. On or about January 18, 2006, Carmel Azzopardi was indicted in the United States District Court for the Northern District of Texas for knowingly and willfully offering for sale, selling, and transporting in interstate commerce an endangered species, in violation of the Endangered Species Act (Answer at 2 ¶ 6; Plea Agreement at 1 and Factual Resume filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006)).

8. In addition to the violations described in Finding of Fact number 6, on or about January 18, 2006, Carmel Azzopardi was indicted in the United States District Court for the Northern District of Texas for three felonies associated with improper paperwork (Answer at 2 ¶ 6)

9. On or about March 28, 2006, Carmel Azzopardi entered into a

plea agreement with the Assistant United States Attorney with respect to *United States v. Azzopardi.* In the plea agreement, Mr. Azzopardi pled guilty to violating the Endangered Species Act. The plea agreement was filed with the United States District Court for the Northern District of Texas on or about March 29, 2006. (Answer at 2 ¶ 7; Plea Agreement at 1 and Factual Resume filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006).)

10. On or about March 28, 2006, Carmel Azzopardi executed a factual resume in which he admitted that he knowingly and willfully offered for sale, sold, and transported in interstate commerce in the course of commercial activity an endangered species of wildlife, in violation of the Endangered Species Act. Carmel Azzopardi set forth the specific facts of his violations as follows and stated that the facts are true and correct:

> On or about July 19, 2005, in the Amarillo Division of the Northern District of Texas, and elsewhere, Carmel Azzopardi, also known as Charlie Azzopardi, defendant, did knowingly and willfully offer for sale and sell in interstate commerce, and transport in interstate commerce from Amarillo, Texas, to Clinton, Oklahoma, in the course of commercial activity, two clouded leopards, an endangered species of wildlife. In violation of 16 U.S.C. §§ 1538(E)(F) and 1540(b)(1) and 50 C.F.R. 17.21(e)(f)(1).

On March 29, 2006, Mr. Azzopardi filed the factual resume with the United States District Court for the Northern District of Texas. (Answer at 2 ¶ 7; Factual Resume filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006).)

11. On or about July 16, 2006, United States Magistrate Judge Clinton E. Averitte adjudicated Carmel Azzopardi guilty of the sale and transport in interstate commerce of an endangered species of wildlife, in violation of the Endangered Species Act (Answer at 2 ¶ 9; Judgment in a Criminal Case filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006)).

12. At all times material to this proceeding, Carmel Azzopardi was the president, director, and agent of Amarillo Wildlife (Complainant's

Response to Respondent's Letter and Request for a Hearing Attach. B; Complainant's Motion for Summary Judgment Decl. of Robert M. Gibbens ¶¶ 11-14; Amarillo Wildlife's Appeal Pet. at 2 ¶ (2); Complainant's Response to Respondent's Appeal Pet. Attachs. F, G, I, J).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Based on the Findings of Fact, I conclude the Administrator's determination that Amarillo Wildlife'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 Amarillo Wildlife is unfit to be licensed under the Animal Welfare Act, within the meaning of 9 C.F.R. § 2.11(a)(6).

Amarillo Wildlife's Appeal Petition

Amarillo Wildlife raises seven issues in its appeal petition. First, Amarillo Wildlife argues the ALJ erroneously failed to consider Amarillo Wildlife's response to the Administrator's motion for summary judgment (Appeal Pet. at 2).

The Hearing Clerk served Amarillo Wildlife with the Administrator's motion for summary judgment on January 23, 2008;[2] therefore, Amarillo Wildlife's response was due no later than February 12, 2008.[3] Amarillo Wildlife requested an extension of time within which to file a response to the Administrator's motion for summary judgment, and the ALJ granted Amarillo Wildlife's request by extending the time for filing a

[2]Domestic Return Receipt for article number 7004 2510 0003 7023 2200.

[3]See 7 C.F.R. § 1.143(d) (providing that a party may file a response to a motion within 20 days after service).

response to March 18, 2008.[4] Amarillo Wildlife filed its response to the Administrator's motion for summary judgment with the Hearing Clerk on March 21, 2008, but argues that its response is timely because Amarillo Wildlife mailed its response on March 17, 2008.

Amarillo Wildlife's argument that the mailbox rule applies to proceedings under the Rules of Practice has been consistently rejected by the Judicial Officer.[5] The Rules of Practice provide that a document is deemed to be filed when it reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computations of time.**
>
> . . . .
>
> (g) *Effective date of filing*. Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk[.]

7 C.F.R. § 1.147(g). The Hearing Clerk's time and date stamp establishes that the Hearing Clerk received Amarillo Wildlife's response to the Administrator's motion for summary judgment on March 21, 2008. Therefore, I find Amarillo Wildlife filed its response to the Administrator's motion for summary judgment 3 days late and the ALJ's failure to consider Amarillo Wildlife's response to the Administrator's motion for summary judgment, is not error.

Second, Amarillo Wildlife asserts Carmel Azzopardi resigned from Amarillo Wildlife prior to April 23, 2007 (Appeal Pet. at 2).

The Administrator instituted the instant proceeding based upon Mr. Azzopardi's relationship with Amarillo Wildlife on the date

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[4]ALJ's February 19, 2008, Extension of Time to Respond.

[5]*In re Bodie S. Knapp*, 64 Agric. Dec. 253, 302 (2005) (indicating the mailbox rule does not apply in proceedings under the Rules of Practice); *In re William J. Reinhart*, 59 Agric. Dec. 721, 742 (2000) (rejecting the respondent's contention that the Secretary of Agriculture must adopt the mailbox rule to determine the effective date of filing in proceedings conducted under the Rules of Practice), *aff'd per curiam*, 39 F. App'x 954 (6th Cir. 2002), *cert. denied*, 538 U.S. 979 (2003).

Mr. Azzopardi was convicted of violating the Endangered Species Act, July 21, 2006 (Compl. ¶¶ 11-12). Moreover, the basis for the ALJ's termination of Amarillo Wildlife's Animal Welfare Act license and disqualification of Amarillo Wildlife from obtaining an Animal Welfare Act license is Mr. Azzopardi's relationship with Amarillo Wildlife when Mr. Azzopardi "was convicted, on July 21, 2006, by a U.S. Magistrate Judge of the misdemeanor of Selling and Transporting in Interstate Commerce an Endangered Species of Wildlife." (ALJ's Initial Decision at 3.) Therefore, I find Amarillo Wildlife's assertion regarding Mr. Azzopardi's resignation on or about April 23, 2007, is not relevant to the instant proceeding.

Third, Amarillo Wildlife asserts that it is "closed" and a new corporation, Texas Wildlife Center, Inc., has been formed. Amarillo Wildlife asserts it no longer holds an Animal Welfare Act license and Animal Welfare Act license 74-C-0486 is held by Texas Wildlife Center, Inc. (Appeal Pet. at 2.)

The Administrator's response to Amarillo Wildlife's appeal petition contains a number of attachments which belie Amarillo Wildlife's assertion that it is closed and Texas Wildlife Center, Inc., is a new corporation (Complainant's Response to Respondent's Appeal Pet. at 4-6, Attachs. B-F). Instead, I find, as Amarillo Wildlife states in its April 16, 2007, letter to the United States Department of Agriculture: Amarillo Wildlife "simply changed the name[]" to Texas Wildlife Center, Inc. (Complainant's Response to Respondent's Appeal Pet. at 4-6, Attach. D.)

Fourth, Amarillo Wildlife concedes that the Secretary of Agriculture has the right to terminate Amarillo Wildlife's Animal Welfare Act license pursuant to 9 C.F.R. §§ 2.11(a)(6), .12, based on Mr. Azzopardi's July 21, 2006, conviction of violating the Endangered Species Act; however, Amarillo Wildlife argues the ALJ's disqualification of Amarillo Wildlife's directors, officers, and agents, other than Mr. Azzopardi, is unfair and not in accordance with the Animal Welfare Act (Appeal Pet. at 2-3.)

I agree with Amarillo Wildlife that, under 9 C.F.R. §§ 2.11(a)(6), .12, I may terminate Amarillo Wildlife's Animal Welfare Act license, based

upon Mr. Azzopardi's having been found to have violated the Endangered Species Act, and that I may disqualify Mr. Azzopardi from obtaining an Animal Welfare Act license; however, I disagree with Amarillo Wildlife's contention that no sanction may be imposed on its directors, officers, and agents, other than Mr. Azzopardi. The Regulations provide that no license shall be issued under circumstances that circumvent an order terminating an Animal Welfare Act license.[6] Granting Amarillo Wildlife's request to limit the disqualification order to Amarillo Wildlife and Mr. Azzopardi would enable Amarillo Wildlife to circumvent the disqualification order through its other directors, officers, and agents. Therefore, I decline to modify the ALJ's disqualification order as requested by Amarillo Wildlife.

Fifth, Amarillo Wildlife asserts Dr. Robert M. Gibbens' declaration attached to the Administrator's motion for summary judgement is "completely out of context." Amarillo Wildlife suggests Dr. Gibbens' declaration overstated the effect of Mr. Azzopardi's violations of the Endangered Species Act and states there was no evidence either presented at Mr. Azzopardi's trial or presented by Dr. Gibbens in his declaration that the animals which Mr. Azzopardi sold and transported, in violation of the Endangered Species Act, were in fact endangered species. (Appeal Pet. at 3-4.)

Mr. Azzopardi did not litigate the charges against him under the Endangered Species Act. Instead, Mr. Azzopardi pled guilty to the charges, admitted to the underlying facts, and was convicted of violating the Endangered Species Act by a United States Magistrate Judge (Plea Agreement, Factual Resume, and Judgment in a Criminal Case filed in *United States v. Azzopardi*, Case Number 2:06-CR-4(1) (N.D. Tex. July 21, 2006)). I reject Amarillo Wildlife's attempt to relitigate Mr. Azzopardi's criminal conviction in this forum.

Sixth, Amarillo Wildlife argues the ALJ erroneously relied on Dr. Gibbens' sanction recommendation (Appeal Pet. at 4).

The ALJ described his reliance on Dr. Gibbens' sanction recommendation, as follows:

> In keeping with the policy often expressed by the Judicial

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[6]9 C.F.R. § 2.11(d).

> Officer that when adjudicating sanction cases, we should ascertain policies relevant to their disposition from the Department's administrative officials and defer to them when appropriate, the following order is being entered in accordance with Dr. Gibbens' declaration.

Initial Decision at 4. The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[7] The ALJ made clear that he was not bound by Dr. Gibbens' sanction recommendation, but that he

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[7] *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

found Dr. Gibbens' sanction recommendation to be appropriate. Therefore, I reject Amarillo Wildlife's argument that the ALJ erroneously relied on Dr. Gibbens' sanction recommendation. Moreover, I have examined the purported mitigating circumstances raised by Amarillo Wildlife (Answer ¶¶ (A)-(D)) and find no basis to modify the sanction imposed by the ALJ.

Seventh, Amarillo Wildlife contends Mr. Azzopardi's 6 months of house arrest, 3 years of probation, and payment of over $50,000 in fines and attorney's fees in connection with his violations of the Endangered Species Act should be taken into account when determining the sanction imposed on Amarillo Wildlife (Appeal Pet. at 3).

I reject Amarillo Wildlife's contention that the penalty imposed on Mr. Azzopardi for his violations of the Endangered Species Act and the attorney's fees that Mr. Azzopardi paid in connection with *United States v. Azzopardi* are relevant to the sanction to be imposed on Amarillo Wildlife under the Animal Welfare Act. The penalty imposed on, and the payments made by, Mr. Azzopardi in connection with *United States v. Azzopardi* do not address the remedial purposes of the Animal Welfare Act.

Amarillo Wildlife's Motions Regarding Sanction

Amarillo Wildlife moves that: (1) Carmel Azzopardi be disqualified from obtaining an Animal Welfare Act license for 2 years; (2) no sanction be imposed on Amarillo Wildlife because it is no longer in existence; and (3) Texas Wildlife Center, Inc., continue to hold Animal Welfare Act license 74-C-0486 (Appeal Pet. at 4).

For the reasons articulated in this Decision and Order, *supra*, Amarillo Wildlife's motions that no sanction be imposed on Amarillo Wildlife and that Texas Wildlife Center, Inc., continue to hold Animal Welfare Act license 74-C-0486 are denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. Amarillo Wildlife's Animal Welfare Act license 74-C-0486 is terminated.

2. Amarillo Wildlife 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.

3. Amarillo Wildlife's directors, officers, and agents and any legal entity in which they may have a substantial interest are disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license.

This Order shall become effective on the 60th day after service of this Order on Amarillo Wildlife.

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In re: ANIMALS OF MONTANA INC., A MONTANA CORPORATION.
AWA Docket No. D-05-0005.
Decision and Order.
Filed March 10, 2009.

AWA – License termination – Disqualification – Lacey Act – Endangered Species Act – Motion for summary judgement – Providing false records to government agency.

Bernadette Juarez, for the Administrator, APHIS.
Michael L. Humiston, Herber City, UT, for Petitioner.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On June 6, 2005, the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], informed Troy Hyde, owner and operator of Animals of Montana, Inc. [hereinafter Animals of Montana], that APHIS intended to terminate Animals of Montana's Animal Welfare Act license (Animal Welfare Act license number 81-C-0023) based upon Troy Hyde's violations of the Lacey Act and the Endangered Species Act. On June 16, 2005, Animals of Montana instituted this proceeding by requesting a hearing regarding APHIS' proposed termination of its Animal Welfare Act license. Animals of Montana 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 the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On July 8, 2005, the Administrator of APHIS [hereinafter the Administrator], responded to Animals of Montana's request for a hearing stating he agreed with Animals of Montana that a hearing should be scheduled.

Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] scheduled a hearing to commence March 9, 2006, in Washington, DC. On March 6, 2006, the Administrator reversed his position regarding the need for a hearing and requested a continuance of the hearing, without date, pending the Administrator's filing a motion for summary judgment and the ALJ's ruling on that motion for summary judgment. On March 6, 2006, the ALJ cancelled the hearing.

On March 8, 2006, the Administrator filed "Respondent's Motion for Summary Judgment." On May 24, 2006, Animals of Montana filed "Petitioner's Response to Respondent's Motion for Summary Judgment" in which it sought denial of the Administrator's motion for summary judgment. On October 29, 2007, the ALJ issued a "Ruling Upon Consideration of Respondent's Motion for Summary Judgment" in which the ALJ: (1) found no material issues of fact with respect to four conclusions; (2) found a number of issues appropriate for consideration only after a hearing and inappropriate for summary judgment; and (3) ordered supplemental briefs to address the issue of whether Mr. Hyde's May 1999 and May 2000 Lacey Act and Endangered Species Act violations could constitute a basis for termination of Animal of Montana's Animal Welfare Act license based upon a regulation (9 C.F.R. § 2.12) that became effective August 13, 2004, more than 4 years after Mr. Hyde's violations of the Lacey Act and the Endangered Species Act.

On April 4, 2008, the Administrator filed "Supplemental Briefing and Motion for Reconsideration of Ruling on Consideration of Respondent's Motion for Summary Judgment," and on April 7, 2008, Animals of Montana filed "Petitioner's Memorandum Re: Retroactive Application of 9 C.F.R. § 2.12."

On July 17, 2008, the ALJ held a conference call to discuss the parties' April 2008 filings. The ALJ stated she had "reversed course" and, instead of holding a hearing to receive testimony and exhibits, concluded she would decide the case based upon written submissions. (Hearing Cancellation filed July 17, 2008.) On August 13, 2008, the Administrator filed "Supplemental Declaration of Robert M. Gibbens, D.V.M." Animals of Montana did not file any supplemental written submission in response to the ALJ's July 17, 2008, conference call.

On August 29, 2008, the ALJ issued a Decision and Order [hereinafter the Initial Decision] in which the ALJ: (1) granted the Administrator's March 8, 2006, motion for summary judgment; (2) terminated Animals of Montana's Animal Welfare Act license; and (3) disqualified Animals of Montana from obtaining an Animal Welfare Act license for 2 years.

On September 29, 2008, Animals of Montana appealed the ALJ's Initial Decision to the Judicial Officer, and on January 16, 2009, the Administrator filed "Respondent's Response to Petitioner's Appeal Petition." On January 23, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's August 29, 2008, Initial Decision terminating Animals of Montana's Animal Welfare Act license and disqualifying Animals of Montana from obtaining an Animal Welfare Act license for 2 years.

DECISION

Discussion

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 terminate a license and to disqualify a person from becoming licensed.[1] The Regulations 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 provides that an initial application for an Animal Welfare Act license will be denied if the applicant has provided false records to a government agency or has been

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[1]*In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. ___, slip op. at 6 (Jan. 6, 2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

found to have violated any federal law pertaining to the transportation, ownership, neglect, or welfare of animals, 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). Section 9 of the Animal Welfare Act (7 U.S.C. § 2139) provides that the act, omission, or failure of any person acting for or employed by an Animal Welfare Act licensee shall be deemed the act, omission, or failure of that licensee. The record supports the conclusions that: (1) Troy Hyde, owner, operator, and president of and the responsible corporate officer for Animals of Montana, has been found to have violated the Lacey Act and the Endangered Species Act; (2) Troy Hyde provided false records to a government agency; (3) Troy Hyde was acting for or employed by Animals of Montana when he was found to have violated the Lacey Act and the Endangered Species Act and when he provided false records to a government agency; and (4) APHIS' termination of Animals of Montana's Animal Welfare Act license and disqualification from obtaining an Animal Welfare Act license for a period of 2 years is warranted in law and justified by the facts.

Findings of Fact

1. Animals of Montana is a Montana corporation (Respondent's Motion for Summary Judgment Attach. A at 2-3).

2. Animals of Montana's mailing address is 14752 Brackett Creek Road, Bozeman, Montana 59715 (Respondent's Motion for Summary Judgment Attach. A at 3).

3. At all times material to the instant proceeding, Animals of Montana held Animal Welfare Act license number 81-C-0023 (Respondent's Motion for Summary Judgment Attach. G at 6-9, 13, 15, 17-22, 24-28, 33-35; Attach. N ¶ 3).

4. Troy Hyde was the incorporator of Animals of Montana (Respondent's Motion for Summary Judgment Attach. A at 3).

5. At all times material to the instant proceeding, Troy Hyde was the registered agent of Animals of Montana (Respondent's Motion for Summary Judgment Attach. A at 3, 6, 8, 10; Attach. N ¶ 6).

6. At all times material to the instant proceeding, Troy Hyde owned and operated Animals of Montana (Respondent's Motion for Summary Judgment Attach. B ¶ 2b; Attach. N ¶ 3; Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 13).

7. At all times material to the instant proceeding, Troy Hyde was the president of and the responsible corporate officer for Animals of Montana (Respondent's Motion for Summary Judgment Attach. A at 4, 6-11; Attach. B ¶ 2b; Attach N ¶ 3; Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 13).

8. On March 8, 2005, in an Information filed with the United States District Court for the District of Minnesota, the United States Attorney for the District of Minnesota charged Troy Hyde with violations of the Lacey Act and the Endangered Species Act, as follows:

COUNT 1

> On or about May 22, 1999, in the State of Minnesota and elsewhere, the defendant,
>
> TROY ALLEN HYDE,
>
> did knowingly transport or cause to be transported wildlife, to wit: a tiger, that had been sold in violation of a law or regulation of the United States, when, in the exercise of due care, he should have known that the wildlife was sold in violation of the

> Endangered Species Act, 16 U.S.C. § 1538(a)(1)(E), (F), and (G); all in violation of Title 16, United States Code, Sections 3372(a) and 3373(d)(1)(B)(2).
>
> **COUNT 2**
>
> On or about May 14, 2000, in the State of Minnesota and elsewhere, the defendant,
>
> TROY ALLEN HYDE,
>
> did knowingly and unlawfully receive, carry or transport, or cause to be delivered, received, or transported, in interstate commerce, and in the course of commercial activity an endangered species, to wit: a tiger; all in violation of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(E) and (G).

Respondent's Motion for Summary Judgment Attach. C.

9. On March 8, 2005, Troy Hyde appeared before United States District Court Judge Ann D. Montgomery and admitted the allegations in the Information referenced in Findings of Fact number 8 (Respondent's Motion for Summary Judgment Attach. L).

10. On March 8, 2005, Troy Hyde entered into a Plea Agreement and Sentencing Stipulations in which he pled guilty to a misdemeanor trafficking violation of the Lacey Act and to a violation of the Endangered Species Act (Respondent's Motion for Summary Judgment Attach. B). The Plea Agreement and Sentencing Stipulations sets forth the factual basis relevant to Troy Hyde's violations of the Lacey Act and the Endangered Species Act, as follows:

> 1. Charges. The defendant agrees to plead guilty to Count[] One charging the defendant with a misdemeanor trafficking violation of the Lacey Act and Count Two charging a violation of the Endangered Species Act.

2. Factual Basis.

a. Regulatory Background. Both the United States Fish and Wildlife Service (USFWS) and the United States Department of Agriculture (USDA) have authority over animals kept in captivity. Among other things, the USFWS regulates the interstate commerce of endangered and threatened species (collectively, referred to hereafter as "protected") through the Endangered Species Act (ESA) (16 U.S.C. §§ 1531 *et seq.)* and Endangered Species Regulations (50 C.F.R. 17). The USFWS also regulates the interstate commerce of wildlife through the Lacey Act (16 U.S.C. §§ 3371 *et seq.).* The Lacey Act, among other things, prohibits a person from knowingly engaging in certain conduct with wildlife when, in the exercise of due care, he should have known that the wildlife was possessed, transported or sold in violation of any wildlife-related federal law or regulation. 16 U.S.C. §§ 3372(a), 3373(d)(1)(B)(2). The USDA regulates the transportation, purchase, sale, housing, care, handling, and treatment of animals through the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.).* Among other things, the Animal Welfare Act requires dealers and exhibitors to make and retain certain records with respect to the purchase, sale, transportation, identification, and previous ownership of animals. The Animal and Plant Health Inspection Service (APHIS) is a component of USDA. The APHIS Form 7020 can be used to record the required information.

Under the ESA, the Secretary of the Interior has, through the USFWS, the authority to issue permits authorizing otherwise prohibited activity, for scientific purposes, to enhance the survival of the species, or for the incidental taking of endangered wildlife. These are known as Endangered Species permits, or ES permits (or registration). Such permits/registrations are difficult to

obtain.

b. General Factual Background. The defendant owns and operates a business known as Animals of Montana, Inc. He is the responsible corporate officer for Animals of Montana. Defendant and Animals of Montana acquired an APHIS Class "C" exhibitor license in 1993. Defendant and his business acquired a "Permit for Roadside Menagerie" from the Montana Department of Fish, Wildlife and Parks in approximately 1993. The defendant and his business have acquired leopards, snow leopards, a spotted leopard, tigers, lions, cougars, bobcats, bears, Canada lynx, wolves, and other wildlife over the years. Several of these transactions involved interstate purchases and sales the defendant made with Kenneth and Nancy Kraft of Racine, Minnesota. Defendant displayed the wildlife at his facility in Bozeman, Montana, and he earned income from displaying the wildlife for photographers and by training certain of the wildlife for use in movies, commercials, and similar film work.

   In 1999, the defendant received a USFWS Captive-Bred Wildlife (CBW) permit for Siberian tigers. In June 2000, the defendant renewed this CBW registration and also obtained a CBW for snow leopards. At the time he applied for and received the CBWs, the defendant received copies of the applicable wildlife regulations and related rules regarding his CBW permit. He signed various paperwork related to his CBW certifying he had read the legislation and other materials applicable to CBW registration. The CBW registration allows for commercial activity with species covered by the CBW, but only with other persons who also have a CBW registration.

c. Offense Conduct. On or about May 22, 1999, the defendant arranged for the sale and purchase of a tiger. The

defendant negotiated the sale of the tiger by telephone with Nancy Kraft. He paid the Krafts $750 for the tiger. The tiger had been identified as both a Bengal and, subsequently, a Siberian. On the APHIS Form 7020, the tiger was identified as a "generic Siberian tiger." The defendant asked a third party to pick up the tiger cub for him from the Krafts in Minnesota, and the tiger was transported to the defendant in Montana. Tigers are endangered. While the defendant had a CBW for Siberian tigers, the Krafts did not have any permit or license to engage in the interstate commercial activity with these, or any other, endangered species. The sale of these animals in interstate commerce violated the Endangered Species Act, and at the time of the offense, the defendant, in the exercise of due care, should have known that the sale was illegal. Thus, the subsequent knowing transport of this tiger to Montana at the defendant's direction violated the Lacey Act. APHIS Forms 7020 record information about the acquisition, disposition or transport of animals (other than cats and dogs). The APHIS Form 7020 the defendant received from the Krafts stated the transaction was a "permanent breeding loan" rather than the sale that it was. The defendant had not entered into any agreement to breed the tiger with the Krafts, nor was it his intention to breed the tiger.

In or about May 2000, the defendant negotiated with Nancy Kraft the purchase of a tiger ("Keeno") for $1,000. The defendant arranged for the transport of the tiger from Minnesota to Montana. While the defendant had a CBW for Siberian tigers, the Krafts did not have any permit or license to engage in the interstate commercial activity with these, or any other, endangered species. The knowing and unlawful transport of these animals in interstate commerce violated the Endangered Species Act. APHIS Forms 7020 record information about the acquisition, disposition or transport of animals (other than cats and dogs). The

> APHIS Form 7020 for this transaction reflected that it was a "donation" rather than the sale that it was.

Respondent's Motion for Summary Judgment Attach. B at 1-3.

11. On March 8, 2005, William H. Koch, Assistant United States Attorney, and Catherine C. Pisaturo, Trial Attorney, United States Department of Justice, on behalf of Thomas B. Heffelfinger, United States Attorney; Troy Hyde; and Bret B. Hicken, Attorney for Troy Hyde, signed the Plea Agreement and Sentencing Stipulations referenced in Findings of Fact number 10 (Respondent's Motion for Summary Judgment Attach. B at 9).

12. On September 8, 2005, based on the Plea Agreement and Sentencing Stipulations referenced in Findings of Fact numbers 10 and 11, United States District Court Judge Ann D. Montgomery convicted Troy Hyde of a trafficking violation of the Lacey Act and a violation of the Endangered Species Act, sentenced Troy Hyde to 2 years of probation and 180 days of home detention, and ordered Troy Hyde to pay $10,000 in restitution (Respondent's Motion for Summary Judgment Attachs. E-F).

13. Troy Hyde falsified United States Department of Agriculture records (APHIS Form 7020) in furtherance of and to conceal his violations of the Lacey Act and the Endangered Species Act (Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 15).

14. Based upon Troy Hyde's falsification of United States Department of Agriculture records and violations of the Lacey Act and the Endangered Species Act Dr. Robert M. Gibbens, D.V.M., Western Regional Director, Animal Care, APHIS, found Animals of Montana unfit to hold an Animal Welfare Act license (Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶ 16).

15. Based upon Troy Hyde's falsification of United States Department of Agriculture records and violations of the Lacey Act and the Endangered Species Act, Dr. Robert M. Gibbens, D.V.M., Western Regional Director, Animal Care, APHIS, found the issuance of an Animal Welfare Act license to Animals of Montana contrary to the purposes of the Animal Welfare Act (Supplemental Decl. of Robert M.

Gibbens, D.V.M. ¶ 19).

16. Dr. Robert M. Gibbens, based upon his 8 years of experience as Western Regional Director, Animal Care, APHIS, and based upon Troy Hyde's falsification of United States Department of Agriculture records and violations of the Lacey Act and the Endangered Species Act, recommended termination of Animals of Montana's Animal Welfare Act license and disqualification of Animals of Montana from becoming licensed under the Animal Welfare Act for a period of 2 years (Supplemental Decl. of Robert M. Gibbens, D.V.M. ¶¶ 1, 20-24).

Conclusions of Law

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

2. Based on the Findings of Fact, I conclude the Administrator's determination that Animals of Montana'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 Animals of Montana is unfit to be licensed under the Animal Welfare Act within the meaning of 9 C.F.R. § 2.11(a)(6).

Animals of Montana's Appeal Petition

Animals of Montana raises eight issues in "Petitioner's Appeal of Hearing Officer's Decision and Order" [hereinafter Appeal Petition]. First, Animals of Montana argues the Administrator's motion for summary judgment was time-barred by section 1.143(b)(2) of the Rules of Practice (7 C.F.R. § 1.143(b)(2)) (Appeal Pet. at 3).

The Rules of Practice provide "[a]ll motions and request[s] concerning the complaint must be made within the time allowed for filing an answer." (7 C.F.R. § 1.143(b)(2).) On June 16, 2005, Animals of Montana instituted this proceeding by requesting a hearing regarding APHIS' proposed termination of its Animal Welfare Act license.[2] The

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[2]The Rules of Practice define the word "complaint" as including a "document by virtue of which a proceeding is instituted." (7 C.F.R. § 1.132.) Therefore, I find (continued...)

Hearing Clerk served the Administrator with Animals of Montana's request for a hearing on June 23, 2005; therefore, the Administrator was required to file with the Hearing Clerk any motion concerning the request for hearing no later than July 13, 2005.[3] The Administrator filed the motion for summary judgment with the Hearing Clerk on March 8, 2006, more than 7 months after a motion concerning the request for hearing was required to be filed. However, after review of the Administrator's motion for summary judgment, I conclude the Administrator's March 8, 2006, motion for summary judgment is not a motion "concerning" the request for hearing. The Administrator does not seek correction or clarification of the request for hearing and does not seek an extension of time to file a response to the request for hearing. Instead, the Administrator's motion for summary judgment seeks a judgment based on the filings in the record. Therefore, I find the time limit in 7 C.F.R. § 1.143(b)(2) is not applicable to the Administrator's March 8, 2006, motion for summary judgment.

Second, Animals of Montana argues the Administrator's motion for summary judgment is inappropriate because suspension or revocation of Animal of Montana's Animal Welfare Act license is discretionary (Appeal Pet. at 4).

The Administrator seeks termination of Animals of Montana's Animal Welfare Act license and a 2-year disqualification from obtaining an Animal Welfare Act license based upon 9 C.F.R. §§ 2.11, .12. The Administrator does not seek suspension or revocation of Animals of Montana's license pursuant to 7 U.S.C. § 2149(a) for violations of the Animal Welfare Act or the Regulations, as Animals of Montana asserts. Therefore, I find Animals of Montana's argument that summary judgment is inappropriate because suspension or revocation of Animals of Montana's license is discretionary, misplaced. Moreover, I have

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[2](...continued)
Animals of Montana's request for a hearing constitutes a "complaint" for the purposes of 7 C.F.R. § 1.143(b)(2).

[3]The Rules of Practice require that an answer must be filed with the Hearing Clerk within 20 days after service of the document instituting the proceeding (7 C.F.R. § 1.136(a)).

repeatedly found summary judgment appropriate in cases involving the termination and denial of Animal Welfare Act licenses based upon prior criminal convictions.[4] Hearings are futile where, as in the instant proceeding, there is no factual dispute of substance.[5]

Third, Animals of Montana argues the Administrator's motion for summary judgment is inappropriate because Animals of Montana was not given an opportunity to demonstrate or achieve compliance with all lawful requirements (Appeal Pet. at 4).

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

> **§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**
>
> . . . .
>
> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the

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[4]*See In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. ___, slip op. at 6 (Jan. 6, 2009) (affirming the administrative law judge's initial decision granting the administrator's motion for summary judgment to terminate an Animal Welfare Act license based on the conviction of Amarillo Wildlife Refuge, Inc.'s president, director, and agent for violations of the Endangered Species Act notwithstanding Amarillo Wildlife Refuge, Inc.'s request for an oral hearing); *In re Loreon Vigne*, 67 Agric. Dec.1060, 1060-61 (2008) (affirming the administrative law judge's initial decision granting the administrator's motion for summary judgment to terminate an Animal Welfare Act license based on the Endangered Species Act conviction of a corporation that Loreon Vigne managed, directed, and controlled); *In re Mark Levinson*, 65 Agric. Dec. 1026, 1028 (2006) (upholding the administrative law judge's initial decision affirming the administrator's denial of Mark Levinson's Animal Welfare Act license application after the administrator demonstrated there was no material fact upon which to hold a hearing).

[5]*See Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

> interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given–
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c). License termination in the instant proceeding is predicated upon Mr. Hyde's having been found to have knowingly violated the Endangered Species Act and the Lacey Act. Therefore, termination of Animals of Montana's Animal Welfare Act license falls within the Administrative Procedure Act's "willfulness" exception to the notice and opportunity to demonstrate or achieve compliance requirement.

Fourth, Animals of Montana contends 9 C.F.R. §§ 2.11, .12 are inconsistent with 7 U.S.C. § 2149 because 9 C.F.R. § 2.11 identifies the circumstances under which an Animal Welfare Act license "will not be issued," while 7 U.S.C. § 2149 specifies when the Secretary of Agriculture "may" suspend or revoke an Animal Welfare Act license for violations of the Animal Welfare Act and the Regulations (Appeal Pet. at 4-6).

As an initial matter, the Administrator does not seek to suspend or revoke Animals of Montana's Animal Welfare Act license for violations of the Animal Welfare Act or the Regulations, pursuant to 7 U.S.C. § 2149(a). Instead, the Administrator seeks to terminate Animals of Montana's Animal Welfare Act license because Mr. Hyde violated the Endangered Species Act and the Lacey Act and provided false records to a government agency thereby demonstrating that Animals of Montana is unfit to hold an Animal Welfare Act license (Supplemental Decl. of

Robert M. Gibbens, D.V.M. ¶ 20).

Moreover, in a recent proceeding, I addressed the contention that 9 C.F.R. § 2.11(a)(6) is "faulty," as follows:

> . . . 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. Therefore, I reject Ms. Vigne's contention that 9 C.F.R. § 2.11(a)(6) is "faulty."

In re Loreon Vigne, 67 Agric. Dec. 1060, 1067 (2008) (footnote omitted).

Further still, the proposed rule relevant to the promulgation of 9 C.F.R. §§ 2.11, .12 explains that the proposed regulations promote the Animal Welfare Act's remedial purpose of ensuring the humane care and treatment of animals and that persons who have violated any Federal, State, or local laws or regulations pertaining to animal cruelty, transportation, ownership, neglect, or welfare would be unfit for an Animal Welfare Act license (65 Fed. Reg. 47,908, 47,911 (Aug. 4, 2000)).

Thus, contrary to Animals of Montana's contention, 9 C.F.R. §§ 2.11, .12 were lawfully adopted pursuant to 7 U.S.C. § 2151, promote the remedial purpose of the Animal Welfare Act, and are rationally related to the purpose of denying Animal Welfare Act license applications to applicants unfit to hold Animal Welfare Act licenses and terminating Animal Welfare Act licenses held by those unfit to hold them.

Fifth, Animals of Montana asserts Mr. Hyde's violations of the

Lacey Act and the Endangered Species Act merely disrupted the administrative mechanism designed to carry out the purposes of the Lacey Act and the Endangered Species Act. Animals of Montana further asserts Mr. Hyde's violations did not result in harm to endangered wildlife or a reduction of the endangered species population. (Appeal Pet. at 6-8.)

Even if I were to find that Mr. Hyde's violations of the Lacey Act and the Endangered Species Act only disrupted the administrative mechanism designed to carry out the purposes of the Lacey Act and the Endangered Species Act and that Mr. Hyde did not harm endangered wildlife and did not reduce the population of endangered species, I would not dismiss the instant proceeding. An Animal Welfare Act license may be terminated if a person acting for or employed by a licensee has been found to have violated any federal laws pertaining to the transportation, ownership, neglect, or welfare of animals.[6] Animals of Montana does not dispute the fact that Mr. Hyde has been found to have violated two statutes pertaining to the transportation, ownership, neglect, or welfare of animals; namely, the Lacey Act and the Endangered Species Act. The Administrator is not also required to establish that Mr. Hyde's violations resulted in harm to animals or the reduction of the population of animals in order to support the termination of Animals of Montana's Animal Welfare Act license.

Sixth, Animals of Montana asserts Mr. Hyde "has already been criminally sanctioned"; thus, "[d]eterrence has already been fully accomplished in his case." (Appeal Pet. at 8-9.)

I reject Animal of Montana's contention that the criminal penalty imposed on Mr. Hyde in *United States v. Hyde*, Case No. 03-315(6) (D. Minn. Sept. 8, 2005), is relevant to the remedy to be imposed on Animals of Montana in the instant civil administrative proceeding. The criminal penalty imposed on Mr. Hyde in *United States v. Hyde* does not

[6] 7 U.S.C. § 2139; 9 C.F.R. §§ 2.11, .12.

address the remedial purposes of the Animal Welfare Act.[7]

Seventh, Animals of Montana asserts that any suspension of its Animal Welfare Act license for more than a month or two will end Mr. Hyde's "otherwise" law-abiding career of 22 years (Appeal Pet. at 9-10).

The impact on Mr. Hyde's career, which may result from the termination of Animals of Montana's Animal Welfare Act license and disqualification of Animals of Montana from holding an Animal Welfare Act license, is not relevant to determining whether Animals of Montana is unfit to hold an Animal Welfare Act license. Moreover, collateral effects of the termination of an Animal Welfare Act license and disqualification from holding an Animal Welfare Act license are not relevant to the determination of whether Animals of Montana is unfit to be licensed.[8]

Eighth, Animals of Montana argues the Secretary of Agriculture cannot retroactively apply a regulation (9 C.F.R. § 2.12) effective after Mr. Hyde violated the Lacey Act and the Endangered Species Act (Appeal Pet. at 10-11).

On September 8, 2005, United States District Court Judge Ann D. Montgomery adjudicated Mr. Hyde guilty of violating the Lacey Act in May 1999 and violating the Endangered Species Act in May 2000 (Respondent's Motion for Summary Judgment Attachs. E-F). The instant proceeding regarding the termination of Animal of Montana's Animal Welfare Act license is based upon 9 C.F.R. § 2.12, a regulation which became effective August 13, 2004,[9] more than 4 years after Mr. Hyde's violations of the Lacey Act and the Endangered Species Act and more than 1 year before Mr. Hyde was convicted of violating the

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[7]*See In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. ___, slip op. at 17 (Jan. 6, 2009) (rejecting Amarillo Wildlife Refuge, Inc.'s argument that its principal's 6 months of house arrest, 3 years of probation, and payment of over $50,000 in fines and attorneys fees in connection with his violations of the Endangered Species Act should be considered when determining the remedy in an Animal Welfare Act license termination proceeding).

[8]*In re Loreon Vigne*, 67 Agric. Dec. 1060, 1061 (2008).

[9]69 Fed. Reg. 42,089 (July 13, 2004).

Lacey Act and the Endangered Species Act.

The Regulations provide that the Secretary of Agriculture may terminate an Animal Welfare Act license when a licensee (or any person acting for or employed by the licensee[10]) "has been found to have violated" any federal laws pertaining to the transportation, ownership, neglect, or welfare of animals.[11] Based upon the language of the Regulations, I find Mr. Hyde's September 8, 2005, conviction of having violated the Lacey Act and the Endangered Species Act triggered the Secretary of Agriculture's ability to terminate Animals of Montana's Animal Welfare Act license; not the date of the underlying criminal activities, as Animals of Montana suggests.[12] Thus, the ALJ's application of 9 C.F.R. § 2.12, to terminate Animals of Montana's license based on Mr. Hyde's September 8, 2005, conviction has no retroactive effect.

For the foregoing reasons, the following Order is issued.

ORDER

1. Animal Welfare Act license 81-C-0023 is terminated.

2. Animals of Montana 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 Animals of Montana.

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[10]7 U.S.C. § 2139.

[11]9 C.F.R. §§ 2.11(a)(6), .12.

[12]*See In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. ___, slip op. at 13 (Jan. 6, 2009) (stating termination of Amarillo Wildlife Refuge, Inc.'s Animal Welfare Act license, pursuant to 9 C.F.R. § 2.12, is based upon Mr. Azzopardi's relationship with Amarillo Wildlife Refuge, Inc., when Mr. Azzopardi was "convicted" of violating the Endangered Species Act).

In re: BRET B. HICKEN, AN INDIVIDUAL; AND ANIMAL INDUSTRIES, LLC.
AWA Docket No. D-08-0164.
Decision and Order.
May 1, 2009.

AWA – Lacey Act – Circumvention of license termination – Successor corporate licensee.

Colleen Carroll for APHIS.
Respondent, Pro se.
Decision and order by Administrative Law Judge Victor W. Palmer.

Decision and Order

Bret B. Hicken initiated this proceeding, on August 11, 2008, by filing a petition in which he alleged that the Animal and Plant Health Inspection Service (APHIS), an agency of the United States Department of Agriculture (USDA), had improperly denied a license he needs to exhibit animals pursuant to the terns of the Animal Welfare Act (7 U.S.C. §§ 2131-2159). The petition states that Mr. Hicken's applications for a license were denied because APHIS erroneously assumed that he was attempting to circumvent the termination of the exhibitor's license held by Animals of Montana, a corporation that Mr. Hicken, an attorney, had represented. On August 18, 2008, APHIS filed a response with a motion for summary judgment seeking the dismissal of the petition.

On January, 28, 2009, I held a transcribed hearing with Mr. Hicken participating by telephone. Both parties filed briefs subsequent to the hearing. Based on the facts developed at the hearing, I conclude that the present denial of an exhibitor's license to Mr. Hicken and the company he owns is proper, and the actions so far taken by APHIS should be upheld. However, Mr. Hicken has testified that if he or his company should be granted a license, he would observe conditions assuring his activities as a licensed exhibitor would be independent of and not a continuation of Animals of Montana, a company owned by his former client Troy Hyde. Based on that testimony and the stated concerns of APHIS, the order that follows includes the requirement that an

exhibitor's license shall be issued to Mr. Hicken or his company, upon the filing of a future application that complies with all governing regulations, subject to the provision that the licensee shall meet and observe conditions specified in the order to assure the separation of its activities from those of Mr. Hyde and Animals of Montana.

Findings

1. Bret B. Hicken, who seeks an exhibitor's license from APHIS, has acted as the attorney for Troy Hyde, owner of Animals of Montana, Inc., who pled guilty (*U.S. vs. Hyde,* No. 03-315(6), D.C. Minn., March 8, 2005), to a misdemeanor trafficking violation of the Lacey Act and a violation of the Endangered Species Act. (RX 1).
2. On August 29, 2008, based on the guilty plea in the criminal case, an order was entered on behalf of USDA that terminated the license held by Animals of Montana that is required under the Animal Welfare Act for exhibiting animals, and disqualified it for two years from obtaining a new license. (RX 7).The order was affirmed by USDA's Judicial Officer on March 10, 2009. (*In re Animals of Montana, Inc.,* AWA Docket No. D-05-0005 (March 10, 2009)).
3. On April 27, 2008, Ms. Tracy Krueger, the companion of Troy Hyde and an officer of Animals of Montana, Inc., applied for an exhibitor's license to operate the Animals of Montana facility. APHIS denied her license application as an attempt to circumvent the impending termination of Animals of Montana's license. (Transcript, pp. 69-75; RX 6, pp. 6-9).
4. Shortly after the denial of Ms. Krueger's application, Bret B. Hicken, on June 6, 2008, formed a limited liability company, Animal Industries, LLC, and began submitting applications to APHIS for an exhibitor's license. The first application was denied for being incomplete. The second application was denied for failing to send the licensing fee. The third application was submitted on July 11, 2008 and was denied by APHIS, on July 17, 2008, because: (1) Mr. Hyde and Animals of Montana continued to own the property, equipment and animals that the application stated Mr. Hicken had purchased; (2) Animals Industries, LLC did not appear to be authorized to transact business in Montana

where the facility and animals were located; and (3) APHIS officials believed that the application by Mr. Hicken was an attempt to circumvent the termination of the license held by Animals of Montana. (Transcript, pp. 76-84; RX 6, pp. 10-16).

4. Mr. Hicken denies that he is seeking a license to circumvent the termination of the license formerly held by Animals of Montana, Inc. He testified that:

(a)Mr. Hicken has previous experience as an animal trainer from approximately 1979 to 1985, when he raised and trained wild animals to work his way through college and law school.

(b)Though Mr. Hicken has represented Mr. Hyde, he had been involved in the animal business before becoming acquainted with Mr. Hyde. Mr. Hicken is licensed to practice law and has represented not only Mr. Hyde, but a number of other clients in his practice. He is now at the point that he wishes to retire and return to the animal training business. He regards the termination of Mr. Hyde's license by APHIS as presenting him with an opportunity to purchase his client's business.

(c)Mr. Hicken has filed Articles of Incorporation in the State of Utah for a new corporation named Animal Industries, Inc. that he proposes should be granted an exhibitor's license under which it will operate the business in replacement of Animals of Montana. Mr. Hicken as the corporation's owner would operate the business under a new name, with new personnel, new telephone and contact number, and probably a new location. Mr. Hicken has entered into a contact with Mr. Hyde to purchase his animals and equipment, but not the real property where the animals were exhibited. If Mr. Hicken is unable to reach a rental agreement with the current owner of the real estate, Mr. Hicken would move the animals to a new location, and create an entirely new business.

Conclusions

1. APHIS properly denied an exhibitor's license to Petitioners in that the property, equipment and animals that were the subject of the application were still owned by Mr. Hyde and Animals of Montana, Inc.

2. At such time in the future as Mr. Hicken, or a company that he owns, files a new application that complies with 9 C.F.R. §§ 2.1, 2.2, 2.3 and 2.6, for a license under the Animal Welfare Act to exhibit animals, the

license should be issued subject to the following conditions which if not observed shall be grounds for license termination under 9 C.F.R. § 2.12 for violating 9 C.F.R. § 2.11(d), in that the license shall be presumed to have been obtained to circumvent the order that terminated the license held by Animals of Montana:

> The licensee shall not employ the name, logo, advertisements, employees, or principals of Animals of Montana, Inc.; and neither Troy Hyde nor Tracey Krueger (or any of their agents or assigns) shall be a full or part-time employee of petitioner(s).
> Troy Hyde shall not participate in any way in promotional or marketing activities or in the exhibition of animals other than as a part-time consultant on an independent contractor basis who is not present at any animal exhibition.
> The licensee shall not hold, use or house any animals personally owned, held or otherwise used by, or in the custody of, Troy Hyde, Tracey Krueger or Animals of Montana, Inc.
> Troy Hyde, Tracey Krueger and/or Animals of Montana, Inc., or their agents or assigns, shall have no interest, financial or otherwise, in petitioner(s) Animal Welfare Act activities, or in any business operated by the licensee that is subject to regulation under the Animal Welfare Act.

Discussion

Mr. Hicken would like to purchase his client's animal exhibition business and retire from the practice of law in the State of Utah. The need of his client, Troy Hyde, to sell his animal exhibition business, is perceived by Mr. Hicken as a unique opportunity to return to a business he knows. However, he cannot exhibit wild animals without first obtaining a license from APHIS as required by the Animal Welfare Act (7 U.S.C. §§ 2131-2159). Under applicable USDA regulations, a person seeking such a license must file an application that among other conditions sets forth "…a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance…." (9 C.F.R. § 2.1). Mr. Hicken cannot comply with this requirement until

he actually purchases the animals and equipment, and acquires a facility where they will be kept. He is therefore presently ineligible for a license, but is afraid to purchase Mr. Hyde's animals and equipment without assurance that the needed license will be granted. APHIS has made it clear that it is fearful that Mr. Hicken, contrary to 9 C.F.R. § 2.11 (c) and (d), is attempting to obtain the license to enable his client, Mr. Hyde, to continue his operations as an animal exhibitor in circumvention of the license termination and the two-year proscription that USDA has imposed. Mr. Hicken states that APHIS is mistaken in that his company is a completely different entity from Mr. Hyde's. He argues that because the two companies are not intertwined, a license may not be denied for circumventing the prior order. *Suncoast Primate Sanctuary Foundation, Inc.,* 65 Agric. Dec.113, 65 Agric. Dec. 1197 (vacated by the Judicial Officer but reaching this conclusion, January 8, 2008, AWA Docket No. D-05-0002, 67 Agric. Dec (2008)). Additionally, Mr. Hicken testified at the hearing that he would be agreeable to conditions being placed upon the grant of a license to assure that the activities of his company would not involve Mr. Hyde. He specifically stated that those conditions could include prohibiting Mr. Hyde's presence when the animals are exhibited. (Transcript, p. 124).

The parties face an impasse that may only be overcome by an advance specification of the conditions under which a license shall be granted that adequately assures that the license is not actually obtained for Mr. Hyde.

Subsequent to the hearing, APHIS undertook to delineate such conditions. Though Mr. Hicken has not addressed the APHIS proposal in his brief, APHIS advises that he presently objects to a proposed requirement that Mr. Hyde may not attend future animal exhibitions by the new licensee. Even though he testified at the hearing that he would agree to this condition (Transcript, p. 124), APHIS advises in its brief, that Mr. Hicken now contends that Mr. Hyde's presence at the exhibitions is needed for his expertise on the animals' training and upbringing to better assure the safety of clients. That may be, but the fact that Mr. Hyde would be present at exhibitions is grounds for a reasonable inference that Mr. Hicken seeks an exhibitor's license as a subterfuge to circumvent Mr. Hyde's two-year disqualification. Animals are regularly sold by one trainer to another with the new owner

assuming all training duties before the animals are again exhibited. To the extent Mr. Hicken needs advice from Mr. Hyde, it should be obtained prior to exhibiting the animals. If Mr. Hicken cannot in that way obtain the expertise and confidence he needs when he exhibits these wild animals, he has the choice of hiring some expert other than Mr. Hyde to assist him at the exhibitions, or not entering into a dangerous business that he is not properly trained and experienced to conduct.

In sum, I find the conditions elaborated by APHIS for the issuance of an exhibitor's license to Mr. Hicken to be prudent and reasonable, and with some modifications I have included them as part of the order being entered in this proceeding.

ORDER

1. The denial of an exhibitor's license to petitioners by APHIS was in accordance with law and is hereby upheld.

2. At such time in the future as Mr. Hicken, or a company that he owns, files a new application that complies with 9 C.F.R. §§ 2.1, 2.2, 2.3 and 2.6, for a license under the Animal Welfare Act to exhibit animals, the license should be issued subject to the following conditions which if not observed shall be grounds for license termination under 9 C.F.R. § 2.12 for violating 9 C.F.R. § 2.11(d), in that the license shall be presumed to have been obtained to circumvent the order that terminated the license held by Animals of Montana:

(a) Mr. Hicken and/or his company, shall not employ the name, logo, advertisements, employees, or principals of Animals of Montana, Inc.; and neither Troy Hyde nor Tracey Krueger (or any of their agents or assigns) shall be a full or part-time employee of the licensee.

(b) Troy Hyde shall not participate in any way in promotional or marketing activities or in the exhibition of animals other than being hired by Mr. HHicken and/or his company, as a part-time consultant on an independent contractor basis who is not present at any animal exhibition.

(c) Mr. Hicken and/or his company, shall not hold, use or house any animals personally owned, held or otherwise used by, or in the custody of, Troy Hyde, Tracey Krueger, or Animals of Montana, Inc.

(d) Troy Hyde, Tracey Krueger and/or Animals of Montana, Inc., or their agents or assigns, shall have no interest, financial or otherwise, in the Animal Welfare Act activities of Mr. Hicken and/or his company, or in any business operated by Mr. Hicken and/or his company, that is subject to regulation under the Animal Welfare Act.

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 as provided in 7 C.F.R. §1.145.

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

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In re: KATHLEEN BAIRD.
AWA Docket No. D-08-0184.
Decision and Order.
May 30, 2009.

AWA – Falsified application – Period of denial, expiration of.

Colleen Carroll for APHIS.
Respondent, Pro se.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision and Order

1.The Petitioner, Kathleen Baird (Petitioner Baird), represents herself (appears *pro se*). The Respondent, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), is represented by Colleen A. Carroll, Esq.

2.This case was previously assigned to Chief Administrative Law Judge Marc R. Hillson, who had scheduled a one-day hearing. The Chief Judge reassigned this case to me, Administrative Law Judge Jill S. Clifton, on March 23, 2009.

3.APHIS's Motion for Summary Judgment was filed on March 31, 2009. Petitioner Baird's Response(s) were timely filed on May 13, 2009 and May 15, 2009. Petitioner Baird included in her Responses, her "Motion for Dismissal." Ordinarily a Petitioner would not request

dismissal of her own petition, so I have taken care to determine what Petitioner Baird was really asking for: Petitioner Baird asked me to undo APHIS's denial of her request for a USDA Animal Welfare Act license.

Findings of Fact and Conclusions

4.The following mixed findings of fact and conclusions, lettered (a) through (h), are not in controversy, are established as a matter of Summary Judgment, and do not require a hearing in order to be proved.

(a) Petitioner Baird applied to APHIS in March 2008 for an Animal Welfare Act license.

(b) By letter dated August 20, 2008, APHIS denied Petitioner Baird's application, based in part on the requirements of 9 C.F.R. § 2.11(a)(6), which, among other things, prohibits the issuance of a license to any applicant who has provided any false records to USDA or other government agencies.

(c) APHIS advised Petitioner Baird that she may reapply for an Animal Welfare Act license one year from the date the denial of her application becomes final.

(d) Petitioner Baird's one year of waiting to reapply has not yet begun to run, because the denial of Petitioner Baird's application cannot become final while it is being appealed.

(e) Petitioner Baird's appeal began on September 9, 2008, when she filed this case. Petitioner Baird's appeal is ongoing.

(f) The Tennessee Wildlife Resources Agency (TWRA), a government agency, had in its possession a record which had been falsified, a USDA AWA exhibitor's license naming Susan Aronoff as the licensee (the purported license bore the false expiration date of February 16, 2008; the true license showed instead an expiration date of February 16, 2006).

(g) Petitioner Baird acknowledges that she sent to TWRA the Susan Aronoff USDA AWA exhibitor license and maintains that she did not falsify it.

(h) TWRA, through Walter T. Cook, its Captive Wildlife Coordinator, maintains that Petitioner Baird provided the false record to it in about February 2007 as part of Petitioner Baird's application for a TWRA

Class I Wildlife permit. [Class I felids includes lions and tigers.] TWRA, again through Walter T. Cook, maintains that Petitioner Baird again provided the false record to it in about October 2007, in follow-up to her application to TWRA.

5.Based on the foregoing mixed findings of fact and conclusions, lettered (a) through (h), which are not in dispute, summary judgment in favor of APHIS is GRANTED, for the reason that APHIS has proved that Petitioner Baird provided the false record to the Tennessee Wildlife Resources Agency, a government agency. It is not necessary that APHIS prove who falsified the Susan Aronoff USDA AWA exhibitor license that bore the false expiration date of February 16, 2008.

Order

6. This Decision affirms APHIS's denial of Petitioner Kathleen Baird's application for a USDA Animal Welfare Act license, contained in APHIS's letter dated August 20, 2008, based on the requirements of 9 C.F.R. § 2.11(a)(6), which prohibits the issuance of a license to an applicant who provided a false record to a government agency, to-wit, the Tennessee Wildlife Resources Agency.

7. Consequently, the hearing, scheduled for July 21 through 23, 2009, in Tampa, Florida, is not necessary and will be canceled by separate Order.

8. Petitioner Kathleen Baird is disqualified from being granted a USDA Animal Welfare Act license for a period of 1 year from the effective date of this Order. This Order is effective on the day after this Decision becomes final (*see* the following section regarding finality).

9. Petitioner Kathleen Baird may apply for an Animal Welfare Act license 60 days prior to the end of the 1 year period of disqualification, with the understanding that no license will issue until disqualification has ended.

Finality

10. 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.

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ADMINISTRATIVE WAGE GARNISHMENT

DEPARTMENTAL DECISIONS

In re: ANNIE PALDO.
AWG Docket No. 09-0032.
Decision and Order.
January 6, 2009.

AWG.

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, Annie Paldo, 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 November 20, 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. Paldo failed to file anything further with the Hearing Clerk and efforts to reach her by telephone were unsuccessful. At the time she requested a hearing, the Petitioner disputed only the amount of the garnishment, stating "I don't make [a] enough money for yall to take my income is low". In an effort to facilitate the Petitioner the hearing that she requested, the above Prehearing Order provided forms upon which to list her financial information so that an informed decision might be made concerning her ability to pay the amount alleged to be due.

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 July 29, 2005, the Petitioner, Annie Paldo, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on September 28, 2005 obtained a home mortgage loan for property located at 611 Roosevelt Street, Navasota, Texas from J.P. Morgan Chase Bank, N.A. (Chase) for $82,000.00 (Loan Number 1082576112). RX-1. In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on May 1, 2007 for $76,500.00. Chase was not able to sell the residence by the marketing expiration date and submitted a loss claim in the amount of $26,103.83 based upon a Liquidation Appraisal of $75,000.00. The residence was subsequently sold for $74,000.00 on February 22, 2008. No further recovery has been made. RX-2, 3 &4.

The Summary of Loss Claim Paid on the Loan Guarantee reflects that USDA paid Chase $26,103.83 under the Loan Guarantee, including principal, accrued interest, the costs of foreclosure, maintenance, and subsequent sale, less the final sales proceeds. RX-2.

The Petitioner did file a Petitioner for Relief under Chapter 13 of the Bankruptcy Act on December 5, 2006 in the United States Bankruptcy Court for the Southern District of Texas (Petition No. 06-37005); however, on February 1, 2007, the Chapter 13 Trustee moved to dismiss the case. On March 13, 2007, the Motion to Dismiss was granted. As the Petitioner was not discharged in bankruptcy, the debt remains collectible.

Conclusions of Law

The Petitioner, Annie Paldo, is indebted to USDA RD in the amount of $26,103.83 as of February 12, 2008 for the mortgage loan guarantee extended to her, further identified as Loan account number 1082576112. 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, Annie Paldo, 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: THERESA CRUEA.
AWG Docket No. 08-0170.
Decision and Order.
January 12, 2009.

AWG .

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, Theresa Cruea, 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 7, 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 and the Petitioner's ability to pay any debt established.

Both parties complied with that Order. The Respondent filed a Narrative together with supporting documentation. The Petitioner filed schedules reflecting her assets and liabilities as well as her current income and monthly expenses. A teleconference was held with the parties on January 8, 2009. The Petitioner participated *pro se*, unassisted by counsel. The Respondent was represented by Mary Kimball and Gene Elkin, both from the Rural Development Office, United States Department of Agriculture, Saint Louis, Missouri. During the teleconference, Ms. Cruea indicated that she did not dispute the amount of the debt, that she did not have any additional exhibits to submit that were not already in the record and would not be calling any witnesses. Ms. Cruea indicated that as a result of the general economic condition, the number of hours that she was allowed to work had been cut to 20 hours per week and that further cuts or lay-offs were possible. She also indicated that the child support that her ex-husband has been ordered to pay will be terminated as her daughter will soon be 18 years of age. The record reflects that her receipt of child support has been problematic as there is an arrearage noted and that she is unable to depend upon regular receipt of the sums owed.

Based upon Ms. Cruea's testimony concerning her current income, her current gross weekly income amounts to $196.00 per week (20 hours @ $9.80/hour) or a monthly average of $842.00 ($196.00 x 4.3 weeks/month). Even were she to receive the child support which her husband has been ordered to pay ($483.41/month + $96.68 arrearage), the Petitioner's necessary monthly expenses of rent, utilities, groceries, transportation and insurance expenses considerably exceed her monthly income.

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 February 22, 1999, the Petitioner, Theresa Cruea applied for and received a home mortgage loan from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at

825 Hemlock, Celina, Ohio in the amount of $64,225.00 (Loan Number 0019282967). RX-1.

In 2005, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. Respondent's Narrative.

The secured property was sold at foreclosure sale on January 3, 2007 for $34,633.83. RX-4.

Subsequent collection activity by the Department of Treasury has reduced the amount due by $8,921.00 leaving the amount remaining due after application of all recovery to date is $25,594.19. RX-4.

The Petitioner's current income from all sources is exceeded by necessary monthly expenses.

Conclusions of Law

The Petitioner, Theresa Cruea is indebted to USDA RD in the amount of $25,594.19.

All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.

Based upon the Petitioner's current income and necessary living expenses, administrative wage garnishment of the wages of the Petitioner would cause financial hardship to her.

Due to the finding of financial hardship, administrative wage garnishment is not authorized at this time.

The Respondent may review the Petitioner's hardship at least annually and may reinstitute proceedings if it receives information that the Petitioner's financial condition has materially changed.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Theresa Cruea, is **not** authorized at this time, without prejudice to reinstituting proceedings should there be a material change in the Petitioner's financial condition.

This matter is stricken from the active docket.

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

Done at Washington, D.C.

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In re: GALEN STACY.
AWG Docket No. 08-0183.
Decision and Order.
February 4, 2009.

AWG.

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision and Order

This matter is before me upon the request of the Petitioner, Galen Stacy, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against Petitioner. On September 17, 2008, I issued a Prehearing Order requiring the parties to exchange information concerning the nature of the debt and the ability of Petitioner to repay all or part of the debt, if established.

I conducted a telephone conference with the parties on November 14, 2008. During this conference, it became evident that Petitioner did not dispute the existence or the amount of the debt, but contended only that he was unable to pay the debt due to limited income and assets. Since Petitioner's written submission in response to my September 17 Order did not contain much in the way of current information, I directed him to submit by December 19, 2008, to the Hearing Clerk and Respondent, several forms[1] concerning his financial status. I scheduled the case for a telephone hearing to be conducted on January 27, 2009.

At the hearing, Petitioner appeared on his own behalf, while Respondent was represented by Gene Elkin, Esq. While the Hearing Clerk had received a copy of the submission prepared by Petitioner on his financial status, Petitioner stated that the copy he sent to Respondent

[1] Assets and liabilities statement; Income and expenses statement.

had been returned to him as undeliverable. I offered to continue the hearing to allow Respondent's counsel to review the submission, but my offer was declined.

After being sworn in, Petitioner testified that, although he graduated from college in the mid-1990's, he had never found a job in line with his university degree. He has been working as a security guard for $9 an hour, and is not optimistic about finding a job in another field. Currently, with overtime, he grosses about $1700 a month, and after taxes and health insurance deductions, he nets approximately $1162 a month. He characterizes his monthly expenses at $1193 per month, owns no real property, and lists his cash and household goods as being worth a total of $620. He undisputedly owes approximately $35,000 on the USDA RD loan, and also lists education, credit card, hospital and IRS debts totaling over $100,000.

Mr. Elkin did not testify.

Findings of Fact

1. On November 30, 2001, Petitioner Galen C. Stacy obtained a USDA Rural Development home mortgage loan for property located at 502 Ohio, Oswego, KS 67536. Petitioner signed a promissory note for $68,000. RX 1.

2. On June 25, 2004 Petitioner was sent a Notice of Default on the promissory note.

RX 3. On August 9, 2004, the account was reinstated and foreclosure efforts were ceased. On September 9, 2004, USDA received Petitioner's request for a moratorium on the loan; however, the property was eventually sold at foreclosure on February 2, 2007 for $49,277.56.

3. After the foreclosure proceeds were applied to the debt owed at the time of the sale, the amount due USDA from Petitioner was $34,955.14. RX 9.

4. Petitioner's current monthly net income is slightly exceeded by his current monthly expenses. In addition, Petitioner is substantially in arrears for student loans, hospital bills, credit card bills, and an IRS lien. His total indebtedness is well over $100,000.

Conclusions of Law

1. Petitioner Galen C. Stacy is indebted to USDA's Rural Development program in the amount of $34,955.14.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. Based upon Petitioner's current income and necessary living expenses, and the large amount of debt owed by Petitioner, administrative wage garnishment of the wages of the Petitioner would cause him financial hardship.
4. Due to the finding of financial hardship, administrative wage garnishment is not authorized at this time.
5. Respondent may review the Petitioner's hardship at least annually and may reinstitute administrative wage garnishment proceedings if it receives information that the Petitioner's financial condition has materially changed.

Order

For the foregoing reasons, administrative wage garnishment of the wages of Petitioner Galen C. Stacy is not authorized at this time, without prejudice to reinstituting proceedings should there be a material change in Petitioner's financial condition.

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

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In re: BARBARA GREER.
AWG Docket No. 09-0005.
Decision and Order.
February 11, 2009.

AWG .

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision and Order

This matter is before me upon the request of the Petitioner, Barbara Greer, 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 November 18, 2008, I issued a Prehearing Order 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.

Respondent filed a Narrative, Witness and Exhibit List even before I issued my November 18 Order. Ms. Greer failed to file anything further with the Hearing Clerk even though she was contacted by telephone. At the time she requested the hearing, Petitioner indicated that her "soon to be [e]x-husband should be responsible for this debt." In response to my Order, Respondent filed a Supplemental Narrative stating that because Petitioner and her then husband jointly signed the loan guarantee, the debt was owed by both borrowers jointly and severally.

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. On February 20, 2005, Aubrey and Barbara Greer, husband and wife, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture's Rural Development Agency for property located at 705 E. Tate, Brownfield, Texas 79316. The loan, for $43,000, was from JP Morgan Chase Bank. RX 1.

2. In September 2005 the Greer's defaulted on the loan. Chase purchased the home at a foreclosure sale for $45,067.47 in April 2006, but was unable to sell the home within six months. Chase submitted a loss claim based on a liquidation appraisal of $30.000. USDA Rural Development paid Chase $19,121.19 under the Loan Guarantee. The home was subsequently sold for $20,000. RX 2, 3.

3. USDA has collected $11,458 of the debt, leaving a current balance of $7,663.19.
4. Petitioner has submitted no evidence in response to my Order that would indicate that her current income from all sources is exceeded by necessary monthly expenses.

Conclusions of Law

1. Petitioner Barbara Greer is indebted to USDA Rural Development in the amount of $7,663.19. Both Petitioner and Aubrey Greer, who was her husband at the time the guarantee was applied for, are jointly and severally liable for this amount, as each borrower signed the loan guarantee.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. § 285.11 have been met.
3. The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Petitioner, Barbara Greer, shall be subject 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.

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In re: MARCUS SEGUNDO.
AWG Docket No. 09-0010.
Decision and Order.
March 25, 2009.

AWG.

Respondent 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, Marcus Segundo, 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 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. The petitioner failed to file anything further with the Hearing Clerk and efforts to reach him by telephone were unsuccessful. At the time he requested a hearing, the Petitioner indicated that he did not owe the amount alleged to be due as "The house was paid off." Attached to the request for hearing was a closing statement indicating that $28,786.26 was paid to the "Clrk of the Dist Court for" on item 504 (Pay off of First Mortgage).

The Narrative filed by the Respondent reflects that Petitioner did redeem the property prior to the expiration of the redemption period and resold the property as reflected by the closing statement provided by the Petitioner, but that USDA Rural Development was nonetheless obligated to pay the lender the sum of $7,345.51 for accrued interest, protective advances, liquidation costs and property sale costs.

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 September 3, 2003, the Petitioner, Marcus Segundo, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on October 10, 2003 obtained a home mortgage loan for property located

at 206 Eldridge, Coffeyville, Kansas from J.P. Morgan Chase Bank, N.A. (Chase) for $32,280.00 (Loan Number 1082058435). RX-1.
In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on June 7, 2007 for $28,050.00. The Petitioner sold the residence on September 4, 2007 for $35,000.00 three days prior to the expiration of the redemption period and redeemed the property for $28,765.20, representing the foreclosure sale price of $28,050.00, interest in the amount of $700.20 for the period from June 7, 2007 through September 5, 2007, and a property inspection fee of $15.00. Chase received the funds from the Court on October 5, 2007 and submitted a loss claim in the amount of $7,345.51to USDA Rural Development for accrued interest, protective advances, liquidation costs and property sale costs. RX-3.

USDA paid Chase $7,345.51 under the Loan Guarantee. RX-3.

Conclusions of Law

The Petitioner, Marcus Segundo, is indebted to USDA Rural Development in the amount of $7,345.51 as of December 19, 2007 for the mortgage loan guarantee extended to him, further identified as Loan account number 1082058435.

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, Marcus Segundo, 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: DARRELL DALY.
AWG Docket No. 09-0082.
Decision and Order.
June 16, 2009.

AWG .

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, Darrell Daly, 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 April 1, 2009, 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. The Petitioner failed to file anything further with the Hearing Clerk and efforts to reach him by telephone were unsuccessful. At the time he requested a hearing, the Petitioner indicated that he did not owe the amount alleged to be due as "When the Judge ruled at the end he stated I owe nothing else and then he closed the case." On June 2, 2009, an Order was entered directing the Petitioner to provide a working telephone number so that a hearing could be scheduled; however, the time set forth in the Order expired without the Petitioner's compliance. Nothing further having been received from the Petitioner, the request for hearing will be considered waived and the matter will be decided upon the record.

The Narrative filed by the Respondent reflects that foreclosure proceedings were brought by the lender against the Petitioner and the property was sold in a foreclosure sale. USDA however was not a party to that action and the debt that is being sought to be collected arises under the Request for Single Family Housing Loan Guarantee signed by the Petitioner by which he agreed to reimburse the agency in the event a loss claim was paid on the loan. As a result of the foreclosure action, USDA Rural Development was obligated to pay the lender the sum of $51,607.51 for accrued interest, protective advances, liquidation costs and property sale costs. The amount due has been reduced by Treasury Offsets amounting to $5,230.50 leaving $46,377.01 due at this time.
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 October 6, 2003, the Petitioner, Darrell Daly, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on February 4, 2004 obtained a home mortgage loan for property located at 407 E. Pine Street, Cadillac, Michigan from J.P. Morgan Chase Bank, N.A. (Chase) for $72,500.00 (Loan Number 1082071546). RX-1.

In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.

Chase purchased the secured property at the foreclosure sale on December 15, 2006 for $62,050.00. Chase submitted a loss claim and USDA paid Chase the sum of $51,607.51 for accrued interest, protective advances, liquidation costs and property sale costs. RX-3, 4. Treasury offsets totaling $5,230.50 have been received. Narrative, p 2. The remaining unpaid debt is in the amount of $46,377.01.

Conclusions of Law

The Petitioner, Darrell Daly, is indebted to USDA Rural Development in the amount of $46,377.01 as of February 22, 2008 for

the mortgage loan guarantee extended to him, further identified as Loan account number 1082071546. 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, Darrell Daly, 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: ERIC WALTERS.
AWG Docket No. 09-0083.
Decision and Order.
June 16, 2009.

AWG .

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, Eric Walters, 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 April 1, 2009, 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. The Petitioner failed to file anything further with the Hearing Clerk and efforts to reach him by telephone were unsuccessful. At the time he requested a hearing, the Petitioner indicated that he did not owe the amount alleged to be due as "House has been resold for the amount that I owed." On June 2, 2009, an Order was entered directing the Petitioner to provide a working telephone number so that a hearing could be scheduled; however, the time set forth in the Order expired without the Petitioner's compliance. Nothing further having been received from the Petitioner, the request for a hearing will be considered waived and the matter will be decided upon the record.

The Narrative filed by the Respondent reflects that foreclosure proceedings were brought by the lender against the Petitioner and the property was sold in a foreclosure sale. USDA however was not a party to that action and the debt that is being sought to be collected arises under the Request for Single Family Housing Loan Guarantee signed by the Petitioner by which he agreed to reimburse the agency in the event a loss claim was paid on the loan. As a result of the foreclosure action, USDA Rural Development was obligated to pay the lender the sum of $16,276.18 for accrued interest, protective advances, liquidation costs and property sale costs. The amount due has been reduced by Treasury Offsets amounting to $6,151.00, leaving $10,125.18 due at this time.
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 April 8, 2004, the Petitioner, Eric Walters, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) and on May 12, 2004 obtained a home mortgage loan for property located at 29 Sears Street, Clarksville, Arkansas from J.P. Morgan Chase Bank, N.A. (Chase) for $65,800.00 (Loan Number 1082197453). RX-1.

In 2005, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.
Chase purchased the secured property at the foreclosure sale on November 20, 2006 for $55,250.00. Chase submitted a loss claim and USDA paid Chase the sum of $16,276.18 for accrued interest, protective advances, liquidation costs and property sale costs. RX-2, 3. Treasury offsets totaling $6,151.00 have been received. Narrative, p 2. The remaining unpaid debt is in the amount of $10,125.18.

Conclusions of Law

The Petitioner, Eric Walters, is indebted to USDA Rural Development in the amount of $10,125.18 for the mortgage loan guarantee extended to him, further identified as Loan account number 1082197453. 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, Eric Walters, 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: NICOLA THOMAS.
AWG Docket No.09-0053.
Decision and Order.
June 23, 2009.

AWG .

Petitioner Pro se.
Mary Kimball for RD.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

This matter is before me upon the request of the Petitioner, Nicola Thomas, for a hearing to contest the efforts of the Respondent, USDA/Rural Development, to garnish her wages in order to collect rental assistance it provided her. Initial efforts to conduct a preliminary telephone conference on April 28, 2009 were unsuccessful in that Ms. Thomas was not at her telephone at the time scheduled. A hearing was thereupon scheduled and held on May 20, 2009. Respondent introduced records that were duly identified and authenticated showing Ms. Thomas' wages when she applied for and received rental assistance from USDA, Rural Development, were higher than the amounts she listed on the application forms she had filed. The amount of her present debt for the rental assistance she received that she was not entitled to receive was proven by the evidence to amount to $15,802. Though Petitioner stated she is unable to pay any amount at this time, she did not produce any evidence in support of this statement elucidating her present ability to pay, or showing at what point a repayment schedule would cause her financial hardship. Inasmuch as Ms. Thomas may not have understood prior to the hearing that she has the burden of proof under 31 C.F.R. § 285.11 (f)(8) to produce evidence of alleged financial hardship, I instructed Respondent to send her forms giving her the opportunity to provide financial information and show her ability to meet a monthly repayment schedule. Respondent advised that such forms were sent and in accordance with my instructions, Ms. Thomas was given until June

15, 2009 to complete the forms and return them to Respondent. Ms. Thomas did not do so.

Accordingly, the petition is hereby DISMISSED, and 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).

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

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In re: GEORGE W. TANNER, JR.
AWG Docket No. 09-0103.
Decision and Order.
June 24, 2009.

AWG .

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 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 May 4, 2009, 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. The Petitioner filed the schedules that had been forwarded to him with the Hearing Clerk, but requested an extension of time for the hearing. At the time he requested a hearing, the Petitioner indicated that he had "explained my situation to 2 USDA-RD Representatives. No[t] one told me that interest would

be accrued. The house payments forced me to short sale. I discussed repayment and tried to get a settlement agreement based on my low or [illegible] income from April 08 to Jan 09."

A telephonic hearing was held on June 24, 2009. The Petitioner was unrepresented spoke on his own behalf. The Respondent was represented by Gene Elkin, Legal Liaison for the Centralized Servicing Center and Mary Kimball, Accountant for the New Program Initiatives Branch, United States Department of Agriculture, Rural Development, St. Louis, Missouri. Diane Green, Secretary to the Administrative Law Judge was also present. Mary Kimball testified for the Respondent, identifying the exhibits attached to the Narrative and explaining the computation of the debt. The Petitioner cross examined Ms. Kimball on certain aspects of her testimony to clarify the computations and then testified how he had completed the schedules and provided some updated information which did not materially alter the picture presented as reflected on his schedules. 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 November 27, 2002, the Petitioner, George W. Tanner, Jr., applied for and received a home mortgage loan in the amount of $111,476.00 from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at 1667 Cherry Street, Lake City, Pennsylvania. RX-1.

The debt was established in the Mort Serv system as account number 0080851100. RX-2.

In 2007, the Petitioner defaulted on the mortgage loan and was sent a Notice of Default on September 18, 2007. RX-3.

A foreclosure sale was held on May 7, 2008 at which time the amount due prior to the sale was $116,224.13, including principal, accrued interest, and fees. Funds received from the sale were $100,277.52, leaving a balance due prior to referral to Treasury of $15,946.61. RX-5.

USDA has received one payment of $74.90 and Treasury has

collected two more payments totaling $205.78 after fees, leaving a balance of $15,665.93, exclusive of Treasury fees due and payable. Narrative, p. 2.

Conclusions of Law

The Petitioner, George W. Tanner, Jr., is indebted to USDA RD in the amount of $15,665.93 for the mortgage loan extended to him.

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, George W. Tanner, 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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EQUAL OPPORTUNITY CREDIT ACT

COURT DECISIONS

SHERRY ROBINSON v. USDA.
No. 08-13255.
Non-Argument Calendar.
December 30, 2008.

[Cite as: 305 Fed.Appx. 629].

United States Court of Appeals,
Eleventh Circuit.

ECOA – Tolling of Limitations, equitable.

The assertion of an applicant for USDA Loan and disaster relief that she was pursuing her remedy through the United States Department of Agriculture's (USDA) administrative processes was insufficient to satisfy her burden of showing that equitable tolling of her Equal Credit Opportunity Act (ECOA) was warranted.

Before ANDERSON, MARCUS, and CARNES, Circuit Judges.

PER CURIAM:

Sherry Robinson, proceeding *pro se,* appeals the Fed.R.Civ.P. 12(b)(6) dismissal of her civil complaint based upon the district court's finding that her Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.,* claim was time-barred. Robinson argues that the court should have applied equitable tolling to her claim because she has not sat "idly by" but rather has pursued a remedy through the United States Department of Agriculture (" USDA")'s administrative processes for many years.

We review *de novo* a district court's ruling on a Rule 12(b)(6) motion. *Hill v. White,* 321 F.3d 1334, 1335 (11th Cir.2003). "When considering a motion to dismiss, all facts set forth in the plaintiff's

complaint 'are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto.' " *Grossman v. Nationsbank, N.A.,* 225 F.3d 1228, 1231 (11th Cir.2000) (citation omitted); *see also* Fed.R.Civ.P. 10(c). Because a statute-of-limitations bar is an affirmative defense, a plaintiff is not required to negate it in her complaint. *La Grasta v. First Union Sec., Inc.,* 358 F.3d 840, 845 (11th Cir.2004). Therefore, "a Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate only if it is 'apparent from the face of the complaint' that the claim is time-barred." *Id.* (citations omitted).

That is apparent from the face of the complaint in this case. The relevant section of the ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1). A later ECOA section notes that no action "shall be brought later than two years from the date of the occurrence of the [§ 1691(a)(1)] violation" unless at least one of two exceptions apply. *Id.* § 1691e(f). Neither applies here. Robinson's complaint did not allege any discriminatory acts by the USDA within the two-year statute of limitations period. Although she filed her complaint in October 2007, the most recent violation that she alleged occurred in 2001. Robinson acknowledges in her brief that she failed to comply with the statute-of-limitations requirements.

Under the doctrine of equitable tolling, "plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. Gen. Motors Acceptance Corp.,* 160 F.3d 703, 706 (11th Cir.1998). The Supreme Court has stated that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato,* 549 U.S. 384, 127 S.Ct. 1091, 1100, 166 L.Ed.2d 973 (2007). It is "appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik v. United States,* 177 F.3d 1269, 1271 (11th Cir.1999). "Because the time limits imposed by

Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990).

Robinson has the burden of establishing that she is entitled to equitable tolling. *See Drew v. Dep't of Corr.,* 297 F.3d 1278, 1286 (11th Cir.2002). *Pro se* status, ignorance of the law, and administrative processes that "are too slow or involve too much delay" do not warrant equitable tolling. *Wakefield v. R.R. Ret. Bd.,* 131 F.3d 967, 970 (11th Cir.1997). Furthermore, the liberal construction given to *pro se* pleadings "does not mean liberal deadlines." *Wayne v. Jarvis,* 197 F.3d 1098, 1104 (11th Cir.1999), *overruled on other grounds by Manders v. Lee,* 338 F.3d 1304 (11th Cir.2003).

While we have not yet considered whether the doctrine of equitable tolling applies to ECOA claims, the well-established rule is that, absent congressional intent to the contrary, equitable tolling principles should be read into every federal statute of limitations. *United States v. Johnson,* 541 F.3d 1064, 1067 (11th Cir.2008); *see also Irwin,* 498 U.S. at 95, 111 S.Ct. at 457 (applying equitable tolling to Title VII claims); *Ellis,* 160 F.3d at 708 (applying equitable tolling to Truth in Lending Act claims). Applying that rule to ECOA claims would not, however, help Robinson. *See, e.g., Ramsdell v. Bowles,* 64 F.3d 5, 9 (1st Cir.1995) (denying equitable tolling as unwarranted but noting that it "may be available in a proper case"). She has not carried her burden of showing that this is one of those unusual cases where the "rare remedy" of equitable tolling is warranted. *See Wallace,* 127 S.Ct. at 1100.

Robinson has not carried her burden, either through the allegations in her complaint or even through arguments in her briefs, of asserting any circumstances that would justify equitable tolling. *See Drew,* 297 F.3d at 1286. Her complaint recounts a series of loan and disaster-relief applications, refusals, and delays stretching from 1992 to 2001, and it even admits that the USDA appellate division suggested in 2000 that she

sue in federal district court. Yet, she waited a full seven years before doing so. She offers no reason for this delay beyond an assertion that she was pursuing her remedy through the USDA's administrative processes. As we have recognized before, however, slow or delayed administrative processes do not justify the rare remedy of equitable tolling. *Wakefield,* 131 F.3d at 970.

Because it is apparent from the face of the complaint that Robinson's claim was time-barred and she has failed to meet her burden of establishing any extraordinary circumstances justifying the application of equitable tolling, the district court did not err when it dismissed her complaint.

AFFIRMED.

GUADALUPE L. GARCIA AND G.A. GARCIA AND SONS FARM, ET AL, v. USDA.
Nos. 08-5110, 08-5135.
Filed April 24, 2009.
Rehearing En Banc Denied June 18, 2009.

[Cite as: 563 F.3d 519].

ECOA – APA – Hispanic minority – Female minority.

Female and Hispanic farmers brought action against USDA under the Equal Credit Opportunity Act (ECOA), the Declaratory Judgment Act, and the Administrative Procedure Act (APA) alleging that the USDA had unlawfully discriminated against them in the administration of its farm benefit programs and failed to act on their administrative complaints in accordance with USDA regulations. On remand, 444 F.3d 625, 525 F.Supp.2d 155, the United States District Court for the District of Columbia reaffirmed its dismissal of the APA failure-to-investigate claims. after the USDA publicly acknowledged it had previously "effectively dismantled" its civil rights enforcement apparatus, had an "adequate remedy" in court within the meaning of the Administrative Procedure Act (APA), and farmers were therefore barred from relying on the APA to obtain relief. Under the Equal Credit Opportunity Act (ECOA), to the

extent they could offer proof that the USDA discriminated against them in the administration of its credit programs, the farmers would be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief. Relief will be deemed "adequate,", where a statute affords an opportunity for de novo district-court review of the agency action, and, also, where there is a private cause of action against a third party otherwise subject to agency regulation. Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.

United States Court of Appeals,
District of Columbia Circuit.

Before: ROGERS and GRIFFITH, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

These appeals relate to the continuing efforts by farmers to obtain relief from the discriminatory distribution of federal farm benefits by the United States Department of Agriculture (" USDA"). *See, e.g., Pigford v. Glickman,* 206 F.3d 1212 (D.C.Cir.2000). This time the complaints were filed by female and Hispanic farmers who alleged that since 1981 the USDA has unlawfully discriminated against them in the administration of its farm benefit programs and failed to act on their administrative complaints in accordance with USDA regulations. This court affirmed the denial of class action certification and the dismissal of the failure-to-investigate claims brought under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f. *Love v. Johanns,* 439 F.3d 723 (D.C.Cir.2006); *Garcia v. Johanns,* 444 F.3d 625 (D.C.Cir.2006). The question in this second interlocutory appeal is whether appellants' failure-to-investigate claims are reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Because appellants fail to show they lack an adequate remedy in a court, we affirm the dismissals of their APA failure-to-investigate claims and remand the cases to the district court.

I.

The ECOA provides that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a). The statute authorizes the recovery of actual damages from creditors, including the federal government, *see id.* §§ 1691a(e)-(f), 1691e(a), and a court "may grant such equitable and declaratory relief as is necessary to enforce [the ECOA]," as well as "reasonable attorney's fees" to applicants bringing a "successful action." *Id.* § 1691e(c)-(d). Claims under the ECOA must be filed within two years of the "date of the occurrence of the violation." *Id.* § 1691e(f).

USDA regulations have long provided that applicants alleging discrimination by the USDA in its direct benefit programs may file administrative complaints with the USDA. *See* 7 C.F.R. § 15d.4; *see also Love v. Connor,* 525 F.Supp.2d 155, 157-58 (D.D.C.2007).[1] Appellants allege, however, that for years the USDA ignored discrimination complaints like theirs. Indeed, in 1997 the USDA publicly acknowledged that in the early 1980s it "effectively dismantled" its civil rights enforcement apparatus.[2]

In response, Congress enacted a special remedial statute in 1998 for applicants who had filed a "nonemployment related complaint" with the USDA before July 1, 1997 that alleged discrimination occurring between January 1, 1981 and December 31, 1996. Omnibus

[1]The USDA regulations treat the filing of administrative complaints alleging discrimination as permissive, rather than mandatory. *See* Nondiscrimination in USDA Conducted Programs and Activities, 63 Fed.Reg. 62,962, 62,963 (proposed Nov. 10, 1998).

[2] CIVIL RIGHTS ACTION TEAM, USDA, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 46-47 (1997); *see also Pigford v. Veneman,* 292 F.3d 918, 920 (D.C.Cir.2002); *Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearings Before the H. Subcomm. on Dep't Operations, Nutrition and Foreign Agric. and the H. Comm. on Agric.,* 105th Cong. 97 (1997) (statement of the Secretary of the USDA).

Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub.L. No. 105-277, § 741(e), 112 Stat. 2681-31 (codified at 7 U.S.C. § 2279 Note) (hereinafter "Section 741"). The statute extended the ECOA statute of limitations until October 21, 2000, and provided that such eligible complainants could either file an ECOA action in federal court, pursuant to Section 741(a), or renew their administrative complaints and obtain a determination on the merits of their claim from the USDA, pursuant to Section 741(b). Subsection (b) of the statute required the USDA to timely process renewed administrative complaints, to investigate the claims, and to issue merits determinations after a hearing on the record. Subsections (d) and (g) provided that complainants denied administrative relief could seek *de novo* review in federal court.

Appellants, nearly all of whom appear to have filed complaints with the USDA before July 1, 1997,[3] chose the first option: On the eve of the October 21, 2000 deadline, they filed complaints in the federal district court here under the ECOA and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Their complaints also included claims under the APA.[4] They alleged that the USDA had discriminated against them with respect to credit transactions and disaster benefits in violation of the

[3] Two Garcia appellants filed administrative complaints with the USDA regarding discrimination occurring after 1996. Those complaints would not be covered by Section 741. This is a circumstance of no significance because we hold that all of the appellants have an adequate remedy at law in the ECOA for their failure-to-investigate claims. During oral argument government counsel acknowledged, however, that were agency action on the post1996-occurrence complaints unreasonably delayed, these Garcia appellants could seek judicial relief in the district court under *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 79-80 (D.C.Cir.1984). Government counsel expressed no opinion on whether such delay had occurred as to these two administrative complaints. We leave for another day whether *TRAC* relief would be available given our holding that the ECOA provides an adequate remedy at law for failure-to-investigate claims.

[4] *See Love v. Veneman,* Civ. No. 00-2502 2001 WL 34840898, *1 (D.D.C. Dec. 13, 2001); *Garcia v. Veneman,* Civ. No. 00-2445, 2002 WL 33004124, at *1 (D.D.C. Mar. 20, 2002).

ECOA, and also had systemically failed to investigate complaints of such discrimination in violation of USDA regulations. In the district court only appellants' ECOA credit transaction claims and the Garcia appellants' APA disaster benefit claims have survived the USDA's motion to dismiss. The district court also denied appellants' motions for class certification on their remaining ECOA discrimination claims, and this court affirmed upon interlocutory review in 2006. *See Love,* 439 F.3d 723; *Garcia,* 444 F.3d 625. Following a remand of the APA failure-to-investigate claims, the district court reaffirmed its dismissal of those claims on the ground that Section 741 provided appellants an adequate remedy at law. *See Love v. Connor,* 525 F.Supp.2d 155; Order, *Garcia v. Veneman,* Civ. No. 00-2445. The district court certified its interlocutory ruling, and this court granted appellants' petition for leave to appeal pursuant to 28 U.S.C. § 1292(b).

II.

The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. In *Bowen v. Massachusetts,* 487 U.S. 879, 904, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988), the Supreme Court interpreted § 704 as precluding APA review where Congress has otherwise provided a "special and adequate review procedure." *Id.* at 904, 108 S.Ct. 2722 (internal quotations omitted). An alternative remedy will not be adequate under § 704 if the remedy offers only "doubtful and limited relief." *Id.* at 901, 108 S.Ct. 2722. So understood, this court has held that the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the "same genre." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs.,* 396 F.3d 1265, 1272 (D.C.Cir.2005). Thus, for example, relief will be deemed adequate "where a statute affords an opportunity for *de novo* district-court review" of the agency action. *Id.* at 1270. In such cases, the court has reasoned that "Congress did not intend to permit a litigant challenging an administrative denial ... to utilize simultaneously both [the review provision] and the APA." *Id.* at 1270 (quoting *Envtl. Defense Fund v.*

Reilly, 909 F.2d 1497, 1501 (D.C.Cir.1990)) (omission and alteration in original). Relief also will be deemed adequate "where there is a private cause of action against a third party otherwise subject to agency regulation." *Id.* at 1271. In evaluating the availability and adequacy of alternative remedies, however, the court must give the APA " 'a hospitable interpretation' such that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.' " *Id.* at 1270 (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)); *see also Bowen v. Massachusetts,* 487 U.S. at 904, 108 S.Ct. 2722.

Appellants contend that the district court erred in two respects in holding that they could not bring a claim under the APA challenging the USDA's failure to investigate their civil rights complaints: First, the district court misapplied *Bowen* by disregarding record evidence that under Section 741 there was no real adequate alternative remedy in a court for their failure-to-investigate claims; second, the district court mistakenly relied on this court's precedents involving claims against an agency for failing to regulate third-party wrongdoers, and therefore failed to follow circuit precedent that permits a plaintiff to bring an APA claim for the agency's failure to follow its regulations in addition to a non-APA discrimination claim. Appellants emphasize that their survival as farmers depends in significant part on their ability to obtain federal benefits authorized by Congress to be administered by the USDA, and that when the USDA fails to comply with its regulations for handling and processing administrative complaints, the benefits systems envisioned by Congress are thwarted and their efforts to survive as farmers are stymied. Although this court has no occasion to doubt appellants' claims of harm, their legal challenges to the dismissal of their APA failure-to-investigate claims are unpersuasive.

First, there is clear and convincing evidence that in enacting Section 741 Congress did not intend for complainants who choose to proceed in the district court on their ECOA claims to pursue their failure-to-investigate claims under the APA simultaneously in the same lawsuit.

In responding to the dilemma presented by the USDA's failure to investigate discrimination claims, Congress resurrected time-barred claims and gave such complainants two options: either file a complaint in the district court or renew their administrative complaint with the USDA with subsequent judicial review if the USDA denied relief. Although appellants had the option first to renew their administrative complaints with the USDA pursuant to Section 741(b), they chose not to do so. Had appellants done so, the USDA would have been obligated to process, investigate, and adjudicate appellants' complaints of discrimination in a timely fashion and absent relief *de novo* judicial review would be available. Having chosen instead to proceed directly to the district court pursuant to Section 741(a), appellants' complaints sought declaratory and injunctive relief that the USDA should have investigated their old, unrenewed administrative complaints about discrimination and requiring USDA to develop a better processing system for such claims-in other words to grant appellants the relief that they chose to forego when they filed their lawsuits pursuant to Section 741(a). By extending the statute of limitations for administrative complaints and by providing for judicial review of USDA's determinations, Congress provided appellants an adequate remedy in court within the meaning of the APA. Appellants are therefore barred from relying on the APA to obtain relief they chose to forego.

Appellants contend, however, that they were entitled to seek a court order pursuant to the APA to remedy the USDA's failure to investigate their old administrative complaints because the alternative administrative option under Section 741(b) was illusory. To that end, appellants offered unrebutted evidence that the USDA never successfully implemented the required administrative process; they also suggested that no plaintiff has yet obtained *de novo* district court review pursuant to Section 741(b).[5] Because of the flaws in the Section 741(b) option, appellants conclude that they may obtain through their Section 741(a) complaint relief under the APA promised by Section 741(b).

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[5] *See, e.g.,* Decl. of Rosalind Gray, Former Director, USDA Office of Civil Rights, Apr. 6, 2002; Gray Supp. Decl., Oct. 18, 2006; Gray Second Supp. Decl., Sept. 12, 2007; *Benoit v. U.S. Dep't of Agric.,* 577 F.Supp.2d 12 (D.D.C.2008).

There are two problems with appellants' approach. The first is simply a matter of statutory interpretation. Adoption of appellants' interpretation would effectively rewrite the statute that Congress specifically enacted in response to the USDA's failure to address discrimination complaints. The plain text of Section 741 required complainants to make a choice between going to court immediately or first renewing their administrative complaints. Congress required the USDA to process, investigate, and adjudicate the renewed administrative complaints and afforded complainants who obtained no relief the opportunity to seek *de novo* review in the district court. Each option afforded an in-court remedy. Moreover, had appellants renewed their administrative complaints pursuant to Section 741(b) and thereby attempted to obtain relief pursuant to the APA through the USDA's administrative process, and been unable to obtain a final determination due to the USDA's unreasonable delay, they could have sought, as government counsel acknowledged during oral argument, relief in the district court under *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 79-80 (D.C.Cir.1984). *Cf. In re Core Commc'ns, Inc.,* 531 F.3d 849, 855, 860 (D.C.Cir.2008); *In re Tennant,* 359 F.3d 523, 531 (D.C.Cir.2004). Appellants' futility contention, then, fails to show that in enacting Section 741 Congress did not intend to require eligible complainants to make a choice between two remedial regimes. *Cf. Engine Mfrs. Ass'n v. EPA,* 88 F.3d 1075, 1088-89 (D.C.Cir.1996).

The second problem arises because, even giving credence to appellants' futility suggestion, they still would be unable to show that they lack an adequate remedy at law. Under the ECOA, to the extent appellants can offer proof that the USDA discriminated against them in the administration of its credit programs, appellants will be entitled to recover money damages and attorneys' fees, and, as appropriate, also injunctive and declaratory relief. 15 U.S.C. § 1691e. This court's precedent in *Council of and for the Blind of Delaware County Valley, Inc. v. Regan,* 709 F.2d 1521 (1983) (en banc), and its progeny-*Coker v. Sullivan,* 902 F.2d 84 (1990), and *Women's Equity Action League v. Cavazos* (“*WEAL*”), 906 F.2d 742 (1990)-make clear that an ECOA

discrimination claim filed directly against the USDA would be adequate to preclude a cause of action under the APA. In those cases the court held that the plaintiff could not maintain an action under the APA directly against a federal agency for failure to investigate and rectify the wrongdoing of a third party where Congress had provided the plaintiff with a private right of action against the third party. *See Council,* 709 F.2d at 1531-33; *Coker,* 902 F.2d at 89-90; *WEAL,* 906 F.2d at 750-51. For example, in *Council,* the plaintiffs had alleged that the Office of Revenue Sharing had failed to process and resolve administrative complaints in a timely manner. On appeal, they contended that a national suit against the federal agency would be more effective. This court held that even so the remedy in the form of a private suit against state and local governments provided by Congress was adequate to address the alleged discrimination. *Council,* 709 F.2d at 1532-33.

The relevant question under the APA, then, is not whether private lawsuits against the third-party wrongdoer are as effective as an APA lawsuit against the regulating agency, but whether the private suit remedy provided by Congress is adequate. *See Council,* 709 F.2d at 1532; *WEAL,* 906 F.2d at 751. As a result, the availability of actions against individuals may be adequate even if such actions "cannot redress the systemic lags and lapses by federal monitors" and even if such "[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight of federal government enforcement." *WEAL,* 906 F.2d at 751. This is because the court concluded in *Council, Coker*, and *WEAL,* "situation-specific litigation affords an adequate, even if imperfect, remedy." *Id.* As explained in *El Rio Santa Cruz,* third-party suits are an adequate remedy for the alleged victims of statutory violations, like unlawful discrimination, because they provide relief of "the same genre" as that offered by an APA claim. 396 F.3d at 1272 (quoting *WEAL,* 906 F.2d at 751).

Appellants' attempts to avoid this precedent are unpersuasive. The court has confirmed that its approach is consistent with the Supreme Court's construction of the APA in *Bowen.* In *El Rio Santa Cruz,* the

court explained that, consistent with *Bowen, Council, Coker*, and *WEAL* held that an alternative adequate remedy at law exists where Congress chooses to grant those allegedly aggrieved by agency failure to remedy the wrongs of a regulated third parties a private cause of action against those third parties. 396 F.3d at 1270-71. The fact that appellants fault the USDA's regulation of itself and not its regulation of a third party does not mean that *Council* and its progeny are inapposite, because there is no material difference between the adequacy of the ECOA remedy and the third-party actions in *Council, Coker* and *WEAL*. The suggestion that ECOA relief would not vindicate appellants' interest in ensuring that the USDA adheres to its duty-to-investigate regulations, was rejected in *Council, Coker*, and *WEAL* when the court concluded that a direct action against a regulated private party was an adequate remedy at law for whatever additional injury a plaintiff suffered as a result of a federal agency's failure to remedy that violation administratively. *See Council,* 709 F.2d at 1531-33; *Coker,* 902 F.2d at 89-90; *WEAL,* 906 F.2d at 750-51. If anything, an ECOA discrimination claim filed directly against the USDA affords a better remedy than those available in *Council, Coker*, and *WEAL*. If successful, a plaintiff can obtain declaratory and injunctive relief against the agency itself, in addition to money damages, and such remedies would presumably deter the USDA to the same extent as a successful APA claim from discriminating against plaintiff-credit applicants and failing to adhere to its duty-to-investigate regulations. On appellants' view of *Council, Coker,* and *WEAL,* the availability of a direct ECOA claim against a private creditor would constitute an adequate remedy barring APA challenges to the FTC's oversight of a private creditor, *see* 15 U.S.C. §§ 1691c, 1691c(a)-(c); *see also* 22 Op. Off. Legal Counsel 11, 1998 WL 1180049, at *1, but the availability of a nearly identical claim against the USDA would not constitute an adequate remedy. Appellants cannot show that Congress intended such disparate results.

McKenna v. Weinberger, 729 F.2d 783 (D.C.Cir.1984), is of no assistance to appellants. In *McKenna,* the court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, did not provide the

exclusive judicial remedy for a probationary employee's claim that the agency failed to follow its regulations in effecting an allegedly discriminatory discharge. *Id.* at 791. The court observed that "Ms. McKenna's claim under the APA is *not* one of discrimination. Rather, she charges that the agency, whether its motive was legal or illegal, failed to conform to its own regulations. She does not claim that these procedural violations constitute employment discrimination." *Id.* (emphasis in original). In other words, her claim related to a personnel matter that was completely distinct from her gender discrimination. Here, by contrast, appellants' APA failure-to-investigate and lending discrimination claims are inextricably linked.

As appellants read *McKenna,* it stands for the proposition that a plaintiff may always bring an APA claim alleging that an agency failed to follow its own regulations in processing or investigating discrimination allegations, notwithstanding the existence of other adequate remedies at law. But *McKenna* cannot bear the weight that appellants place upon it. In *McKenna,* the court did not address whether the judicial and administrative procedures under Title VII constituted an adequate remedy at law so as to preclude APA review and so cannot be read, as appellants urge, as inconsistent with *Council* and its progeny. Appellants cite to no case that reads *McKenna* that way, and such precedent as we have found does not support their position.[6] In *McKenna* the court simply assumed without deciding that Title VII procedures did not constitute an adequate remedy at law. *Cf. Trudeau v. FTC,* 456 F.3d 178 (D.C.Cir.2006). Appellants' other authorities also provide no support. For instance, their reliance on *Esch v. Yeutter,* 876 F.2d 976, 984-85 (D.C.Cir.1989), is misplaced; the court held only that the potential availability of a cause of action in the Claims Court was not an adequate remedy because that court lacked equitable jurisdiction and it was doubtful that court had jurisdiction over the plaintiffs claims.

Remaining are appellants' APA claims that the USDA discriminated in dispersing non-credit disaster benefits, which are not covered by

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[6] *See Nichols v. Agency for Int'l Dev.,* 18 F.Supp.2d 1, 3 & n. 2 (D.D.C.1998); *Lynch v. Bennett,* 665 F.Supp. 62, 64-65 (D.D.C.1987).

Section 741. We remand these claims. As to the Garcia appellants, the district court's dismissal did not address their non-credit claims. *See* Order, *Garcia v. Veneman,* Civ. No. 00-2445 (Nov. 30, 2007). As to the Love appellants, the district court's conclusion that there was no reason to allow them to proceed with their non-credit claims "at this time," *Love,* 525 F.Supp.2d at 161, was not a dismissal with prejudice, *see Foremost Sales Promotions, Inc. v. Dir., Bureau of Alcohol, Tobacco & Firearms,* 812 F.2d 1044, 1045-46 (7th Cir.1987); 12 MOORE'S FEDERAL PRACTICE § 58.02. Finally, the court will not address the government's jurisdictional and other contentions for dismissal of these claims because the district court has yet to rule on them and they were not adequately briefed in this interlocutory appeal.

Accordingly, we affirm the dismissals of appellants' APA failure-to-investigate claims and otherwise remand the cases to the district court.

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ROBERT WILLIAMS, ET AL, v. USDA.
Civil Action No. 03-2245 (CKK).
June 1, 2009.

[Cite as: 620 F.Supp.2d 40].

EOCA – Race minority – Non discriminatory reasons for denial .

Farmers brought action against USDA, alleging that they were discriminated against on the basis of race by the USDA when their application for a farm loan was denied. Credit applicant complained of inquiry into their credit history. FSA's determination that their undisclosed existing debts made their operation financially not feasible was not discriminatory. Court granted USDA's motion for summary judgment.

United States District Court,
District of Columbia

MEMORANDUM OPINION

COLLEEN KOLLAR-KOTELLY, District Judge.

Plaintiffs Robert and LaVerne Williams allege that they were discriminated against on the basis of race by the United States Department of Agriculture (" USDA") when their application for a farm loan was denied in 2003. Defendant Ed Schafer, Secretary of the United States Department of Agriculture (together with the United States and other government officials sued in their official capacities, "Defendants"), deny Plaintiffs' allegations and have filed the pending Motion for Summary Judgment.[1] After a searching review of the parties' submissions, relevant case law, statutory authority, and the entire record of the case as a whole, the Court finds that there is no evidence in the record from which to find that Plaintiffs were subject to discrimination based on their race. Accordingly, the Court shall GRANT Defendants' Motion for Summary Judgment, for the reasons that follow.

I. BACKGROUND

A. Statutory and Regulatory Background

This case involves the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.,* pursuant to which the Farm Service Agency ("FSA") is authorized to make loans to (1) eligible farmers who (2) propose plans of operation that are feasible. *See* 7 C.F.R. §§ 1910.5, 1941.12, 1941.33. With respect to this first requirement (eligibility), the FSA considers various enumerated criteria, including an inquiry into an applicant's credit history. 7 C.F.R. § 1910.5(b), (c). Pursuant to an instruction issued by the USDA, this inquiry includes an assessment of whether the applicant is "creditworthy" in the sense that he or she must not have provided false information in connection with the loan application:

[1] The Court has substituted Secretary Vilsack for the name of his originally-named predecessor, Secretary Ann Veneman, pursuant to Federal Rule of Civil Procedure 25(d) ("[a]n action does not abate when a public officer who is a party in an official capacity ... ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party").

Applicants ... will be determined not creditworthy if they have ever deliberately provided false information, intentionally omitted information relative to the loan decision, or have not made every reasonable effort to meet the terms and conditions of any previous loan.

Defs.' Reply, Ex. A at 2 (Instruction 1910-A(c)). With respect to the second requirement (a feasible plan), the FSA reviews the applicant's plan to assess whether the applicant will be able to:
(1) Pay all operating expenses and all taxes which are due during the projected farm budget period;
(2) Meet necessary payments on all debts; and
(3) Provide living expenses for the [applicant's] family members.
7 C.F.R. § 1941.33(b), 1941.4.

Only loans that comply with all established policies and regulations, including the requirement that "[t]he proposed loan is based on a feasible plan," are subject to approval. *Id.* § 1941.33(b).

B. Factual Background

The following material facts are based on undisputed evidence in the record.[2] Plaintiffs own a small cotton farm in Roscoe, Texas. Defs.'

[2] The Court notes that it strictly adheres to the text of Local Civil Rule 7(h)(1) (formerly 56.1) when resolving motions for summary judgment. The Court instructed the parties that the Court would strike pleadings that violated Local Civil Rule 7(h), and that it would "assume [ ] facts identified by the moving party in its statement of facts are admitted, unless ... controverted." *See* [225] Order at 2 (Dec. 12, 2008). Pursuant to this Order, the Court struck Plaintiffs' initial Opposition to Defendants' Motion for Summary Judgment because Plaintiffs' objections to Defendants' proffered facts were unsupported by citations to record evidence. *See* Min. Order dated Feb. 19, 2009. Plaintiffs re-filed their Opposition on February 23, 2009, admitting many of Defendants' proffered facts but continuing to object to certain of the them without record support. These "disputed" facts shall be deemed conceded in accordance with the Court's prior Orders. Accordingly, the Court shall cite directly to Defendants' Statement of Material Facts ("Defs.' Stmt.") and, where an objection has been made that includes record support, the Court shall cite to Plaintiffs' Response to Defendants' Statement of Material Facts ("Pls.' Resp. Stmt."). The Court shall also cite directly to evidence in the record, where appropriate. Finally, the Court notes that Plaintiffs submitted a Statement of Genuine
(continued...)

Stmt. ¶ 1. In early 2003, Plaintiffs applied for a farm loan from the FSA. *Id.* ¶ 4. In connection with their loan application, Plaintiffs met with Robert Kalina, a Farm Loan Manager. *Id.* ¶¶ 4, 5. With Mr. Kalina's assistance, Plaintiffs submitted a complete loan application in March 2003. *Id.* ¶¶ 8, 12.

On April 4, 2003, Mr. Kalina and Plaintiffs developed a Farm and Home Plan (the "Plan") that would "cash flow," a term of art used to describe a feasible plan whereby an applicant is able to (1) pay all of his or her farm operating expenses and taxes, (2) meet necessary payments on debts, and (3) provide living expenses for family members. *Id.* ¶ 13. The Plan met these requirements by $152. *Id.*

As part of the loan application process, Mr. Kalina conducted an equipment inspection and appraisal of Plaintiffs' farm operation. *Id.* ¶ 15. Mr. Kalina observed several pieces of equipment on Plaintiffs' property that were not included in the Plan, including a "4650" tractor. *Id.* ¶ 15. Plaintiffs informed Mr. Kalina that this equipment, including the 4650 tractor, belonged to his neighbors. *Id.* Based on the Plan that Mr. Kalina and Plaintiffs created (and Plaintiffs' representations that the equipment visually observed by Mr. Kalina was not owned by them), the FSA initially approved two loans for Plaintiffs-a refinance loan of $23,500 for tractor repairs on a "4640" tractor, and an operating loan of $55,800. *Id.* ¶ 14. Problems arose almost immediately.

On April 15, 2003, Mr. Kalina spoke with Plaintiffs about obtaining the financing statement for their 4640 tractor. *Id.* ¶ 17. For the first time, Plaintiffs informed Mr. Kalina that the requested financing actually related to a 4650 tractor that they had recently purchased, which the Key Brothers Equipment store ("Key Brothers") could verify. *Id.* ¶ 17. When Mr. Kalina spoke with Key Brothers, he discovered that Plaintiffs owed $23,268 for repairs associated with the 4640 tractor, $24,000 associated

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[2](...continued)
Disputed Issues along with their Opposition. Because this statement is unsupported by evidence in the record, the Court shall disregard it pursuant to Local Civil Rule 7(h)(1) and the Court's Orders relating to the same.

with the 4650 tractor (including an outstanding payment of $5,610), and $22,275 for various other parts and repairs. *Id.* ¶¶ 19, 24. Key Brothers informed Mr. Kalina that approximately $38,280 was needed to bring Plaintiffs' account current. *Id.* ¶ 19. When Mr. Kalina asked Plaintiffs about the 4650 tractor, Plaintiffs explained that the 4650 tractor that Mr. Kalina previously observed, was an identical model owned by his neighbor, and that his 4650 tractor was located in a friend's barn at the time. *Id.* ¶ 20. Although the 4640 tractor had been contemplated by the Plan, the 4650 tractor and the additional debt for parts and repairs had not been disclosed by Plaintiffs and had not been known to the FSA when it initially approved Plaintiffs' loans. *Id.* ¶¶ 22-27.

Mr. Kalina successfully sought to set up a payment plan with Key Brothers to lower Plaintiffs' monthly payments and potentially allow a feasible Plan to be created. *Id.* ¶¶ 24-25, 28, 30. Despite these efforts, the 4650 tractor added $5,610 to Plaintiffs' debt, and the payment plan with Key Brothers added another $500 per month. *Id.* ¶ 31. These additional debts prevented the Plan from achieving cash flow by approximately $11,500. *Id.* ¶ 32. On April 22, 2003, Mr. Kalina met with Plaintiffs to discuss the Plan, and although they discussed ways in which Plaintiffs could increase their cash flow or reduce their operating expenses, none of their ideas resulted in the creation of a cash flow plan. *Id.* ¶¶ 33-35, 38.

On April 30, 2003, Larry Owens, the FSA's Texas Farm Loan Chief, rescinded the initial approval of Plaintiffs' loans. *Id.* ¶ 39. In a May 1, 2003 letter to Plaintiffs, Mr. Owens explained that the FSA had decided to deny Plaintiffs' loan application for two reasons. *Id.* ¶ 40. First, the FSA concluded that Plaintiffs were not "creditworthy" based on their failure to disclose debts in connection with the creation of their Plan:

As you know, a lien search revealed a previously undisclosed debt of $24,078.00 to John Deere Credit Corporation for a 4650 John Deere tractor. While verifying that debt, FSA discovered an additional $22,000 dollar debt owed to Key Brothers Equipment for farm equipment parts and repairs. Based upon this information, FSA has concluded that you

are not eligible for loan assistance because you are not creditworthy as required by 7 C.F.R.1910.5, FmHA Instructions 1910-A, section 1910.5(c), [which] states in part that: 'Applicants ... will be determined not creditworthy if they have ever deliberately provided false information, [or] intentionally omitted information relative to the loan decision.'

Defs.' Mot., Ex. 28 at 1 (5/1/08 Letter from L. Owens to Plaintiffs). Second, the FSA determined that Plaintiffs' additional debts prevented the Plan from remaining feasible:

Inclusion of the additional debt that was discovered during the pre-closing activity results in your plan of operation (cash flow projection) not being feasible ... The inclusion of the additional debts discovered by the agency in your Farm & Home Plan results in balance available in your plan lacking $11,458.00 to project a feasible plan.

Id. at 1-2.[3]

Dissatisfied with the FSA's handling of their loan application, Plaintiffs filed a complaint of discrimination through their attorney, Mr. James W. Myart. *Id.,* Ex. 42 (10/27/03 Letter from C. Pearson to Plaintiffs). The Office of Civil Rights for the Department of Agriculture investigated Plaintiffs' complaint and found no discrimination. *Id.* Plaintiffs initiated this lawsuit on November 3, 2003.

C. Procedural Background

To suggest that this case has a tortured history is to dramatically understate the difficulties encountered during its prosecution (or lack thereof) by Plaintiffs. The Court shall not again recount these difficulties, as they have been exhaustively described by Magistrate Judge John M. Facciola and the undersigned Judge in previous Orders

[3] Mr. Owens noted that Plaintiffs had suggested that they were going to begin a catering business to increase their planned income, but that Plaintiffs had not submitted a business plan or market analysis that supported their income projections, or submitted proof that they had obtained the health department permits necessary to operate such a business. *See* Defs.' Mot., Ex. 28 at 2 (5/1/08 Letter from L. Owens to Plaintiffs).

and Opinions. *See, e.g.,* 498 F.Supp.2d 113 (D.D.C.2007) (describing the history of discovery abuses by Plaintiffs' counsel, including his failure to follow court orders, file required pleadings, cooperate with opposing counsel, and respond to or pursue appropriate discovery); 518 F.Supp.2d 205 (D.D.C.2007) (describing a misrepresentation made by Plaintiffs' counsel to the Court and the baseless reasons that he proffered for the numerous extensions of time that delayed resolution of this case). The Court shall incorporate these opinions by reference herein. For present purposes, the Court shall simply note three relevant points about the procedural history of this case.

First, the parties were afforded the opportunity to pursue discovery in this case from July 2005 through June 2007. Plaintiffs' efforts to take their own discovery were minimal:

Discovery began in July of 2005. From that date to at least March of 2007, Plaintiffs engaged in no discovery whatsoever. More specifically, they did not give notice of their intention to take any depositions until those they noticed in the week before discovery is to end. The persons to now be deposed include: the President of the United States, the Deputy Secretary of the United States Department of Agriculture, the Chief of Staff of the United States Department of Agriculture, and the Director of the Office of Civil Rights. Plaintiffs contend that during their depositions they recounted a meeting with the President and then with other persons to be deposed and that these meetings provided evidence of persons with direct and relevant knowledge regarding matters before the Court.

But, Plaintiffs have been aware of the meetings to which they refer since they occurred and cannot possibly say to have recently discovered their existence and significance ... Even with the multiple stays granted in this case, Plaintiffs' waiting so late in the process to begin depositions hardly justifies the extension they seek.

Order at 1-2, 2007 WL 1723661 (Jun. 11, 2007) (internal punctuation omitted). Plaintiffs' lack of initiative toward discovery was also reflected

in their deficient responses to Defendants' discovery, for which Plaintiffs were sanctioned:

Plaintiffs failed to adequately respond to Defendants' interrogatory regarding potential lay and expert witnesses-and at least twice the failure was in direct violation of court orders. On April 27, 2006, when discovery responses were already two months overdue, the Court ordered Plaintiffs to supplement their response of 'will supplement' to the interrogatory on witnesses within ten days. They did not do so. Instead, Plaintiffs provided Defendants with the precise response the Court held insufficient in its previous order. Despite this violation, the Court provided another opportunity for Plaintiffs to 'provide a list of all potential lay and expert witnesses known at this point in the case within ten days of this memorandum opinion or forego the introduction of witnesses at trial.' Plaintiffs again failed to do so. The result, as clearly stated in the Court's order, is the foregoing of the introduction of witnesses at trial.

498 F.Supp.2d at 116-17 (D.D.C.2007) (emphasis and internal citations omitted). *See also* [92] Mem. Op. at 16 ("[a]s a result of plaintiffs' violation of this Court's Order relating to [discovery], plaintiffs will only be allowed to introduce the two names provided as the only two similarly situated white farmers whose application[s] for [ ] farm operating loan[s] [were] treated more favorably than plaintiffs' application").

Second, the Court sought to ensure that Plaintiffs were apprised of the developments in their case by sending its Orders and Opinions directly to Plaintiffs themselves. *See, e.g., id.* at 118 ("The Court ... orders the Clerk to issue a copy of this Memorandum Opinion with the accompanying Order directly to Plaintiffs Mr. and Mrs. Williams"); 518 F.Supp.2d at 212 (D.D.C.2007) ("[the] Clerk shall issue a copy of this Order and accompanying Memorandum Opinion directly to Plaintiffs Mr. and Mrs. Williams"). Despite receiving the orders and opinions describing their counsel's conduct, Plaintiffs affirmatively decided to continue with Mr. Myart as their counsel. *See* Mot. to Amend, Ex. 11 at 11 (Nov. 28, 2007) (Affidavit of L. Williams) ("we want Mr. Myart to

continue to be our lawyer").

Third, Mr. Myart's application to renew his membership in the bar of this Court was rejected in December 2007. *See* 529 F.Supp.2d 22, 22-23 (D.D.C.). The Court notified Plaintiffs by Order dated January 2, 2008, that their counsel could no longer file pleadings in this case, and thereafter allowed Plaintiffs an extensive period of time to either proceed *pro se* or to retain new counsel prior to moving forward with dispositive motions. Ultimately, Plaintiffs retained new counsel in December 2008-after Defendants had filed their Motion for Summary Judgment but prior to the deadline for Plaintiffs' Response. *See* Order at 1 (Dec. 12, 2008). At the request of Plaintiffs' new counsel, the Court granted yet another extension of more than two months to allow counsel to prepare an appropriate response to Defendants' Motion for Summary Judgment. Plaintiffs filed an Opposition to Defendants' Motion for Summary Judgment on February 23, 2009, and Defendants filed a Reply on March 18, 2009. This case is now ripe for resolution.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56, a party is entitled to summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tao v. Freeh,* 27 F.3d 635, 638 (D.C.Cir.1994). Under the summary judgment standard, the moving party bears the "initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The non-moving party, in response to the motion, must "go beyond the pleadings and by [his] own affidavits, or depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id.* at 324, 106 S.Ct. 2548 (internal citations

omitted).

Although a court should draw all inferences from the supporting records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To be material, the factual assertion must be capable of affecting the substantive outcome of the litigation; to be genuine, the issue must be supported by sufficient admissible evidence that a reasonable trier-of-fact could find for the nonmoving party. *Laningham v. U.S. Navy,* 813 F.2d 1236, 1242-43 (D.C.Cir.1987); *Liberty Lobby,* 477 U.S. at 251, 106 S.Ct. 2505 (the court must determine "whether the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law"). "If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted." *Liberty Lobby,* 477 U.S. at 249-50, 106 S.Ct. 2505 (internal citations omitted). "Mere allegations or denials in the adverse party's pleadings are insufficient to defeat an otherwise proper motion for summary judgment." *Williams v. Callaghan,* 938 F.Supp. 46, 49 (D.D.C.1996). The adverse party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, while the movant bears the initial responsibility of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-movant to "come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Id.* at 587, 106 S.Ct. 1348 (citing Fed.R.Civ.P. 56(e)) (emphasis in original).

III. DISCUSSION

Plaintiff's sole remaining claim in this case is brought under the Equal Credit Opportunity Act ("ECOA"), which prohibits a creditor from discriminating against any applicant on the basis of race, color, religion, national origin, sex, marital status, or age. 15 U.S.C. §

1691(a)(1).[4] As an initial matter, the parties dispute the appropriate legal framework for examining an ECOA discrimination claim.

Most courts have examined ECOA claims using the Title VII burden-shifting paradigm articulated in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Rosa v. Park W. Bank & Trust Co.,* 214 F.3d 213, 215 (1st Cir.2000) ("[i]n interpreting the ECOA, this court looks to Title VII case law"); *Matthiesen v. Banc One Mortgage Corp.,* 173 F.3d 1242, 1246 (10th Cir.1999) (affirming lower court's decision to analyze ECOA claim "in the same manner as discrimination claims brought under Title VII"); *Lewis v. ACB Bus. Servs., Inc.,* 135 F.3d 389, 406 (6th Cir.1998) (applying Title VII framework to ECOA claim). Although the D.C. Circuit has not expressly adopted the *McDonnell Douglas* framework for ECOA claims, it has affirmed the decision of at least one district court that has applied it. *See Mavity v. Veneman,* 2004 U.S.App. LEXIS 28796 at *4-*5 (D.C.Cir. Mar. 31, 2004) (rejecting the argument that "the [lower] court improperly used [a] direct evidence standard ... rather than the burden-shifting framework of *McDonnell Douglas* " in the context of an ECOA claim because the lower court considered the evidence "under the framework of *McDonnell Douglas* and its progeny").

Acknowledging the weight of the foregoing authority, Defendants analyze Plaintiffs' ECOA claim under the *McDonnell Douglas* framework. *See* Defs.' Mot. at 13-21. In contrast, Plaintiffs argue that *McDonnell Douglas* does not supply the appropriate legal standard, citing *Latimore v. Citibank Federal Savings Bank,* 151 F.3d 712 (7th Cir.1998). *See* Pls.' Opp'n at 12. In *Latimore,* the Seventh Circuit held that the *McDonnell Douglas* framework was unsuitable for ECOA claims "when there is no basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other, similarly situated persons." 151 F.3d at 714. Instead, the court held that a plaintiff could

[4] The Court dismissed Plaintiffs' other claims on July 5, 2005. *See* Mem. Op. at 1-16 (Jul. 5, 2005) (granting Defendants' Motion to Dismiss as to all claims except the pending ECOA claim of discrimination).

"show in a conventional way, without relying on any special doctrines of burden-shifting, that there is enough evidence, direct or circumstantial, of discrimination to create a triable issue." *Id.* at 715. Although Plaintiffs do not advocate the adoption of a particular standard (beyond arguing that the standard should not be based on the *McDonnell Douglas* framework), any distinction drawn between *Latimore* and the cases applying the *McDonnell Douglas* framework is more illusory than real.

The D.C. Circuit has explained that the burden-shifting framework of *McDonnell Douglas* is "almost always irrelevant." *Brady v. Office of the Sergeant at Arms,* 520 F.3d 490, 492-93 (D.C.Cir.2008). Where an employer asserts a legitimate, non-discriminatory reason for its challenged conduct, thereby doing "everything that would be required of [it] if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *Id.* (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)). Where a defendant asserts a legitimate, non-discriminatory reason, a district court's inquiry collapses into a single question: "[h]as the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?" *Id.* at 494. In other words, the district court's inquiry in such cases is functionally identical to the one contemplated by the Seventh Circuit in *Latimore-i.e.,* whether the plaintiff has produced evidence of discrimination sufficient to create a genuine issue of material fact.

In this case, Defendants have asserted two legitimate, non-discriminatory reasons for the denial of Plaintiffs' loan application-(1) that Plaintiffs were not "creditworthy" based on their failure to disclose debts in connection with the creation of the Plan, and (2) that Plaintiffs' additional debts prevented the Plan from remaining feasible. Accordingly, the Court's inquiry in this case is the same regardless of whether it applies the *McDonnell Douglas* framework or the standard

articulated in *Latimore*-whether Plaintiffs have proffered evidence that their loan application was denied based on their race rather than the two reasons advanced by Defendants.

Plaintiffs present three arguments in their Opposition in connection with this inquiry. First, Plaintiffs argue that "creditworthy" is not a criteria for loan eligibility, and that without such a requirement, Plaintiffs "were eligible for financial assistance from FSA." Pls.' Opp'n at 14. Second, and in the alternative, Plaintiffs argue that even if "creditworthy" is an element of eligibility, that "Defendants fail to provide sufficient evidence ... to support their claim that Plaintiffs deliberately and intentionally did not add the loan for the ... 4650 tractor." *Id.* at 15. Third, Plaintiffs argue that they should be granted additional discovery under Federal Rule of Civil Procedure 56(f) in the hopes that they would discover evidence of discrimination and successfully oppose Defendants' Motion for Summary Judgment. *Id.* at 16-18. The Court shall address each of these arguments in turn.

Plaintiffs' first argument is both legally erroneous and factually irrelevant. Legally, the Court agrees with Defendants that "[i]t is hard to see how an inquiry into a loan applicant's 'credit history' ... could prevent USDA from determining that a particular loan applicant is not 'creditworthy.' " Defs.' Reply at 8. As described above, the USDA Instruction concerning the evaluation of loan applications specifically contemplates such an inquiry. Defs.' Reply, Ex. A at 2 (Instruction 1910-A(c)) ("[a]pplicants ... will be determined not creditworthy if they have ever deliberately provided false information, intentionally omitted information relative to the loan decision, or have not made every reasonable effort to meet the terms and conditions of any previous loan"). Plaintiffs do not argue that this Instruction exceeds the scope of the USDA's statutory authority, *see* Pls.' Opp'n at 15, and such instructions are entitled to deference. *See Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (holding that courts "must give substantial deference to an agency's interpretation of its own regulations"). Plaintiffs also authorized an inquiry into their creditworthiness as a part of their loan application,

certifying that their representations were "complete and correct" and "authoriz[ing] the FSA to make all inquiries deemed necessary to verify the accuracy of the information contained [therein] to determine [Plaintiffs'] credit-worthiness and to answer questions about their credit experience with [Plaintiffs]." Defs.' Mot., Ex. 6 at 3 (10/29/08 Facsimile Copy of the Plan).[5]

Factually, Plaintiffs' argument fails for several reasons, not the least of which is that, even assuming Plaintiffs were able to show that Defendants mistakenly applied the eligibility criteria, Plaintiffs would still have to proffer evidence that Defendants applied the criteria incorrectly *based on* Plaintiffs' race, which they have not done. *See, e.g., Brady,* 520 F.3d at 493, 496 n. 4 ("[e]ven if [the plaintiff] showed that the sexual harassment incident was not the actual reason for his demotion, he still would have to demonstrate that the actual reason was a racially discriminatory reason") (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 514, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). Plaintiffs have not presented the Court with *any* evidence from which racial discrimination could reasonably be inferred.

Additionally, and no less significantly, Defendants rejected Plaintiffs' loan application based on their ineligibility *and* on the basis that the Plan was not feasible. *See* Defs.' Mot., Ex. 28 (5/1/08 Letter from L. Owens to Plaintiffs). Plaintiffs do not dispute that Defendants could only approve a plan that was feasible. *See* 7 C.F.R. § 1941.33(b) (allowing approval of loan applications only when they comply with all established policies and regulations, including the requirement that "[t]he proposed loan is based on a feasible plan"). Thus, regardless of whether or not Plaintiffs were creditworthy, it remains undisputed that

[5] The Court notes that a *different* regulation concerning loan approvals, 7 C.F.R. § 1941.33, was amended in 2003, and the word "creditworthy," which had appeared in the pre-amendment text, was eliminated in the post-amendment text. It does not follow, however, that an inquiry into an applicant's credit history under 7 C.F.R. § 1910.5 cannot consider whether an applicant has provided false information in connection with his or her loan application. In fact, the D.C. Circuit has since noted that the USDA criteria concerning eligibility decisions "emphasizes credit history and reliability." *Love v. Johanns,* 439 F.3d 723, 725 (D.C.Cir.2006).

Defendants denied Plaintiffs' loan application for a legitimate, non-discriminatory reason.

Plaintiffs' second argument fares no better. Acknowledging that an inquiry into whether Plaintiffs intentionally omitted items from their Plan could be relevant to the approval or denial of their loan application, Plaintiffs argue that "Defendants fail to provide sufficient evidence ... to support their claim that Plaintiffs deliberately and intentionally did not add the loan for the ... 4650 tractor." *Id.* at 15. This argument suffers from several deficiencies. First, as support for this argument, Plaintiffs rely on an unsworn one-paragraph letter signed by Mr. Williams. *See, e.g.,* Pls.' Resp. Stmt. ¶¶ 29, 37. This letter states that Mr. Williams did not intentionally omit the 4650 tractor from the Plan, but rather, that he "paid no attention to [the] tractor because it did not belong to [him], [he] was merely leasing it, and that is why it wasn't included in the plan." Pls.' Opp'n, Ex. 1 at 1 (2/20/09 Letter from R. Williams to Whom It May Concern). This explanation conflicts with the evidence in the record indicating that the tractor was purchased, not leased. *See, e.g.,* Pls.' Opp'n at 15-16 ("when Mr. Williams was questioned as to why he did not report the loan on the John Deere 4650 tractor, he stated that 'he *purchased* the tractor outside of the FSA and he did not think it should be shown on the balance sheet' ") (emphasis added). And, as an unsworn statement, Mr. Williams' letter is not admissible to create a genuine issue of material fact. *See* Fed.R.Civ.P. 56(e)(2).

Second, even if the letter were admissible, it would not create a genuine issue of material fact because the FSA found that Plaintiffs failed to disclose *two* debts-the debts associated with the 4650 tractor and the debts associated with repairs and parts purchased from Key Brothers. *See* Defs.' Mot., Ex. 28 (5/1/08 Letter from L. Owens to Plaintiffs). Mr. Williams' letter does not even address his omission of this second debt. Third, Plaintiffs' argument does nothing to undermine the other legitimate, non-discriminatory reason for rejecting Plaintiffs' application-that Plaintiffs' Plan was not feasible. There is nothing in the

record demonstrating otherwise.[6]

Plaintiffs' third and final argument is that they should be allowed additional discovery under Federal Rule of Civil Procedure 56(f) in the hopes that they may locate evidence of discrimination that would allow them to oppose successfully Defendants' Motion for Summary Judgment. *See* Pls.' Opp'n at 16-18. This argument has no merit. As an initial matter, this request is not accompanied by an affidavit demonstrating that Plaintiffs "cannot present facts essential to justify opposition," as is required by Rule 56(f). *See* Fed.R.Civ.P. 56(f). Equally problematic, the two issues identified by Plaintiffs as potential targets for additional discovery are nonsensical. The first issue relates to whether one of the two potential comparators identified in discovery "is in fact a similarly situated comparator to Plaintiffs." Pls.' Opp'n at 17. Plaintiffs need no discovery to ascertain this information, as this individual[7] was deposed during the discovery phase of this case, and he testified that he last applied for a loan from the FSA in 1992 (not 2003), that his application sought loan subordination (not a new operating loan), and that Mr. Kalina had no involvement with his 1992 application. *See* Defs.' Ex. 23 at 8:8-8:25. In short, no additional discovery could convert this individual into a comparator. The second issue identified by Plaintiffs concerns whether Plaintiffs' potential

[6] Plaintiffs are not helped by the record evidence concerning two potential white comparators identified in discovery. The first potential comparator did not apply for a loan from the FSA in 2003. The second potential comparator applied for loan subordination, which requires an already outstanding loan with the USDA. Plaintiffs proffer no evidence that this farmer's credit situation and farm operation were similar to that of Plaintiffs by showing that he omitted debts from his loan application or proposed an operation that was not feasible. *See, e.g.,* Defs.' Stmt. ¶ 48. For these reasons, Plaintiffs' Opposition appears to concede that these individuals cannot be considered comparators. *See* Pls.' Opp'n at 12 (arguing that the legal standards articulated in *Latimore* applied in this case because the *McDonnell Douglas* framework is inapplicable " 'where there is no basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other, similarly situated persons' ") (quoting *Latimore,* 151 F.3d at 714).

[7] The Court shall refrain from using this individual's name based on the Protective Order approved by the Court on December 4, 2007.

income would have been supplemented in 2003 by the commencement of a catering business. Pls.' Opp'n at 17. Here, Plaintiffs clearly do not require a re-opening of discovery because, if they began to operate a catering business in 2003, such records would already be in their possession. In fact, Plaintiffs' Opposition appears to concede that they did *not* operate a catering business in 2003. *Id.* (referring to the income that "may" have been earned, suggesting that such income was not actually earned).

Even if Plaintiffs had submitted an appropriate affidavit and identified appropriate areas for additional discovery, the purposes supporting application of Rule 56(f) clearly do not exist in this case. " '[T]he purpose of Rule 56(f) is to prevent railroading the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery.' " *Kakeh v. United Planning Org.,* 537 F.Supp.2d 65, 71 (D.D.C.2008) (quoting *Bancoult v. McNamara,* 217 F.R.D. 280, 282 (D.D.C.2003)). There is nothing premature about Defendants' Motion for Summary Judgment. As discussed above, Plaintiffs were given a full opportunity to engage in discovery from July 2005 through June 2007. That Plaintiffs failed to take the discovery they now deem necessary does not make Defendants' motion premature. Similarly, the fact that Plaintiffs were represented by counsel whose conduct resulted in discovery sanctions (as to which they were fully informed), or that Plaintiffs have now switched counsel, provides no basis to reopen discovery. If that were not the case, every plaintiff who is subject to sanctions based on discovery abuses or whose counsel failed to pursue appropriate discovery would simply switch counsel and seek to reopen discovery pursuant to Rule 56(f). In short, the position in which Plaintiffs now find themselves is a product of their own choices and those of their counsel.

Because Defendants' reasons for denying Plaintiffs' loan application are supported by undisputed evidence in the record, and because Plaintiffs proffer no evidence from which to find that Defendants denied their loan application based on racial discrimination, the Court finds that entry of summary judgment in favor of Defendants is appropriate.

IV. CONCLUSION

For the reasons set forth above, the Court shall GRANT Defendants' Motion for Summary Judgment. This case shall be DISMISSED in its entirety. An appropriate Order accompanies this Memorandum Opinion.

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TIMOTHY PIGFORD, et al., v. USDA[1]
CECIL BREWINGTON, ET AL., v. USDA
Civil Action Nos. 97-1978 (PLF), 98-1693 (PLF).
May 12, 2009.

[Cite as: 613 F.Supp.2d 78].

ECOA – EAJA – Hensley test prong – Unsuccessful claims not allowable.

United States District Court

Under Equal Credit Opportunity Act (ECOA), there is no certain method of determining when claims are related or unrelated. Generally speaking "interrelated claims" are those that cannot be viewed as a series of discrete claims. Claims may be "related," for purposes of an award of attorney fees under (EAJA) and Equal Credit Opportunity Act (ECOA), if they are brought under different legal theories but are intended to establish the illegality of the same conduct. When a plaintiff's claims overwhelmingly involve distinct legal and factual issues, then they are "unrelated," even though claims all invoked the same legal authority and relied on the same legal standard; claims did not require the resolution of identical, interlocking, or overlapping legal questions or mixed questions of law and fact. Inability to recover attorneys' fees on unsuccessful claims that are unrelated to a plaintiff's successful claims ensures that a plaintiff will not be able to force his opponent to pay for the legal services involved in bringing groundless claims simply because those unsuccessful claims were brought in a lawsuit that included successful claims. [Editor's Note: *See Purdue v Kenny* 599 U.S. _____ (2010) for approval of the "lodestar" principal].

United States District Court

[1] Petitioners initially named Edward T. Schafer, former Secretary of Agriculture, as the party defendant. The Court now substitutes Tom Vilsack, current Secretary of Agriculture, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

OPINION AND ORDER

PAUL L. FRIEDMAN, District Judge.

This matter is before the Court on a motion for attorneys' fees, costs and expenses by Covington & Burling LLP ("Covington"), counsel for class member Robert E. Holmes, Sr. ("Mot."); an opposition to Covington's motion by the United States Department of Agriculture ("Opp."); Covington's reply ("Reply"), and USDA's surreply ("Surreply").

I. BACKGROUND

On October 1, 2007, "Mr. Holmes prevailed against the [USDA] in a Track B arbitration, which was conducted pursuant to the Court's April 14, 1999 consent decree[.]" Mot. at 1-2; *see also id.,* Declaration of Joshua A. Doan, Ex. 1, In Re: Track B Claim of Robert E. Holmes, Sr. (Claim No. 19230, Arb. No. 131) (Oct. 1, 2007) ("Arbitrator's Decision").[2] The USDA chose not to appeal the arbitrator's decision, and

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[2]The Court approved the Pigford Consent Decree on April 14, 1999. See Pigford v. Glickman, 185 F.R.D. 82, 113 (D.D.C. 1999). The Consent Decree

> creates a mechanism for resolving individual claims of class members outside the traditional litigation process. See Pigford v. Glickman, 185 F.R.D. 82, 94 (D.D.C. 1999). Class members may choose between two claims procedures, known as Track A and Track B. Track A awards $50,000 in monetary damages, debt relief, tax relief, and injunctive relief to those claimants able to meet a minimal burden of proof. See id. at 96-97. Track A claims are decided by a third-party neutral known as an adjudicator. Track B imposes no cap on damages and also provides for debt relief and injunctive relief. Claimants who choose Track B must prove their claims by a preponderance of the evidence in one-day mini-trials before a third-party neutral known as an arbitrator. See id. at 97. Decisions of the adjudicator and the arbitrator are final, except that the monitor, a court-appointed third-party neutral, may on petition direct the adjudicator and the arbitrator to re-examine

(continued...)

it became final on January 29, 2008.

In the Track B proceeding, Mr. Holmes alleged that the Farmers Home Administration, an agency of the USDA, discriminated against him in the provision and servicing of farm loans on various occasions between 1985 and 1994. Presumably because they occurred at different times and rested on distinct facts, the arbitrator treated Mr. Holmes' various allegations of discrimination as eleven discrete claims. The arbitrator found in Mr. Holmes' favor with respect to some but not all of his claims. Specifically, the arbitrator found in Mr. Holmes' favor on Claim 1 ("Failure to Provide Limited Resource Interest Rate[ ] [Loan in] 1985"); Claim 2 ("Delay in Processing 1986 Loan"); Claim 3 ("Delay in Processing 1987 Loan"), Claim 4 ("Delay in Processing the 1988 Loan"); and two of three allegations in Claim 6 ("Denial of Loans and Loan Servicing in 1990"). The arbitrator did not find in Mr. Holmes' favor on Claim 5 ("Delay in Processing the 1989 Loan and Servicing Request"); one of three allegations in Claim 6; Claim 7 ("Denial of Loans and Loan Servicing in 1991"); Claim 8 ("Denial of Loans and Loan Servicing in 1992"); Claim 9 ("Denial of Loan Servicing in 1993 and 1994"); Claim 10 ("Denial of Loans for Machinery Purposes"); and Claim 11 ("Denial of Farm Ownership Loans"). *See* Arbitrator's Decision at 21-33. The arbitrator awarded Mr. Holmes a total of $202,290.87 in actual damages and $100,000 in emotional distress damages. *Id.* at 36. He also directed that any outstanding loan balances in the Operating Loan program dating from 1985 were to be forgiven. *Id.*

Covington represented Mr. Holmes throughout the litigation of his Track B claim. The firm now seeks $192,180.93 in attorneys' fees, costs

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[2](...continued)
claims if the monitor determines that "a clear and manifest error has occurred" that is "likely to result in a fundamental miscarriage of justice." See id.

Pigford v. Schafer, Civil Action No. 97-1978, Memorandum Opinion and Order at 2 (D.D.C.
Nov. 12, 2008).

and expenses under the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d) ("ECOA"), and the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA").[3] The USDA concedes that Mr. Holmes is a prevailing party for fee-shifting purposes, and thus that the ECOA and the EAJA entitle Covington to reasonable fees, costs and expenses. *See* Opp. at 1. The USDA contends, however, that Covington's fee should be reduced to account for the fact that Mr. Holmes did not prevail on all of his claims. *See id.*

The USDA's argument is based on *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and its progeny. In *Hensley,* the Supreme Court "defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney fees" under fee-shifting statutes like the ECOA and the EAJA. *George Hyman Construction Co. v. Brooks,* 963 F.2d 1532, 1535 (D.C.Cir.1992).[4] In such cases, *Hensley* prescribes the following two-part inquiry for assessing a plaintiff's "degree of success," *Goos v. Nat'l Ass'n of Realtors,* 997 F.2d 1565, 1568 (D.C.Cir.1993), and hence the reasonableness of the fees sought:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?
>
> *Hensley v. Eckerhart,* 461 U.S. at 434, 103 S.Ct. 1933.

If the answer to the first question is "yes," then "no fee may be awarded for services on the unsuccessful claim[s]," because "[t]he congressional intent to

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[3] Under the ECOA, parties who prosecute "successful action[s]" against the government are entitled to reasonable fees. 15 U.S.C. § 1691e(d). Similarly, under the EAJA, "prevailing part[ies]" are entitled to reasonable fees-unless the government's position was substantially justified or special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A).

[4] "Though the *Hensley* analysis was crafted in the ... context [of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988], it was explicitly designed by the Court to apply to all federal statutes limiting fee awards to 'prevailing part[ies].' " *George Hyman Construction Co. v. Brooks,* 963 F.2d at 1535.

limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits[.]" *Id.* at 435, 103 S.Ct. 1933. *See also Sierra Club v. EPA,* 769 F.2d 796, 801 (D.C.Cir.1985) (fees should not be awarded for meritless or unsuccessful claims "simply because those unsuccessful claims were brought in a lawsuit that included successful claims").

If, however, the court finds that a prevailing party's unsuccessful and successful claims are "interrelated," then it is instructed "to skip the first *Hensley* [prong] and move to its second." *George Hyman Construction Co. v. Brooks,* 963 F.2d at 1537. Under *Hensley*'s second prong, the court must consider "whether the success obtained ... is proportional to the efforts expended by counsel," *George Hyman Construction Co. v. Brooks,* 963 F.2d at 1535, and then "award only that amount of fees that is reasonable in relation to the results obtained." *Hensley v. Eckerhart,* 461 U.S. at 440, 103 S.Ct. 1933. In other words, if the successful and unsuccessful claims "share a common core of facts or are based on related legal theories, then a court should simply compute the appropriate fee as a function of degree of success." *George Hyman Construction Co. v. Brooks,* 963 F.2d at 1537.

The USDA's principal argument is that Covington's fee request should be reduced under *Hensley*'s first prong. Specifically, the USDA contends that Covington is not entitled to fees for its work on Mr. Holmes' unsuccessful claims because those claims are "unrelated" to Mr. Holmes' successful claims. *See* Opp. at 2; *see also id.* at 11-13. In the alternative, the USDA argues that if the Court disagrees with its principal argument-*i.e.,* if the Court concludes that Mr. Holmes' claims are "related" under *Hensley*'s first prong-then Covington's fee request should be reduced under *Hensley*'s second prong. The USDA asserts that it would be disproportionate and excessive to award Covington fees for its work on all of Mr. Holmes' claims when Mr. Holmes prevailed on only some of those claims. *See id.* at 16-17.

Covington, of course, disagrees on both points. With respect to the first point, Covington argues that Mr. Holmes' unsuccessful claims were

related to his successful claims because all of his claims were formulated as "disparate treatment claims under the Equal Credit Opportunity Act that relied on the *McDonnell Douglas* framework (because of an absence of direct evidence of racial animus)." Reply at 7; *see also id.* at 10 (arguing that "Mr. Holmes' successful and unsuccessful claims were closely related because they were brought using related legal theories under the same statute using the same legal framework and relying on the same type of evidence.").[5] With respect to the second point, Covington argues that it is entitled to the full fee sought because that fee would reasonably compensate the firm for its work on Mr. Holmes' Track B claim, particularly in light of the excellent results obtained. *See id.* at 10.

II. SCOPE

As an initial matter, the Court will accept the USDA's invitation to (1) limit its analysis to the first issue raised by the parties-that is, whether Mr. Holmes' unsuccessful claims are "related" to his successful claims under *Hensley*'s first prong-and (2) order the parties to attempt to settle this matter in light of the Court's ruling on that issue. *See* Opp. at 2, 16; *see also Ass'n of Admin. Law Judges, Inc. v. Heckler,* Civil Action No. 83-0124, 1988 WL 30760, at *6-7 & n. 4 (D.D.C. Mar. 21, 1988) (utilizing this approach). Because "[a] request for attorney's fees should not result in a second major litigation," and "[i]deally ... litigants will settle the amount of a fee," *Hensley v. Eckerhart,* 461 U.S. at 437, 103 S.Ct. 1933, the Court concludes that it is both wiser and more efficient to give the parties one last chance to resolve this dispute. *See Morgan v. District of Columbia,* 824 F.2d 1049, 1067 (D.C.Cir.1987) (noting the "Supreme Court's call for [parties to make a] conscientious effort to resolve differences over [fee] awards").

III. "RELATEDNESS" OF CLAIMS

[5] In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court set forth a burden-shifting formula for evaluating claims of discrimination when direct evidence of discriminatory animus is lacking.

According to the D.C. Circuit, unsuccessful claims are unrelated to successful claims when the unsuccessful claims are " 'distinctly different' in all respects, *both legal and factual,* from the ... successful claims." *Morgan v. District of Columbia,* 824 F.2d at 1066 (quoting *Hensley v. Eckerhart,* 461 U.S. at 434, 103 S.Ct. 1933) (emphasis added); *see also Williams v. First Gov't Mortgage and Investors Corp.,* 225 F.3d 738, 746 (D.C.Cir.2000) (same). Although "there is no certain method of determining when claims are 'related' or 'unrelated,' " *Hensley v. Eckerhart,* 461 U.S. at 436 n. 12, 103 S.Ct. 1933, generally speaking "interrelated claims are those that 'cannot be viewed as a series of discrete claims.' " *George Hyman Construction Co. v. Brooks,* 963 F.2d at 1539 (quoting *Hensley v. Eckerhart,* 461 U.S. at 435, 103 S.Ct. 1933). Thus, for example, a plaintiff's claims may be related if they are brought under different legal theories but are intended to establish the illegality of the same conduct. *See Goos v. Nat'l Ass'n of Realtors,* 997 F.2d at 1569 (concluding that a common law contract claim and a statutory claim were related because "both claims focused on a single, necessary factual issue:" whether plaintiff was dismissed from her job for retaliatory and hence unlawful reasons). But when a plaintiff's claims "overwhelmingly involve[ ] distinct legal and factual issues," then they are unrelated under *Hensley*'s first prong. *Martin v. Lauer,* 740 F.2d 36, 47 (D.C.Cir.1984). Applying these principles, the Court concludes that Mr. Holmes' unsuccessful claims are unrelated to his successful claims, and that Covington therefore is not entitled to a fee award for work performed on Mr. Holmes' unsuccessful claims.

It is beyond dispute that Mr. Holmes' unsuccessful claims are factually distinct from his successful claims. As the arbitrator's 38-page decision illustrates, each of Mr. Holmes' eleven claims of discrimination were based on different factual allegations, with no discernible factual overlap among claims. *Compare, e.g.,* Arbitrator's Decision at 21 (discussing Claim 1, based on Mr. Holmes' allegation that "in 1985, a similarly-situated white farmer ... received a Limited Resource loan while he did not") *with id.* at 30 (discussing Claim 7, based on Mr. Holmes' allegation that he "applied for and was qualified for an OL loan and servicing in January 1991 but never received the desired funding").

Thus, not surprisingly, Covington does not contend that Mr. Holmes' unsuccessful claims are *factually related* to his successful claims. *See, e.g., Goos v. Nat'l Ass'n of Realtors,* 997 F.2d at 1569 (claims were related because they "shared a common core of facts"). Rather, Covington argues that Mr. Holmes' unsuccessful claims are *legally related* to his successful claims because all of Mr. Holmes' claims were based on the same legal argument: that is, that specific actions by the USDA were motivated by racial discrimination in violation of the ECOA. *See, e.g.,* Reply at 7.

This argument has some surface plausibility, but it must be rejected for at least three reasons. First, Covington cites no authority (and the Court has discovered none) which supports its theory that a series of otherwise discrete, easily separable claims are "legally related" simply because they invoke the same legal authority and rely on the same legal standard. Rather, the case law indicates that claims are legally related for *Hensley* purposes when they require the resolution of identical, interlocking or overlapping legal questions (or mixed questions of law and fact). *See, e.g., Williams v. First Gov't Mortgage and Investors Corp.,* 225 F.3d at 746 (statutory and common law claims were related because they all required resolution of whether defendant's sale of insurance to plaintiff was fraudulent); *Morgan v. District of Columbia,* 824 F.2d at 1066 (claims were related because they all arose from plaintiff's "central claim that the [defendants] had been deliberately indifferent to [plaintiff's] eighth amendment rights in connection with the assault [suffered by plaintiff]").

Mr. Holmes' claims did not require the resolution of identical, interlocking or overlapping legal questions or mixed questions of law and fact. Instead, each claim required the arbitrator to resolve a unique and distinct legal question: whether Mr. Holmes' allegations and evidence pertaining to a specific governmental action (for example, the denial of a loan to Mr. Holmes in a particular year), evaluated under the *McDonnell Douglas* framework, were sufficient to establish by a preponderance of the evidence that the specific action in question was motivated by discriminatory animus. *See Sierra Club v. EPA,* 769 F.2d

at 803 (claims were unrelated because "petitioners could be granted relief on any one issue without necessarily obtaining their desired relief on any other issue"); *Martin v. Lauer,* 740 F.2d at 47 (claims under the First Amendment and a whistleblower statute were unrelated because "the legal issues raised by the First Amendment claim were largely distinct from those implicated by the whistleblower claim"); *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Svc.,* Civil Action No. 01-0765, 2004 WL 2239483, at *6 & n. 3 (D.D.C. Sept. 27, 2004) (claims could be "compartmentalized" for *Hensley* purposes). Thus, Mr. Holmes' claims are easily "viewed as a series of discrete claims"-both factually *and* legally-and his unsuccessful claims therefore should be regarded as unrelated to his successful claims. *Hensley v. Eckerhart,* 461 U.S. at 435, 103 S.Ct. 1933.

Second, to accept Covington's theory would be to severely undermine the purpose and intent of *Hensley*'s first prong. As the D.C. Circuit has explained, *Hensley*'s first prong is intended to ensure that "a plaintiff [will] not be able to force his opponent to pay for the legal services involved in bringing groundless claims simply because those unsuccessful claims were brought in a lawsuit that included successful claims." *Sierra Club v. EPA,* 769 F.2d at 801. Under Covington's theory, however, a prevailing party could seek fees for any number of groundless claims so long as those groundless claims were submitted under the same legal authority as the party's successful claims. In other words, Covington's theory would permit a prevailing party to seek fees that were not in any cognizable way "premised on successful litigation of a claim," *Trout v. Winter,* 464 F.Supp.2d 25, 30 (D.D.C.2006)-in direct contravention of *Hensley*'s first prong.

Third, and relatedly, it would be particularly inappropriate to adopt Covington's theory in the context of Track B adjudications under the *Pigford* Consent Decree. As the USDA points out, "*only* disparate treatment claims under the ECOA can be brought under Track B, and all [or nearly all] are subject to the *McDonnell Douglas* standard of proof." Surreply at 2 (emphasis added). Thus, under Covington's theory, "all claims in a Track B arbitration would always be 'interrelated[.]' " *Id.*

That result would be unacceptable because-as Mr. Holmes' case illustrates-Track B claims may well include many "truly fractionable" claims. *Action on Smoking and Health v. Civil Aeronautics Board,* 724 F.2d 211, 216 (D.C.Cir.1984) (internal quotation marks and citation omitted).

IV. CONCLUSION

In sum, the Court concludes that Mr. Holmes' unsuccessful claims are unrelated to his successful claims under the principles of *Hensley* and its progeny. As the parties will be ordered to try to settle this matter in light of that conclusion, it is worthwhile to note what that conclusion does *not* entail or imply. In deciding that Mr. Holmes' unsuccessful claims are unrelated to his successful claims, and hence that Covington is not entitled to fees for its work on Mr. Holmes' unsuccessful claims, the Court does not mean to endorse "a mathematical approach" to calculating a reasonable fee. *Hensley v. Eckerhart,* 461 U.S. at 435 n. 11, 103 S.Ct. 1933. The Court recognizes-as the USDA seems to concede, *see* Surreply at 7-that simply reducing Covington's fee by a fraction corresponding to the number of unsuccessful claims is not likely to result in a fair and reasonable fee for Covington's services. After all, "even when a lawsuit involves distinct claims, there inevitably may be some overlap in the requisite factual and legal analysis." *Martin v. Lauer,* 740 F.2d at 47. *Cf. Int'l Center for Technology Assessment v. Vilsack,* 602 F.Supp.2d 228, 233 (D.D.C.2009) (concluding that plaintiffs' unsuccessful claims were unrelated to their successful claims, but noting that "[p]laintiffs spent a good deal of time ... working on other issues not directed to any of the three claims specifically, but which was necessary to plaintiffs' successes"). Moreover, Covington likely would have had to perform certain litigation-related tasks whether or not it brought the unsuccessful claims. *See Ustrak v. Fairman,* 851 F.2d 983, 988 (7th Cir.1988).[FN6]

The Court also expresses no view as to the USDA's argument that Covington is not entitled to certain fees related to this fee dispute. *See* Surreply at 8-9.

For all of these reasons, it is hereby

ORDERED that the parties shall attempt to settle Covington's motion for an award of attorneys' fees in light of this Opinion and Order. If the parties are able to settle this matter, they shall inform the Court immediately in writing and shall file the appropriate settlement or dismissal papers. If the parties are unable to settle this matter, they shall file a joint report so informing the Court on or before June 8, 2009.

SO ORDERED.

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ENERGY POLICY ACT

DEPARTMENTAL DECISIONS

In re: PUBLIC SERVICE COMPANY OF COLORADO d/b/a XCEL ENERGY TACOMA HYDROELECTRIC PROJECT.
EPAct Docket No. 09-0055.
FERC No. 12589-001.
Decision and Order.
April 28, 2009.

EPAcT – Burden of persuation on moving party – Best available science – Best professional judgement – Mandatory conditions – Best biological potential.

Donald H Clarke, Rekha K. Roa for Petitioners
Lois G. Wittee, Steve C. Silverman, Randall J Bremer for FS.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision and Order

In this decision, which is the first issued by the United States Department of Agriculture (USDA) under the FERC Hydropower Licensing Provisions of the Federal Power Act, I find that Petitioner Public Service of Colorado ("PSCo") d/b/a Xcel Energy did not meet their burden of persuasion on six of the seven contested issues of material fact that were the subject of this proceeding. I find in favor of PSCo on the 7th contested issue in that there was not a determination that the construction of the stream flow device required by Condition 18 made the project economically viable.

Procedural Background

This matter arises out of a process whereby the USDA's Forest Service may impose mandatory conditions on licenses to operate hydropower facilities which have an impact on lands under the

jurisdiction of the Forest Service. PSCo, the current license holder for the facility in question, applied on June 25, 2008, for a new license to continue operation of the facility. On October 29, 2008, the Forest Service imposed a number of preliminary conditions to the issuance of the license. On December 3, 2008, PSCo filed a request for a trial-type hearing under Section 4(E) of the Federal Power Act, identifying eight issues of material fact which it alleged were in dispute. All eight issues were related to two of the conditions (17 and 18) imposed by the Forest Service.

On January 28, 2009, this matter was referred by the Forest Service to the United States Department of Agriculture's Office of Administrative Law Judges. Under the Rules of Procedure governing hydroelectric matters, 7 CFR §1.601 et seq., these cases are handled in a particularly expeditious manner, with discovery, an on-the-record hearing, and a written decision by the administrative law judge all to be accomplished within 90 days of referral.

On February 2, 2009, I entered a Docketing Order in which I set a prehearing telephone conference for February 17, 2009. The parties entered into a pre-trial Stipulation on February 15, agreeing on a number of procedural matters, such as the utilization of electronic filing, the agreement that the appropriate hearing site would be at the Forest Service's Regional Office in Golden Colorado, and that the hearing would be conducted during the week of March 30, 2009. The parties also agreed that PSCo would have the burden of proof in this case,[1] and that PSCo witnesses would testify before Forest Service witnesses.
On February 17, 2009, I conducted a pre-trial conference related to discovery issues and issued a Summary of the Pre-Hearing conference on February 20, 2009. On March 18, 2009, the parties entered into a Joint Stipulation related to Discovery matters.

The Forest Service filed motions to dismiss all eight of the issues proposed by PSCo. On February 27, 2009, I dismissed the sixth

[1] This would be consistent with my ruling in Idaho Power Company, 65 Agric. Dec. 278 (2006), as well as with the rulings in Avista Corporation v. U.S. BIA, FERC Docket 2545, 12606, and Klamath Hydroelectric Project, FERC Docket 2082.

numbered issue[2], and denied the motions with respect to the remaining seven issues. I also ordered that all discovery be completed by March 16, 2009.[3]

On March 23, 2009, the parties filed written direct testimony[4] as required by the rules of procedure. The rules in these hydroelectric cases require that all witnesses present their testimony in writing within five days after the close of discovery, and that any witness submitting such written testimony must be presented in person at the hearing to be available for cross examination. The written testimony must be authenticated via affidavit or declaration. PSCo presented the written testimony of five witnesses, while the Forest Service presented the written testimony of eight witnesses. Each witness indicated the exhibits he or she was proposing to be introduced into evidence.

I conducted a hearing in Golden, Colorado on March 31-April 1, 2009. Donald H. Clarke, Esq. and Rekha Rao, Esq. represented PSCo, while the Forest Service was represented by Lois G. Witte, Esq. and Randy Bramer, Esq. Each of the thirteen witnesses who submitted written testimony was made available for cross examination. In addition, after the Forest Service objected to the admission of an affidavit[5] by Jon Ickes, an individual who was not slated to testify, I allowed PSCo to present Mr. Ickes to validate his affidavit and to be subject to cross examination.

At the start of the hearing, the Forest Service moved that PSCo be

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[2] "PSCo's development and operation of the project has established existing conditions in the bypass reach that are inconsistent with those goals established by the USFS in the Forest Service plan."

[3] There was some confusion as to whether the interrogatory responses were due earlier than March 16 pursuant to Rule 1.643(c), which resulted in the Forest Service submitting their responses several days earlier than PSCo, but I determined that PSCo was entitled to rely on my order, and that no prejudice resulted in any event.

[4] Exhibits are styled as follows: Forest Service as FS Ex., Public Service of Colorado as CX, Joint Stipulation as JS, Joint Exhibit as JS Ex., Transcript as Tr.

[5] CX 17.

sanctioned for failure to fully comply with discovery, in that thousands of pages of emails and other documents were turned over to the Forest Service in the days immediately before the hearing. The Forest Service contended that they did not have the time to review the documents, particularly as they would apply to the cross examination of John Devine. I declined to impose sanctions, but indicated, repeating what I had stated in an earlier telephone conference concerning discovery, that I would continue the hearing for a few days if necessary. When Mr. Devine was presented for cross-examination on March 31, the Forest Service declined to cross-examine him, requesting that I continue the hearing until Tuesday, April 7, 2009 so that they could cross-examine Mr. Devine through audio-visual means. I indicated that I would reluctantly grant this request, even though it would not change the due dates for briefing and the issuance of my decision.

At the conclusion of the cross-examination of the Forest Service witnesses on April 1, the Forest Service indicated that they were able to review all the documents submitted by PSCo, and that they would waive their right to cross-examine Mr. Devine. Accordingly, I closed the hearing at that point.

On April 13, 2009, the parties submitted their post-hearing briefs and proposed findings of fact.

In these proceedings, the administrative law judge plays a more limited role than in traditional adversarial proceedings. Rather than make findings of fact and conclusions of law, I am only allowed to make "findings of fact on all disputed issues of material fact." Rule 1.671(b)(1)(i). I may only make "[c]onclusions of law necessary to make the findings of fact (such as rulings on materiality and on the admissibility of evidence)." Rule 1.671(b)(1)(ii). I cannot make any conclusions on the ultimate issues—whether conditions should be adopted, modified or rejected. Rule 1.671(b)(3).

Statutory and Regulatory Background

The Energy Policy Act of 2005 ("EPAct") amended Section 4(e) of the Federal Power Act ("FPA") to include the following language:
The license applicant and any party to the proceeding shall be entitled

to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding.

See Pub. L. No. 109-58, Title II, § 241,119 Stat. 675 (Aug. 8, 2005) (codified at 16 U.S.C. §797(e)).

In response to this legislative direction, the USFS issued interim procedural regulations implementing the changes set forth by the EPAct, effective November 17, 2005 (codified at 7 C.F.R. Part 1). These interim regulations remain in effect.

The interim regulations, at 7 C.F.R. § 1.621, provide that a license applicant or other license party may submit a request for a trial-type hearing on disputed issues of material fact to the Deputy Chief, National Forest Systems, USFS. Any such hearing request must be filed within 30 days after the deadline for the agencies to file preliminary conditions with FERC.

This expedited trial-type proceeding arises under Section 241 of the Energy Policy Act of 2005, Pub. L. No. 109-58, § 241, 119 Stat. 594, 674-75 (Aug. 8, 2005) ("EPAct"), codified at 16 USC § 797(e). Section 241 amends sections 4(e) and 18 of the Federal Power Act ("FPA"), amended and codified at 16 USC. §§ 791-823d. Those sections provide certain federal agencies authority to include conditions and/or fishway prescriptions in any hydroelectric license issued or re-issued by FERC. See 16 USC § 797(e). The EPAct creates a new administrative hearing procedure, within the FERC application review process, to resolve disputed issues of fact material to those proposed conditions.

Under section 4(e), the Secretary of the Department of the Agriculture – Forestry Service ("FS"), may establish conditions deemed necessary for the protection of national forests: and public lands to be included in a hydroelectric license. See 16 USC § 797(e).

Pursuant to section 241 of the EPAct, "[t]he license applicant and any

party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions." 16 USC. § 797(e).

Factual Background
Project Description

PSCo filed an application for a new license for the continued operation of the Project on June 25, 2008.[6] The Commission issued a Notice of Application Ready for Environmental Analysis on September 4, 2008.[7] On October 29, 2008, USFS submitted its preliminary Section 4(e) conditions.[8]

The Project is located approximately 20 miles north of Durango, Colorado, on a high intermountain plateau west of the Animas River in La Planta and San Juan Counties. Water used by the Tacoma Project for generation purposes originates in three drainage basins: Cascade Creek, Little Cascade Creek, and Elbert Creek. The primary water storage reservoir is Electra Lake. The Cascade Creek diversion dam and conveyance facilities provide the primary water supply for the Project. These diversion facilities consist of a diversion dam on Cascade Creek. The Cascade Creek diversion dam is located approximately 4,400 feet upstream of where U.S. Highway 550 crosses Cascade Creek and 3.2

[6] *Public Service Company of Colorado,* Application for License, FERC Docket No. 12589 (June 25, 2008), http://elibrary.ferc.gov/idmws/searehl/intermediate.asp?link file=yes&doclist= 13624685.

[7] *Public Service Company of Colorado,* Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions, FERC Docket No. 12589 (Sept. 4, 2008), http://elibrary.ferc.gov/idmws/common/opennat.asp?fiIelD= 11794507.

[8] *USDA Forest Service,* Comments, Preliminary Terms, Conditions, Recommendations, and Summary of Evidence by the USDA Forest Service, Rocky Mountain Region, FERC Docket No. 12589 (Oct. 29,2008), http://elibrary.ferc.gov/idmws/common/opennat.asp?fiIeID=1 1840863.

miles upstream of the confluence of Cascade Creek and Lime Creek at Purgatory Flats. The diversion dam is approximately 30 feet long and 10 feet high.

The Project has been in existence for over a century. It has been resold and expanded a number of times and has been licensed under the Federal Power Act since 1936. The current license expires on June 30, 2010. Public Service Company of Colorado (PSCo) acquired the Project in 1992. FERC transferred the license to PSCo by order dated April 15, 1992.

The annual operation of the Project is significantly affected by the hydrology of Cascade Creek, especially the annual snow pack and its rate of runoff, the severe winter conditions experienced at the site, and the remote location of certain project facilities. The general arrangement of the Project facilities is shown in Figure B-1 of Exhibit CX-47. Given the altitude and the climate, Cascade Creek unsurprisingly has greatly reduced flow during the winter.

Water diverted from Cascade Creek flows through Little Cascade Creek, and eventually to PSCo's plant for hydraulic conversion to electricity. The water is stored in Electra Lake so as to balance variations in seasonal stream flows. The waters diverted from Cascade Creek are such that the full flow of the Creek is captured by the diversion dam approximately 95% of the time and transported via an open flume and pipe to Little Cascade Creek. J.S. ¶ 1. The bypassed water continuing on as Cascade Creek plus accretions into Cascade Creek flow without controls (run of stream) to the hydroelectric facility downstream. PSCo also owns substantial water rights and trades or sells water to the Durango Mountain Resort, primarily for use in snow making.

The diversion dam, and the 6.6 miles of Cascade Creek impacted by the flow loss until the confluence of the Creek and the Animas River, is located on National Forest System lands, and is part of the San Juan National Forest (SJNF). The Tacoma Project currently operates under FERC license No. 400, which will expire on June 30, 2010. JS ¶1. The SJNF operates under a comprehensive plan filed with FERC which documents how waterways affected by hydroelectric projects will be

improved or developed for beneficial public uses, including the protection of fish and wildlife. JS ¶ 1. This plan was last amended in 1992.

B. The Delphi study

As part of the relicensing process, the Forest Service requested that PSCo conduct an Instream Flow Incremental Methodology (IFIM) using the Physical Habitat Simulation (PHABSIM) model to evaluate the effects of flow on aquatic habitat. This study would be for the purpose of determining whether the SJNF plan's standard that "Habitat for each species on the forest will be maintained at least at 40% or more of potential" is met. FS Ex. 151, p. 13, FS Ex. 95, p. III-26. The PHABSIM is considered a precise quantitative tool, but can be costly and time-consuming. In fact, PSCo was concerned about the expense of a PHABSIM and countered with a proposal that a "Delphi-type" assessment be used. FS Ex. 151, p. 25. The Forest Service agreed to the Delphi study. A study team was chosen to identify site specific management objectives and carry out the study. The Delphi Study team consisted of four biologists with voting authority, and one facilitator, who did not have a vote. The facilitator, Stephen Arnold, was employed by Devine Tarbell & Associates, Inc. (DTA),[9] a consultant firm hired by PSCo. The voting members of the Delphi team were Andrew Scott, also of DTA, Mark Uppendahl of the Colorado Division of Wildlife (CDOW), and David Gerhardt and Justin Jiminez of the Forest Service. The purpose of a Delphi-type study is to utilize a team of experts using their collective best professional judgment ("BPJ") to resolve quantitative issues where absolute answers may not be possible via a consensus method. The philosophy behind it is essentially that a consensus of experts attempting to resolve complex technical questions can come up with a more accurate answer than the opinion of a single expert. FS Ex. 192, p. 2. The primary purpose of the Delphi Team was to develop biologically based flow recommendations based on changes to fish habitat from various released flows. FS Ex. 16, p. 3. The team crafted management objectives and underlying attainment criteria with

[9] By the time of the hearing, the name of DTA had been changed to HDR, but DTA was the name used throughout the hearing, and in all pertinent documents. Tr. 123.

the notion of examining what flows would be needed to achieve the 40% minimum habitat standard required by the SJNF Forest Plan. FS Ex. 31, pp. 7-9.

While several aspects of the Delphi study will be discussed in the context of the specific disputed material facts, several general points apply across the board. First, the study was undertaken at the behest of PSCo after they decided the PHABSIM study would be too costly and time consuming. Second, the study was agreed to by the Forest Service and approved by FERC. Third, there was no evidence of absence of consensus on any aspect of the study; in fact, it is clear that Mr. Scott kept his boss, John Devine, and PSCo, informed of all issues and decisions of the Delphi team. Tr. 173-174. Fourth, after the Delphi team had issued its initial conclusions, Mr. Devine issued clear instructions to Mr. Scott, Devin Malkin and Alfred Hughes in an email on April 24, 2008, that "we"—presumably DTA on behalf of PSCo –"are going to need to construct a well-conceived and technically sound approach to disprove the need for, and merit of, the likely bypass flow to be recommended by the USFS." FS Ex. 188. While Mr. Scott testified that he was never issued the hydrology assignment, designed to question the flows recommended by the Delphi team, he also testified that Mr. Devine did not have any problem with the assumptions of the Delphi team, and that part of his job, which he accomplished, was to keep Devine informed. Thus, even though the Delphi study was proposed by PSCo, actively participated in and adopted by all members of the Delphi team, and that DTA and PSCo knew of the recommendations of the study team, there was an 11th hour decision made to attempt to overturn the key recommendation that the study was set up for in the first place.

The Delphi Report, FS Ex. 16, was issued in July 2007. However, a final report was resubmitted to FERC by PSCo in December 2007. CX 67. While the two reports remained substantially the same, the December submission contained, as an attachment, a hydrology study prepared by PSCo. The study was not made a part of the actual Delphi team's recommendations because the team members were unable to reach consensus on its applicability or usefulness. The Delphi report

clearly started with the premise that the "Project's diversion of flow from Cascade Creek has affected downstream aquatic and riparian resources and has altered the natural conditions related to aquatic habitats, fish populations, macroinvertebrates, water quality, and riparian vegetation communities downstream of the diversion dam. Many of the present physical and biological attributes of the stream system are the product of the altered flow regime." FS Ex. 16, p. 1, CX 67, p. 7 (p. 1 of the Delphi Report). The target species of the study included brook, brown, rainbow and cutthroat trout.

Overall, the team concluded "that project diversions limit the quantity and quality of fish habitat within the bypass reach during much of the year. The project diverts the majority of natural flow with the exception of leakage at the dam and accretion downstream of the diversion dam. As a result, wetted perimeter and overall stream depth on Cascade Creek is decreased, as well as pool frequency, residual pool depth, and overall pool quality, which results in a reduction of over-wintering habitat quality and year-round cover features." CX 67, p. 18. After evaluating three different flows, the team came to a consensus that the 9 cfs would be the minimum necessary to safeguard the habitat at the standard required by the SJNF plan.

The Delphi Team consensus on biologically-based minimum instream flows and proposed flow sharing plan are as follows:

- When inflow to the diversion dam equals or exceeds 9 cfs, the minimum flow at the diversion dam to Cascade Creek (as measured immediately below the dam) is recommended to be 7 cfs, plus accretion downstream of that point, and the minimum flow diverted to the flume to Little Cascade Creek (as measured at the point of diversion) will be 2 cfs plus any additional inflow above 9 cfs.
- When inflow to the diversion dam is less than 9 cfs, the minimum flow diversion to the flume will remain at 2 cfs, and the flow to Cascade Creek will be equal to inflow minus 2 cfs. This accomplishes two goals: (1) two cfs diverted into the flume will prevent winter freezing and subsequent failure of the flow line; and (2) it allows for the diversion structure to be set at 2 and 7 cfs before the winter season begins without

concern for constant monitoring, at this inaccessible location, based on variable stream flows.

▲ This proposal is based on the assumption that the 2 cfs flow diverted to the flume is for the primary purpose of preventing ice damage to the flow line flume and pipe, which could threaten the long term operation and viability of the Tacoma Project.

▲ This proposal also assumes that natural flows and accretions to Little Cascade Creek will equal or exceed 2.5 cfs where, in combination with the 2 cfs diversion from Cascade Creek, it will achieve the biologically-recommended minimum flow of 4.5 cfs at the spawning site.

There were two reasons for this assumption: (1) modeled hydrology predicts that 2 cfs is always available in Cascade Creek to be diverted into the flume to prevent winter freezing and subsequent failure of the flow line; and (2) accretion flows were assumed to be locally enhanced due to the presence of Columbine Lake and its potential influence on local groundwater.

List of Factual Issues in Dispute

Each of the remaining seven disputed issues relates to two conditions imposed by the Forest Service. Condition Number 17[10] required that PSCo provide year round continuous minimum flows to the bypass reach in Cascade Creek of 9 cubic feet per second (cfs), of which 2 cfs

[10] **Condition No. 17— Instream Flow Requirements**
The Licensee shall provide year-round continuous minimum flows in the bypass reach in Cascade Creek as follows:
• When flows upstream of the diversion dam equal or exceed 9 cubic feet per second (cfs), the Licensee shall release an instantaneous instream flow of 7 cfs downstream into Cascade Creek (as measured approximately 100 yards below the dam). This will allow a minimum of 2 cfs to be maintained in the Project flume.
• When flows upstream of the diversion dam are less than 9 cfs, the Licensee shall release an instream flow downstream of the dam in Cascade Creek equal to inflow less 2 cfs; said 2 cfs shall be diverted to the Project flume. JS Ex. 18 at 84.

would be directed to the Project flume. Where the flows upstream of the diversion are less than 9 cfs, the first 2 cfs would be directed to the flume, to prevent damage from freezing. Condition 18[11] required that PSCo construct, operate and maintain a device that would guarantee the stream flows required by Condition 17 and also construct means to measure and record compliance with the stream flow requirements.

Disputed Issue #1: There is a direct relationship between Project operations and reduced ecosystem sustainability in Cascade Creek.

Disputed Issue #2: The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is consistent with the results of the Delphi Study.

Disputed Issue #3: The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is required to comply with the USFS' quantitative "standard", set forth in the Forest-Wide Direction, Wildlife and Fish Resource Management, of maintaining habitat for each species on the forest at 40 percent or more of potential.

Disputed Issue #4: PSCo's water diversion on Cascade Creek degrades aquatic habitats and has diminished the aquatic ecosystem from the Cascade Creek diversion dam to the Animas River.

Disputed Issue #5: Only "minor flow accretions" occur between the diversion dam and Mill Creek and therefore the dewatering of Cascade Creek diminishes public uses of the aquatic resources in the bypass reach.

Disputed Issue #7: The USFS requirement in Condition No. 18 that PSCo construct and operate a stream flow device to deliver the flows required by Condition No. 17 is based on a collaborative determination with utility representatives and allows PSCo to maintain an economically viable project.

Disputed Issue #8: The Delphi Team made a technical assessment of the

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[11] **Condition No. 18— Guaranteed Priority Flow Bypass Device and Gaging** In order to ensure that the instream flows required are released, the Licensee shall construct, operate, and maintain a guaranteed priority streamflow device, approved by the US Forest Service, as part of the diversion/intake structure. Minimum flows required by the instream flow condition shall be automatically released through this device. At least 60 days prior to beginning construction of the diversion structure, the Licensee shall file for Commission approval functional design drawings and an implementation schedule for the guaranteed priority streamflow device. JS Ex. 18 at 85.

storage capacity of Columbine Lake, its contribution to local groundwater sources, the amount of local groundwater flows to Little Cascade Creek, and the resulting impacts of the Delphi Team recommendation on the aquatic resources of Little Cascade Creek.

Findings of Fact

Findings 1 through 28 have been stipulated to by the parties.

1. The Tacoma Hydroelectric Project ("Project") is located approximately 20 miles north of Durango, on a high intermountain plateau west of the Animas River in Las Plata and San Juan Counties. It is owned by Public Service Company of Colorado (PSCo). Water used by the Tacoma Project for power generation purposes originates in three drainage basins; Cascade Creek, Little Cascade Creek, and Elbert Creek. The primary water source for the Project comes from the watershed of Cascade Creek. "Except for leakage at the diversion facilities, the Cascade Creek diversion dam captures the full flow of Cascade Creek approximately 95 percent of the time." JS Ex.1; FERC Accession No. 20050523- 0021. The primary storage reservoir is Electra Lake.

2. The Cascade Creek diversion dam and conveyance facility provides the primary water supply for the Project. These diversion facilities consist of a diversion dam on Cascade Creek has a current hydraulic capacity of approximately 250 cfs.

3. The Cascade Creek diversion dam is located approximately 4,400 feet upstream of the U.S. Highway 550 crossing of Cascade Creek. The Project's inverted siphon crosses over Cascade Creek immediately upstream of U.S. Highway 550. Mill Creek enters Cascade Creek less than 0.5 miles downstream of U.S. Highway 550. Approximately 3 miles downstream from the Cascade Creek diversion structure is a stream reach referred to as Purgatory Flats. Lime Creek flows into Cascade Creek at Purgatory Flats.

4. Portions of the Project, in particular the diversion structure located on Cascade Creek, are located on National Forest System ("NFS") lands, specifically on the San Juan National Forest ("SJNF")

5. There are no gages on Cascade Creek which record the flow of

Cascade Creek.
6. The water diverted from Cascade Creek is transported through the Project's conveyance facilities, and then released into Little Cascade Creek. A gaging station used by the Colorado Division of Water Resources ("CDWR") for recording diverted flows exiting the Cascade Creek diversion pipe is located at the outlet of the pipe where the diverted flow enters the channel of Little Cascade Creek. Little Cascade Creek conveys water to Aspaas Lake which then diverts water into Electra Lake. Water stored in Electra Lake is conveyed to the Tacoma powerhouse.
7. The Tacoma Project operates primarily as a peaking facility.
8. The SJNF Land and Resource Management Plan, as amended in 1992 (SJNF Forest Plan) is filed with the Federal Energy Regulatory Commission ("FERC") pursuant to FERC requirements as a comprehensive plan that documents how the waterways affected by hydroelectric projects will be improved or developed for all beneficial public uses, including the protection of fish and wildlife and other beneficial public uses. See SJNF LAND AND RESOURCE MANAGEMENT PLAN, AS AMENDED IN 1992 (SJNF Forest Plan) JS Ex. 2; PSCo Hearing Request Ex.4.
9. The Tacoma Project currently operates pursuant to FERC license No. 400 (Tacoma-Ames Project). This license will expire on June 30, 2010.
10. FERC established new rules, including the establishment of a new Integrated Licensing Process (ILP) for licensing of hydropower projects, on July 23, 2003 (Final Rule and Tribal Policy Statement). Although FERC did not require license applicants to use the ILP as the default licensing process until July 23, 2005, PSCo chose to use the ILP and commenced informal meetings of interested stakeholders, which included establishment of Resource Working Groups (RWG) in 2004.
11. The ILP is a well-defined process with both short time frames and strict time lines; the intent of the informal meetings proposed by PSCo was to provide opportunity for stakeholders to work closely together prior to formal commencement of the proceeding to identify resource issues, review existing studies and data, identify information needs, and review study plans.
12. On May 20, 2005, PSCo filed a Notice of Intent to File License

Application for a New License (NOI) and a Pre-Application Document (PAD) [JS Ex. 3; FERC Accession No. 20050523-0020].

13. In response to the NOI and PAD, FERC issued Scoping Document 1 (SDl) on July 12, 2005 [JS Ex. 4; FERC Accession No. 20050712-3009]. The public scoping process is done to "ensure that all pertinent issues are identified and analyzed and that the Environmental Assessment is thorough and balanced" [JS Ex. 4; FERC Accession No. 20050712-3009, page 2]. Because PSCo intends to seek separate licenses for the Tacoma and Ames Projects, SDI also established a new project number for the Tacoma license proceeding, P-12589.

14. FERC subsequently commenced the proceeding, starting the relicensing process through recognition of the PSCo NOI filing, and solicited comments on the PAD, SDl, and study requests on July 21, 2005 [JS Ex. 5; FERC Accession No. 20050721-3065].

15. The U.S. Forest Service (USFS) filed comments on the PAD and SD1, on September 16, 2005 which included Forest Service comments on PSCo's proposed studies. [JS Ex. 6 (Answer FS Ex. 13); FERC Accession No. 20050916-5020]. The USFS noted that the PAD did not disclose resource impacts from the Cascade Creek diversion, including effects to "water quantity, fish and aquatic resources, and wildlife" and that "diverting all flows from a stream 95% of the time is likely to affect resources" [JS Ex. 6 (Answer 3 FS Ex. 13); FERC Accession No. 20050916-5020, page 4]. Additionally, the USFS formally requested a study based on the Water RWG issue assessment "Instream Flows below Cascade Creek Diversion Dam" [JS Ex. 6 (Answer FS Ex. 13); FERC Accession No. 20050916-5020, page 8].

16. PSCo informed the RWG that it was concerned about the costs of a PHABSIM study and suggested as an alternative, the use of a "Delphi-type assessment" in their comments to FERC on stakeholder study requests and in their Proposed Study Plan package dated November 1, 2005 [JS Ex. 7 (Answer FS Ex. 24); FERC Accession No. 200511015038, pages 4, 7-24].

17. The USFS committed to working with PSCo to make the Delphi process work. USFS informed PSCO that it would fallback to using the PHABSIM assessment unless the management objectives and attainment

criteria met FS information needs [JS Ex. 8 (Answer FS Ex. 23); FERC Accession No. 20051220-5016, pages 1-4].
18. On January 26, 2006, the USFS provided comments to PSCo's draft Delphi-type study plan. [JS Ex. 9; FERC Accession No. 20060127-5049]
19. PSCo filed their revised Study Plan with FERC on March 1, 2006. PSCo proposed the Delphi Study Plan. [JS Ex. 10 (PSCo Hearing Request Ex. 11; FERC Accession No. 20060301-5047).
20. The USFS filed comments on PSCo's revised Study Plan on March 9, 2006. JS Ex. 11 FERC Accession No. 20060309-5130.
21. PSCo filed the final Delphi Report. This report was based upon, and reviewed by, a technical study conducted by a technical team which included the USFS, Devine Tarbell and Associates, and Colorado Division of Wildlife, on July 9, 2007 [JS Ex. 12 (FS Answer Ex. 16); FERC Accession No. 20070709-5029].
22. The USFS filed comments with FERC (dated July 26, 2007) on the final Delphi Report on July 27, 2007 [JS Ex. 13 (FS Answer Ex. 14); FERC Accession No. 200707275023].
23. PSCo filed with FERC the Response to Comments on the Initial Draft Study Reports and Study Report Meeting Summary on July 20, 2007 (JS Ex. 14; FERC Accession No. 20070720-5065)
24. The USFS filed with FERC a request for an economic study for the Project on May 24, 2007 [JS Ex. 15 (FS Answer Ex. 18); FERC Accession No. 20070524-5075].
25. FERC staff denied the study request by letter dated July 30, 2007. [JS Ex. 16 FERC Accession No. 20070730-3003]
26. The USFS filed comments on the Final Study Reports and Preliminary Licensing Proposal on March 10, 2008 [JS Ex. 17 (FS Answer Ex. 6); FERC Accession No. 200803105006].
27. The USFS filed comments on the License Application on October 29, 2008 [JS Ex. 18 (FS Answer Ex. 2); FERC Accession No. 20081029-5072].
28. PSCo filed another final Delphi Study Report dated November 2007 with FERC on December 14, 2007, with the addition of the Hydrology Study. [JS Ex. 19; FERC Accession No. 20071214-5133].

Ultimate Finding 1-- There is a direct relationship between Project operations and reduced ecosystem sustainability in Cascade Creek.

Ultimate Finding 4-- PSCo's water diversion on Cascade Creek degrades aquatic habitats and has diminished the aquatic ecosystem from the Cascade Creek diversion dam to the Animas River.

After review of the record, I have decided that Disputed Issues 1 and 4 are essentially the same issue stated differently. The parties seem to have recognized this as well in their proposed findings and supporting argument.

1-1. The Forestry Plan requires the attainment of 40% of habitat potential for viable populations of all existing vertebrate wildlife species. "Habitat for each species on the forest will be maintained at least at 40 percent or more of potential." FS Ex. 95, III-26, Joint Stipulation ("JS") ¶ 8.

1-2. The Delphi Study team evaluated the degree of attainment of management objective goals[12] for Cascade Creek at a nominal water bypass [thru to Cascade Creek] rates of 3 CFS (Q3), 7 CFS (Q7), and 12 CFS (Q12)[13] and using agreed measuring criteria - determined that the nominal 7 CFS and higher did meet the 40% quality standard required in the Forestry Plan, but the nominal 3 CFS did not. FS Ex. 16, p. 12, Table 2-5.

1-3. It is not unreasonable to conclude that diverting nearly 100% of Cascade Creek's flow over 95% of the time would have an adverse effect on aquatic habitat.

1-4. The concept of "reduced ecosystem sustainability" was not contained in any of the studies that are part of this record. It is not mentioned in either condition 17 or 18, but is only contained in a cover letter. There was no formal study of "ecosystem sustainability."

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[12] "The primary purpose of the Delphi Team was to develop biologically based flow recommendations based on changes to fish habitat from various released flows." FS Ex. 16 , p. 3.

[13] The target flow rates were set at the diversion dam to be 3 cfs, 7 cfs, and 12 cfs. The field measured flow was actually 4.49 cfs, 10.89 cfs, and 13.75 cfs, respectively which were thereafter identified as Q3, Q7, and Q12. FS Ex. 16 at Table 2-2.

Practically speaking, the ultimate finding by the Forest Service was that a certain minimum flow was necessary to sustain the 40% quality standard required in the Forestry Plan.

1-5. The Forest Service proposed a PHABSIM study to develop flow-habitat relationships over a range of flows for resident trout in Cascade Creek. FS Ex. 26, p. 11. Such a study would be consistent with agency recommendations in other FERC licensing proceedings. FS Ex. 154, p. 12.

1-6. PSCo proposed to use the Delphi study as an alternative habitat based assessment, generally because of its lower cost.

1-7. Both the Forest Service and FERC agreed to the Delphi Study, which is the only FERC approved habitat based assessment for this license proceeding. FS Ex. 156.

1-8. The Delphi Study was an appropriate alternative approach to the PHABSIM study. The Delphi Study involved the participation of PSCo, through its contractor DTA, which included one of the four voting members of the team, Andrew Scott, as well as the facilitator of the study, Stephen Arnold. The CDOW was represented on the team by Mark Uppendahl, and the Forest Service was represented by David Gerhardt and Justin Jiminez.

1-9. The Delphi team devised management objectives and underlying attainment criteria to principally evaluate what flows would be necessary to maintain the 40% habitat of potential standard. The team conducted a number of meetings in which all members participated, as well as a field study participated in by all voting team members but which facilitator Arnold did not attend.

1-10. The study team agreed to evaluate three different flow rates to determine what minimum stream flows would meet or exceed the minimum standard for aquatic habitat. They selected specific observation sites, and evaluated flow releases of 3, 7 and 12 cfs during their field assessment conducted from September 11-14, 2006. The team members each rated these flows according to the degree that they met the attainment criteria cited in the management objectives for the study.

1-11. The Delphi Team met on December 6-7, 2006 and came up with a team consensus for the appropriate flows. They found that the

nominal 7 cfs (Q7) was the appropriate flow objective.

1-12. Over the winter months, trout generally prefer deeper, slower habitat. Pool depth generally increases with increasing flow to the benefit of resident trout.

1-13. There is no basis to find that an increase in winter flow as prescribed in Condition 17 will have any harmful effect on fish or fish habitat.

1-14. The initial "final" Delphi Report was filed with the FERC on July 9, 2007. FS Ex. 16. PSCo filed a second Final Delphi Study Report with FERC on December 14, 2007. CX 67. The body of the report was the same, but the December filing contained, as an attachment, an estimated hydrology study. The Delphi team could not reach consensus on the contents of the hydrology report, but it did reach consensus to include it as an attachment. PSCo CX 67, p. 119 thru 155.

1-15. The Forest Service flow recommendation in Condition 17 is totally consistent with the consensual minimum instream flow recommendation that was developed through the Delphi process.

1-16. On April 24, 2008, John Devine, on behalf of PSCO, sent a communication to Alfred Hughes, the manager of the Tacoma Project, DTA employee and Delphi Team member Andrew Scott, and DTA employee and botanist Devin Malkin. This communication was to craft ways to "[d]isprove the need for, and the merit of, the likely bypass flow to be recommended by the USFS." This communication clearly delineates a strategy to overturn expected recommendations of the USFS derived from the very Delphi study that PSCo suggested be used as an alternative to the PHABSIM recommended by the Forest Service.

1-17. To further the strategy discussed in the April 24, 2008 memo, PSCo and DTA attempted to conduct several other studies and analyses. I find that the PSCo's analysis of CDOW's fish studies does not support their conclusion that fish habitat below the diversion dam is healthy or robust; I find that the Proper Functioning Condition (PFC) assessment was not conducted according to protocol or for the purposes for which such a study is designed, and that the conclusions from the macroinvertebrate assessment conducted by PSCo are not supported by the evidence submitted.

A. The CDOW fish data

(i) The historic fish data is not reliable for making comparative analysis of fish densities above or below the diversion structure.
(ii) Andrew Scott testified that he recommended that the entire reference section to fish data be removed from the Delphi Study, and the Delphi team agreed that the use of such data was not appropriate for comparison purposes. Mr. Scott's testimony on cross examination indicated that he had much doubt about how to use this data, including how to deal with issues such as statistical reliability, sampling protocol, etc.
(iii) On the other hand, Michael Japhet, the former Senior Aquatic Biologist for CDOW, testified that the CDOW data on fish population does not support the conclusion that the fish population below the dam was superior to that above the dam, and that there was no factual evidence that the Project enhances the ecology of Cascade Creek. He stated that a true and valid comparison study would involve multiple samplings and locations over time, that the electrofishing sampling relied on by PSCo was the product of improper methodologies, including utilizing sampling reaches of too small a size, and that the studies were not comparable sampling events. FS Ex. 107.
(iv) All-in-all, the CDOW fish data were not sufficient to show by a preponderance of the evidence, that the fish population below the dam was equal to or superior to that above the dam.

B. The PFC Study

(i) The studies necessary to determine channel and riparian conditions in this case have not been conducted by PSCo. FS Ex. 99, pp. 3-4, 9-10.

(ii) The PFC conducted by PSCo was not objective, and was not appropriate for the type of use urged by PSCo. FS Ex. 99, p. 4.

(iii) A PFC study is designed to assess livestock impacts to streams and is not an assessment tool that can be used to ascertain whether the bypass reach of Cascade Creek was degraded. FS Ex. 99, p. 11, Tr. 337-340.

(iv) The fact that the PFC study as used in this case was conducted

solely by DTA personnel acting under instructions to "disprove" the recommendations generated by the Delphi study and the fact that it was used for a purpose outside the normal scope of PFC use renders it untrustworthy.

C. The macroinvertebrate assessment

(i) The Macroinvertebrate *Assessment* conducted by PSCo in 2008 was not sufficient to conclude that that the macroinvertebrate populations above and below the diversion are equally robust. Roper Direct FS Ex. 122, p. 7:21-23.
(ii) PSCo's assessment was flawed because PSCo relied on a large scale index rather than finer scale evaluation in order to determine if communities differed in the reaches just above and below the Tacoma Diversion. Roper Direct FS Ex. 122, pp. 10-11.
(iii) PSCo failed to build an appropriate Index of Biological Integrity. FS Ex. 112, pp. 33-34; FS Ex. 50, p. 887; FS Ex. 141, Abstract; FS Ex. 179, p. 3; FS Ex. 180A
(iv) When properly analyzed the macroinvertebrate studies provides evidence that the downstream of the diversion has been degraded. Roper Direct FS Ex. 122, p. 35-36

1-18. The fish abundance or biomass studies done by DTA does not overcome the presumption of correctness of the Delphi Study that the [current] reduced flow volume from " . . .project diversions . . . results in reduction of over-wintering habitat quality and year-round cover features." FS Ex. 16, p. 12.

Ultimate Finding 2-- The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is consistent with the results of the Delphi Study.

2-1. The consensus of the Delphi team was that a biologically-based minimum flow at the diversion dam to Cascade Creek should be 7 cfs. FS Ex. 16, p. 13.

2-2. Andrew Hughes, the manager of the Tacoma Project, addressed the Delphi team at one of its meetings on December 6-7, 2006, and

emphasized that the team should not only consider the needs of the fish, but should take measures to assure that enough water was diverted to Little Cascade creek in the winter so that the flow in the flume would not freeze. CX 15, p. 8.

2-3. Mr. Hughes stated that there had never been a freeze as described above and that the flow had been as little as 2 cfs "so that is as good an estimate as any." CX 15, p. 8.

2-4. While Mr. Hughes testified that he had not been quoted accurately in the notes of the meeting, Tr. 252, he had been copied with a variety of documents which reflected those same meeting notes and never asked the team or FERC to correct his statement. Tr. 252-257.

2-5. PSCo's consultant Scott testified that John Devine and PSCo's representative Hughes was aware of the Delphi Team instream flow recommendation, including the assumptions relied upon by the Delphi Team in reaching that flow recommendation and that he was never informed either by PSCo or by his employer that he was without authority to make these assumptions as their representative on the Delphi Team. Tr. 174-175, 183-184.

2-6. In its FERC Application, PSCo asserts it has always maintained 3 to 4 cfs into the flume and siphon and that this has been sufficient to keep the pipeline from freezing. CX 47, p. B-6.

2-7. Mr. Hughes provided the only information about minimum flows to the pipeline so as to allow the Delphi Team had to make their instream flow recommendation. The Delphi Team minimum bypass flow recommendation provided for a minimum flow of 2 cfs to the Little Cascade Creek flume and the pipeline as a first priority. FS Ex. 16, p. 13.

2-8. Historic diversion practices over the past 36 years show conclusively that winter diversions into the pipeline have been 2 cfs or less. FS Ex.119, pp. 13-14; FS Ex 126, p. 5, FS Ex. 126A, p.1.

2-9. The Forest Service had no need to balance flows between Cascade Creek and Little Cascade Creek.

2-10. While the Forest Service elected not to cross-examine John Devine, his direct testimony was not undisputed, as it was contradicted by the testimony of several other witnesses and the conclusions of the Delphi Study.

2-11. I find that the testimony of Mr. Devine regarding the minimum flows necessary to protect the flowline from freezing is less persuasive than the consensus conclusion of the Delphi team, particularly after the team received input from Mr. Hughes, the manager of the Tacoma Project.

Ultimate Finding 3-- The mandatory condition requiring instream flows below Cascade Creek (USFS Condition #17) is required to comply with the USFS' quantitative "standard", set forth in the Forest-Wide Direction, Wildlife and Fish Resource Management, of maintaining habitat for each species on the forest at 40 percent or more of potential.

3-1.The Forestry Plan requires the attainment of 40% of habitat potential for viable populations of all existing vertebrate wildlife species. "Habitat for each species on the forest will be maintained at least at 40 percent or more of potential." FS Ex. 95, III-26, JS ¶ 8.

3-2. Delphi team member D. Gerhardt stated that the USFS management plan is 40% of bank full wetted perimeter (FS Ex. 16, Appendix B-9), however there are two additional criteria.

3-3. Using only the 40 percent bank full wetted perimeter criteria, PSCo's consultant calculated that only 0.8 cfs of bypass into Cascade Creek is required to meet the 40% requirement.[14]

3-4. The Cascade Creek Riffle and Pool at Observation point #1 appears to achieve a 40% wetted perimeter bank at a bypass discharge flow rate [at the diversion dam] of less than 2 cfs. FS Ex. 16, Appendix D-2 and D-4.

3-5. FS follows a more rigorous three part measurement criteria. These criteria include: 1) Average velocity of one foot-per second; 2) Fifty (50%) of bank wetted perimeter, and 3) an average water depth of 1% of bank full top width, or 0.2 ft, whichever is less. FS Ex. 16 at Appendix. B-9, (Espegren, 1994, FS Ex. No. 153.).[15]

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[14] "The flow needed to meet the 40% quantitative standard is 0.8 cfs" [Exhibit No. CX-51, p. 18, line 18].

[15] The State of Colorado invested in the Colorado Water Conservation Board ("CWCB") the power to implement a statute where the CWCB must "determine that the (continued...)

3-6. The FS and the State of Colorado follow standardized field and office procedures for determining initial instream flow recommendations based upon R2CROSS (a proprietary software program) output.

3-7. I find that the PSCo technique of satisfaction of the 40% criteria solely by percentage of bank wetted perimeter measurements was not scientifically rigorous. (See 3-3 above).

3-8. I find that the three criteria method prescribed by the CWCB and resolved in the prescribed software program known as R2CROSS is a more rigorous evaluation of the degree that a stream has achieved a 40% of its habitat potential.

3-9. All of Cascade Creek and parts of Little Cascade Creek are within SJNF lands and subject to the 1992 SJNF Plan. PSCo's position is that because Little Cascade Creek's water flow will be diminished under the minimum instream flow recommendations of the Delphi Study, therefore Little Cascade Creek's biological potential mandated under the SJNF Plan will not be achieved.

3-10. The Forest Service, in applying its own regulations, has resolved the potentially conflicting definitions of (a)"existing [flow] conditions," (b) "native flow conditions," (c) "baseline [flow] conditions" to mean "flow without augmentation." Thus, the pre-project stream flow of Little Cascade Creek is zero cfs instream flow diverted from Cascade Creek.[16] In performing its duties under applicable statutes

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[15](...continued)
natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; that there is a natural environment that can be preserved to a reasonable degree with the CWCB's water right, if granted; and that such environment can exist without material injury to water rights" (§ 37-92-102(3c), C.R.S. (1990)). The CWCB makes these findings based upon a synthesis of the supporting technical data and a final instream flow recommendation prepared by the CWCB staff. **Standardized field and office procedures** (emphasis added) help to ensure that the CWCB staffs final instream flow recommendations are reasonable, necessary, and consistent. As such, standard field procedures have been established for selecting transect sites and collecting hydraulic and biologic data.

[16] The minimum flow recommendation for Cascade Creek is consistent with Forest Service law and policy. The decision not to impose a minimum flow recommendation on Little Cascade Creek is also consistent with Forest Service law and policy. FS Ex. 151, p.56.

and its own regulations and procedures, a government agency may interpret its own regulations.[17]

3-11. Under the FS interpretation, if Little Cascade Creek is augmented by the priority flow of 2 cfs (under the Delphi Study Plan), then it will always exceed its un-augmented biological potential and there is no need for further analysis.

3-12. Under the FS interpretation, if the maximum bypass of instream flow (under the Delphi Study Plan) to Cascade Creek is implemented, then it will come as close as possible to meeting its biological potential. Thus Condition 17, which diverts limited [2 cfs] priority instream flow to Little Cascade Creek, will come as close as possible to meeting the biological potential of Cascade Creek.

3-13. It is undisputed that PSCo has valid existing water rights to waters of Cascade Creek on SJNF lands[18]. The water rights claimed by PSCo are the antithesis of the Forest Service instream requirements for Cascade Creek. The resolution of controlling Cascade Creek water use rights are beyond the scope of my inquiry.

Ultimate Finding 5-- Only "minor flow accretions" occur between the diversion dam and Mill Creek and therefore the dewatering of Cascade Creek diminishes public uses of the aquatic resources in the bypass reach.

5-1. Except during spring run-off periods, PSCo operates the diversion dam during the majority of the year to give flow priority to the diversion to Little Cascade Creek. JS ¶ 1

5-2. PSCo states plant operators' estimates of flow from approximately 15 individual springs range from 0.25 to 0.75 cfs each and accumulate to roughly 1.5 to 2.5 cfs (total estimated accretion) at the

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[17] *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (holding that "agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."(internal quotations and citations omitted)).

[18] PSCo holds water rights that provide for the diversion of up to 400 cubic feet per second (cfs) from Cascade Creek. Currently, PSCo diverts flows up to the capacity of the wooden flume, which is reported to be 250 cfs. FS Ex. 2, p. 17.

US Highway 550 crossing." FS Ex. 4A, p. B-16, Section 3.2.7.1. PSCo witness Devine stated that field measurements of the full stream flow of Cascade Creek on during various seasons (after the diversion dam and before U.S. Highway 550 bridge) showed that accretions ranged from 1.3[19] to 3.0 cfs[20]. No independent validation of the 10 cfs accretions referenced by PSCo witness Devine could be found.[21] Standard streamflow meter measurements were performed using comparison of the differential of volumes of water between the diversion dam and the bottom of the reach (U.S. Highway 550). CX 34, p. 24 at line 9 -12. The PSCo field team suggested that private cabin owners on FS lands are withdrawing waters from Cascade Creek thus absorbing some of the stream accretions. PSCo CX 34, p. 25.

5-3. Forest Service spring flow measurements for 15 separate springs in this section of Cascade Creek showed accretion quantities as less than those reported by PSCo. Forest Service measured the largest spring flow as 0.02 cfs (two one hundredths of a cubic foot per second) at the source. FS Ex. 120. PSCo pointed out that the point of accretion stream measurement should be at the point of confluence with the main stream body - not the spring source as reported by the FS team. A three person FS measured the full flow of Cascade Creek as 1.12 cfs. avg. (FS Ex. 121) on two winter dates which closely matches PSCo witness Scott's observations at 1.3 cfs. (see 5-2 above). There is no credible proof that the day to day winter flow rates (in upper Cascade Creek) fluctuate significantly in the winter. FS Ex. 119, p. 10. PSCo has records showing that "Excepting minor leakage at the diversion facilities (normally less than 0.2 cfs), the Cascade Creek diversion dam captures the full flow of Cascade Creek approximately 95 percent of the time" FS Ex. 4B, p. E-23.

5-4. Even with PSCo's largest reported accretion of 3.0 cfs (using

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[19] Accretions from these inflows provided an approximate net gain of approximately 1.3 cfs from top to bottom of the bypass reach during the monitoring period. PSCo CX-5, p. 2, CX 22, p.10.

[20] Total accretions actually measured during field studies averaged 3.0 cfs upstream of U.S. Highway 550. FS Ex. 4A, Section 3.2.7.1

[21] Devine Direct Testimony PSCo CX 34, p. 7 line 5, p. 24 line 14.

multi-source validation), the total flow of Cascade Creek is less than Q3 (FS Ex. 16) which means the upper part of the stream (Reach 1) does not meet the Forest Plan of 40% of biological aquatic potential.

5-5. All of Management Objective Criteria 1 thru 4 and 6 thru 9 relate to the spawning and growth of fish in the (upper) Cascade Creek stream habitat. FS Ex. 16, Table 2-1. None of the management objectives related to fish are met at a nominal Q3 (FS Ex. 16) flow rate. In fishery biology, it is a commonly accepted fact that trout require water to survive; more water generally produces more trout. FS Ex. 107, p. 37. I note that the cross-examination of FS witness Michael Japhet failed to overcome this simple premise.

5-6. The uncontradicted testimony of professional fishing guide Tom Knopick concurs with the Delphi Management Object findings and that of FS biologist Michael Japhet. [22]

5-7. I find that current PSCo operational parameters (e.g. nearly complete diversion of instream flow over to Little Cascade Creek) causes the public uses (fishing) of aquatic resources of (upper) Cascade Creek to be diminished.

Ultimate Finding 7-- The USFS requirement in Condition No. 18 that PSCo construct and operate a stream flow device to deliver the flows required by Condition No. 17 was not based on a collaborative determination with utility representatives. The economic viability of the project may be adversely affected by the imposition of Conditions 17 and 18.

7-1. The Delphi study team collaborated to arrive at a biologically-based instream flow sharing plan between Little Cascade Creek and Cascade Creek. FS Ex. 16, p. 13.

7-2. The flow sharing formula specifically prioritized a minimum flow of 2 cfs to go to Little Cascade Creek so as to minimize the

[22] "The diversion dam removes almost all the flow from Cascade Creek most of the time. This has a tremendous negative impact on the quality of the fish habitat and on the fish population in Cascade Creek. All things being equal, more water in Cascade Creek below the diversion dam would mean more fish in the stream below the diversion." FS Witness Knopick Ex. 110, p. 5.

operational difficulties of successful continuous un-manned operation during low flow conditions in the winter season at high mountain altitudes.

7-3. The assigned flow regime for Little Cascade Creek was not based upon a detailed engineering study of the operational parameters of un-manned operation of the diversion dam, open flume, and pipeline at high mountain attitudes in winter conditions.[23]

7-4. PSCo computes that the water flow diversion scheme contained in the Delphi study will result in approximately 16% annual reduction in electricity generation. PSCo CX -43.

7-5. There was no specific economic study conducted, and therefore "the Forest Service has no basis for any statement concerning the economic viability of the project." FS Ex. 151, p. 59.

7-6. The Forest Service requested that PSCo conduct an economic study, but "PSCo refused to conduct the analysis." FS Ex. 151, p. 59.

7-7 The decision to recommend that the first 2 cfs be diverted to Little Cascade Creek was based on a collaborative determination with PSCo, in that the Delphi Team, and the Forest Service, attempted to incorporate the recommendations made by Mr. Hughes at the December 6-7, 2006 Delphi Team meeting.

7-8. I find that the record does not contain evidence that the costs of the stream flow device required by Condition 18 to guarantee the flow required by Condition 17 were considered by the Forest Service; therefore the economics of the construction of the stream flow device was not the product of a collaborative effort between PSCo and the Forest Service[24].

Ultimate Finding 8-- The Delphi Team made an assessment of the storage capacity of Columbine Lake, its contribution to local groundwater sources, the amount of local groundwater flows to Little

[23] "There is no room for error or assumption because getting that number wrong could lead to the type of catastrophic failure of Project water transmission facilities described above." CX-28, p. 3 line 19.

[24] Whether the extra costs are justified by the benefits, and whether PSCo is at fault for not providing the requested economic study is beyond the scope of my fact-finding role in this hearing.

Cascade Creek, and the resulting impacts of the Delphi Team recommendation on the aquatic resources of Little Cascade Creek.

8-1. Although the term "technical assessment" is not formally defined in this record, I find that the Delphi team came to a consensus opinion regarding the storage capacity of Columbine Lake, and the overall aquatic resources of Little Cascade Creek without anything that can be construed as a formal "technical assessment." This is in contrast to the type of assessment that was conducted to determine the condition and flows of Reach 1 of Cascade Creek.

8-2. In the absence of any technical information, the Delphi Team used the Delphi process and applied their best professional judgment to estimate a minimum level of naturally occurring flow in Little Cascade Creek at the spawning habitat location. FS Ex. 151, pp. 59-60.

8-3. The 2.5 cfs that is at issue is relevant to the spawning habitat at the bottom of the Little Cascade Creek study area, and is located on private land. Tr. 132. This habitat was not a matter of big concern to the Forest Service. FS Ex. 151, p. 24. See discussion in Issue 3-11 above.

8-4. To achieve the Delphi Study biologically-recommended minimum flow in Little Cascade Creek, the Delphi Study Team assumed the existence of a year-round accretion flow of 2.5 cfs. CX-33, p. 19.

8-5. Unlike on Cascade Creek where a number of accurate accretion flow measurements were made, no measurements of accretion flows have been made on Little Cascade Creek.

8-6. The Forest Service did review the Little Cascade Creek information on accretion flows provided in PSCo's FERC application, and there was no information in that report that caused the Forest Service to change the flow recommendation in condition No. 17 or any other opinion relative to Little Cascade Creek. Tr. 399-400.

8-7. Given that the participants in the Delphi Study, conducted at PSCo's behest, determined that their analysis was sufficient to establish a consensual determination as to Columbine Lake capacity and the flows and aquatic resources of Little Cascade Creek, I find that PSCo's post hoc attempts to bring in a variety of studies to attack the recommendations of the Delphi Team do not establish, by a

preponderance of the evidence, that the Delphi Team's conclusion that there was a 2.5 cfs accretion flow in Little Cascade Creek, was incorrect.

Discussion

At the heart of this case is the conflict between: (a) the desire of the licensee (PSCo) to continue operations related to the Cascade Creek diversion dam as it has for decades, and (b) the responsible governmental agency (FS) carrying out its duties as it interprets the applicable statutes and regulations. There was no issue raised in this case as to why these particular FS regulations (and ultimately condition 17 and 18) are being applied at this license renewal and not previously. Similarly, the matter of the ownership and applicability of historical water rights held by PSCo are not for my consideration. There is no claim by PSCo that the regulations being applied by FS, which results in Condition 17 and 18, are being applied unlawfully or that PSCo is being singled out for discriminatory treatment at the hands of the regulating agency. Both parties are bound by the 1992 Amended Land and Resource Management Plan for the San Juan National Forest (SJNF) a.k.a. San Juan National Forest Plan which sets out goals and criteria for the enhancement[25] and protection of biological habitat and lawful uses of the SJNF. The SJNF Plan sets out duties that the agency FS are bound to follow.[26] On page 58 of 555 pages of the SJNF Plan are the Standards and Guidelines for fish in the SJNF. Key is

> "Habitat for each species on the forest will be maintained at least at 40 percent or more of potential."

It is clear that the decision to utilize the 40% standard, and whether it should be applied against native or actual conditions, is outside the

[25] "Improve fish habitat on suitable streams and low elevation ponds and lakes". FS Ex. 95 at III-3.

[26] The management requirements in the Forest Direction section set the baseline conditions that must be maintained throughout the Forest in carrying out this Forest Plan. FS Ex. 95 page III-6.

scope of my authority[27].

Even with the relative paucity of decisions issued under the EPAct, it is already well-established that the burden of proof in resolving issues of material fact is on the party that is challenging conditions imposed by the regulatory agency. In reviewing the material facts at issue, I generally found that determinations made via the consensus route of the Delphi Study, which involved the participation of the Forest Service, PSCo and the CDOW, were entitled to significant weight. By definition the Delphi Study was conducted to make quantitative determinations by a team of experts. The theory behind the Delphi Study is that where such consensus is achieved after methodologies are agreed upon and executed, that the results achieved are more valuable and accurate than determinations made by individual experts. This is particularly appropriate where the studies being offered to refute the conclusions of the Delphi Team are themselves somewhat lacking in reliability and are not used for the purposes for which they are designed.

I also find it significant that the Delphi Study was proposed by PSCo as a less costly and time-consuming, if admittedly less reliable, approach than the IFIM PHABSIM study proposed by the Forest Service. For PSCo to propose this approach, and have it accepted by the Forest Service and FERC, and then to deliberately set out to nullify many of the conclusions of the Study is more than a little ironic, particularly where the facilitator and one of the team members were employees of PSCo consultant DTA. It is also noteworthy that Delphi Team Member Scott was not only part of the team's consensus, but kept his manager fully apprised of the team's flow and other recommendations, and was never told until April 2008 that DTA and PSCo management had any opposition to these consensus findings.

I also find it significant that 36 C.F.R. § 219.11 Role of science in planning, requires that responsible officials utilize best available science

[27] Although the contention that native flows applied was ably supported by the testimony during cross-examination of David Gerhart, Tr. 360-362, among others.

in forest planning.[28] I generally find that the best available science supports the findings of the consensus driven Delphi Study rather than the after-the-fact attacks on the study by means that were not persuasive. With respect to the specific disputed material facts, it has become evident to me after the hearing and review of evidence that there is not much of a difference between issues 1 and 4. Thus, the factual findings I have made on these two issues are combined in one section. Briefly stated, I am applying the same principle throughout this decision, namely that the Delphi Study is presumed to be the better science and that the later PSCo studies that were conducted with the specific purpose of countering the Study. The Forest Service has provided ample evidence that the methodology used by PSCo in attempting to use other studies in a manner other than their intended use, and that studies PSCo conducted without Forest Service participation were flawed in a variety of ways.

With respect to issue 2, the primary purpose of the Delphi Team was to develop biologically based flow recommendations based on changes to fish habitat from various released flows. The Delphi team started with the premise that the diversion of flow from Cascade Creek has affected downstream aquatic and riparian resources. Using their collective Best Professional Judgment they analyzed the minimum flow needed in Cascade Creek to achieve the biological potential required by the SJNF Plan. The diversion of all of Cascade Creek over to Little Cascade Creek up to 95% of the time was contrary to their mandated responsibilities with respect to the "40% of biological potential" required in the SJNF

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[28] (a) The Responsible Official must take into account the best available science. For purposes of this subpart, taking into account the best available science means the Responsible Official must:

(1) Document how the best available science was taken into account in the planning process within the context of the issues being considered;

(2) Evaluate and disclose substantial uncertainties in that science;

(3) Evaluate and disclose substantial risks associated with plan components based on that science; and

(4) Document that the science was appropriately interpreted and applied.

(b) To meet the requirements of paragraph (a) of this section, the Responsible Official may use independent peer review, a science advisory board, or other review methods to evaluate the consideration of science in the planning process.

Plan. After conducting field tests at flow levels Q3, Q5, and Q12, the Team analyzed the achievement of management objectives at each flow level at Reach 1 on Cascade Creek. The results of their collective Best Professional Judgment are expressed in Table 2-1 of FS Ex.16. The results of Table 2-1 are summarized with the Team's Instream Flow Recommendation in FS Ex. 16 at 13 and it is consistent with the results of the Delphi Study.

With respect to issue 3, the mandatory standards of the SJNF Plan require the FS to work toward the achievement of 40% of biological potential (as a minimum requirement) for all species in the forest. The Delphi Study team was tasked with finding the stream flow conditions that were likely to achieve success in meeting the SJNF Plan Management Objectives. A study was designed and executed which focused on the field measurement of the parameters necessary to provide reliable data for the R2CROSS (software) stream evaluation. R2CROSS is a standardized field and office procedure to help ensure that final stream flow recommendations are reasonable. The standard methods prescribed by R2CROSS are significantly more rigorous than those relied upon by PSCo. The methods utilized by PSCo to calculate the 40% biological potential do not meet the burden of persuasion sufficient to overcome the FS prescription for stream flow rates.

As to issue 5, PSCo acknowledges that it diverts nearly all of Cascade Creek approximately 95% of the time, but counters with the argument that upper Cascade Creek (Reach #1) is biologically healthy because the accretions (ranging from 1.3 to 3.0 cfs) from minor springs and seeps coalesce with leakage around the diversion dam on upper Cascade Creek (Reach 1) to provide adequate fish habitat until such time as lower streams of Mill Creek and Lime Creek converge with Cascade Creek. The Delphi Study team did not measure the volumes of minor springs and seeps flowing into Cascade Creek. FS employees measured the aggregated springs and seeps on two winter days and tend to agree with the lower end of the PSCo accretion estimate. PSCo witness Devine stated that accretions into the upper section of Cascade Creek ranged from 1.3 cfs to 10 cfs. The record does not indicate where the 10 cfs measurement was properly documented. Mr. Devine stands alone as the

source and thus the claim of a large accretion flow rate (10 cfs) does not rise to the level sufficient to meet PSCo's burden of proof. PSCo's APPLICATION FOR LICENSE (6/25/08) filing makes reference in Section 3.2.7.1 to a measured accretion of "3.0 cfs upstream of U.S. Highway 550." Even using PSCo's highest documented accretion flow rate of 3.0 cfs added to the leakage around the diversion dam still only achieves the Q3 flow level which the Delphi Study Team determined did not meet SJNF Management Objective criteria. The only valid conclusion that can be drawn from the evidence in the record is that the biological potential of Cascade Creek remains diminished until such time as the flow rate increases to a level approaching Q7.

Issue 7 is the only issue where I feel that PSCo has met its burden of proof, at least to the extent of demonstrating that there is a lack of evidence that the Forest Service and PSCo reached a collaborative decision on the economic impact of Condition 18. While it is reasonably clear that the Delphi Team, and the Forest Service, believed they were making an economic accommodation to PSCo by assuring that the first 2 cfs would be diverted to prevent winter freeze-up situations, I could not find anything that was pointed out to me in this record that would indicate that the construction and operation of the device mandated in condition 18 was the product of a collaborative determination. On the contrary, Mr. Devine's undisputed direct testimony indicates that there may be significant economic consequences to the construction and operation of this device that may call into question the economic viability of the project. While economics may have been a consideration for the Delphi Team and the Forest Service, I cannot find that Condition 18 was the result of a collaborative determination.

With respect to issue 8, I agree that there was far less technical consideration given by the Delphi Team to their findings in this area. The Team apparently made some decisions concerning where to focus their actual technical activities and made consensus decisions, based on some assumptions and review of a variety of documents. While I do not find that the Team made a "technical assessment" compared to what they did regarding the flow to Cascade Creek, it is clear that they made an assessment, based on their combined technical expertise and best

professional judgment, which has not been refuted by PSCo.

Order

Copies of this decision shall be served upon the parties. This decision, along with the complete hearing record, shall be immediately forwarded to FERC, pursuant to Rule 1.669(c)(2).
Done at Washington, D.C.

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HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: KIMBERLY COPHER BACK, LINDA RUTH PATTON, d/b/a SWEET REVENGE STABLES, and RICHARD EVANS.
HPA Docket No. 08-0007.
Decision and Order.
May 12, 2009.

HPA – Thermography – Digital palpation.

Robert Ertman for APHIS.
David Broderick for Respondents.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

Preliminary Statement

On October 22, 2007, Kevin Shea, the Acting Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture, ("APHIS") initiated this disciplinary proceeding against the Respondents by filing a complaint alleging violations of the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq*.) (the "Act"). On November 13, 2007, counsel for the Respondents filed an Entry of Appearance and Answer denying generally the material allegations of the Complaint, raising certain affirmative defenses, and requesting that an oral hearing be scheduled.

The case was assigned to the docket of Administrative Law Judge Victor W. Palmer and on April 23, 2008, he conducted a telephonic pre-hearing conference at which time dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Louisville, Kentucky on November 6 and 7, 2008. On request of Respondents' counsel, the hearing date was rescheduled for November 18 and 19, 2008. Following a second telephonic conference prompted by another scheduling conflict, Judge Palmer again continued the hearing and rescheduled it to commence on February 2, 2009. On

January 16, 2009, the case was transferred to my docket.

At the oral hearing held on February 2, 2009 in Louisville, Kentucky, the Complainant was represented by Robert A. Ertman, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC[1] and the Respondents were represented by David F. Broderick, Esquire and Christopher T. Davenport, Esquire, both of the firm Broderick & Associates of Bowling Green, Kentucky.[2] Eleven witnesses testified and nine exhibits were identified and received into evidence.[3] Following the hearing, proposed findings of fact, conclusions of law and briefs in support of their respective positions were submitted by both parties and a Reply Brief was filed by the Respondents.

Discussion

The complaint alleges that on or about April 20, 2007, the Respondent Kimberly Copher Back violated §5(2)(A) of the Act (15 U.S.C. § 1824(2)(A)), by showing or exhibiting "Reckless Youth" as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; that on or about April 20, 2007, Respondents, Kimberly Copher Back, Linda Ruth Patton (doing business as Sweet Revenge Stables), and Richard Evans violated §5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)) entered for the purpose of showing or exhibiting the horse known as "Reckless Youth" as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore; and that on or about the same date, Respondent Kimberly Copher Back, violated § 5(2)(D) of the Act (15 U.S.C. § 1824(2)(D), by allowing the entry for the purpose of showing or exhibiting the horse known as "Reckless

[1] The Complainant was initially represented by Frank Martin, Jr., Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC.

[2] Tad T. Pardue, Esquire, of the Broderick firm also appears as counsel of record on some of the pleadings.

[3] GX-1 through 8 and RX-1. References to the Transcript of the proceedings will be to "Tr."

Youth" as entry number 35, class number 49 at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

In addition to denying generally the allegations of the Complaint, the Respondent raised a number of affirmative defenses, including collateral estoppel, and/or judicial estoppel, any applicable statutes of limitation, and *res judicata*. The affirmative defenses may be disposed of summarily. It is well established that the United States is not bound by any state statute of limitation. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp*., 412 F.2d 1076 (2d Cir. 1970). Similarly, counsel's attempt to invoke the federal statute of limitations is without merit as the Complaint in this action was brought well within the five years set forth in 28 U.S.C. § 2462, limiting the enforcement of civil fines, penalty, or forfeiture, pecuniary or otherwise. The general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). Even were all the requisite threshold elements present necessary to trigger such defenses, which they are not, a detailed discussion of the doctrines of *res judicata,* collateral estoppel and judicial estoppel is not necessary as the issue of whether any determination or disciplinary proceedings instituted by entities other than the Secretary bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondent by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell*, *et al.,* 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S. Department of Agriculture*, WL 2430314 (6th Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

Congress passed the Horse Protection Act in 1970, finding that the practice of deliberately injuring show horses to improve their performance was "cruel and inhumane." 15 U.S.C. § 1822(1). Known

as "soring," the technique employed included fastening action devices, such as chains or padded shoes to the horses' limbs or forefeet and/or applying caustic or irritating chemicals or solutions to their forefeet. The term "sore" is defined in both the Act and the regulations as:

The term "sore" when used to describe a horse means that-

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

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

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

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given. 15 U.S.C. § 1821(3); 9 C.F.R. §11.1

In 1976, Congress amended the Act "to stop an inhumane and harmful practice that the Congress thought would end when it enacted the Horse Protection Act of 1970 (Pub. Law 91-540), but which has not in fact ended." S. Rep. 418, 94th Cong., 1st Sess. 1 (1975). Not only did Congress seek to put an end to the unnecessary cruelty of soring, it also sought to eliminate the competitive disadvantage faced by horse owners who do not practice soring techniques. *American Horse Protection Association, Inc. v. Lyng,* 812 F. 2d 1, at 7 (D.C. Cir. 1987).

In this case, as in most cases brought under the Horse Protection Act, the Complainant relies primarily upon the statutory presumption found in 15 U.S.C. § 1825(d)(5) which provides:

In any civil or criminal action to enforce this chapter or any regulation

under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court ruled that in order to be constitutional, the §1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that rule does not directly apply to this type of administrative proceeding.

Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

In most pre 1993 cases brought under the Act, the statutory presumption does have a direct connection between the presence of bilateral sensitivity and the ultimate fact of soreness and it is logical that an inference of soreness may well be drawn from evidence of bilateral sensitivity, even were there no presumption. *Thornton v. U.S. Department of Agriculture*, 715 F.2d 1508, 1511 (11th Cir. 1983). In 1992, Congress manifested its desire to require greater proof than merely failure of a Veterinary Medical Officer (VMO) digital palpation test.[4]While the case law is replete with examples of affidavits and testimony from examining "veterinarians" concerning a horse's reaction to palpation alone being sufficient to constitute substantial evidence of

[4] *See,* Pub. L No. 101-341, 105 Stat. 873, 881-82 (1992) ….*Provided further,* That none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act.

violations of the Act, if not meaningfully controverted, the statutory presumption is not irrebuttable and cannot be used to shift the ultimate burden of persuasion. *Vlandis v. Kline*, 412 U.S. 441 (1972); *In re: Larry Edwards*, 49 Agric. Dec. 188, 198 (1990).

In applying the statutory presumption, the Department's Judicial Officer and other Administrative Law Judges have consistently noted that "it is the Secretary's belief that the opinions of its veterinarians[5] as to whether a horse is sore is more persuasive than the opinion of DQPs." *In re: Timothy Fields, et al.,* 54 Agric. Dec. 215 at 219 (1995) (citing *In re: Bill Young and Floyd Sherman,* 53 Agric. Dec. [1232] (slip op at 64, August 31, 1994));[6] *In re: C. M. Oppenheimer,* 54 Agric. Dec. 221 (1995); *In re: William Dwaine Elliott,* 51 Agric. Dec. 334 (1992), *aff'd* 990 F.2d 140 (4th Cir.), *cert. den.* 510 U.S. 867 (1993); *In re: Pat Sparkman,* 50 Agric. Dec. 602 (1991); *In re: Larry Edwards,* 49 Agric. Dec. 188 (1990), *aff'd. per curiam,* 943 F. 2d 1318 (11th Cir. 1991), *cert.den.* 503 U.S. 937 (1992). As was the case in *Young,* even though possibly misplaced, the same greater weight and preference has been afforded the testimony of VMOs even where there has been testimony from veterinarians who are equine specialists employed by Respondents. *Young* at 1277[7]. Despite the fact that the holding in *Landrum* makes it clear that the possibility exists that the presumption may be rebutted by a Respondent, even a casual reading of the recent cases tends to belie such a notion, strongly suggesting instead that rebutting the presumption

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[5] Although the cases routinely interchange the term veterinarian and VMO, the evidence in this case establishes that not all Veterinary Medical Officers are licensed veterinarians.

[6] The Judicial Officer's decision in the *Young* case was reversed on appeal, 53 F.3d 728 (5th Cir. 1995).

[7] *See also*, *In re: Perry Lacy,* 66 Agric. Dec. 488 (2007); aff'd, 278 Fed Appx. 616 (6th Cir. 2008) In *Lacy,* the Administrative Law Judge relied upon testimony of a licensed equine practioner with years of significant experience treating West Nile cases. The Judicial Officer relied instead upon the testimony of VMO Bourgeois as being entitled to greater weight despite the fact that his testimony made it clear that he had little familiarity with the disease. The testimony in that case did not disclose the fact that the VMO was not licensed.

is an all but impossible burden in any case where a Veterinary Medical Officer employed by the Department opines that the horse is sore after being palpated.[8] While it now appears from the testimony at the hearing that the Department will be transitioning to the use of thermography to determine soreness in future cases, digital palpation was the sole diagnostic means employed to prove the existence of soreness in this

[8] *See: In re: Ronald Beltz and Christopher Jerome Zahnd,* 64 Agric. Dec. 1438 (2005), *rev.,*64 Agric. Dec. 1487 (2005); *Motion for reconsideration denied,* 65 Agric. Dec. 281 (2006); *Aff'd. sub nom. Zahnd v. Sec'y of the Dep't of Agric.,* 479 F. 3d 767 (11th Cir. 2007). In *In re: Perry Lacy,* 65 Agric. Dec. 1157 (2006), the Administrative Law Judge found that evidence that the horse suffered from West Nile virus was sufficient to rebut the findings of the DQPs and VMOs that the horse was sore. On appeal, the Judicial Officer disagreed, reversed the ALJ's findings, found the statutory presumption was not rebutted and imposed a civil penalty and suspension upon Mr. Lacy. 66 Agric. Dec. 488 (2007). On appeal, the Sixth Circuit affirmed the decision of the Judicial Officer, indicating that the decision of the Department was entitled to significant deference under the *Chevron* doctrine (*Chevron, USA, Inc. v. Nat'l Resources Defense Council , Inc.,* 467 U.S. 837 (1984)). 278 Fed. Appx. 616 (6th Cir. 2008). In that case, contrary to the instant case, the veterinary licensure status of Lynn P. Bourgeois, the VMO who was the principal government witness (who is also one of the witnesses in this case) was not called into question. Had the Court been aware of the fact that the VMO was not licensed as a veterinarian in any state, it remains to be seen as to whether the Court would have reached the same result in affording his opinion testimony any serious consideration or weight as an expert when his testimony was in diametrical opposition to that coming from a highly experienced licensed veterinarian having superior qualifications and 35 years of specialized equine practice, including the experience of handling numerous West Nile cases. The witness's (Bourgeois) blanket conclusion in the Lacy case that there was no naturally occurring condition, no disease condition, and no kind of injury which would cause bilateral sensitivity other than the deliberate application of either caustic chemicals or the use of chains was legally incorrect in light of the holding in *In re: Horenbein,* 41 Agric. Dec. 2148 (1982). By way of contrast, the Office of Personnel Management (OPM) requires that incumbent Administrative Law Judges must be licensed to practice law or be in good standing, despite the fact that they are generally precluded from practicing law while performing duties as a judge. *See*, 5 C.F.R. § 930.204(b). A similar requirement exists for military attorneys who are serving as judge advocates or who are detailed to perform legal duties. 10 U.S.C. §3065(e); Article 27, Uniform Code of Military Justice, 10 U.S.C § 827; and DA Pam 600-3, ¶39-2(b)(1). Similarly, the Army also requires all members of its Veterinary Corps to be licensed. DA Pam 600-4, ¶13-1(a).

case.[9]

The evidence in this case indicates that the Respondent Kimberly Copher Back is the owner of the horse known as "Reckless Youth" and that the horse was entered as entry number 35, class 49 (the Novice Amateur class) in the Spring Jubilee Charity Horse Show held in Harrodsburg, Kentucky on April 20, 2007. "Reckless Youth" is a stallion and had been trained by the Respondent Richard Evans for approximately two years before this particular show. Prior to being allowed to compete in the class, "Reckless Youth" was presented by Evans for a pre-show inspection which was performed by Designated Qualified Person (a "DQP") Greg Williams. (Tr. 215). The pre-show inspection was unremarkable and the horse was moved to the warm up area for last minute preparations and pre-competition warm up by the Respondents Richard Evans and Kimberly Copher Back, the latter of whom would be riding the horse in the event. (Tr. 266-269). "Reckless Youth" ridden by Respondent Back tied for third place in the competition and was taken back to the inspection area and subjected to a post-show inspection.

During the course of the post-show inspection, "Reckless Youth" was examined initially by VMO Miava Binkley who after digitally palpating the horse concluded that the animal exhibited bilateral sensitivity and thus was sore. VMO Binkley did not observe any abnormality of gait, problem with locomotion, swelling, redness, scarring, blisters, or chemical odors. Tr. 59 at 1-5, 77 at 15-18. The horse then was re-examined by DQP Greg Williams who testified that his post-show examination produced no sensitivity on the left and inconsistent responses upon digital palpation on the right; as a result, in his opinion, the horse was not sore. Tr. 217. The horse was then examined by VMO Lynn P. Bourgeois who agreed with VMO Binkley's

[9] *See,* http://www.aphis.usda.gov/animal_welfare/hp/ ; http://www.aphis.usda.gov/animal_welfare/hp/downloads/thermography_presentation.pdf; http://www.aphis.usda.gov/animal_welfare/hp/downloads/faq_useofthermo.pdf ; and http://www.aphis.usda.gov/animal_welfare/hp/downloads/stakeholder/ac_su_04-08-09.pdf.

findings.[10] VMO Bourgeois also failed to observe any abnormality of gait, problem with locomotion, swelling, redness, scarring, blisters, or chemical odors. Tr. 153 ay 7-13, 18-20. The two VMOs conferred as to their findings, an APHIS Form 7077 was prepared by VMO Binkley, the form was first signed by her, and then countersigned by VMO Bourgeois.[11]

While as noted previously the exclusive reliance upon the use of digital palpation to determine whether a horse has been sored has in the past been upheld in numerous cases, including both the Sixth and District of Columbia Circuits,[12] despite at least one invitation to do so

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[10] Richard Evans, who was present with the horse throughout the post-show examination, testified the reactions the VMOs received were not in the same areas. Tr. 290.

[11] In many prior cases, each of the VMOs would mark the form, with one using "x"s and the other using "o"s so that the findings of each individual VMO were distinguishable as to where they found sensitivity. In this case, only the "x"s were placed on the form by VMO Binkley and VMO Bourgeois signed the form indicating that he agreed with what had been marked. According to VMO Bourgeois, all that is needed is that "we agree on some spots." Tr. 152.

[12] *See, e.g., In re: William J. Reinhart,* 59 Agric. Dec. 721, 751 (2000), *aff'd. per curiam,* 39 Fed. Appx. 954 (6th Cir. 2002), *cert. den.* 123 S. Ct. 1802 (2003); *In re: David Tracey Bradshaw,* 59 Agric. Dec. 228 (2000); *In re: Gary Edwards,* 55 Agric. Dec. 892 (1996); *In re: John T. Gray,* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (1996); *In re: Mike Thomas,* 55 Agric. Dec. 800, 836 (1996); *In re: Kim Bennett,* 55 Agric. Dec. 176, 180-81, 236-37 (1996); *In re: C.M. Oppenheimer,* 54 Agric. Dec. 221, 309 (1995); *In re: Kathy Armstrong,* 53 Agric. Dec. 1301, 1319 (1994), *aff'd. per curiam,* 113 F. 3d 1249 (11th Circ. 1997) (unpublished); *In re: Danny Burks,* 53 Agric. Dec. 322 (1994); *In re Eddie Tuck,* 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed,* No. 94-1887 (4th Cir. Oct. 6, 1994); *In re: Ernest Upton,* 53 Agric. Dec. 239 (1994); *In re: William Earl Bobo,* 53 Agric. Dec. 176, 201 (1994), *aff'd.* 52 F.3d 1406 (6th Cir. 1995); *In re: Jack Kelly,* 52 Agric. Dec. 1278, 1292 (1993), *appeal dismissed,* 38 F. 3d 999 (8th Cir. 1994); *In re: Charles Sims,* 52 Agric. Dec. 1243, 1259-60 (1993); *In re: Cecil Jordan,* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (1993), *aff'd. sun nom. Crawford v. United States Department of Agriculture,* 50 F. 3d 46 (D.C. Cir.), *cert. den.,* 516 U.S. 824 (1995); *In re: Paul A. Watlington,* 52 Agric. Dec. 1172, 1191 (1993); *In re: Glen O. Crowe,* 52 Agric. Dec. 1132, 1151 (1993); *In re: Billy Gray,* 52 Agric. Dec. 1044, 1072-73 (1993), *aff'd.,* 39 F. 3d 670 (6th Cir. 1994); *In re: Linda Wagner,* 52 Agric. Dec. 298 (1993); *In re: John Allan*

(continued...)

(which was rejected), the Department's continued use of the "scientific" technique has never been subjected to evaluation standards using the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786 (1993).[13] In *Daubert,* the Supreme Court imposed upon trial judges the task of ensuring that an expert's testimony both rests upon a reliable foundation and is relevant to the task at hand. The Court set forth four factors to be considered in deciding whether a scientific technique or theory is sufficiently reliable as to allow expert testimony based upon it. There, the Court noted:

> Proposed testimony must be supported by appropriate validation-*i.e.,* "good grounds," based upon what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.*Id.* at 590

In enumerating the factors to be considered in determining reliability, the Court indicated that:

> "a key question to be answered was whether a …technique is scientific … will be whether it can be (and has been) tested." …

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[12](...continued)
Callaway, 52 Agric. Dec. 272, 287 (1993); *In re: Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (1993); *In re: A. P. Holt, et al.* (Decision as to Richard Polch and Merie Polch), 52 Agric. Dec. 233, 246 (1993), *aff'd. per curiam,* 32 F. 3d 569 (6th Cir. 1994); *In Re: Larry E. Edwards, et al.,* 49 Agric. Dec. 919 (1990); *In re: A. P. Sonny Holt, et al.,* 49 Agric. Dec. 853 (1990); *In re: A.S. Whitcomb,* 36 Agric. Dec. 1165 (1976).

[13] The Judicial Officer considered *Daubert* not to apply because the Federal Rules of Evidence do not normally apply to the Department's disciplinary proceedings. *In re: Carl Edwards & Sons Stables, et al.,* 56 Agric. Dec. 529, 582 (1997). In light of *Landrum,* however, it would appear that in order for the statutory presumption to pass constitutional muster, there is at least limited applicability of the Federal Rules of Evidence and an obligation to determine whether there is sufficient reliability to the technique when prior reliance appears to have been based upon the testimony of USDA "veterinarians" who had superior qualifications and decades years of significant experience with horses.

> "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication." …

"in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error," …

"Finally, "general acceptance" can yet have a bearing on the inquiry." *Id*. at 593-594

In its decision to transition to the use of thermography as the basis for enforcement actions, despite contrary earlier positions that the Auburn and Ames studies were obsolete,[14] the Department appears to have finally vindicated and accepted as valid the comprehensive body of studies pioneered by Dr. Ram C. Purohit, Associate Professor, Department of Large Animal Surgery and Medicine at the Auburn University School of Veterinary Medicine in Auburn, Alabama between 1978 and 1982 (Auburn Study) along with those of numerous others which have consistently found thermography and other available diagnostic tools to provide a more accurate and objective means of determining whether a horse had been sored than relying exclusively upon palpation.[15] The reliability of the exclusive use of palpation as a

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[14] Departmental Decision of Judicial Officer Donald A. Campbell in *In re: Bill Young and Floyd Sherman,* 53 Agric. Dec. 1232 at 1268 (1994). Both the Ames Study and the Auburn Study were done before the Scar Rule was promulgated in 1979. (9 C.F.R. § 11.3). *See also*: *American Horse Protection Association, Inc. v. Lyng,* 681 F. Supp. 949 (D.D.C. 1988). In that case, the Department attempted to characterize the Auburn Study as a study of the use of thermography as a diagnostic tool, rather than its actual scope as a study of soring methods and techniques. The Auburn Study is actually a series of 18 separate studies.

[15] R. Purohit, D.V.M., Ph.D., *Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors,* (Summary of Research from September 1978 to December 1982), School of Veterinary Medicine, Auburn University, 1982; T. Turner, D.V.M. , M.S. *Utilizing Thermography to Assess Compliance with the Horse Protection Act*, School of Veterinary Medicine, 2009; *See also,* H.A. Nelson, D.V.M. and D.L. Osheim, B.A., *Soring in Tennessee Walking Horses: Detection by Thermography,* (USDA, National Veterinary Services Laboratories, Ames, Iowa, 1975 (Ames Study); *Thermographic Enforcement of the*

(continued...)

diagnostic tool was questioned and the possible adoption of the use of thermography was recommended by United States District Judge Gasch in his 1988 decision in *American Horse Protection Association, Inc. v. Lyng*, 681 F. Supp. 949, 956-958 (D.D.C. 1988).[16] Congress has also expressed reservations and some concern on the use of palpation as the sole basis for determining whether a horse had been sored.[17] Thus far however, only the Fifth Circuit has found the use of palpation alone to determine whether a horse has been sored to be unacceptable. *Young v. United States Department of Agriculture,* 54 Agric. Dec. 208, 53 F. 3d 728 (5th Cir. 1995); *Bradshaw v. United States Department of Agriculture,* 254 F. 3d 1081 (5th Cir. 2001) (Table).[18]

Applying the *Daubert* factors to the use of palpation as the sole diagnostic tool to determine whether a horse has been sored, it appears

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[15](...continued)
Horse Protection Act, Vol 172, J.A.V.M.A. (1978); L.vanHoogmoed, J.R. Snyder, A.K. Allen and J.D. Waldsmith, *Use of Infrared Thermography to Detect Performance-Enhancing Techniques in Horses,* University of California at Davis School of Veterinary Medicine, 2001. USDA previously took the position that the Auburn Study was a study of the use of thermography as a diagnostic tool, rather than a study of soring methods and techniques. *American Horse Protection Association, Inc. v. Lyng*, 681 F. Supp. 949, 953 (D.D.C. 1988).

[16] This action was originally brought as *American Horse Protection Association, Inc. v. Block*, No. 84-3298 memo op (October 30, 1985), *rev and remanded, sub. nom. American Horse Protection Association, Inc. v Lyng,* 812 F. 2d 1 (D.C. Cir. 1987); *on remand,* 681 F. Supp. 949 (D.D.C. 1988)

[17] Restrictive and precatory language were inserted in the Animal Plant and Health Inspection Service (APHIS) appropriations for the fiscal years 1993 and 1994 which were critical of the continued use of digital palpation as the exclusive means of determining whether a horse had been sored. For a brief summary and discussion of those provisions, *See: Young,* 53 Agric. Dec. at 1283-1286.

[18] The Court noted the testimony of several highly qualified expert witnesses who testified that soring could not be diagnosed through palpation alone and also that Congress had expressed its disapproval of soring diagnoses based solely upon palpation in an appropriation bill. *Young* at 54 Agric. Dec. 208, 211-212; *See,* Pub. L. No. 102-341, 106 Stat. 873, 881-882 (1992); *see also,* H.R. Rep. No. 617, 102d Cong., 2d Sess. 48 (1992); S. Rep. No. 334, 102 Cong. 2d Sess. 49 (1992).

that its exclusive use fails each of the criteria required provide the degree of reliability deemed appropriate and necessary under the four factors. Palpation is subjective in nature[19] and not susceptible to being objectively tested; it has been found wanting in publications; due to its subjectivity, error rates are not quantifiable, and its general acceptance is no longer universal, a matter apparently now conceded by the Department with its promulgation of the use of thermography on April 9, 2009 as an additional and more objective tool in the detection of the soring of horses.

Given my conclusion that despite precedent palpation is not sufficiently "scientific" as to be a reliable diagnostic means under the *Daubert* standard, I find that in light of the conflict between the opinion of the DQP that the horse gave inconsistent responses and that of the VMOs that the responses were consistent enough,[20] that the Department failed to establish that "Reckless Youth" had been "sored" by either chemical or mechanical means and accordingly, the statutory presumption was not triggered. Neither VMO Binkley nor VMO Bourgeois found evidence that any illegal device had been used, nor did they find any evidence of the use of caustic chemicals. Tr. 27, 29, 34, 142-3, 145. Although in the past, the testimony of VMOs has been afforded unquestioned and nearly unanimous weight and acceptance on the basis of their being highly qualified "veterinarians,[21]" the practice of unconditional acceptance of their opinion as to the ultimate facts of a case without supporting acceptable scientific evidence would appear to

[19] VMO Binkley conceded that palpation was subjective. Tr. 77. Bourgeois while acknowledging that thermography was an objective test producing objective findings, indicated "Yeah, that's why I don't like it." Tr. 135. In describing the scientific technique of palpation, he testified "…you touch an ouchy spot and you get a response. " *Id.* The fact that three individuals got different results with the same procedure would tend to strongly indicate the subjectivity of the method.

[20] The manner in which the APHIS Form 7077 was completed made it impossible to verify the extent of consistency between the two VMOs. VMO Bourgeois testified that the two of them did not have to agree on all reaction points, but only that they had to agree on some spots. Tr. 152. Richard Evans felt the examinations of the VMOs produced reactions in different spots. Tr. 290.

[21] To refer to VMOs as veterinarians might be considered a catachresis.

make the purpose of any hearing nugatory, if not totally meaningless.[22] Moreover, acceptance of the testimony of VMOs as that of "veterinarians" appears misplaced as the term "veterinarian" is defined by Websters as "one qualified and authorized to treat diseases and injuries of animals."[23] In this case, neither VMO was able to testify as to the means by which the horse had been sored, i.e., whether done by chemical or mechanical means. Although APHIS Form 7077 contains separate boxes specifically designed to indicate the method of soring, in this case, only the ultimate conclusion of the VMOs that the horse was sore was entered on the APHIS Form 7077 without further elaboration. None of the boxes indicating what method was used in making the horse "sore" were marked and on cross examination, neither VMO found fault with the horse's locomotion or could determine what method had been used, only that they were of the opinion that the horse was "sore."[24]
In light of my finding that the horse was not sore, it is unnecessary to determine to discuss or make findings as to whether there was inappropriate or questionable interaction with the DQP's fiancé by one

[22] Although both VMOs are graduates of a school of veterinary medicine, neither at the present time would meet the requirements of 9 C.F.R. § 11.7(1) to be licensed as a DQP as that paragraph incorporates the accreditation provisions under part 161 of chapter I of title 9. 9 C.F.R. § 161.2(a)(2)(ii) requires that the veterinarians be licensed or legally able to practice in the state in which he or she wishes to be accredited.

[23] Websters Ninth New Collegiate Dictionary, Merriam Webster, Springfield , Massachusetts, 1990, p. 1312. The requirement "authorized" implicitly requires licensure. *See,* http://www.aphis.usda.gov/animal_health/vet_accreditation/apply.shtml

[24] Only Item 28 Is Horse Sore was marked "Yes." No entries were made on Item 22 Action Devices; VMO Binkley indicated that she did weigh the chains and found them to be within the regulatory limits of 6 ounces, but did not record the weights. Tr. 23, 26-27, 96-97. Neither was any entry was made on Item 24 Prohibited Substances. If the chains were within regulatory limits, Phase XI of the Auburn Study indicates that chains of up to and including 6 ounces will not produce harmful effects, other than possible hair loss.

of the VMOs[25] which could possibly have provided motivation to commit calumny or at least cast the DQP in a less than favorable light, or to have to consider what, if any, inference to draw from the absence of evidence of the DQP having been disciplined for of substandard performance at the show[26] despite what was characterized by VMO Binkley as his "general pattern of poor performance." Tr. 48. Suffice it to say that after viewing the excerpt of the video of the examinations and the lighting conditions at the time of the examinations,[27] it is difficult to fully accept as credible the testimony of VMO Binkley that she was capable of observing whether the DQP's thumb was "blanched" during his examination of the horse, particularly in view of her admission that her eyesight was not that good. Tr. 14-17, 67-68; GX-8. VMO Bourgeois testified that he did observe the DQP's examination. Tr. 132. In assessing the credibility of the witnesses, I found the testimony of the DQP to be credible and based upon a genuine belief that his examination on digital palpation produced inconsistent responses from the horse. Tr. 217, 224. Although VMO Binkley faulted his examination technique as she felt that the DQP was not exerting sufficient pressure, she admitted that her eye sight "is not that good" and agreed that his examination did not elicit a pain response. Tr. 68. As the owner of Tennessee Walking horses who from time to time exhibited his horses himself in shows

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[25] Both the DQP and his fiancé, Kim Angel, testified about their interaction with VMO Bourgeois. Tr. 208-11, 234-5. VMO Binkley noted that there had been a "heated discussion" and described it as a "confrontation." Tr. 49, 54.

> Q.But there was a confrontation.
>
> A.There was.
>
> Q.And in fact Dr. Bourgeois was told very pointedly in your presence that the DQP would not tolerate his wife being talked to the way she was.
>
> A. I remember something to that effect. Tr. 54 at 6-13

VMO Bourgeois testified that he had a "problem" with the DQP's wife (actually his fiancé), but in contrast to his recall of the specifics of his examination of the horse, indicated that he didn't remember that night "that well." Tr. 122. *See also,* Para. 7, Code of Ethics for Veterinarians.

[26] Both VMOs indicated that their duties included monitoring the performance of the DQP. Tr. 47, 105.

[27] GX-8.

where he was not involved as a DQP,[28] rather than having any predisposition to be lenient to other exhbitors, the DQP would have significant incentive to fairly examine the horses at the shows at which he was employed to preclude unfair competition by others in the industry.

Even had I found "Reckless Youth" to have been sore, which I do not, I would not have found Linda Ruth Patton to have violated the §5(2)(B) of the Act by reason of entering the horse. In this action, although such documents are typically introduced, no effort was made to enter documentary evidence such as any of the entry forms or cancelled checks paying entry fees. While admissible as having been prepared in the course of preparation of the case, Government Exhibit 4 was given little weight given the failure of the investigator to obtain Ms. Patton's signature or initials as to its accuracy and the exhibit's paraphrasing style[29] rather than the question and answer format typically taught at the Federal Law Enforcement Training Center at Glyncoe, Georgia or other law enforcement training facilities. When called by the Government as a rebuttal witness,[30] while she acknowledged that Sweet Revenge Stables was located on land that she owned, she indicated that she did not operate the horse training business. Tr. 313.

Although VMO Binkley testified that she informed the custodian (Respondent Evans) that the horse was sore after the examination was concluded (Tr. 91-2), Evans denied that was communicated to him. Tr. 291. In fact, Evans testified that he was told that he was not going to get a ticket:

Q Now at that stage, she's asking you the number, and presumably we've seen everything that they have videotaped, at least that's the tape they provided to us to introduce as an exhibit. At any time did she or Dr.

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[28] Tr. 197.

[29] Stephen Fuller testified that when Interview Logs were prepared, they would "typically try to write up the interview where it will flow smooth." Tr. 186.

[30] Although the Government was allowed to call Ms. Patton as a rebuttal witness over objection of Respondent's counsel, the questions asked should properly have been asked during the Government's case rather than as rebuttal testimony.

Bourgeois give you the information that they thought that you were in violation of the Horse protection Act?

A. All I was ever told, I asked if I was being issued a ticket, and they said no. They said, we're going to take information on two feet. But they never told me that he was sore in two feet.

They said they were taking information, and they said it would be up to someone else to decide, and they did mention a hearing officer, they said would be the one to decide. Tr. 291-2

Evans went on to indicate that had he known that they found the horse to be sore, he would have quarantined the horse in Harrodsburg and waited on the vet to get there, as it was illegal to transport a sore horse. Tr. 292. If credence is given to the account related by Evans, an examination by a licensed veterinarian might have also provided either confirmation that the horse was sore or evidence which might have been exculpatory.

Upon consideration of the testimony given at the hearing the evidence of record, and the proposed findings, conclusions and briefs filed by the parties, I find that the allegations of violations contained in the Complaint brought against the Respondents should be dismissed. The following Findings of Fact, Conclusions of Law and Order will entered.

Findings of Fact

1. The Respondent Kimberly Copher Back is a resident of Mount Sterling, Montgomery County, Kentucky. At all times material herein, she owned "Reckless Youth," a registered Tennessee Walking Horse that was entered as entry number 35, class number 49 of the Jubilee Spring Charity Horse Show held on April 19-21, 2007 in Harrodsburg, Kentucky for the purpose of showing or being exhibited.

2. The Respondent Richard Evans is a resident of Mount Sterling, Montgomery County, Kentucky. He had trained "Reckless Youth" at Sweet Revenge Stables which is located on property owned by his

mother-in-law, Respondent Linda Ruth Patton, for approximately 24 months prior to the horse being entered in the show which is the subject of this action and was the one responsible for entering the horse at the show.

3. Respondent Linda Ruth Patton is a resident of Mount Sterling, Montgomery County, Kentucky where she owns the land upon which Sweet Revenge Stables is located, however, the training and stable operation is the responsibility of Respondent Richard Evans.

4. At the pre-show inspection for class 49 on April 20, 2007, "Reckless Youth" was found to have no evidence bilateral sensitivity by the examining DQP and was passed as being eligible to compete.

5. "Reckless Youth" was ridden by Kimberly Copher Back during the competition and was tied for third in the class. By reason of placing in the class, "Reckless Youth" was subjected to a post-show inspection, where the horse was examined in turn by means of digital palpation by VMO Binkley, DQP Williams, and VMO Bourgeois.

6. The DQP Williams has three or four years of experience as a DQP and has no record of disciplinary action ever having been taken against him for the performance of his duties as a DQP. Tr. 194, 202. More specifically, no record exists of any recommendation of disciplinary action being made against him for his performance of his duties at the show where the alleged violations occurred in this action.

7. Although both VMOs are graduates of a school of veterinary medicine, neither is currently licensed to practice veterinary medicine in any state and licensure is not a condition of employment as a VMO.

8. Although the DQP found the horse not to be sore, the VMOs concluded that the horse was sore. Although the Department is transitioning to the use of thermography as an additional technique, the more subjective test of digital palpation (as evidenced by the differing findings of the examiners) was the sole diagnostic criteria used in this case.

9. There was no testimony or documentary evidence that "Reckless Youth" exhibited any abnormality of gait, locomotion, swelling, redness, scarring, blisters or chemical odor.

10. On the basis of the evidence before me, the Department failed to

meet its burden of proof in establishing that "Reckless Youth" was "sore" on April 20, 2007.

Conclusions of Law

The Secretary has jurisdiction in this matter.

1. As "Reckless Youth" was not "sore" within the meaning of the Act on April 20, 2007, the Respondents did not violate the Act as alleged in the Complaint.
2. The evidence of alleged violations of the Act were based upon diagnostic techniques which were not sufficiently reliable using *Daubert* criteria as to raise the 15 U.S.C. §1825(d)(5) presumption.

Order

For the foregoing reasons, the Complaint is dismissed on its merits.

This Decision will become final and effective 35 days after service thereof upon the Respondent unless there is an appeal to the Judicial Officer by a party to the proceeding.

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

Done at Washington, D.C.

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INSPECTION AND GRADING

COURT DECISIONS

LION RAISINS, INC. v. USDA.
No. 1:08-CV-00358-OWW-SMS.
Filed January 21, 2009.

[CITE AS: 2009 WL 160283 (E.D.Cal.)].

I&G – F.O.I.A.

United States District Court,
E.D. California.

MEMORANDUM DECISION AND ORDER RE PLAINTIFF'S MOTION FOR DISCOVERY

OLIVER W. WANGER, District Judge.

I. INTRODUCTION

Before the court is a "motion for discovery" brought by Plaintiff Lion Raisins, Inc. ("Lion") pursuant to Federal Rules of Civil Procedure 26 and 56(f)(2).[1] Lion seeks discovery in connection with various requests it made, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records of the United States Department of Agriculture ("USDA"). The court heard oral argument on the motion on January 16, 2009. For the reasons discussed below, Lion's motion for discovery is denied.

II. DISCUSSION AND ANALYSIS

[1] After filing its principal brief in support of its motion, Lion submitted a supplemental memorandum of points and authorities (Doc. 22). Lion also submitted a twenty-four-page supplemental declaration (Doc. 21), and then later a "further" declaration (Doc. 22-2). Lion motioned for approval of its supplementation (Doc. 22), and the court grants this motion.

A. Lion's Motion Under Rule 56(f)(2)

The USDA has not yet moved for summary judgment in this case. Accordingly, Lion's motion under Rule 56(f)(2) is premature and, on that basis, is denied. *See Pabaon Osvaldo v. U.S. Penitentiary Lewisburg Warden,* No. Civ. 3:CV-05-155, 2006 WL 485574, at *4 n. 6 (M.D.Pa. Feb.28, 2006) ("Plaintiff's motion is not properly made pursuant to Rule 56(f) as Defendants have not moved for summary judgment in this action."); *FEC v. Carlucci,* CIV. A. No. 87-1747, 1988 WL 35378, at *2 (D.D.C. Mar.31, 1988) ("[P]laintiff cannot rely on Rule 56(f) because no motion for summary judgment is pending at this time."). When the USDA files a motion for summary judgment, Lion can move under Rule 56(f)(2) and attempt to establish that discovery is warranted under this rule.

B. Lion's Motion Under Rule 26

1. Local Rule 37-251

Lion also moves for discovery under Rule 26, and such motions are subject to the meet and confer requirements of Local Rule 37-251, with which Lion did not comply. Non-compliance with Local Rule 37-251 typically results in a denial of the discovery motion. *See, e.g., Peyton v. Burdick,* No. 07-cv-0453 LJO TAG, 2008 WL 880573, at *1 (E.D.Cal. Mar.31, 2008) ("Plaintiff's motion is not accompanied by a certification or an affidavit indicating that he conferred with Defendants' counsel and attempted to resolve this discovery dispute without resorting to filing a motion. Accordingly, Plaintiff's motion to compel discovery fails to comply with FRCP 37(a)(1) and L.R. [3]7-251, and must be denied."); *Abubakar v. City of Solano,* No. CIV S-06-2268 LKK EFB, 2008 WL 508911, at *3 (E.D.Cal. Feb.22, 2008) (denying a discovery motion without prejudice to extent it dealt with discovery issues over which the parties did not "meet and confer" as required by Local Rule 37-251). When questioned by the court whether there was a reason why Lion did not comply with the Local Rules, Lion offered no reason for its non-compliance. Lion was allowed to present oral argument on its

motion nonetheless, and, after hearing from both parties, it was apparent that granting Lion's motion and permitting discovery at this time would be inappropriate.[2]

2. Discovery In FOIA Cases

In a FOIA case, like in others, "[a] district court has wide latitude in controlling discovery, and its rulings will not be overturned in absence of a clear abuse of discretion." *Lane v. Dep't of Interior,* 523 F.3d 1128, 1134 (9th Cir.2008) (internal quotation marks omitted). Given that *Lane* explicitly recognized that a district has "wide latitude in controlling discovery" in a FOIA case, it is indisputable that discovery is permissible in a FOIA case (otherwise there would be no latitude). Although discovery is permissible in a FOIA case, "discovery is limited because the underlying case revolves around the propriety of revealing certain documents. Accordingly, in these cases courts may allow the government to move for summary judgment before the plaintiff conducts discovery." *Lane,* 523 F.3d at 1134 (citation omitted).

FOIA cases are usually decided at the summary judgment stage. *Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep't of the Treasury,* 534 F.Supp.2d 1126, 1131 (N.D.Cal.2008) ("Procedurally, district courts typically decide FOIA cases on summary judgment before a plaintiff can conduct discovery."); *Sakamoto v. EPA,* 443 F.Supp.2d 1182, 1188 (N.D.Cal.2006) ("It is generally recognized that summary judgment is a proper avenue for resolving a FOIA claim."). At the summary judgment stage, the government is often the moving party and ordinarily it submits affidavits and argument to establish the applicability of an exemption as to withheld records, the adequacy of its search for responsive records, and any other matters necessary to support the motion. To obtain summary judgment in its favor, the government must establish that an exemption applies as to withheld documents, *Dobronski v. FCC,* 17 F.3d 275, 277 (9th Cir.1994), and that its search for responsive records was adequate, *Zemansky v. EPA,* 767 F.2d 569, 571-73 (9th Cir.1985). *See also U.S. Dep't of Justice v. Reporters*

[2] Future compliance with the Local Rules is expected.

Comm. for Freedom of the Press, 489 U.S. 749, 755, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.' ") (*quoting* 5 U.S.C. § 552(a)(4)(B)). If the government affidavits submitted in connection with a motion for summary judgment are sufficient to meet the government's burden, the case can be decided without discovery. *See Lane,* 523 F.3d at 1125-36; *Citizens Comm'n on Human Rights v. FDA,* 45 F.3d 1325, 1329 (9th Cir.1995).

After a government defendant has moved for summary judgment in a FOIA case and submitted its supporting affidavits, some courts have permitted, or have indicated a willingness to permit, certain discovery relating to the exemption(s) claimed and/or the adequacy of the search when the plaintiff impugns the government affidavits with evidence of bad faith or when some other deficiency renders the affidavits insufficient. *See, e.g., Carney v. U.S. Dep't of Justice,* 19 F.3d 807, 812 (2nd Cir.1994) (noting that "discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's [summary judgment] submissions are adequate on their face[,]" and "[i]n order to justify discovery once the agency has satisfied its burden [on summary judgment], the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations ... or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate."); *Van Strum v. EPA,* 680 F.Supp. 349, 352 (D.Or.1987) (permitting discovery in a FOIA case, stating "[s]ummary judgment without discovery is appropriate where the plaintiff has made no showing of agency bad faith sufficient to impugn the agency affidavit[,]" but "where plaintiff or the agency's response raises serious doubts as to the completeness and good faith of the agency's search, discovery is appropriate"); *Exxon Corp. v. FTC,* 466 F.Supp. 1088, 1094 (D.D.C.1978) (noting, in a FOIA case, that a "court should not, of course, cut off discovery before a proper record has been developed; for example, where the agency's response

raises serious doubts as to the completeness of the agency's search ... where the agency's response is patently incomplete ... or where the agency's response is for some other reason unsatisfactory"), *aff'd,* 663 F.2d 120 (D.C.Cir.1980).[3] Even where discovery is allowed in a FOIA case, it is limited. *Lane,* 523 F.3d at 1134; *Giza v. Sec'y of Health, Educ. & Welfare,* 628 F.2d 748, 751 (1st Cir.1980) ("To the extent that discovery is allowed in a[ ] FOIA action, it is directed at determining whether complete disclosure has been made, e.g., whether a thorough search for documents has taken place, whether withheld items are exempt from disclosure."); *Lawyers' Comm. for Civil Rights,* 534 F.Supp.2d at 1131-32 (noting that in FOIA cases discovery is "sparingly granted, and is most often limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like") (internal quotation marks omitted); *Van Strum,* 680 F.Supp. at 352 ("In general, the scope of discovery in a[ ] FOIA case is limited to whether complete disclosure has been made by the agency in response to the request for information").[4] Although the government often moves for summary judgment in a FOIA case, a plaintiff can also move or cross-move for summary judgment or summary adjudication. *See, e.g., Van Bourg, Allen, Weinberg & Roger v. NLRB,* 751 F.2d 982, 984 (9th Cir.1985); *Van Strum,* 680 F.Supp. at 350.

Here, Lion has submitted affidavits and argument in an attempt to show bad faith and other misconduct on the part of the USDA in hopes of demonstrating that discovery should be allowed. Lion's motion for discovery, which is factually detailed, touches upon the USDA's

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[3]. At least one court has also permitted discovery relating to a plaintiff's FOIA claim for a "pattern and practice of untimely responses to FOIA requests." *Gilmore v. U.S. Dep't of Energy,* 33 F.Supp.2d 1184, 1188, 1190 (N.D.Cal.1998). The discovery was limited to the Department of Energy's "policies and practices for responding to FOIA requests, and the resources allocated to ensure its compliance with the FOIA time limitations." *Id.* at 1190. No such discovery is sought here.

[4]As an alternative to permitting discovery, if the government affidavits are insufficient, a court can order the government to submit additional affidavits. *See Pollard v. FBI,* 705 F.2d 1151, 1154 (9th Cir.1983).

responses to Lion's FOIA requests, the applicability of FOIA exemptions and the agency's search for records. In other words, Lion has submitted evidence and argument in its motion for discovery that, in a FOIA case, would normally be advanced at the summary judgment stage. The USDA has responded to Lion's motion with only legal argument as to the propriety or impropriety of discovery in FOIA cases, and the USDA contends that a decision as to discovery should be made only after the USDA files its motion for summary judgment. The USDA has not supplied affidavits or briefing regarding its responses to the FOIA requests, any claimed exemptions, the searches conducted, or other substantive matters that might bear on the disposition of this case. Without the USDA's position and evidence on substantive matters pertinent to disposition of this case (e.g., the extent of its search for responsive records), there is not enough information to conclusively determine, at this time, whether or to what extent discovery should be permitted, or whether this case or particular issues can be properly decided without discovery. *See Murphy v. FBI,* 490 F.Supp. 1134, 1137 (D.D.C.1980) ("[C]ases uniformly establish that discovery may proceed in a FOIA controversy when a factual issue arises concerning the adequacy or completeness of the government search and index. But they further establish a self-evident principle: a factual issue that is properly the subject of discovery can arise only after the government files its affidavits and supporting memorandum of law.").

Rather than engage in an unproductive exercise of directing the USDA to respond to Lion's discovery motion with more information, and given that Lion's discovery motion contains evidence and argument that is typically advanced at the summary judgment stage, the previously set deadline (May 18, 2009) for summary judgment motions (Doc. 13 at p. 7.) is advanced. Such motions, from either party, shall be filed by March 2, 2009. Opposition to such motions shall be filed by March 16, 2009. Replies thereto shall be filed by March 23, 2009. The motion(s) will be heard on March 30, 2009, at 10:00 a.m. In the interest of efficiency, the parties may incorporate by reference any affidavits or briefing submitted in connection with Lion's motion for discovery.

For the foregoing reasons, Lion's motion for discovery is denied.

IT IS SO ORDERED.

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INSPECTION AND GRADING

DEPARTMENTAL DECISIONS

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.
I & G Docket No. 04-0001.
Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.
Filed April 17, 2009.

I&G – Agricultural Marketing Act – Raisins – Debarment from inspection services – Statute of limitations – Misrepresentation or deceptive or fraudulent practices or acts – Falsifying inspection certificates – U.S. Grade B – U.S. Grade C.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, for Respondents Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this debarment proceeding by filing a Complaint on November 20, 2003.[1] The Administrator instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act]; the regulations governing the inspection and certification of processed

[1]The Administrator filed an Amended Complaint on June 8, 2004, and a Second Amended Complaint on September 10, 2004.

fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice]. The Administrator seeks to debar Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Alfred Lion, Jr.; Bruce Lion; Daniel Lion; Jeffrey Lion; Larry Lion; and Isabel Lion [hereinafter Respondents] for violations of the Agricultural Marketing Act and the Regulations.

The Administrator alleges Respondents engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results during the period May 24, 1996, through May 11, 2000 (Second Amended Compl. ¶¶ 11-198). Respondents answered, denying the factual allegations contained in the complaints and asserting affirmative defenses.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] dismissed the allegations in paragraphs 11 through 89 of the Second Amended Complaint pertaining to conduct occurring more than 5 years prior to the date of the filing of the Complaint as being barred by the statute of limitations in 28 U.S.C. § 2462 (December 20, 2005, Memorandum of Conference and Order at 3).

The ALJ conducted an oral hearing, commencing February 21, 2006, and continuing through February 23, 2006, in Washington, DC, and then reconvening in Fresno, California, on February 27, 2006, and concluding on March 3, 2006. Colleen A. Carroll, Office of General Counsel, United States Department of Agriculture [hereinafter USDA], Washington, DC, represented the Administrator (Tr. 4). Wesley T. Green, Selma, California, represented Lion Raisins, Inc. (Tr. 5). James A. Moody, Washington, DC, represented Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion (Notice of Entry of Appearance, filed December 1, 2005; Tr. 6-7). During the oral hearing, the Administrator called two witnesses and Respondents called 13 witnesses. In addition to the transcript of the hearing, the evidence includes 74 exhibits introduced by the Administrator that were admitted

and 22 exhibits introduced by Respondents that were admitted. The Administrator and Respondents submitted post-hearing briefs in support of their respective positions.

On June 9, 2006, the ALJ issued a Decision and Order in which he: (1) concluded that on 33 occasions, during the period November 11, 1998, through May 11, 2000, Respondents willfully violated section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)) by engaging in misrepresentation or deceptive or fraudulent practices or acts and (2) debarred Respondents from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 5 years.[2] On July 13, 2006, Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion [hereinafter the Lions] appealed to, and requested oral argument before, the Judicial Officer.[3] On September 25, 2006, the Administrator filed a response to the Appeal Petition. The Hearing Clerk transmitted the record to the Judicial Officer on October 2, 2006, but later withdrew it. On June 5, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I adopt, with minor modifications, the ALJ's Decision and Order as the final Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

DECISION

[2] *In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 224, 232-33 (2006).

[3] On June 15, 2006, the Hearing Clerk served Lion Raisin Company, Lion Packing Company, and Isabel Lion with the ALJ's Decision and Order (United States Postal Service Domestic Return Receipts for article number 7004 1160 0004 4087 9979 and article number 7004 1160 0004 4087 9368), and on June 16, 2006, the Hearing Clerk served Larry Lion with the ALJ's Decision and Order (United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4087 9993). Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion did not file an appeal petition within 30 days after service of the ALJ's Decision and Order and the ALJ's Decision and Order became final and effective as to Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion 35 days after service of the ALJ's Decision and Order on Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion. (See 7 C.F.R. § 1.142(c)(4).)

Background

David W. Trykowski, Chief of Investigations, Agricultural Marketing Service [hereinafter AMS] Compliance Office, USDA, testified that the investigation of the Lions was initiated after the AMS inspection office in Fresno, California, received an anonymous telephone call indicating Bruce Lion was falsifying USDA inspection certificates (Tr. 37). The information from the anonymous caller was subjected to a "credibility check" which was accomplished by sending letters to 109 overseas buyers of California raisins requesting that they provide information concerning the USDA inspection certificates they had received in connection with their raisin purchases (Tr. 38). The information provided in the responses received was then compared to the USDA inspection records maintained in the AMS Fresno inspection office, a preliminary report was drafted confirming that irregularities had been found, and the matter was referred to the Office of the Inspector General, USDA, for criminal investigation (Tr. 38-49). Incident to the criminal investigation, a search warrant was obtained and executed on October 19, 2000, and a number of the Lions' records were seized. These records primarily pertained to the Lions' export customers and covered the period from approximately 1995 through October 2000 (Tr. 49).

Mr. Trykowski personally reviewed both the USDA records and the Lions' records, compared the parallel sets of records for each transaction, and noted the non-conforming records (Tr. 49-55).[4] A comparison of the Lions' shipping files with USDA's inspection files reveals that during the period November 11, 1998, through May 11, 2000, different results were reported in the respective files with respect to 33 invoices in three general areas: moisture, grade, and size. Moisture differences were the most prevalent, with 20 such variances.

[4]The results of the analysis of the two sets of records are summarized in tabular form in CX 126A. The exhibit identifies the type of conduct complained of, the alteration involved, the USDA inspection certificate (if applicable), the date of inspection, the customer, the product, the Lions' order number, the sales amount, the cash incentive received, the applicable paragraphs of the Second Amended Complaint, and the applicable exhibit numbers.

Grade differences, with changes from U.S. Grade C to U.S. Grade B,[5] accounted for 14 variances, and there was a single instance in which a mixed-size determination was changed to midget size.[6]

Aside from the single instance in which a USDA certificate was altered to lower the moisture results from 16.0% to 15.4% (CX 72-CX 73), the allegations are primarily based upon the Lions' use of facsimile certificates prepared on Lion letterhead, but prepared in the same general format and containing the same information as that used by USDA and in which the source of the sample is identified as being an "officially drawn sample," a term defined in the Regulations.[7] (7 C.F.R. § 52.2.)

The Lions argue, because the moisture content of raisins tends to drop rapidly after processing and even after packing, USDA moisture testing does not accurately reflect results that are representative of the moisture content of the raisins when they are received by the Lions' overseas customers. The Lions also suggest their customers were neither misled nor dissatisfied with the raisins they received,[8] and USDA's testing results often are so negligently performed as to be inherently unreliable (Tr. 651, 1435). The Lions further argue the results from their own independent quality control moisture testing, the specifics of which differ from those used by USDA, are a far more

[5]U.S. Grade B requires a higher quality of raisin than U.S. Grade C.

[6]The record contains evidence of two instances in which both moisture and grade variances were present (CX 56-CX 57 and CX 59).

[7]The Lions note the use of a certificate, similar to the Lion certificate, by Sun-Maid (RX 3-0187 (LR 0745)). On Sun-Maid's certificate, however, the source of samples is "Sun-Maid" rather than "Officially Drawn."

[8]The testimony indicates that only one of the Lions' customers (Western Commodities) involved in this proceeding is no longer purchasing raisins from the Lions, but that Western Commodities is no longer purchasing California raisins (Tr. 1462).

accurate indication of actual raisin moisture content than USDA results.[9] However, the relative accuracy of USDA testing results and the Lions' testing results is not at issue in the instant proceeding. Instead, the issue is whether the Lions engaged in misrepresentation or fraudulent or deceptive practices or acts. The record amply demonstrates a pattern of repeated conduct by the Lions to either deliberately alter or impermissibly misrepresent USDA inspection results to meet the Lions' needs.

As a remedy, the Administrator seeks debarment of each of the Lions for a period of 15 years (Tr. 374). Although the "remedy" witness, G. Neil Blevins, the Associate Deputy Administrator for Compliance Safety and Security, AMS, testified USDA did not intend to end the use of the Lion name on raisins sold from California (Tr. 516),[10] he did indicate that in almost 20 years on this job, he had never seen a company as unethical in its dealing with USDA (Tr. 377) and stated that "[i]t is clearly the aim of the Agency that we never wish to provide service to this corporation or this family ever again." (Tr. 375.) In arriving at the 15-year period, Mr. Blevins suggested that normally debarment for 2 to 4 years for each willful violation would be appropriate in cases such as this one (Tr. 374-75).

On the basis of the evidence before me, I find the Lions engaged in a pattern of misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results as alleged but the requested relief of debarment for 15 years sought by the Administrator against each of the Lions is excessive.

Findings of Fact

[9]The differences between USDA and the Lions' testing included the stage of processing at which the raisins were tested for moisture, with the Lions testing before the application of oil in the processing and USDA testing after application of the oil. Other differences include the timing of the testing as well as the size of the sample. The Lions would also retain samples and would test the retained sample on occasion.

[10]Mr. Blevins was also asked if USDA intended to put the Lion family out of the raisin growing, handling, and marketing business and he answered "[a]bsolutely not and I don't see how it would do that." (Tr. 522.)

1. Lion Raisins, Inc., is a California corporation, formerly known as Lion Raisins and Lion Enterprises, Inc. (CX 1 at 6-14), with offices currently in Selma, California.[11] Lion Raisins, Inc., processes, packs, and sells processed raisins both domestically and internationally, being the second largest such company in the raisin industry. Lion Raisins, Inc., is a closely held Subchapter S family corporation, with the corporation's 1,000 shares of stock being held by only three individuals: Alfred Lion, Jr. (500 shares), Isabel Lion (499 shares), and Larry Lion (1 share).[12] (Tr. 1085-86, 1113-17.) Lion was incorporated in 1967;[13] however, members of the Lion family have been in the raisin business for over 100 years (Tr. 1117-18).

2. Alfred Lion, Jr., is one of Lion Raisins, Inc.'s directors and is named as Lion Raisins, Inc.'s president on filings with the Raisin Administrative Committee [hereinafter the RAC] (CX 3 at 1-17). On other filings with the California Secretary of State's Office, Alfred Lion, Jr., is listed as the chief executive officer, chief financial officer, and registered agent of Lion Raisins, Inc. (Tr. 1186-88; CX 1 at 4-5). Bruce Lion, Daniel Lion, and Jeffrey Lion are Alfred Lion, Jr.'s sons. The Lion family involvement in the raisin industry began with Alfred Lion Jr.'s grandfather; prior to Lion's incorporation, he and his brother, Herbert Lion, owned the partnership known as Lion Packing Company (CX 1 at 40-46; Tr. 1082).

3. Bruce Lion is listed as one of Lion Raisins, Inc.'s directors on the 1997 and 2000 filings with the California Secretary of State and as a vice president of Lion Raisins, Inc., on the filings with the RAC for the crop years 1996 through 2004. Bruce Lion exercised responsibility and control over the sales and shipping operations of Lion Raisins, Inc. (CX 1 at 4-5, CX 3 at 1-11; Tr. 1111-21). Bruce Lion testified that he was an officer and director of the corporation (Tr. 1350) and that he

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[11]Lion Raisins, Inc., moved its operation from 3310 East California Avenue, Fresno, California, to 9500 South Dewolf, Selma, California, in 1999 (CX 3; Tr. 1373).

[12]Isabel Lion is Herbert Lion's widow; Larry Lion is their son (Tr. 1086).

[13]Lion was initially incorporated as Lion Enterprises, Inc.; however, its failure to file an annual report with the California Secretary of State's Office allowed another to take that name and the corporation was renamed Lion Raisins, Inc. (Tr. 1084).

exercised exclusive authority over whether raisins were to be "released" (Tr. 1467).

4. During 1998, 1999, and 2000, Daniel Lion exercised responsibility and control over Lion Raisins, Inc.'s production or processing department and was listed as one of Lion Raisins, Inc.'s vice presidents in the filing with the RAC only in 1997 (CX 3 at 9, CX 4; Tr. 1119-21).

5. During 1998, 1999, and 2000, Jeffrey Lion exercised responsibility and control over Lion Raisins, Inc.'s ranch and grower's operations and was named as one of Lion Raisins, Inc.'s vice presidents in filings with the RAC beginning in 1992 (CX 3 at 1-15; Tr. 119-21).

6. Lion failed to observe corporate formalities in numerous ways, including filing of inconsistent documents with the California Secretary of State's Office and the RAC, naming different individuals as officers and directors of Lion with the California Secretary of State's Office and the RAC, failing to file required annual reports (which resulted in Lion losing its original corporate name of Lion Enterprises, Inc.), naming of officers of the corporation with a variety of different titles, using titles other than those contained on filings with the California Secretary of State's Office, designating individuals as vice presidents of the corporation without apparent approval or action by the board of directors,[14] failing to hold annual shareholder meetings, failing to hold annual meetings of the board of directors, and failing to maintain accurate and appropriate minutes of those meetings[15] (CX 1 at 3-4, CX 127; Tr. 1100-06, 1113-17, 1121-22).

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[14]The use of various titles was explained as "being management titles" rather than a corporate officer (Tr. 1044, 1046).

[15]Alfred Lion, Jr., testified that Susan Keller, one of Lion Raisins, Inc.'s employees, prepared the minutes, but did not attend the meetings (Tr. 1109-10). In one set of minutes, Larry Lion was indicated as being present for the meeting of the board of directors for 1999, 2000, and 2001; however, the testimony indicated Larry Lion did not attend corporate meetings or otherwise perform the duties of corporate secretary (Tr. 1102-05, 1109-10). None of the minutes refers to any litigation in which Lion Raisins, Inc., was involved, the retention of outside counsel, or personnel appointments, such as that of Kalem Barserian as general manager.

7. During the period November 11, 1998, through May 11, 2000, as is indicated in the AMS Inspection and Grading Manual (RX 3-0189 (LR 0748-1025)), AMS inspectors recorded the results of their inspection sampling on line check sheets. AMS inspectors provided copies of their line check sheets to Lion Raisins, Inc. AMS inspectors retained the original line check sheets, along with the pack-out report provided by the packer. (RX 3-0189 (LR 0955, 0957).)

8. During the period November 11, 1998, through May 11, 2000, AMS' Processed Products Branch used Form FV-146 Certificate of Quality and Condition (Processed Foods), a packet form that comprised multiple pages, with the top page on white paper, identified as "original" in red in the lower right-hand corner, followed by seven blue tissue pages (separated by carbon paper) each identified by the word "copy" (also in red) in the lower right-hand corner. Each FV-146 form was identifiable by a singular serial number at the top right side. (Tr. 39-40; CX 47 at 15-16.) On the top page only, the serial number was printed in red. (See, e.g., CX 47 at 15.)

9. During the period November 11, 1998, through May 11, 2000, if requested by the packer, AMS inspectors prepared a certificate worksheet, using the inspection information from their line check sheets, and product labeling and buyer information supplied by the packer (RX 3-0189 (LR 0998)). The worksheet was essentially a "draft" of the inspection certificate (Tr. 40-41).

10. Packers could and did request USDA Certificates of Quality and Condition (FV-146) after the product had been shipped. In that event, the inspector would prepare the form using the inspection documents and the order information (RX 3-0189 (LR 0980)).

11. Once the FV-146 was prepared and signed, the original and up to four of the blue tissue copies were provided to the packer (or designee) (RX 3-0189 (LR 0981)). USDA retained a blue tissue copy in its files, along with any order information that had been provided by the packer when the certificate was requested, and the certificate worksheet, if it had been returned to the inspector (Tr. 39-42; RX 3-0189 (LR 0981)). The certificates were recorded in a ledger maintained by the AMS Inspection Service, with voided certificates being so noted. The voided original certificate was retained in the USDA files, and all

blue tissue copies were destroyed. (CX 14; Tr. 39-42, 52-53; RX 3-0189 (LR 0976-77).) If the AMS inspector could not recover the original and all of the blue tissue copies, the inspector would issue a superseded certificate, according to the procedures set forth in the AMS inspection manual (Tr. 43; RX 3-0189 (LR 0977)).

12. AMS filed the blue tissue copies, in the case of valid certificates, and the original, in the case of void certificates, together in numerical order (Tr. 40-42; RX 3-0189 (LR 0977, 0981)).

13. During the period November 11, 1998, through May 11, 2000, AMS inspectors performed on-line in-plant inspections of product at Lion Raisins, Inc. Although AMS personnel were provided with office space, the inspectors lacked the capability of printing official inspection certificates and instead provided Lion Raisins, Inc.'s shipping clerks with blank FV-146 forms (CX 4). When Lion Raisins, Inc., requested a certificate, it would generally give the AMS inspector a copy of Lion Raisins, Inc.'s "outside" order form, which contained information regarding the buyer, codes, labels, and product specifications (Tr. 84).

14. Lion Raisins, Inc.'s shipping files in evidence typically contain a customer order form, prepared by the sales department, and an "inside" invoice and "invoice trail," prepared by the shipping department. The customer order form, prepared by the sales department, contains the customer's order specifications. The "inside" invoice is an internal shipping department document that precedes the "invoice trail." The "invoice trail" denotes the customer's specifications, the contract price, the manner and date of shipment, and, usually, the date when the order documentation was mailed to the customer, generally by United Parcel Service.

15. Under a program operated by the RAC, packers who sold raisins for export could apply for, and receive, "cash back" for such sales by filing a RAC Form 100C. The amount of "cash back" was based on the weight of the raisins (See, e.g., CX 47 at 12). Lion Raisins, Inc., applied for "cash back" from virtually all of the sales that are the

subject of the instant proceeding.[16]

16. Once Lion Raisins, Inc., developed a "Lion" certificate, Lion implemented the practice of charging its customers for USDA certificates, thereby creating a disincentive to request the USDA certificate FV-146 (CX 7). Customers were advised a "Lion" certificate would be provided without charge and Lion certificates contained the same information as USDA certificates. (See CX 73 at 44 ("Please note that the Lion certificate and the USDA certificate for each order is the same.")).

17. Lion certificates were prepared not by Lion Raisins, Inc.'s quality control personnel, but rather by employees in the shipping department (CX 7). Lion certificates were prepared on Lion Raisins, Inc.'s letterhead but followed the same format used on the FV-146 in the body of the document, providing the same information categories found on the USDA worksheet and/or USDA certificate.

18. Order Number 43387. On October 26, 1998, Western Commodities, Ltd., contracted for 1,660 cases of oil-dressed, select raisins that were certified U.S. Grade B (CX 47 at 1-2). On November 11, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 46 at 8).[17] Lion Raisins, Inc., requested an inspection certificate, USDA inspectors prepared a worksheet, provided it to Lion Raisins, Inc.'s shipping department, USDA certificate Y-869392 was prepared, and the inspector signed it (CX 46 at 1). Lion Raisins, Inc., retained the original inspection certificate Y-869392 and one copy in its shipping file (CX 47 at 15-16). Lion Raisins, Inc.'s shipping file contains a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information concerning the raisins as the USDA

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[16]See generally Findings of Fact numbers 18-49. CX 126A does not reflect "cash back" from all transactions.

[17]According to the line check sheet, one pallet (which inspectors had found failed because of mold) was set aside, and Lion Raisins, Inc., elected to dump it back into the processing line. On a subsequent sampling, the raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.'s processing personnel. (CX 46 at 8 (see entries for mold and remarks: "C grade OK by Graham").)

certificate — except that "U.S. Grade B" was substituted for the U.S. Grade C found by USDA inspectors (CX 47 at 14). Lion Raisins, Inc., mailed the order documents to the buyer on December 2, 1998, and requested and received $13,661.76 "cash back" from the RAC (CX 47 at 1, 12).

19. Order Number 43588. On November 5, 1998, Central Import contracted for 2,880 cases of oil-dressed, midget raisins, not more than 18% moisture (CX 99 at 1). On November 28, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17.8 to 18.0% in the officially drawn samples (CX 98 at 1). Lion Raisins, Inc., requested an inspection certificate, USDA inspectors prepared a worksheet, provided it to Lion Raisins, Inc.'s shipping department, USDA certificate B-033610 was prepared, and the inspector signed it (CX 98 at 1-2). Lion Raisins, Inc., retained the original USDA certificate B-033610 and one copy in its shipping file (CX 99 at 18-19). Lion Raisins, Inc.'s shipping file contains a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was stated to be "17.8 Percent" rather than 17.8 to 18.0% as was found by the USDA inspectors (CX 99 at 17). Lion Raisins, Inc., mailed the order documents to the buyer on December 10, 1998, and requested and received $23,702 "cash back" from the RAC (CX 99 at 1, 13).

20. Order Number 43598. On November 5, 1998, Central Import placed an order for 1,440 cases of oil-treated, midget raisins, U.S. Grade B (CX 49 at 1). On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 114 at 7). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 49 at 11). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES:

Officially Drawn" and contained the identical information as the USDA worksheet — except that "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors (CX 49 at 6, 11). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received $10,572.50 "cash back" from the RAC (CX 49 at 2, 9).

21. Order Number 43601. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 51 at 1). On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as mixed raisins and as U.S. Grade C (CX 50 at 6, CX 51 at 14).[18] The raisins were shipped that day (CX 51 at 1). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 50 at 6). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors (CX 51 at 13-14).[19] Lion Raisins, Inc., mailed the order documents to the buyer on February 11, 1999, and requested and received $12,187.75 "cash back" from the RAC (CX 51 at 1, 11).

22. Order Number 43603. On November 5, 1998, Central Import placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 101 at 1). On February 3, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as mixed size and as U.S. Grade C (CX 50 at

[18]According to the line check sheet, the samples exceeded the maximum allowable number of substandard and underdeveloped raisins (CX 50 at 6). The raisins were certified as meeting U.S. Grade C, which was accepted by Lion Raisins, Inc.'s processing personnel (CX 50 at 6 (see remarks: "C grade sub OK'd by Robert")).

[19]The USDA certificate worksheet contains both the range and average berry count; the "Lion" certificate gives only the average. This difference is present in a number of transactions.

6).[20] Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 50 at 6, CX 101 at 12, 21). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors (CX 101 at 12, 21-22). Lion Raisins, Inc., mailed the order documents to the buyer on March 3, 2000, and requested and received $12,187.75 "cash back" from the RAC (CX 101 at 1, 9).

23. Order Number 43612. On November 5, 1998, Shoei (U.S.A.) Foods, Inc., placed an order for 1,250 cases of oil-treated, midget raisins, U.S. Grade B, and requested a USDA certificate (CX 103 at 1). On November 21, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 102 at 1). Lion Raisins, Inc., requested an inspection certificate after the raisins were loaded in a container and sealed. USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 102 at 2). Lion Raisins, Inc., returned the USDA worksheet and a typed USDA certificate Y-869393 which the inspector signed (CX 102 at 1, CX 103 at 12). The original USDA certificate Y-869393 and a blue tissue copy were found in Lion Raisins, Inc.'s shipping file for this order (CX 103 at 12-13). The blue tissue copy was annotated with the words "don't send" written on its face in pencil (CX 103 at 13). Lion Raisins, Inc.'s shipping file also contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "GRADE" is typed as "U.S. Grade B" instead of the U.S.

[20]The line check sheet reflects that the samples exceeded the maximum allowable number of substandard and underdeveloped raisins and were graded as U.S. Grade C. This grade was accepted by Lion Raisins, Inc. (see remarks: "C grade sub OK'd by Robert"). (CX 50 at 6.)

Grade C found by the USDA inspectors (CX 103 at 11-12). Lion Raisins, Inc., mailed the order documents to the buyer on November 23, 1998, and requested and received $8,199.39 "cash back" from the RAC (CX 103 at 1, 10). On the "inside" order sheet located in Lion Raisins, Inc.'s shipping file, there was a post-it note from "Yvonne" to "Bruce," stating:

> Bruce–
> USDA shows Grade C -
> Do you want to send Lion
> Cert of Quality instead
> of USDA for both orders.
> Tx, Yvonne

In pencil, the word "yes" was written in response. (CX 103 at 2.)

24. Order Number 43694. On November 12, 1998, Central Import placed an order for 1,440 cases of oil-treated, midget raisins, U.S. Grade B (CX 105 at 1). On November 24, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 104 at 6). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 104 at 2-3). Lion Raisins, Inc., returned the worksheet and a typed certificate Y-869397 (CX 104 at 1, CX 105 at 24-25). The original USDA certificate Y-869397 (and one official copy) were found in Lion Raisins, Inc.'s shipping file for this order (CX 105 at 24-25). Lion Raisins, Inc.'s shipping file also contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the U.S. Grade C found by the USDA inspectors (CX 105 at 23). Lion Raisins, Inc., mailed the order documents to the buyer on December 8, 1998, and requested and received $15,025.38 "cash back" from the RAC (CX 105 at 1, 13).

25. Order Number 43922. On December 1, 1998, Farm Gold

placed an order for 3,200 cases of oil-treated, midget raisins, U.S. Grade B (CX 107 at 1). On November 29, 1998, and December 6, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 105 at 5, 8). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 106 at 2). Lion Raisins, Inc., returned the worksheet and a typed certificate B-033629 (CX 106 at 1, CX 107 at 33-34). The original USDA certificate B-033629 (and one of the official copies) were found in Lion Raisins, Inc.'s shipping file for this order (CX 107 at 33-34). In addition, the shipping file contained a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" is substituted for the U.S. Grade C found by the USDA inspectors (CX 107 at 32). Lion Raisins, Inc., mailed the order documents to the buyer on December 24, 1998, and requested and received $33,361.84 "cash back" from the RAC (CX 107 at 3, 22).

26. Order Number 43956. On December 3, 1998, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 109 at 1). On January 20, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 108 at 5, CX 109 at 21). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 109 at 21). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors (CX 109 at 20-21). Lion Raisins, Inc., mailed the order documents to the buyer and requested and received $15,844.08 "cash back" from the RAC (CX 109 at 1, 12).

27. Order Number 43957. On December 3, 1998, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, and requested a USDA certificate (CX 111 at 1, 4). On January 20, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 108 at 5, CX 111 at 25). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 111 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "U.S. Grade B" was substituted for the U.S. Grade C found by the USDA inspectors. (CX 111 at 21, 25.) Lion Raisins, Inc., mailed the order documents to the buyer and requested and received $15,844.08 "cash back" from the RAC (CX 111 at 1, 13).

28. Order Number 43975. On December 4, 1998, Central Import Muenster placed an order for 2,880 cases of oil-treated, midget raisins, U.S. Grade B (CX 53 at 2). On December 16, 1998, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant grading the officially drawn samples as U.S. Grade C (CX 52 at 17, CX 53 at 13-14). Lion Raisins, Inc., requested an inspection certificate after the raisins were loaded in a container and sealed.[21] USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 52 at 2). Lion Raisins, Inc., returned the worksheet and a typed certificate B-033631 (CX 53 at 13-14). Lion Raisins, Inc.'s shipping file contained the original USDA certificate and a photocopy as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "U.S. Grade B" was substituted for the U.S.

[21]CX 52 at 3. The document provided to the USDA inspectors reflects this order was loaded by "BH" in containers APMU 2751550 and TRIU 3706610 with seal numbers 0017053 and 0017054.

Grade C found by the USDA inspectors (CX 53 at 12-14). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received $23,682.12 "cash back" from the RAC (CX 53 at 1, 10).

29. Order Number 44120. On December 14, 1998, Navimpex, S.A., placed an order for 1,660 cases of oil-treated, select raisins, U.S. Grade B, with no more than 15% moisture and requested copies of the USDA's line check sheets (CX 55 at 1). On January 21, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 16.4 to 16.5% in the officially drawn samples (CX 54 at 5, CX 55 at 7). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 55 at 7). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file for this order contained the USDA worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn." (CX 55 at 6-7.) The Lion certificate contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "15.0 Percent" instead of the 16.4 to 16.5% found by the USDA inspectors (CX 55 at 6-7.) On the invoice, next to "LINE CHECK SHEETS," there appeared a handwritten notation "Do not send (per Bruce)." (CX 55 at 1.) Lion Raisins, Inc.'s shipping file also contained a copy (redacted) of the USDA's line check sheet for the inspection of these raisins. The copy bore a post-it note, in red ink:

> Bruce–
> Please note USDA
> Line check sheets
> show higher moisture
> than spec.
> Tx, Yvonne

The response, in pencil, said: "don't send or reduce them." The "don't send" was circled (CX 55 at 5). Lion Raisins, Inc., mailed the order

documents to the buyer on February 3, 1999, and requested and received $12,187.75 "cash back" from the RAC (CX 55 at 1, 15).

30. Order Number 44122. On December 14, 1998, Navimpex, S.A., placed an order for 1,660 cases of oil-treated, select raisins, U.S. Grade B, with no more than 15% moisture (CX 113 at 1). On March 1, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 15.0 to 17.0% in the officially drawn samples (CX 112 at 4).[22] Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file for this order contained the USDA worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "15.0 Percent" rather than the 15.0 to 17.0% found by USDA inspectors (CX 113 at 14). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received $15,844.08 "cash back" from the RAC (CX 57 at 1, 12).

31. Order Number 44184. On December 16, 1998, Heinrich Bruning placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 57 at 1). On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 16.7 to 17.0% in the officially drawn samples and grading the raisins as U.S. Grade C (CX 56 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a certificate worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 57 at 22). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file for this order contained the USDA worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.0

[22]The USDA inspector noted that she "notified Joe on moisture." (CX 112 at 4.)

Percent" and the "GRADE" is typed as "U.S. Grade B" rather than the moisture of 16.7 to 17.0% and U.S. Grade C found by the USDA inspectors (CX 57 at 17, 22). Lion Raisins, Inc., mailed the order documents to the buyer on March 11, 1999, and requested and received $12,187.75 "cash back" from the RAC (CX 113 at 1, 7).

32. Order Number 44185. On December 16, 1998, Heinrich Bruning placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 59 at 1). On January 12, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 16.7 to 17.0% in the officially drawn samples and grading the raisins as U.S. Grade C (CX 56 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 59 at 19). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file for this order contained the USDA worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.0 Percent" and the "GRADE" is typed as "U.S. Grade B" instead of the moisture level of 16.7 to 17.0% and U.S. Grade C found by the USDA inspectors (CX 59 at 18-19). Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received $15,844.08 "cash back" from the RAC (CX 59 at 1, 11).

33. Order Number 44351. On January 4, 1999, Central Import placed an order for 290 cases of oil-treated, midget raisins, with no more than 15.5% moisture (CX 115 at 1). On January 6, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17% in the officially drawn samples (CX 114 at 7). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 115 at 21). Lion Raisins, Inc., returned a typed certificate B-033650 which stated that the raisins sampled were "officially drawn" and certified at 17% moisture

(CX 114 at 1). Lion Raisins, Inc.'s shipping file contained the original USDA certificate B-033650 and the worksheet as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.5%" rather than the 17% found by the USDA inspectors (CX 115 at 18-19, 21). Lion Raisins, Inc.'s shipping file also contains a post-it note from "RW" to "Bruce, as follows:

> 3/9
> Bruce,
> (See order attached)
> The Berry count met the specs,
> however the moisture did not.
> According to USDA moisture
> was 17%.
> Tx,
> RW

CX 115 at 15. Lion Raisins, Inc., mailed the order documents to the buyer on January 20, 1999, and requested and received $2,768.03 "cash back" from the RAC (CX 115 at 1, 13).

34. Order Number 44488. On January 11, 1999, Heinrich Bruning placed an order for 4,980 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 61 at 1). On January 22, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 16.6 to 17.0% in the officially drawn samples (CX 60 at 5). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 61 at 16). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed

as "16.0 Percent" instead of the 16.6 to 17.0% found by the USDA inspectors (CX 61 at 15-16). Lion Raisins, Inc., mailed the order documents to the buyer on February 3, 1999, and requested $47,531.90 "cash back" from the RAC (CX 61 at 1, 24).

35. Order Number 44865. On February 4, 1999, Primex International placed an order for 440 cases of oil-treated, select raisins, with no more than 15% moisture, and requested a USDA certificate (CX 117 at 1). On February 8, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17.2% in the officially drawn samples (CX 116 at 2). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 117 at 14). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "15.0 Percent" instead of the 17.2% found by the USDA inspectors (CX 117 at 13). There was a post-it note on the "Lion" certificate from "RW" to "Bruce":

> Bruce,
> Moisture did not
> meet spec of 15%
> Actual moisture
> is 17.2%.
> RW

CX 117 at 13. Lion Raisins, Inc., mailed the order documents to the buyer on February 12, 1999, and requested and received $3,235.41 "cash back" from the RAC (CX 117 at 1, 11).

36. Order Number 45199. On March 5, 1999, Sunbeam Australian Dried Fruits Sales placed an order for 3,320 cases of oil-treated, zante currant raisins, U.S. Grade B, with no more than 17.5%

moisture (CX 63 at 1). On April 15, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17.6 to 18.9% in the officially drawn samples (CX 62 at 8).[23] Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 63 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate to USDA; however, the USDA worksheet was located in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Rosangela Wisley, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "17.5 Percent" instead of the 17.6 to 18.9% found by the USDA inspectors (CX 63 at 25, 46). Lion Raisins, Inc., requested and received "cash back" from the RAC (CX 63 at 42 (the amount is obscured)).

37. Order Number 46171. On May 21, 1999, Sunbeam Australian Dried Fruits Sales placed an order for 3,320 cases of oil-treated, zante currant raisins, U.S. Grade B, with no more than 16.5% moisture (CX 65 at 1). On July 26, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Fresno plant finding moisture levels of 17.6 to 18.9% in the officially drawn samples (CX 64 at 5). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 65 at 41). Lion Raisins, Inc., failed to return the worksheet or a typed certificate to USDA; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.9 to 17.0 Percent" rather than the

[23] The inspector notified the processing staff that the moisture was high (CX 62 at 8 ("notified Robert on moist")). The maximum allowable moisture percentage for zante currant raisins is 20%. (7 C.F.R. § 52.1857.)

17.6 to 18.9% found by the USDA inspectors (CX 65 at 31, 41).[24] Lion Raisins, Inc.'s shipping file also contained a letter, dated July 21, 1999, sent to Sunbeam Australian Dried Fruits Sales, which stated:

> Your PO 8863 has already been processed. Enclosed please find a copy of the signed USDA certificate showing the moisture content of 17 percent which is below the maximum requirement of 18 percent.
>
> Per your PO 9003 we have adjusted the maximum moisture specification to 17 percent to ensure the moisture level is reduced as per your request.
>
> We will try testing under 17 percent but our production thinks it might be difficult to obtain the moisture any lower than the 17 percent.[25]

Lion Raisins, Inc., mailed the order documents to the buyer on August 9, 1999, and requested and received $36,032.50 "cash back" from the RAC (CX 65 at 26).

38. Order Number 46371. On May 14, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 16% moisture (CX 67 at 1). On September 1, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 15.5 to 17.0% in the officially drawn samples (CX 66 at 5).[26] Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet

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[24]USDA stated that the certificate covered 91,489.24 pounds of product, while the "Lion" certificate referred to 91,489 pounds.

[25]CX 65 at 12-13; see also CX 65 at 14 (noting "USDA readout 17.0%"). "PO" appears to refer to Sunbeam Australian Dried Fruits Sales' purchase orders. See CX 65 at 6 (reference to PO9003), 14.

[26]According to the line check sheets, the maximum moisture for the order was 17% (CX 66 at 5).

and provided it to Lion Raisins, Inc.'s shipping department (CX 67 at 23). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, both of which used the legend "SOURCE OF SAMPLES: Officially Drawn." (CX 67 at 21-22.) One of the "Lion" certificates contained – in typewriting – the identical information about the raisins as the USDA worksheet — including the non-conforming "15.5 to 17.0" percent moisture (CX 67 at 22). The entire page, however, was struck through with a red line, and, in pencil, the "17.0 Percent" was obliterated and corrected with a handwritten "16." (CX 67 at 22.) On the other "Lion" certificate, presumably the final version, the "Moisture" was typed as "15.5 to 16.0 Percent" instead of the 15.5 to 17.0% found by the USDA inspectors (CX 67 at 21, 23). Lion Raisins, Inc., mailed the order documents to the buyer on September 19, 1999, and requested and received $10,725.22 "cash back" from the RAC (CX 67 at 1, 16).

39. Order Number 46811. On July 19, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B (CX 69 at 1). On September 19, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant grading the officially drawn samples as U.S. Grade C (CX 68 at 3).[27] Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 69 at 18). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as two "Lion" certificates, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that on one Lion certificate, the "GRADE" was typed as it is on the USDA worksheet, as "U.S. Grade C." (CX 69 at 17-18.) The "C" was circled in pencil and a "B" placed next to it, also in pencil (CX 69 at 17-18).

[27]The samples were graded U.S. Grade C as the maximum allowable number of substandard and underdeveloped raisins was exceeded for U.S. Grade B. The remarks reflect "C grade Sub OK. Robert" (CX 68 at 3).

The other "Lion" certificate was corrected to read "GRADE: U.S. GRADE: B." (CX 69 at 16.) Lion Raisins, Inc., mailed the order documents to the buyer on October 5, 1999, and requested and received $10,725.22 "cash back" from the RAC (CX 69 at 1, 25).

40. Order Number 47456. On September 8, 1999, Farm Gold placed an order for 3,320 cases of oil-treated, midget raisins, U.S. Grade B (CX 119 at 1). On September 23, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant grading the officially drawn samples as U.S. Grade C (CX 118 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well a "Lion" certificate, signed by Barbara Baldwin, which used the legend "SOURCE OF SAMPLES: Officially Drawn" and stated that the "GRADE" was "U.S. GRADE: B" rather than the U.S. Grade C found by the USDA inspectors (CX 119 at 26). The "Lion" certificate also included an additional case code that does not appear on the USDA worksheet (CX 119 at 26). Lion Raisins, Inc., mailed the order documents to the buyer on October 14, 1999, and requested and received $28,762.80 "cash back" from the RAC (CX 119 at 1, 12).

41. Order Number 48052. On October 20, 1999, Demos Ciclitira, Ltd., placed an order for 1,660 cases of oil-treated, Medos zante currant raisins, U.S. Grade B, with no more than 17% moisture, and requested a USDA certificate (CX 71 at 1, 6, 26). On October 27, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 17.0 to 18.0% in the officially drawn samples (CX 70 at 8). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 71 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and

contained the same information about the raisins as the USDA worksheet — except that the moisture read "[blank] To 17.0 Percent" and the principal label marks contained additional information not found on the USDA worksheet (CX 71 at 24-25).[28] Lion Raisins, Inc., mailed the order documents to the buyer on November 18, 1999, and requested and received $1,632.25 "cash back" from the RAC (CX 71 at 1, 14).

42. Order Number 48137.

a. On October 25, 1999, Borges, S.A., contracted to buy 665 cases of oil-treated, Lion Select raisins, at no more than 16% moisture (CX 121 at 1). On November 4, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 16.8 to 17.0% in the officially drawn samples (CX 120 at 14).[29] After the raisins were loaded in a container, Lion Raisins, Inc., requested an inspection certificate, and the USDA inspector gave a worksheet to Lion Raisins, Inc.'s shipping department and received the USDA worksheet and typed USDA certificate B-034321 (CX 120 at 3-5). Lion Raisins, Inc.'s shipping file contained the original USDA certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as "16.0 Percent" instead of the 16.86 to 17.0% found by the USDA inspectors (CX 121 at 36, 38).

b. On October 25, 1999,[30] Borges contracted to buy 735 cases of oil-treated, golden raisins, at no more than 18% moisture (CX 121 at 1). On October 15, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of

[28]The Lion Raisins, Inc., shipping file contains an outside order form with the same label information that appears on the "Lion" certificate, but not on the USDA worksheet (CX 71 at 22).

[29]The USDA line check sheet reflects only 16.8 to 17.0% moisture levels; however, the FV-146 reflects the 16.86 to 17.0% figures (CX 120 at 1, 14, CX 121 at 42).

[30]October 25, 1999, appears to be the incorrect order date as it is well after the inspection of the raisins, but this order date is reflected in the exhibits.

16.5 to 17.3% in the officially drawn samples (CX 120 at 12).[31] After the raisins were loaded in a container, Lion Raisins, Inc., requested an inspection certificate, and the USDA inspector gave a worksheet to Lion Raisins, Inc.'s shipping department and received the USDA worksheet and typed USDA certificate B-034317 (CX 120 at 1-2). Lion Raisins, Inc.'s shipping file contained the original USDA certificate as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and represented the moisture as 16.0% rather than the 16.0 to 17.9% found by the USDA inspectors (CX 121 at 35, 37).

c. Lion Raisins, Inc., mailed the documents for order 48137 (both parts) to the buyer on January 6, 1999, and requested and received $6,109.95 "cash back" from the RAC (CX 121 at 1, 10).

43. Order Number 48397. On November 10, 1999, NAF International AMBA placed an order for 650 cases of bagged, oil-treated, raisins, U.S. Grade B, with no more than 15% moisture, and 800 cases of oil-treated, select raisins, U.S. Grade B, with no more than 16% moisture (CX 73 at 1). On December 6, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 15.1 to 15.3% in the officially drawn samples (CX 72 at 12). Lion Raisins, Inc., requested an inspection certificate after the raisins were loaded in a container and sealed, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 72 at 8). Lion Raisins, Inc., returned the USDA worksheet and a typed USDA certificate B-034343 (CX 72 at 4).[32] Lion Raisins, Inc.'s shipping file contained the original USDA certificate B-034343 (and several photocopies of the certificate) for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and

[31] The USDA line check sheet reflects moisture of 16.5 to 17.3%; however, the worksheet and the certificate reflected moisture levels of 16.0 to 17.9% (CX 120 at 1-2, 12).

[32] Although the USDA worksheet records state the moisture as being 15.1 to 15.3% consistent with the line check sheet, USDA certificate B-034343 contains a moisture level of 15.3 to 15.4%.

contained the identical information about the raisins as the USDA certificate — except that the "Moisture" was typed as "15.3 TO 16.0 Percent" rather than the 15.3 to 15.4% recorded on the USDA certificate found in the USDA file (CX 72 at 4, CX 73 at 34 (original), 39, 40-43). The original USDA certificate was altered to read "Moisture - 15.3 TO 16.0 Percent," and a copy of the altered original was in the shipping file as well (CX 73 at 34, 39). Lion Raisins, Inc., mailed the order documents to the buyer on January 5, 2000, and requested and received $6,751.94 "cash back" from the RAC (CX 73 at 1, 16).

44. Order Number 48416. On November 11, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, midget raisins, with no more than 17% moisture (CX 123 at 1). On December 13, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 17.9 to 18.0% in the officially drawn samples (CX 122 at 3). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and stated that the "Moisture" was 17.0% rather than the 17.9 to 18.0% found by the USDA inspectors. (CX 123 at 30-31.) Lion Raisins, Inc., mailed the order documents to the buyer on January 12, 2000, and requested and received $17,664.63 "cash back" from the RAC (CX 123 at 1, 10).

45. Order Number 48487. On November 16, 1999, Farm Gold placed an order for 1,660 cases of oil-treated, select raisins, with no more than 16% moisture (CX 125 at 1). On November 30, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 15.1 to 15.8% in the officially drawn samples (CX 124 at 4). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department. Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this

order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and stated that the "Moisture" was 15.1 to 15.5% rather than the 15.1 to 15.8% found by the USDA inspectors (CX 125 at 29-30). Lion Raisins, Inc., mailed the order documents to the buyer on December 23, 1999, and requested and received $17,664.63 "cash back" from the RAC (CX 125 at 3, 14).

46. Order Number 48523. On November 18, 1999, Heinrich Bruning placed an order for 1,660 cases of oil-treated, midget raisins, U.S. Grade B, with no more than 17% moisture (CX 75 at 1). On December 2, 1999, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 16.6 to 17.0% moisture in the officially drawn samples (CX 74 at 3). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 75 at 22). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and contained the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.0 Percent" rather than the 16.6 to 17.0% found by the USDA inspectors (CX 75 at 18, 22). The "Lion" certificate bore a post-it note (CX 75 at 18) stating:

USDA certificate shows a moisture of 16.6-17.0.

Lion Raisins, Inc., mailed the order documents to the buyer on December 30, 1999, and requested and received $17,664.63 "cash back" from the RAC (CX 75 at 1, 9).

47. Order Number 49334. On January 20, 2000, EKO Produkter AB placed an order for 1,660 cases of oil-treated, select raisins, U.S. Grade B, with no more than 17% moisture (CX 77 at 1). On December 21 and 22, 1999, USDA inspectors had sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 16.6 to 17.8% in the officially drawn samples (CX 76 at 4, 13). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors

prepared a worksheet which bore Order Number 49334 and provided it to Lion Raisins, Inc.'s shipping department (CX 77 at 22).[33] Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, the USDA worksheet was found in Lion Raisins, Inc.'s shipping file for this order as a well as a "Lion" certificate, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" and which stated that the pack dates were January 21 and 22, 2000, and bore the identical information about the raisins as the USDA worksheet — except that the "Moisture" was typed as "16.6 To 17.0 Percent" rather than the 16.6 to 17.8% found by the USDA inspectors (CX 77 at 21). The "Lion" certificate bore a post-it note (CX 77 at 21) stating:

> USDA shows no packing on the 21 & 22nd of January.
> The moisture for the Dec. pack date shows 16.6 - 17.8%.

Lion Raisins, Inc., mailed the order documents to the buyer on February 7, 2000, and requested and received $11,573.38 "cash back" from the RAC (CX 77 at 1, 12).

48. Order Number 50431. On April 14, 2000, NAF International AMBA placed an order for 1,440 cases of oil-treated, select raisins, U.S. Grade B, with 16 to 18% moisture (CX 79 at 1). On April 17, 2000, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant finding moisture levels of 17.2 to 17.5% in the officially drawn samples (CX 78 at 3). Lion Raisins, Inc., requested an inspection certificate, USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 79 at 25). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file contains two "Lion" certificates, signed by Barbara Baldwin, that used the legend "SOURCE OF SAMPLES: Officially Drawn" (CX 79 at 23-24). One certificate contained the USDA's moisture results and bore a handwritten (in pencil) notation "16-17 adjacent to the moisture entry." (CX 79 at 23.) The second "Lion" certificate contained the typewritten moisture of 16 to 17% (CX 79 at 24). Lion Raisins, Inc., mailed the order documents

[33]The record is not entirely clear as the order date is well after the inspection date.

to the buyer on April 20, 2000, and requested and received $13,421.36 "cash back" from the RAC (CX 79 at 1, 4.)

49. Order Number 50750. On May 8, 2000, J.L. Priestly & Company, Ltd., placed an order for 1,660 cases of oil-treated, midget raisins (CX 81 at 1). On April 14 and May 11, 2000, USDA inspectors sampled processed raisins on-line at Lion Raisins, Inc.'s Selma plant grading the officially drawn samples as mixed size raisins (CX 80 at 6, 11). Lion Raisins, Inc., requested an inspection certificate, and USDA inspectors prepared a worksheet and provided it to Lion Raisins, Inc.'s shipping department (CX 81 at 21). Lion Raisins, Inc., failed to return the worksheet or a typed certificate; however, Lion Raisins, Inc.'s shipping file for the order contained the USDA worksheet as well as two "Lion" certificates (one signed by Barbara Baldwin) that used the legend "SOURCE OF SAMPLES: Officially Drawn." (CX 81 at 23-24, 26.) One certificate contained USDA's size result and the other recorded the size as "Midget." (CX 81 at 23-24, 26.) The shipping documents related to this order number 50750 also include a post-it note which stated:

> Bruce,
> The USDA certificate
> shows a size of Mixed.

The handwritten response, in pencil indicated:

> "Change to Midget," circled. (CX 81 at 25.)

Lion Raisins, Inc., mailed the order documents to the buyer on May 25, 2000, and requested and received $15,471.78 "cash back" from the RAC (CX 81 at 1, 3).

Conclusions of Law

1. The Secretary of Agriculture has the authority under the Agricultural Marketing Act to: (a) prescribe regulations for the inspection, certification, and identification of the class, quality, and

condition of agricultural products and (b) issue regulations and orders to carry out the purposes of the Agricultural Marketing Act, including authority to issue debarment regulations and to debar persons and entities from benefits under the Agricultural Marketing Act.

2. The term "officially drawn sample," as defined in 7 C.F.R. § 52.2, is limited to those samples selected by USDA inspectors, licensed samplers, or any other persons authorized by the Administrator. The use of the term "officially drawn" on Lion Raisins, Inc., certificates, indicating that the source of samples was "officially drawn," impermissibly attempts to extend the term "officially drawn sample" to sampling results performed by an entity's quality control personnel. While no regulation prohibits the use of a non-USDA certificate or guarantee by a processor, packer, or seller of raisins, the use of the term "officially drawn" allows no leeway or deviation from the sampling results found by USDA inspectors.

3. U.S. Grades, as applied to raisins, are based upon a variety of components, only one of which is the maturity of the raisin. Lion Raisins, Inc.'s false representation that certain orders (which had been graded by USDA inspectors as U.S. Grade C) were in fact U.S. Grade B, based only upon maturity, was an impermissible use of the U.S. Grade designation given to the raisins in question.

4. Lion Raisins, Inc., impermissibly attempted to use its own standards to define the term "midget" when that term is defined and used by USDA as part of the identification of the size of a raisin.

5. By reason of Lion Raisins, Inc.'s failure to observe corporate formalities, Lion Raisins, Inc., is not an entity separate and apart from Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

6. On 33 occasions during the period November 11, 1998, through May 11, 2000, in connection with 32 orders, Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion willfully violated section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)), by engaging in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results, as follows:

a. Order Number 43387 (November 11, 1998). The Lions used

an official inspection certificate (Y-869392) as a basis to misrepresent the U.S. Grade of 45,744.62 pounds of raisins sold by the Lions to Western Commodities, Ltd., as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when USDA had certified them as U.S. Grade C, as shown on the official certificate. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part the official inspection certificate issued for these raisins for the purpose of purporting to evidence the U.S. Grade of the raisins. (7 C.F.R. § 52.54(a)(1)(v).)

b. Order Number 43588 (November 28, 1998). The Lions used an official inspection certificate (B-033610) as a basis to misrepresent the moisture content of 79,364 pounds of raisins sold by the Lions to Central Import Meunster. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins to be 17.8% moisture, when the USDA's officially drawn sample of those raisins was certified as 17.8 to 18.0% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part the official inspection certificate issued for these raisins for the purpose of purporting to evidence the officially drawn moisture level of the raisins. (7 C.F.R. § 52.54(a)(1)(v).)

c. Order Number 43598 (January 6, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by the Lions to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

d. Order Number 43601 (February 3, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by

the Lions to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

e. Order Number 43603 (February 3, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Central Import Meunster as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

f. Order Number 43612 (November 21, 1998). The Lions used an official inspection certificate (Y-869393) as a basis to misrepresent the U.S. Grade of 37,500 pounds of raisins sold by the Lions to Shoei Foods (U.S.A.), Inc., as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate for the raisins certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

g. Order Number 43694 (November 24, 1998). The Lions used an official inspection certificate (Y-869397) as a basis to misrepresent the U.S. Grade of 39,682.08 pounds of raisins sold by the Lions to Central Import Meunster, as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate for the raisins certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also

used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

h. Order Number 43922 (December 6, 1998). The Lions used an official inspection certificate (B-033629) to misrepresent the U.S. Grade of 88,182.40 pounds of raisins sold by the Lions to Farm Gold as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

i. Order Number 43956 (January 20, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold as U.S. Grade B, when the officially drawn sample for that product was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v)).

j. Order Number 43957 (January 20, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold as U.S. Grade B, when the officially drawn sample for those raisins was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

k. Order Number 43975 (December 16, 1998). The Lions used an official inspection certificate (B-033631) as a basis to misrepresent the U.S. Grade of 79,364.16 pounds of raisins sold by the Lions to Central Import Meunster as U.S. Grade B, when the official U.S. Grade of those raisins was U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iii).) The

Lions also used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as U.S. Grade B, when the official inspection certificate certified them as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

l. Order Number 44120 (January 21, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Navimpex, S.A., at 15.0% moisture, when the officially drawn sample for that product was certified at 16.4 to 16.5% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

m. Order Number 44122 (March 1, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Navimpex, S.A., at 15.0% moisture, when the officially drawn sample for that product was not certified at such moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

n. Order Number 44184 (January 12, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture and U.S. Grade B, when the officially drawn sample for those raisins was certified at 16.7 to 17.0% moisture and as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

o. Order Number 44185 (January 12, 1999). The Lions used a

legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture and U.S. Grade B, when the officially drawn sample for that product was certified at 16.7 to 17.0% moisture and as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

p. Order Number 44351 (January 6, 1999). The Lions used an official inspection certificate (B-033650) as a basis to misrepresent the moisture of 7,991.53 pounds of raisins sold by the Lions to Central Import Meunster as 15.5%. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified those raisins as having 15.5% moisture, when the officially drawn sample was certified at 17% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

q. Order Number 44488 (January 22, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 137,233.86 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

r. Order Number 44865 (February 8, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 13,200 pounds of raisins sold by the Lions to Primex International, with final destination of Manila, Philippines, at 15.0% moisture, when the officially drawn sample for those raisins was certified as 17.2% moisture. (7 C.F.R. §

52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

s. Order Number 45199 (April 15, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 91,489.24 pounds of raisins sold by the Lions to Sunbeam Australian Dried Fruits Sales, at 17.5% moisture, when the officially drawn sample for those raisins was certified at 17.6 to 18.9% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

t. Order Number 46171 (July 26, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 91,489 pounds of raisins sold by the Lions to Sunbeam Australian Dried Fruits Sales, at 16.9 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.9 to 17.5% moisture and the officially drawn sample for that product also had identified 91,489.24 pounds of product. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

u. Order Number 46371 (September 1, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold, at 15.5 to 16.0% moisture, when the officially drawn sample for those raisins was certified at 15.5 to 17.0% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

v. Order Number 46811 (September 19, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by

the Lions to Farm Gold, to be U.S. Grade B, when the officially drawn sample for that product was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

w. Order Number 47456 (September 19, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified that 92,489.24 pounds of raisins sold by the Lions to Farm Gold were inspected on September 19, 1999, code marked "PKD 19 SEP 99L" and determined to be U.S. Grade B. The officially drawn sample for that product was drawn and inspected on September 23, 1999, was code marked "PKD 23 SEP 99L," and the officially drawn sample was certified as U.S. Grade C. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the U.S. Grade of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

x. Order Number 48052 (October 27, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Demos Ciclitira, Ltd., at 17.0% moisture. The officially drawn sample for that product was certified at 17.0 to 18.0% moisture and the product was to have been packed under a different label. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

y. Order Number 48137 (November 4, 1999). The Lions used an official inspection certificate (B-034321) as a basis to misrepresent the moisture percentage of 19,950 pounds of raisins sold by the Lions to Borges, S.A. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified these raisins as containing 16% moisture, when the officially drawn sample for that product was not certified at such moisture percentage. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate

for the purpose of purporting to evidence the U.S. Grade and officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

z. Order Number 48137 (October 15, 1999). The Lions used an official inspection certificate (B-034317) as a basis to misrepresent the moisture of 22,050 pounds of raisins sold by the Lions to Borges, S.A. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified these raisins at 16% moisture, when the officially drawn sample for that product was not certified at such moisture percentage. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

aa. Order Number 48397 (December 9, 1999). The Lions altered an official inspection certificate (Y-034343) to misrepresent the moisture of 22,045.6 pounds of raisins sold by the Lions to NAF International AMBA, by falsifying the moisture of the officially drawn sample. (7 C.F.R. § 52.54(a)(1)(iii).) The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified these raisins at 15.3 to 16.0% moisture, when the officially drawn sample for that product was not certified at such moisture and the product from which the official sample was drawn was to be packed under a different label. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

bb. Order Number 48416 (December 13, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold, at 17% moisture, when the officially drawn sample for that product was not certified at such moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

cc. Order Number 48487 (November 30, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Farm Gold, at 15.1 to 15.5% moisture, when the officially drawn sample for that product was not certified at such moisture percentage. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

dd. Order Number 48523 (December 2, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to Heinrich Bruning, at 16.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.0% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

ee. Order Number 49334 (December 22, 1999). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to EKO Produkter AB, at 16.6 to 17.0% moisture, when the officially drawn sample for that product was certified at 16.6 to 17.8% moisture and the product from which the official sample was drawn was to be packed in containers bearing different code marks. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

ff. Order Number 50431 (April 17, 2000). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 39,682.08 pounds of raisins sold by the Lions to NAF International AMBA, at 16.0 to 17.0% moisture, when the officially drawn sample for that product was certified at 17.2 to 17.5% moisture. (7 C.F.R. § 52.54(a)(1)(iv).) The Lions also used a

facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn moisture level of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

gg. Order Number 50750 (May 11, 2000). The Lions used a legend ("SOURCE OF SAMPLES: Officially Drawn") falsely signifying that USDA had certified 45,744.62 pounds of raisins sold by the Lions to J.L. Priestly & Company, Ltd., as "midget" size raisins, when the officially drawn sample for that product certified it as "mixed" size raisins and the product was to have been packed under a different label. The Lions also used a facsimile form that simulated in part an official inspection certificate for the purpose of purporting to evidence the officially drawn size of these raisins. (7 C.F.R. § 52.54(a)(1)(v).)

7. Each of the acts and practices described in Conclusions of Law number 6 was a willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).

8. The acts and practices described in Conclusions of Law number 6, in connection with inspection documents for the Lions' raisins and raisin products, constitute sufficient cause for the debarment of Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

The Lions' Request for Oral Argument

The Lions' request for oral argument, which the Judicial Officer may grant, refuse, or limit,[34] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Timeliness of the Lions' Appeal Petition

The Administrator asserts the Hearing Clerk served counsel for the Lions with the ALJ's Decision and Order on June 13, 2006; therefore, the Lions were required to file an appeal petition with the Hearing Clerk

[34] 7 C.F.R. § 1.145(d).

no later than 4:30 p.m., July 13, 2006.[35] The Administrator argues the Lions' Appeal Petition was late-filed as the Lions sent a facsimile of the Appeal Petition to the Hearing Clerk beginning at 3:18 p.m., July 13, 2006, and ending at 4:38 p.m., July 13, 2006.

The most reliable evidence of the date and time a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document.[36] The Office of the Hearing Clerk stamped the Lions' Appeal Petition as having been received at 4:28 p.m., July 13, 2006. The Administrator further asserts the Lions' Appeal Petition was late-filed because the July 13, 2006, filing was a facsimile and the original of the Lions' Appeal Petition was not filed until July 14, 2006. I have long found that an appeal petition is timely-filed if a facsimile of the appeal petition is received by the Hearing Clerk within the time for filing the appeal petition and an original of the appeal petition is promptly filed after the filing of the facsimile, even if the original is not filed within the time for filing the appeal petition. Therefore, I find the Lions timely filed their Appeal Petition with the Hearing Clerk, and I reject the Administrator's contention that the Appeal Petition was late-filed.

The Lions' Appeal Petition

The Lions raise 30 issues in the Appeal Petition. First, the Lions contend the Secretary of Agriculture lacks authority to issue debarment regulations or to debar the Lions from raisin inspections by USDA (Appeal Pet. at 12-14, 85-108, 127-30, 135).

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[35]The Rules of Practice provide that an appeal petition must be filed with the Hearing Clerk within 30 days after receiving the administrative law judge's written decision (7 C.F.R. § 1.145(a)). The Office of the Hearing Clerk receives documents from 8:30 a.m. to 4:30 p.m. *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

[36]*In re Bruce Lion* (Ruling Granting Complainant's Motion Not to Consider Reply to Complainant's Appeal Petition; and Order Vacating the Administrative Law Judge's Initial Decision and Remanding Proceeding to the Administrative Law Judge), 65 Agric. Dec. 1214, 1221 (2006).

As an initial matter, the Lions' argument that the Secretary of Agriculture's debarment authority cannot be extended to mandatory inspection requirements under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], is misplaced. The AMAA does not authorize the Secretary of Agriculture to inspect the Lions' raisins. The instant proceeding concerns only debarment from receiving USDA inspection services under the Agricultural Marketing Act.

I agree with the ALJ's conclusion that the Secretary of Agriculture has authority to debar the Lions from receiving USDA inspection services under the Agricultural Marketing Act (ALJ's Decision and Order at 3-4). The Agricultural Marketing Act directs and authorizes the Secretary of Agriculture to develop and improve standards of quality, condition, quantity, grade, and packaging and to recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.[37] The Secretary of Agriculture is also directed and authorized to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products under orders, rules, and regulations as the Secretary of Agriculture deems necessary to carry out the Agricultural Marketing Act.[38] The Secretary of Agriculture's debarment regulations (7 C.F.R. § 52.54) establish a means to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary is directed and authorized to administer. Based on the plain language of the Agricultural Marketing Act, I conclude the Secretary of Agriculture has authority to promulgate debarment regulations and to debar persons who engage in misrepresentation or deceptive or fraudulent practices or acts in connection with the inspection services provided by the Secretary of Agriculture.

Moreover, the United States Court of Appeals for the Ninth Circuit specifically addressed the issue of the Secretary of Agriculture's authority to promulgate debarment regulations under the Agricultural Marketing Act, as follows:

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[37]7 U.S.C. § 1622(c).

[38]7 U.S.C. §§ 1622(h), 1624(b).

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

American Raisin Packers, Inc. v. U.S. Dep't of Agric., 66 F. App'x 706 (9th Cir. 2003). Similarly, the United States Court of Appeals for the Eighth Circuit concluded the Agricultural Marketing Act authorizes the Secretary of Agriculture to promulgate regulations to withdraw meat grading services and affirmed the district court's denial of a request to enjoin the Secretary of Agriculture from holding an administrative hearing to determine whether meat grading services under the Agricultural Marketing Act should be withdrawn, as follows:

> In summary, we uphold regulation 53.13(a), which permits the Secretary to withdraw grading services for misconduct in order to ensure the integrity of the grading service. The Secretary's interpretation of his power to enforce the substance of 53.13(a) has been followed, unchallenged, for at least thirty years. Moreover, the regulation was issued pursuant to express rule making authority and is reasonably designed to preserve the integrity and reliability of the grading system the Secretary is directed and authorized to administer. Thus, although not expressly authorized, the regulation enjoys an especially strong presumption of validity which West has not rebutted. The regulation is not inconsistent either with an express statutory provision or with agriculture laws taken as a whole. Finally, the legislative history tends to support rather than strongly oppose the view that the regulations are authorized by Congress.

West v. Bergland, 611 F.2d 710, 725 (8th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980). Finally, in response to certified questions submitted to me by Administrative Law Judge Jill S. Clifton, I held the Secretary of Agriculture has authority under the Agricultural Marketing

Act to debar persons from USDA inspection services.[39] The Lions characterize that Ruling on Certified Questions as conclusory. Admittedly, I viewed and continue to view the issue of the Secretary of Agriculture's debarment authority as a simple issue that does not require exhaustive discussion. The Lions have thoroughly addressed the issue of the Secretary of Agriculture's debarment authority in their Appeal Petition; however, the Lions' arguments fail to convince me that *In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004), is error or that the Secretary of Agriculture lacks authority to debar the Lions from receiving inspection services from USDA under the Agricultural Marketing Act.

Second, the Lions contend debarment from inspection services under the Agricultural Marketing Act constitutes withdrawal of a license and the Administrative Procedure Act (5 U.S.C. § 558(c)) requires the Administrator to provide the Lions with notice of the conduct which may warrant withdrawal of the license and an opportunity to demonstrate or achieve compliance with all lawful requirements (Appeal Pet. at 14-16, 82, 123-27).

The ALJ found debarment from inspection services under the Agricultural Marketing Act did not constitute withdrawal of a license; hence, the Administrator was not required by 5 U.S.C. § 558(c) to provide the Lions with notice of the conduct which may warrant withdrawal of the license and an opportunity to demonstrate or achieve compliance with all lawful requirements (ALJ's Decision and Order at 4-5).

The Administrative Procedure Act defines the word "license" as follows:

> **§ 551. Definitions**
>
> For the purpose of this subchapter—
>
> . . . .
>
> (8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership,

[39] *In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004).

> statutory exemption or other form of permission[.]

5 U.S.C. § 551(8). Inspection and grading services performed by USDA for the Lions are not forms of permission granted to the Lions, but rather services performed by USDA for the Lions. The United States Court of Appeals for the Ninth Circuit, responding to a claim identical to that raised by the Lions, stated 5 U.S.C. § 558 is not applicable to debarment of inspection service under the the Agricultural Marketing Act, as follows:

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

American Raisin Packers, Inc. v. U.S. Dep't of Agric., 66 F. App'x 706 (9th Cir. 2003). Therefore, I reject the Lions' claims that debarment from the benefits of the Agricultural Marketing Act constitutes withdrawal of a license and that 5 U.S.C. § 558(c) is applicable to the instant proceeding.

Third, the Lions contend the ALJ's finding that Lion Raisins, Inc., lost it corporate form, is error (Appeal Pet. 16-27, 111-12).

Lion Raisins, Inc., failed to observe corporate formalities in numerous ways, including the filing of inconsistent documents with the California Secretary of State's Office and the RAC; naming different individuals as officers and directors of Lion Raisins, Inc., with the California Secretary of State's Office and the RAC; failing to file required annual reports (which resulted in Lion losing its original corporate name, Lion Enterprises, Inc.); naming of officers of the corporation with a variety of different titles; using titles other than those contained on filings with the California Secretary of State's Office; designating individuals as vice presidents of the corporation without apparent approval or action by the board of directors; failing to hold annual shareholder meetings; failing to hold annual board of directors

meetings; and failing to maintain accurate and appropriate minutes of shareholder and board of directors meetings (CX 1 at 3-4, CX 127; Tr. 1100-06, 1113-17, 1121-22).

Lion Raisins, Inc., identified different officers and directors on different forms and records for the same years (CX 130). Alfred Lion, Jr., testified that Susan Keller, one of Lion's employees, prepared the minutes, but did not attend the meetings (Tr. 1109-10). In one set of minutes, Larry Lion was indicated as being present for the meeting of the board of directors for 1999, 2000, and 2001; however, the record indicates he did not attend corporate meetings or otherwise perform the duties of corporate secretary (Tr. 1102-05, 1109-10). None of the minutes refers to litigation in which Lion Raisins, Inc., was involved, the retention of outside counsel, or personnel appointments, such as that of Kalem Barserian as general manager.

Therefore, I agree with the ALJ's conclusion that Lion Raisins, Inc., is not an entity separate and apart from Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion (ALJ's Decision and Order at 9-11, 37).

Fourth, the Lions contend the ALJ erroneously failed to find that USDA inspectors did not follow USDA procedures when inspecting the Lions' raisins and that USDA inspectors issued unreliable and inaccurate documents relating to the inspection of the Lions' raisins (Appeal Pet. at 27-28, 82-84, 131, 135-37).

I find irrelevant the Lions' contentions that USDA failed to follow its own procedures and issued unreliable documents. The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results. Even if I were to find that USDA inspectors issued unreliable documents in connection with the inspection of the Lions' raisins (which I do not so find), the Lions would be prohibited from altering USDA certificates or misrepresenting their own inspection results as USDA's inspection results.

Fifth, the Lions contend the ALJ erroneously found the invoice trail is the last document prepared with respect to the transactions that are the subject of the instant proceeding, the invoice trail denotes customer specifications, and the invoice trail indicates whether the customer requested a USDA certificate. The Lions contend the invoice trail is a

Lion order form that indicates, among other things, whether the Lions requested a USDA certificate. (Appeal Pet. at 29-31.)

The record establishes that the invoice trail for each transaction that is the subject of the instant proceeding was prepared after the product reflected on the invoice trail had been inspected, graded, and shipped; therefore, the invoice trail could not be a "request" for a USDA certificate. Moreover, the record does not establish that the invoice trail was the last document prepared with respect to each transaction that is the subject of the instant proceeding. Consequently, I do not adopt the ALJ's finding that the invoice trail was "the last document prepared," and I do not find that the invoice trail establishes whether the Lions' customers requested a USDA certificate.

Sixth, the Lions, citing the ALJ's Decision and Order at 12 ¶ 14, contend the ALJ erroneously found USDA provided USDA certificates to the Lions' designee (Appeal Pet. at 32).

As an initial matter, the ALJ did not find that USDA provided USDA certificates to the Lions' designee, as the Lions assert. Instead, the ALJ found "[o]nce the FV-146 was prepared and signed, the original and up to four of the blue tissue copies were provided to the packer (or designee)." (ALJ's Decision and Order at 12 ¶ 14.) Further, the ALJ's Findings of Fact numbers 11 through 15 contain a description of AMS procedures applicable to packers generally, not simply procedures applicable to the Lions. Therefore, I reject the Lions' contention that the ALJ's Findings of Fact number 14, is error. I further note, the ALJ's description of the manner in which AMS distributed inspection certificates to the packer or the packer's designee comports with the Regulations, which provide as follows:

> **§ 52.21 Disposition of inspection certificates.**
>
> The original of any inspection certificate, issued under the regulations in this part, and not to exceed four copies thereof, if requested prior to issuance, shall be delivered or mailed promptly to the applicant, or person designated by the applicant. All other copies shall be filed in such manner as the Administrator may

> designate. Additional copies of any such certificates may be supplied to any interested party as provided in § 52.49.

7 C.F.R. § 52.21.

Seventh, the Lions contend the ALJ's findings that the Lions requested and received cash back from the RAC are unsupported, irrelevant, and prejudicial (Appeal Pet. at 32-33).

The record establishes that, under a program operated by the RAC, packers who sold raisins for export could apply for, and receive, "cash back" for such sales by filing a RAC Form 100C. The amount of "cash back" was based on the weight of the raisins. The documents applicable to the transactions that are the subject of the instant proceeding establish that the Lions requested and received "cash back" from the RAC in virtually all of the transactions.[40] Therefore, I reject the Lions' contention that the ALJ's findings that the Lions applied for and received "cash back" are unsupported. Further, I find the ALJ's descriptions of the transactions, which are the subject of the instant proceeding, are neither irrelevant nor prejudicial.

Eighth, the Lions contend the ALJ's finding that the Lions charged a fee to customers that requested a USDA certificate, is error. The Lions state there is no evidence in the shipping files to support this finding of fact. (Appeal Pet. at 33-34.)

The ALJ found that "[o]nce Lion developed a 'Lion' certificate, Lion implemented the practice of charging its customers for USDA certificates" (ALJ's Decision and Order at 14 ¶ 19). The ALJ did not rely on the shipping files for this finding of fact. Instead, the ALJ relied upon an interview conducted by David W. Trykowski, Chief of Investigations, AMS Compliance Office, with Rosangela Wisley, a shipping clerk employed by the Lions. Ms. Wisley stated the Lions' customers were charged a fee for USDA certificates, as follows:

> WISLEY said that at a certain point in time Lion Raisins began charging an extra fee for customers to receive a USDA certificate

[40] CX 126A reflects the Lions' receipt of "cash back" from the RAC in all but six transactions.

> but the customers were told they could receive a Lion certificate that contained the same information for no charge. WISLEY said Bruce LION had instructed the employees to tell customers that the Lion certificate was the equivalent of a USDA certificate.

CX 7. Therefore, I reject the Lions' contention that the ALJ's finding that the Lions had a practice of charging their customers for USDA certificates, is error.

Ninth, the Lions contend the ALJ's finding that the Lions advised their customers that Lion certificates contain the same information as USDA certificates, is error. The Lions contend the ALJ's support for this finding is unreliable hearsay. (Appeal Pet. at 35-37.)

The ALJ found "[c]ustomers were advised a 'Lion' certificate would be provided without charge and that Lion certificates contained the same information as a USDA certificate. See CX 73 at 44 ('Please note that the Lion certificate and the USDA certificate for each order is the same.')." (ALJ's Decision and Order at 14 ¶ 19.) The exhibit (CX 73 at 44) relied upon by the ALJ is a letter dated January 12, 2000, from Lion Raisins, Inc.'s export traffic administrator to NAF International - Copehagen, which states, as follows:

> Please find enclosed the USDA Certificates for the above mentioned shipments, per your request. We have also included copies of the Lion Certificates of Quality and Condition. Please note that the Lion certificate and the USDA certificate for each individual order is the same.
>
> In an effort to remain competitive in the market, we began issuing Lion Quality and Condition certificates in place of the USDA. We do not feel it is justified to require Lion to absorb the cost of issuing USDA certificates when the Lion Certificate provides the same information (obtained from USDA). Please advise your customer that we will issue only Lion Certificates of Quality and Condition for future shipments, unless they are willing to compensate Lion for the administrative/clerical costs.

CX 73 at 44. I disagree with the Lions' contention that the letter is unreliable hearsay. As an initial matter, I find the Lions' own letter a reliable reflection of the advice the Lions provided to their customers. Moreover, I do not find the letter hearsay as it was used by the ALJ not as support for the matter asserted ("the Lion certificate and the USDA certificate for each individual order is the same"), but merely to show that the Lions gave the advice that the Lion certificate and the USDA certificate for each individual order is the same.[41]

Tenth, the Lions contend the ALJ's finding that Lion certificates were prepared not by the Lions' quality control personnel, but rather by those in the shipping department is misleading because the shipping department prepared Lion certificates from Lion check sheets and either USDA line check sheets or USDA worksheets (Appeal Pet. at 37-38).

The Lions do not allege error by the ALJ, and I find none. The Lions appear to agree with the ALJ's finding that "Lion certificates were prepared not by Lion's quality control personnel, but rather by those in the shipping department." (ALJ's Decision and Order at 14 ¶ 20.)

Eleventh, the Lions contend the ALJ's finding that Lion certificates follow the same format and provide the same information as USDA certificates, is error (Appeal Pet. at 38-41).

The ALJ found "Lion certificates were prepared on Lion letterhead but follow the same format used on the FV-146 in the body of the document, providing the same information categories found on the USDA's worksheet and/or certificate." (ALJ's Decision and Order at 14 ¶ 20.) Based upon a comparison of the USDA certificates and the Lion certificates in the record, I agree with the ALJ's finding that Lion certificates followed the same format as USDA certificates and provided the same information categories as are found on the USDA's certificates. (Compare, e.g., CX 73 at 34 and CX 73 at 49.)

The Lions also state no customers complained that they mistook Lion certificates for USDA certificates and state they have changed the Lion certificates and improved their audit trails in an attempt to satisfy

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[41] *In re George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2508 (1985) (stating "Mr. Gentry's testimony as to what Mr. Kostelecky requested would not have been hearsay since it would have been offered only to show that Mr. Kostelecky made the request; not to show the truthfulness of what Mr. Kostelecky said. *See* 6 Wigmore, *Evidence* § 1766 (Chadbourn rev. 1976).").

USDA's concerns (Appeal Pet. 40-41). I find both of these statements irrelevant to the issues in the instant proceeding.

The Lions suggest that I decline to adopt the ALJ's finding that the Lion certificates "follow" the same format used on the USDA certificates, and, instead, use the past tense "followed" to indicate that the finding regarding similarity of format with regard to the Lion certificates and the USDA certificates relates only to the period material to the instant proceeding. I adopt the Lions' suggestion. (See Finding of Fact number 17, *supra*.)

Twelfth, the Lions contend the ALJ erroneously found the Lions' customers requested USDA certificates (Appeal Pet. at 41-47).

The ALJ relied on the notation "USDA Cert: YES" on the invoice trails as support for his finding that the Lions' customers requested USDA inspection certificates (see, e.g., CX 107 at 1); however, Mr. Trykowski testified he had been informed by former Lion employees that the notation "USDA Cert: YES" on the invoice trails indicates the Lions requested a USDA certificate (Tr. 161) and Mr. Bruce Lion confirmed Mr. Trykowski's testimony (Tr. 1483-84). Therefore, except for the four transactions in which the Lions state their customers did request USDA certificates (Appeal Pet. at 46-47; Findings of Fact 23, 27, 35, and 41, *supra*), I do not adopt the ALJ's findings that the Lions' customers requested USDA certificates.

Thirteenth, the Lions contend the ALJ erroneously suggested the Lions' retention of USDA worksheets and certificates was wrongful (Appeal Pet. at 41-47).

The evidence indicates the Lions' retention of USDA certificates and worksheets was lawful (Tr. 289-90). However, the Lions do not cite and I cannot locate any finding by the ALJ suggesting the Lions' retention of USDA worksheets and certificates was wrongful. Therefore, I reject the Lions' contention that the ALJ erroneously suggested the Lions' retention of USDA worksheets and certificates was wrongful.

Fourteenth, the Lions contend the ALJ erroneously found the Lions' customers ordered U.S. Grade B raisins in the majority of orders. The Lions assert that the ALJ based this finding on the notation "Grade: B" on the invoice trails and that the notations on those invoice trails only

relate to maturity. The Lions further assert their customers were willing to accept raisins that met the overall standards for U.S. Grade C raisins as long as the raisins met the U.S. Grade B standards for maturity. (Appeal Pet. at 47-53, 109-10, 112-14.)

U.S. Grades, as applied to raisins, are based upon a number of factors, only one of which is maturity.[42] The Regulations contain no U.S. Grade B designation for maturity only. The Lions' representations that raisins that had been graded by USDA as U.S. Grade C, were U.S. Grade B, because the raisins met the standards for U.S. Grade B based only upon maturity of the raisins was an impermissible use of the U.S. Grade designation. Therefore, I reject the Lions' argument that they accurately represented raisins as U.S. Grade B, even though the raisins had been graded by USDA as U.S. Grade C.

Fifteenth, the Lions contend the ALJ erroneously found that on 21 occasions the Lions' customers ordered raisins with a maximum moisture percentage. The Lions contend customers specified a maximum moisture percentage with respect to only four loads of raisins (CX 71, CX 73, CX 117) and the remaining moisture percentages specified in documents related to these transactions are merely the Lions' internal targets for moisture percentage, not customer specifications. (Appeal Pet. at 53-61.)

I have reviewed the invoice trails and other documentation related to the transactions in question and find the record supports the ALJ's findings that the Lions' customers ordered raisins with maximum moisture percentages. For example, with respect to order number 44351, the record establishes that Central Import placed an order for raisins with a maximum moisture content of 15.5 percent. The invoice trail reflects this order (CX 115 at 1 ("Moisture %: 15.5% Max")) and all of the documents related to this transaction indicate that Central Import specified the maximum moisture percentage. I find nothing in the documents related to this transaction indicating that the maximum moisture percentage is merely an internal target set by the Lions. If the maximum moisture percentage were merely an internal target set by the Lions, there would be no basis for the post-it note to Bruce Lion from a Lion employee stating the moisture percent did not meet the

[42]See 52 C.F.R. §§ 52.1846, .1849, .1852, .1853, .1855, .1857, .1858.

specifications in the order (CX 115 at 15) and no reason for the Lion certificate to reflect the information in the USDA certificate, except to indicate that the moisture was 15.5% rather than the 17% found by USDA inspectors (CX 115 at 18-19, 21).

Sixteenth, the Lions contend their test results more accurately reflect the quality and condition of raisins than the USDA test results, contend USDA inspections are not accurate or reliable, and contend USDA line check sheets, worksheets, and certificates are untrustworthy (Appeal Pet. at 57, 62-64, 74-81, 114-16, 131, 135-37).

Even if I were to find that the Lions' test results more accurately reflect the quality and condition of raisins than USDA test results and that USDA inspections are not accurate or reliable, I would not dismiss the instant proceeding. The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results, not whether the Lions' test results more accurately reflect the quality and condition of raisins than USDA test results or whether USDA inspections are accurate and reliable. I find the relative accuracy of USDA test results and the Lions' test results and the accuracy and reliability of USDA inspections irrelevant to the instant proceeding.

Seventeenth, the Lions contend the ALJ concluded the Lions obliterated USDA certificate Y-034343, but did not make a finding that the Lions had obliterated USDA certificate Y-034343 (Appeal Pet. at 62).

The ALJ concluded the Lions obliterated "a portion of the remarks section of [USDA] certificate" B-034343 (ALJ's Decision and Order at 47 ¶ 6aa). I agree with the Lions that the ALJ made no finding of fact that corresponds to this conclusion; therefore, I do not adopt the ALJ's conclusion regarding obliteration of a portion of the remarks section of USDA certificate B-034343.

Eighteenth, the Lions contend the ALJ concluded the Lions used USDA certificate B-034321 to misrepresent the moisture and size of raisins sold by the Lions to Borges, S.A., but the ALJ did not make a finding that the Lions misrepresented the size of the raisins (Appeal Pet.

at 61-62).

The ALJ concluded the Lions used an official inspection certificate (B-034321) as a basis to misrepresent the size of raisins sold by the Lions to Borges, S.A. (ALJ's Decision and Order at 46 ¶ 6y). I agree with the Lions that the ALJ made no finding of fact that corresponds to this conclusion; therefore, I do not adopt the ALJ's conclusion regarding the misrepresentation of raisin size with respect to this transaction.

Nineteenth, the Lions contend that they presented reasonable explanations for handwritten post-it notes that are in the Lions' shipping files (Appeal Petition at 64-74).

The record contains handwritten post-it notes (CX 55 at 5, CX 75 at 18, CX 77 at 21, CX 81 at 25, CX 103 at 2, CX 115 at 15, CX 117 at 13). The ALJ correctly quoted statements on the post-it notes, and I reject the Lions' explanations for the post-it notes. Instead, I find each of the post-it notes indicates that Bruce Lion instructed the Lions' employees to prepare Lion certificates so that those certificates contained information indicating that the Lions' raisins met customer specifications, when USDA did not certify the raisins as meeting customer specifications. (See Findings of Fact numbers 23, 29, 33, 35, 46-47, 49, *supra*).

Twentieth, the Lions assert the ALJ failed to address a number of relevant and material facts. The Lions identify those purportedly relevant and material facts, as follows: (1) USDA has a contractual obligation to warn the Lions of their violations of the Agricultural Marketing Act and the Regulations; (2) the Lions received complaints about the accuracy of USDA certificates; (3) the Lions implemented a quality control department and testing procedures; (4) USDA's testing and inspection procedures were faulty; (5) the Lions' certificates accurately reflected the quality of their raisins; (6) the Lions did not receive complaints from their customers; (7) the Lions had outstanding business ethics; (8) the Lions made good faith efforts to demonstrate and achieve compliance with the Agricultural Marketing Act and the Regulations; (9) debarment would have an adverse impact on the Lions, the Lions' employees, minorities, the local community, the California raisin industry, growers, packers, and vendors; and (10) USDA found that Lion Raisins, Inc., is a responsible bidder to be awarded contracts.

(Appeal Pet. at 82-84, 123-24.)

I do not address whether the evidence supports any of the facts listed by the Lions. However, I find that none of the purported facts listed is relevant and material to the issue of whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in violation of the Agricultural Marketing Act and the Regulations. Therefore, I reject the Lions' assertion that the ALJ erroneously failed to address relevant and material facts.

Twenty-first, the Lions contend the ALJ erroneously concluded that the Lions' use of the term "officially drawn" on Lion certificates is an impermissible attempt to extend the meaning of the term "officially drawn sample" to include results found by the Lions' quality control personnel (Appeal Pet. at 108-09, 116-18).

I find the ALJ correctly determined that the Lions used the term "officially drawn" on Lion certificates to falsely equate the Lion certificates and the information on the Lion certificates with USDA certificates (ALJ's Decision and Order at 37 ¶ 2). The term "officially drawn sample" is defined in the Regulations, as follows:

> **§ 52.2 Terms defined.**
>
> Words in the regulations in this part in the singular form shall be deemed to import the plural and vice versa, as the case may demand. For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:
>
> . . . .
>
> *Officially drawn sample.* "Officially drawn sample" means any sample that has been selected from a particular lot by an inspector, licensed sampler, or by any other person authorized by the Administrator pursuant to the regulations in this part.

7 C.F.R. § 52.2. Samples drawn by the Lions' quality control personnel are not "officially drawn sample[s]." The term "officially drawn" on Lion certificates is a legend signifying that the product has been

officially inspected. The results on the Lion certificates are in fact not from officially inspected samples; therefore, the Lion certificates constitute misrepresentations.

Twenty-second, the Lions contend the ALJ's conclusion that they willfully violated the Agricultural Marketing Act and the Regulations, is error (Appeal Pet. at 122-23).

An act is considered "willful" under the Administrative Procedure Act if the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice or (2) acts with careless disregard of statutory requirements.[43] The Lions' long-standing pattern of misrepresentation or deceptive or fraudulent practices or acts, in connection with the use of official inspection certificates and/or inspection results, constitutes careless disregard of the Agricultural Marketing Act and the Regulations, and the Lions' violations are clearly willful.

Twenty-third, the Lions contend USDA is attempting to punish the Lions for their violations of the Agricultural Marketing Act and the Regulations (Appeal Pet. at 123, 130, 133-35).

Debarment from the benefits of the Agricultural Marketing Act is remedial, not punitive.[44] The purpose of debarring those who engage in misrepresentation or deceptive or fraudulent practices or acts is to

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[43] *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991).

[44] *See United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir.) (determining debarment is not punishment), *cert. denied*, 519 U.S. 1047 (1996); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) (stating the provision in the Generic Drug Enforcement Act for civil debarment was remedial where debarment served compelling government interests unrelated to punishment and punitive effects were merely incidental to the overriding purpose to safeguard the integrity of the generic drug industry while protecting public health); *United States v. Holtz*, 1993 WL 482953 *11 (E.D. Pa. 1993) (stating debarment is designed 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), *aff'd*, 31 F.3d 1174 (3d Cir. 1994) (Table).

protect the integrity of the inspection service and to protect the public.[45] Debarment of such persons is designed to ensure that quality and condition standards are uniform and consistent, so that consumers obtain the quality product they desire unaffected by corrupt influences. Therefore, I reject the Lions' contention that USDA is attempting to punish the Lions.

Twenty-fourth, the Lions assert the ALJ had discretion to reject the Administrator's recommended remedy and impose no debarment even if the ALJ found the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts. The Lions also assert the Administrator's remedy recommendation is not entitled to any weight. (Appeal Pet. at 132-33, 138-41.)

I agree with the Lions' assertion that the ALJ had discretion to impose no period of debarment despite a finding that the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts. The Regulations clearly provide that any misrepresentation or deceptive or fraudulent practice or act "may be deemed sufficient cause for . . . debarment[.]"[46] However, I find no indication that the ALJ was unaware that he could find the Lions violated the Agricultural Marketing Act and the Regulations and also determine that the Lions' violations were not a sufficient cause for debarment.

I reject the Lions' assertion that the remedy recommendations of administrative officials are entitled to no weight. Instead, I conclude the recommendations of administrative officials charged with the responsibility for achieving the congressional purposes of the Agricultural Marketing Act are entitled to great weight and must be considered by the administrative law judge when determining whether

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[45] *See Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (stating a 5-year suspension from the Medicare program was remedial because its purpose was to protect the public from those who defraud the program); *United States v. Drake*, 934 F. Supp. 953, 959 (N.D. Ill. 1996) (stating suspension from obtaining loans from the Commodity Credit Corporation for failure to employ good faith in disposition of secured crops "is not punitive in nature, rather, the regulation exists to protect the integrity of the CCC and the price support loan program").

[46] 7 C.F.R. § 52.54(a).

to debar a person for engaging in fraud or misrepresentation described in 7 C.F.R. § 52.54(a). However, administrative officials' recommendations are not controlling and may be rejected by the administrative law judge. The ALJ rejected the 15-year debarment period recommended by administrative officials and imposed a 5-year debarment period; thereby indicating the ALJ fully understood that the recommendations of administrative officials are not controlling.

Twenty-fifth, the Lions contend one of the purposes of the Agricultural Marketing Act is the promotion of the marketing of agricultural products through voluntary inspections and debarment of the Lions from receiving USDA inspection services is contrary to this purpose of the Agricultural Marketing Act (Appeal Pet. at 135).

The Secretary of Agriculture is directed and authorized to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products in accordance with orders, rules, and regulations as the Secretary of Agriculture deems necessary to carry out the Agricultural Marketing Act.[47] The Secretary of Agriculture's debarment regulations (7 C.F.R. § 52.54) establish a means to maintain public confidence in the integrity and reliability of the processed products inspection service by withdrawing USDA services from persons who have engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with inspection certificates and/or inspection results. I find the maintenance of public confidence in the integrity and reliability of the processed products inspection service is fully consistent with the purposes of the Agricultural Marketing Act.

Twenty-sixth, the Lions assert any conclusion that the Lions lack present business integrity would be arbitrary and capricious (Appeal Pet. 144-51).

The Lions do not cite and I cannot locate any conclusion of law by the ALJ that states the Lions "lack present business integrity." Therefore, I reject, as speculative, the Lions' assertion that any conclusion that the Lions lack present business integrity "would be" arbitrary and capricious.

Twenty-seventh, the Lions contend the ALJ's imposition of a 5-year period of debarment is unreasonable under the circumstances (Appeal

[47] 7 U.S.C. §§ 1622(h), 1624(b).

Pet. at 151-54).

In light of the number and the nature of the Lions violations of the Agricultural Marketing Act and the Regulations and the 2-year period during which the Lions violated the Agricultural Marketing Act and the Regulations, I find the ALJ's imposition of a 5-year period of debarment reasonable and conclude the 5-year period of debarment is sufficient and necessary to maintain public confidence in the integrity and reliability of the processed products inspection service.

Twenty-eighth, the Lions contend the ALJ erroneously debarred Lion Raisins, Inc.'s employees, successors, and assigns (Appeal Pet. at 154).

The Regulations provide any person committing an act or engaging in a practice or causing an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all of the benefits of the Agricultural Marketing Act. In addition, the Regulations provide that "agents, officers, subsidiaries, or affiliates" of the person who actually committed an act or engaged in a practice or caused an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all benefits of the Agricultural Marketing Act. The Regulations do not identify "employees, successors, and assigns" as subject to debarment. Therefore, I do not adopt the ALJ's Order debarring Lion Raisins, Inc.'s "employees, successors, and assigns." Instead, I debar Lion Raisins, Inc., and its agents, officers, subsidiaries, and affiliates, as provided in the Regulations.

Twenty-ninth, the Lions contend the Administrator did not present one "iota or scintilla of evidence" that Alfred Lion, Jr.; Isabel Lion; Larry Lion; or Jeffrey Lion violated the Agricultural Marketing Act or the Regulations; therefore, the ALJ's debarment of Alfred Lion, Jr.; Isabel Lion; Larry Lion; and Jeffrey Lion, is error (Appeal Pet. at 154).

As an initial matter, Isabel Lion and Larry Lion did not appeal the ALJ's June 9, 2006, Decision and Order and the ALJ's debarment of Isabel Lion and Larry Lion became final and effective in July 2006. As for Alfred Lion, Jr., and Jeffrey Lion, the record establishes they were officers of Lion Raisins, Inc., and Lion Raisins, Inc., is not an entity separate and apart from Alfred Lion, Jr., and Jeffrey Lion. Therefore, even if I were to find that the Administrator presented no evidence that

Alfred Lion, Jr., and Jeffrey Lion violated the Agricultural Marketing Act and the Regulations, that finding would not affect my disposition of the instant proceeding as to Alfred Lion, Jr., and Jeffrey Lion.

Thirtieth, the Lions contend the ALJ's Decision and Order providing that the Lions may petition the Secretary of Agriculture or the Secretary's designee, is error, and the Order should be modified to provide that the Lions may petition the ALJ or the Judicial Officer (Appeal Pet. at 154-55).

The ALJ provided that the 5-year period of debarment may be suspended, as follows:

> 3. After a period of one year, upon a showing of good faith and adequate assurances of future compliance, the Respondents, or any of them, may petition the Secretary or his designee to suspend the balance of the period of debarment; however, with such suspension conditioned upon no violations being found during the remaining period of suspension. In the event additional violations were to be found, the full suspended balance of the period of debarment would then be reinstated.

ALJ's Decision and Order at 50. I find the third paragraph in the ALJ's Order is superfluous as a party may seek suspension of a period of debarment from benefits under the Agricultural Marketing Act and the ALJ lacked authority to impose restrictions on a party's request for suspension of a period of debarment. Therefore, I do not adopt that portion of the ALJ's Order which limits the Lions' right to seek suspension of the 5-year period of debarment from benefits under the Agricultural Marketing Act.

The ALJ Erred in Dismissing Allegations as Time-Barred

On December 20, 2005, the ALJ issued a Memorandum of Conference and Order dismissing paragraphs 11 through 89 of the Second Amended Complaint on the ground that they alleged violations that were time-barred by reason of 28 U.S.C. § 2462.

The limitation in 28 U.S.C. § 2462 applies only to proceedings for

"civil fines, penalties, and forfeitures," and is strictly construed in favor of the government.[48] Debarment is not a fine, penalty, or forfeiture. Debarment is "the act of precluding someone from having or doing something" and "does not extract payment in cash or in kind."[49] Forfeiture, on the other hand, imposes a loss by the taking away of some specific property or preexisting valid right without compensation.[50] Moreover, 28 U.S.C. § 2462 applies to "penalty actions"[51] and debarment is not penal.

The United States Supreme Court, interpreting the predecessor

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[48] *E.I. Dupont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (stating statutes of limitations sought to be applied to bar rights of the government must receive a strict construction in favor of the government); *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918) (stating this court strictly construes statutes of limitations when urged to apply those statutes to bar the rights of government); *United States v. Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886) (stating the United States, asserting its rights vested in it as a sovereign government, is not bound by any statute of limitations unless Congress has clearly manifested its intention that the United States should be so bound).

[49] *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 186 n.6 (2001) (citing *Printup v. Alexander & Wright*, 69 Ga. 553, 556 (Ga. 1882) ("to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); *Haynesworth v. Hall Constr. Co.*, 163 S.E. 273, 277 (Ga. Ct. App. 1932) ("to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); BLACK'S LAW DICTIONARY 407 (7th ed. 1999) (defining debarment as the act of precluding someone from having or doing something; exclusion or hindrance); WEBSTER'S COLLEGIATE DICTIONARY 296 (10th ed. 1997) (defining "debar" as to bar from having or doing something); 4 THE OXFORD ENGLISH DICTIONARY 308 (2d ed. 1991) (defining "debar" as to exclude or shut out from a place or condition; to prevent or prohibit from entrance or from having, attaining, or doing anything)).

[50] *L & K Realty Co. v. R.W. Farmer Const. Co.*, 633 S.W.2d 274, 279 (Mo.App.1982).

[51] *United States v. Rebelo*, 358 F. Supp.2d 400, 408 (D.N.J. 2005) (stating 28 U.S.C. § 2462, the catch-all statute of limitations, has particular applicability to penalty actions).

> statute to 28 U.S.C. § 2462, has said that "penalty or forfeiture" means "something imposed in a punitive way for an infraction of public law." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed 644 (1915). Where the liability sought to be enforced is not punitive, but rather "strictly remedial," the catch-all statute of limitations does not apply. *Id*.

United States v. Rebelo, 358 F. Supp.2d 400, 408-09 (D.N.J. 2005) (footnote omitted). Debarment from the benefits of the Agricultural Marketing Act is strictly remedial.[52] The purpose of debarring those who engage in misrepresentation or deceptive or fraudulent practices or acts is to protect the integrity of the inspection service and to protect the

[52]*See United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir.) (determining categorically that debarment is not punishment), *cert. denied*, 519 U.S. 1047 (1996); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) (stating the Generic Drug Enforcement Act's provision for civil debarment was remedial where debarment served compelling government interests unrelated to punishment and punitive effects were merely incidental to the "overriding purpose to safeguard the integrity of the generic drug industry while protecting public health."); *United States v. Furlett*, 974 F.2d 839, 844 (7th Cir. 1992) (stating debarment from all trading activity reasonably can be viewed as a remedial measure); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (stating removal of persons whose participation in government programs is detrimental to public purposes is remedial by definition); *Taylor v. Cisneros*, 913 F. Supp. 314, 320 (D.N.J. 1995) (stating, while debarment manifestly carried the "sting of punishment" in the eyes of the defendant, that alone could not recast a remedial measure as punishment because the analysis does not proceed from the defendant's perspective; purposes, not deterrent effects, are paramount), *aff'd*, 102 F.3d 1334 (3d Cir. 1996); *United States v. Holtz*, 1993 WL 482953 (E.D. Pa. 1993) (holding the Federal Aviation Administration's revocation of an aviation license for violating federal aviation regulations by falsifying maintenance records subject to FAA inspection was not a punitive sanction), *aff'd*, 31 F.3d 1174 (3d Cir. 1994) (Table); *Doe v. Poritz*, 142 N.J. 1, 43 (1995) (stating a statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions; a law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: the intent to punish.).

public.[53] The exclusion of such persons helps to ensure that quality and condition standards are uniform and consistent, so that consumers may be able to obtain the quality product that they desire unaffected by corrupt influences.

Therefore, I conclude debarment under section 52.54 of the Regulations (7 C.F.R. § 52.54) is not "a fine, penalty, or forfeiture" and the statute of limitations in 28 U.S.C. § 2462 does not apply to the instant proceeding. The ALJ's determination that paragraphs 11 through 89 of the Second Amended Complaint are time-barred, is error; however, even if I were to remand the instant proceeding to the ALJ and he were to find the Lions committed the violations alleged in paragraphs 11 through 89 of the Second Amended Complaint, I would not change the disposition of the instant proceeding. Therefore, I decline to remand the proceeding to the ALJ, and I dismiss paragraphs 11 through 89 of the Second Amended Complaint.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lion Raisins, Inc., and its agents, officers, subsidiaries, and affiliates are debarred for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.

2. Alfred Lion, Jr.; Bruce Lion; Daniel Lion; and Jeffrey Lion are each debarred for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.

3. This Order shall become effective 30 days after service of this Order on the Lions.

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[53] *See Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (stating a 5-year suspension from the Medicare program was remedial because its purpose was to protect the public from those who defraud the program); *United States v. Drake*, 934 F. Supp. 953, 959 (N.D. Ill. 1996) (stating suspension from obtaining loans from the Commodity Credit Corporation for failure to employ good faith in disposition of secured crops "was not punitive in nature, rather, the regulation exists to protect the integrity of the CCC and the price support loan program.").

In re: LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND AS LION RAISINS LION RAISIN COMPANY, LION PACKING COMPANY AN AL LION, JR. DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; AND BRUCE LION, AN INDIVIDUAL,

AND

In re: BRUCE LION, AN INDIVIDUAL; ALFRED LION, JR., AN INDIVIDUAL;DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; ISABEL LION, AN INDIVIDUAL; LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AND LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION.
I&G Docket No. 01-0001.
I&G Docket No. 03-0003.
Decision and Order.
May 4, 2009.

I&G – Debarment – Iinspection certificates, forged, altered or falsified.

Colleen Carroll for AMS.
James A. Moody, Wesley T. Green, Daniel A. Bacon for Respondents.
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision Summary

1. To protect the integrity of USDA inspection, analysis, and reporting of raisin quality, considering the unauthorized and unlawful alteration or fabrication of official USDA inspection certificates that occurred in the shipping department of Lion Raisins, Inc., in Fresno or Selma, California, in 1997-98, I decide the length of debarment (being banned from receiving USDA inspection and grading services), if any, that is necessary, appropriate and proportionate, as to each Respondent. I

decide that, for Bruce Lion, who managed the shipping department, debarment not to exceed 36 months is necessary, appropriate and proportionate. Bruce Lion was responsible for what the shipping department did (or failed to do), and the shipping department's actions (or failures to act) cause each of the three respondent companies (1) Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and Lion Raisins; (2) Lion Raisin Company, a partnership or unincorporated association; and (3) Lion Packing Company, a partnership or unincorporated association; to be subjected, likewise, to debarment not to exceed 36 months. Dan Lion, also known as Daniel Lion, managed production and the packing department and did not know of the shipping department's unauthorized and unlawful alteration or fabrication of official USDA inspection certificates, but I nevertheless decide that, for Dan Lion, debarment not to exceed three months is necessary, appropriate and proportionate, based on the contribution of the packing department to product being out-of-customer-specifications. For the four remaining Respondents, each an individual, I decide that no debarment is necessary, appropriate or warranted: (1) Al Lion, Jr., also known as Alfred Lion, Jr.; (2) Jeff Lion, also known as Jeffrey Lion; (3) Larry Lion; and (4) Isabel Lion; each of whom could not have known, nor should any of them have known, of the unauthorized and unlawful alteration or fabrication of official USDA inspection certificates that occurred in the shipping department. 7 U.S.C. § 1621 *et seq.*, 7 C.F.R. § 52 *et seq*.

Introduction

2. Lion's shipping department, on occasion, provided an inspection certificate to a customer, to apprise the customer of the condition and quality of a shipment of raisins. Lion's shipping department was managed by Bruce Lion during the time material herein, including about March 14, 1997 through about April 27, 1998 ("01" case, referring to I&G Docket No. 01-0001) including August 26, 1997 ("03" case, referring to I&G Docket No. 03-0001). What Lion provided to its customer did not, at times, match the USDA inspection certificate copy in USDA's files. Lion asserts that the fault lay with USDA's record-keeping failures. Evidence to the contrary comes from two sources: documentation surrounding inspection certificate issuance, found in Lion's own files as well as USDA's files; and the experience of Lion office workers, who testified, who were responsible for creating inspection certificates that never were issued by USDA. What Lion Raisins FAXed to its customer was not what USDA records showed that USDA had issued. The sinister explanation: In order to convey to Lion's customer that the customer got what it ordered, Lion personnel in the shipping department routinely forged, altered, or otherwise falsified the official USDA results. The innocent explanation: USDA did determine the condition of the raisins to be as stated on the certificate that was FAXed to Lion's customer, but USDA's record-keeping did not keep up with events on the ground. Further, the certificate that was FAXed to Lion's customer conveyed the true condition of the raisins.

3. There are seven (7) inspection certificates at issue, delivered to Lion customers, six (6) in the "01" case; one (1) in the "03" case. Of the seven certificates delivered to Lion customers, one certificate has a discrepancy between the USDA official grade, based on USDA records, and the grade shown to the Lion customer AS IF it were the USDA official grade. The remaining six certificates have discrepancies between the USDA official moisture content, based on USDA records, and the moisture content shown to the Lion customer AS IF it were the USDA official moisture content.

Parties and Counsel

4. The Complainant is the Administrator of the Agricultural Marketing Service, United States Department of Agriculture (frequently herein "AMS" or the "Complainant").

5. AMS is represented by Colleen A. Carroll, Esq., with the Office of the General Counsel (Marketing Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1417.

6. By "Lion," I refer to all Respondents, collectively. The Respondents are Bruce Lion, who was an important salesman, the manager of the shipping department, and the corporate Vice President; the three respondent companies (1) Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and Lion Raisins; (2) Lion Raisin Company, a partnership or unincorporated association; and (3) Lion Packing Company, a partnership or unincorporated association; Dan Lion, also known as Daniel Lion, who was the manager of the packing department ("processing") (Dan was given an operating title of "Vice President" to acknowledge his importance, but Dan was not truly a corporate officer); Al Lion, Jr., also known as Alfred Lion, Jr., who was Chief Executive Officer and Chief Financial Officer, handled the check book, was the corporate President, a corporate Director, a corporate shareholder, and the corporate registered agent; Jeff Lion, also known as Jeffrey Lion, who was the manager of the farm operations ("growing" and "growers") (Jeff also was given an operating title of "Vice President" to acknowledge his importance, but Jeff was not truly a corporate officer); Larry Lion, who was corporate Secretary-Treasurer, a corporate Director, and a corporate shareholder; and Isabel Lion, who was a corporate Director, and a corporate shareholder.

7. The Respondents are represented by James A. Moody, Esq., Suite 300, 1101 30th St. N.W., Washington, D.C. 20007; and Wesley T. Green, JD MBA, Corporate Counsel for Lion Raisins, Inc., 9500 S. DeWolf Avenue, P.O. Box 1350, Selma, CA 93662. Bruce Lion was also represented by Daniel A. Bacon, Esq.

Procedural History

8. Violations are alleged of the Agricultural Marketing Act of 1946, as amended, 7 U.S.C. § 1621 *et seq.*, and the regulations, 7 C.F.R. Part 52, in both the Second Amended Complaint filed on July 2, 2002 in the "01" case, and the Amended Complaint filed on July 12, 2005 in the "03" case. Respondents' Answer was filed July 29, 2002. Ironically, it was Brian Leighton, former attorney for Lion, who then asked that any other amendments be filed in a new case. That's what gave rise to the "03" case. The "03" case has a dramatic history. The "03" case was decided in AMS's favor by default, but the U.S. District Court put a stop to that. Then the "03" case was decided in Lion's favor by dismissal based on the statute of limitations, but the Judicial Officer has put a stop to that.

9. The hearing in the "01" case took 72 days; the hearing in the "03" case began on June 9 and 10, 2008 and was not concluded. The transcript is referred to as "Tr." All of the proposed transcript corrections are accepted, and the transcript is ordered corrected accordingly.

10. Respondents' oral motion for consolidation is hereby granted; I hereby consolidate for decision the two cases (the "01" case and the "03" case); receive into evidence in the "03" case all the evidence admitted in the "01" case; and receive into evidence in the "03" case, over objection, the exhibits delivered to me on June 9, 2008: Complainant's exhibits CX 1 through CX 4; and CX 6 through CX 12; and the three volumes of Respondents' exhibits, RX 1 through RX 148.

11. All motions to reopen the evidence in the "01" case are denied, and no additional evidence will be received in either case, the "01" case or the "03" case. On careful review of the record before me, I find sufficient evidence to render a decision; additional proceedings will do nothing more than waste resources, mine, AMS's and Lion's. More proceedings will not provide new insight into Lion's business operations or AMS's inspection and grading operations and will not alter my views on the outcome of these proceedings.

12. All motions to certify questions to the Judicial Officer are denied.

13. On the statute of limitations issue in the "03" case, I adopt in its

entirety the reasoning on that issue of the Judicial Officer in his Decision and Order issued April 17, 2009 in *In re Lion Raisins, Inc.*, I&G Docket No. 04-0001 (the "04" case), except that I do not dismiss any of the "03" case. *See* pp. 87-91.

14. AMS's Motion to Rescind Order Assigning Mediator is denied.

15. All other pending motions are denied, to the extent that they are not addressed in this Decision and Order.

Findings of Fact and Conclusions

16. Paragraphs 17 through 35 contain intertwined Findings of Fact and Conclusions.

17. The Secretary of Agriculture has jurisdiction over each Respondent and the subject matter involved herein.

18. No penalties are imposed by this Decision & Order. No civil penalties are authorized by Statute. 7 U.S.C. § 1621 *et seq*. The Statute authorizes criminal penalties, but no criminal case was filed, and this is a civil case.

19. Regarding the inspection certificates addressed in this Decision, seven of them, from 1997-98, which were provided to Lion customers by Lion's shipping department, the evidence shows that Lion's shipping department took impermissible short cuts, conforming inspection certificates to customers' specifications without taking the required steps designed to re-determine the actual quality and condition of the raisins.

20. What is really alarming is that, in 1997-98, Lion shipping clerks routinely fabricated or altered official USDA inspection certificates when the inspector's worksheet (the worksheet was used to communicate the findings that go on the inspection certificate), reflected something other than the customer's specifications. Lion shipping clerks even forged inspectors' names, and even used "white-out" to change the grade (the "white-out" and alteration are quite noticeable on the original but would not be noticeable on a FAXed photocopy). The testimony of Dorothy Proffitt Hamilton (CX 31a, 31b, Tr. 495-96) and the testimony of Ken Turner (CX 36, 36a, Tr. 1552-53, 1559-1563)

persuade me that this is true, that they both had done it, too, routinely enough that they did not even remember the occasion of their first forgery, and that Bruce Lion was aware it was being done.

21. By altering or fabricating official USDA inspection certificates, Lion's shipping department thereby attributed to USDA unfounded statements of quality and condition. Thus, since USDA had not made the findings, creating an inspection certificate that said USDA had, was a misrepresentation, or deceptive or fraudulent practice or act. That may be deemed sufficient cause for debarment. 7 C.F.R. § 54.

22. Even when the altered or fabricated inspection certificate was more accurate as to the quality and condition of the raisins, creating it was still a misrepresentation, or deceptive or fraudulent practice or act, because its findings are falsely attributed to USDA.

23. Lion worked hard to deliver to its customers what its customers requested; which is one reason why Lion had sold and continued to sell a huge quantity of its California raisins all over the world. There is no evidence of what the moisture content was, of the raisins delivered to Lion's customers, or how that compared to the raisins' moisture content shown on the inspection certificates addressed in this Decision. Bruce Lion testified that if a certificate did not match customer specifications, Lion's salesman would get upset, point a finger at the shipping department employee, who would point finger at USDA, "and so it created quite a commotion." Tr 13,368. What DID customers complain about? Not that raisins were too wet, testified Bruce Lion. Tr 13,367. Sometimes that they were too hard (too dry). Stems, capstems, stickiness. Tr 13,367. Free-flowingness (related to damage more than to moisture).

24. Lion was aware that measuring raisin moisture content is not an exact science. There is of course variability from raisin to raisin: 12 pounds of raisins taken as a sample during an hour, when 40,000 pounds of raisins passed through the stemmer, may vary from a different 12 pounds taken as a sample. Tr. 12,808-10. Even using the same sample can yield a different moisture content reading, depending on the method of taking the reading. Lion was aware that many of its shipments would lose moisture during shipping. Lion was aware that many of its customers used different equipment to measure moisture than that used

by the inspectors at Lion's plant. If Lion needed to communicate all such factors to its customers, to assure them they were getting what they requested, despite a USDA inspection certificate that said something else, a cover letter, or a phone call, could have been the remedy. To choose unauthorized and unlawful alteration or fabrication of official USDA inspection certificates, was an arrogant and stupid choice.

25. AMS has good cause to be outraged by the unauthorized and unlawful alteration of official USDA inspection certificates that I find happened in 1997-98. Lion showed disrespect to AMS's authority over raisin inspection and grading. Of the individual respondents, only Bruce Lion could have known of the unauthorized and unlawful acts. Not even the USDA inspection and grading personnel on Lion's premises knew (all of whom worked for USDA, some as USDA employees and some as "contractors"), and they had control mechanisms in place to prevent just such happenings, accountability mechanisms. No, were it not for the anonymous tip, and the subsequent investigative work by Ms. Martinez-Esquerra and Mr. David W. Trykowski, no one but shipping department workers would have known. Therefore debarment makes no sense for the individuals who did not know and could not reasonably have been expected to know of the unauthorized and unlawful acts: Al Lion, Jr., Jeff Lion, Larry Lion, and Isabel Lion.

26. AMS sought 36 years debarment for each Respondent, for the six inspection certificates (described in 18 alleged violations) in the "01" case. AMS Br. at 105, 180.

27. A primary value of debarment is deterrence, not only at Lion, but also where others use inspection and grading services. Deterrence is a benefit in remedial actions, such as this, as well as in punitive actions. I conclude that, for all the wrongdoing, not only in the "01" case and the "03" case, but the "04" violations included, a 36-month debarment, maximum, suffices as deterrent. For that reason I conclude that the 36-month debarment, maximum, should be a concurrent remedy.

28. What this Decision and Order imposes, as to all but four of the Respondents, is the temporary loss of privileges. Being debarred triggers the loss of inspection and grading privileges. The impact

extends not only to those who lose privileges but also to onlookers who are warned. The deterrent effect of remedies is valuable, just as the deterrent effect of punishments is valuable. [The classic example of a remedy having a deterrent effect is the driver losing his privilege to drive.]

29. I now take into consideration Lion's many reasons why no debarment is necessary: all the changes during the past 11 years that make it impossible for the wrongdoing to happen again. Assuming all Lion's reasons are true and valid, I still choose a 36-month debarment, maximum, for the deterrent effect.

30. I now take into account all the frustration that Lion had in 1997-98 with the inadequacies of USDA's inspection and grading. Lion was frustrated with the lack of precision by USDA inspectors. Bruce Lion testified that AMS never put enough inspectors on the job to keep up. Lion was frustrated that incoming raisins that should have been failed were passed; making it more difficult to have them meet specifications after processing (Lion bought from others and paid accordingly; Lion could have reconditioned failing raisins for a better end result; Lion could have chosen better which raisins to match with which orders (paste was one option). Lion points to the great number of 18% moistures in a row, proving to Lion that USDA was not getting the job done. Lion was frustrated that USDA did not time the moisture measurement, contending that the moisture results vary, depending on how much time elapses. (The inspectors were busy doing other things while getting the moisture readings, and the time was variable.) Bruce Lion testified that oil treatment "would probably make the reading be 1.5 to 2 percent higher than it really was." Tr. 13,334. The moisture measuring machines that USDA used were not the same as what Lion Raisins Quality Control used and not the same as used by some of Lion Raisins' European customers. There was even the difficulty of desired results for some Lion customers being partially thwarted by the maximum allowable moistures of 18%, where some customers wanted more moisture than that. Agreeing that all these concerns are important, they do not justify the unauthorized and unlawful alteration or fabrication of official USDA inspection certificates, and I still choose a 36-month debarment, maximum, for the deterrent effect.

31.I now consider that Lion has been at a tremendous disadvantage throughout this litigation. Lion's original shipping files were seized by the U.S. Government for a criminal investigation. Lion's attempts to get copies of what had been seized were frustrated and not fully successful. Even when Lion got copies, copies do not always suffice to evaluate alleged alterations or forgeries. Lion's handwriting expert did not have originals to work from. Some paperwork had been destroyed that showed the disposition of product that was "set out"- - Lion refers to the missing documentation as the "red tag ledger log." The destroyed documentation might have been valuable when inspectors may not have noted everything on the line check sheets with respect to product that was "set out". Lion's FOIA (Freedom of Information Act) requests were thwarted in many ways. I regretted USDA detaching the worksheets from certificates before supplying copies of the certificates. I, too, wanted to see the worksheets. Lion was unable to persuade me of its theory: that the seven certificates that do not match the official USDA data are the result of USDA failing to follow its own procedures, taking short cuts of its own; that USDA inspectors made changes but failed to document them properly. I take all these disadvantages to Lion into account and believe still that Lion got a fair trial, and that the most believable explanation for the discrepancies is that USDA official inspection certificates were at times changed by Lion office workers ("shipping clerks") to reflect the customer's specifications without regard for the actual condition of the raisins, which could have been determined with extra effort. Methods were in place to coordinate review of the raisins' condition with USDA, but at times no methods for review were employed. Rather, an unauthorized inspection certificate that purported to show USDA results was created by Lion office workers, without regard for the truth or falsity of its representations.

32.I have taken into account that Ken Turner used pencil, like Bruce Lion, and that some of the instructions for which Bruce Lion is blamed, may have been authored by Ken Turner. Maralee Berling's testimony, looking at handwriting, was especially persuasive to me in this regard. Bruce Lion also identified one of Ken Turner's instructions that could

have been mistaken for Bruce Lion's. Bruce Lion supervised Ken Turner, as Bruce Lion also supervised the others in the shipping department. Whether the unauthorized alterations and fabrications were done in direct response to Bruce Lion or not, Bruce Lion was aware they were happening. I conclude that all seven certificates at issue here are the responsibility of a Lion employee who worked in the shipping department, either Bruce Lion or someone under his direction or supervision.

33. Regarding the credibility of witnesses, to the extent that Bruce Lion did not acknowledge knowing that unauthorized alterations and fabrications of USDA official inspection certificates were being done in 1997-98 in Lion's shipping department, I conclude that he did know. Especially valuable witnesses were Maralee Berling, Dorothy Hamilton (formerly Proffitt), and David Trykowski, each of whom had an impressive command of facts important during March 14, 1997 through April 27, 1998, and each of whom was totally credible.

34. Each of the seven (7) inspection certificates at issue, delivered to Lion customers, six (6) in the "01" case; one (1) in the "03" case, is an example of a violation of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. § 1621, *et seq.*), and 7 C.F.R. § 54. In each of these seven instances, the preponderance of the evidence shows that alteration or fabrication was not authorized by USDA; consequently delivering the altered or fabricated certificate to a customer constitutes falsification of a USDA certificate (whether the falsified certificate was accurate or not).

A. Violation(s) on or about March 14, 1997: Lion's shipping department altered a valid USDA Certificate which showed the U.S. Grade to be "C" and then provided the altered Certificate to a raisin customer in Denmark showing the U.S. Grade to be "B". Paragraphs 8 and 15 of the Second Amended Complaint.

B. Violation(s) on or about April 22, 1998: Lion's shipping department fabricated a Certificate and provided it to a raisin customer in Macau, showing moisture content to be 16.0% when the valid USDA Certificate had shown the moisture content to be 16.0% to 16.4%. Lion's shipping department placed a non-authorized signature (forged) of a USDA inspector on the fabricated Certificate. Paragraphs 9, 10, and 15 of the

Second Amended Complaint.

C. Violation(s) on or about December 18, 1997: Lion's shipping department fabricated a Certificate and provided it to a raisin customer in France, showing moisture content to be 15.9% when the valid USDA Certificate had shown the moisture content to be 16.0% to 17.8%. Lion's shipping department placed a non-authorized signature (forged) of a USDA inspector on the fabricated Certificate. Paragraphs 11, 12, and 15 of the Second Amended Complaint.

D. Violation(s) on or about March 18, 1998: Lion's shipping department utilized a form it had created (that mimics - - impersonates - - a USDA Certificate except that it's on Lion Raisins letterhead) and provided it to a raisin customer in France, showing the moisture to be 15% when the valid USDA results had shown the moisture to be 16.0% to 16.6%. This "facsimile" Certificate (unauthorized and misleading, in that it appears to report results determined by a USDA inspector) simulates a USDA Certificate. Paragraphs 13 and 16 of the Second Amended Complaint.

E. Violation(s) on or about April 27, 1998: Lion's shipping department utilized a form it created (that mimics - - impersonates - - a USDA Certificate except that it's on Lion Raisins letterhead) and provided it to a raisin customer in France, showing the moisture to be 15% when the valid USDA results had shown the moisture to be 14.8% to 16.8%. This "facsimile" Certificate (unauthorized and misleading, in that it appears to report results determined by a USDA inspector) simulates a USDA Certificate. Paragraphs 14 and 16 of the Second Amended Complaint.

F. Violation(s) on or about December 18, 1997: Lion's shipping department fabricated a Certificate and provided it to a raisin customer in Austria, showing moisture content to be 17% when the valid USDA Certificate had shown the moisture content to be 18%. Lion Raisins placed a non-authorized signature (forged) of a USDA inspector on the fabricated Certificate. Paragraphs 15, 17 and 18 of the Second Amended Complaint.

G. Violations on or about August 26, 1997: Lion's shipping department altered a Certificate and provided it to a raisin customer in Macau,

showing the moisture content to be 16% when the valid USDA Certificate had shown the moisture content to be 18%. Paragraphs 11, 12 and 13 of the Amended Complaint. "03" case.

35.Only Bruce Lion, the three Lion companies, and Dan Lion shall be denied inspection services (debarred), for any time, under 7 C.F.R. § 52.54; the four remaining individual respondents should not, as they had no culpability in these violations and could not have known they were occurring. The periods of debarment shown in the following Order are necessary, appropriate, and proportionate, and shall run **concurrently** (in the "01" case and the "03" case and the "04" case).

Order

36. The debarments specified in this Order shall be effective (shall begin) on the tenth day after this Decision & Order becomes final.[1]

37. For a period not to exceed thirty-six months Respondent Bruce Lion, an individual, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

38. For a period not to exceed thirty-six months Respondent Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and Lion Raisins, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

39. For a period not to exceed thirty-six months Respondent Lion Raisin Company, a partnership or unincorporated association, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

40. For a period not to exceed thirty-six months Respondent Lion Packing Company, a partnership or unincorporated association, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for

[1] *See* paragraph 46.

actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

41. For a period not to exceed three months Respondent Dan Lion, an individual, is debarred within the meaning of 7 C.F.R. § 52.54. This debarment is for actions (or failures to act) in I&G Docket No. 01-0001 and I&G Docket No. 03-0001 and shall run concurrently with any debarment in I&G Docket No. 04-0001.

42. Respondent Al Lion, Jr., an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. He did not know and could not have known what the Lion shipping department was doing in 1997-98.

43. Respondent Jeff Lion, an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. He did not know and could not have known what the Lion shipping department was doing in 1997-98.

44. Respondent Larry Lion, an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. He did not know and could not have known what the Lion shipping department was doing in 1997-98.

45. Respondent Isabel Lion, an individual, shall not be debarred within the meaning of 7 C.F.R. § 52.54. She did not know and could not have known what the Lion shipping department was doing in 1997-98.

Finality

46. This Decision & 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 (as to both I&G 01-0001 and I&G 03-0001) shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

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SUGAR MARKETING ACT

COURT DECISIONS

AMALGAMATED SUGAR CO LLC v. USDA.
No.07-35971.
Filed: April 06, 2009.

[Cite as 563 F. 3d 822].

SMA – Beet sugar allotments – Sugar processor – Permanent termination of operations – *Chevron* standard – Arbitrary, capricious, not in accordance with the law – Sale of all assets – New entrants Rational connection by agency administrator..

Ordinarily, courts give deference to an agency's interpretation of its own regulations. Where an agency interprets or administers a statute in a way that furthers its own self-serving administrative or financial interests, the agency interpretation must be subject to greater scrutiny. The USDA Inspector General reported that Washington Sugar (the seller of the sugar beet allotment) had defaulted on a $20 million USDA guaranteed loan and approved the transfer of sugar beet allotment upon conditions.

Before: J. CLIFFORD WALLACE, STEPHEN S. TROTT and N.R. SMITH, Circuit Judges.

ORDER AND AMENDED OPINION

ORDER

The opinion in the above-captioned matter filed on February 11, 2009, and published at 555 F.3d 816 (9th Cir.2009), is amended as follows:

1. On slip Opinion page 1631, line 3, replace "to be" with "are".
2. On slip Opinion page 1632, lines 20-21, replace "Section 1359cc" with "§1359cc".
3. On slip Opinion page 1648, lines 13-23, delete in their entirety the two sentences that state:

Where an agency interprets or administers a statute in a way that

furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny. Chevron deference is also inappropriate where an agency has a self-serving, pecuniary interest in advancing a particular interpretation of a statute. Cf. Nat'l Fuel Gas Supply v. F.E.R.C., 811 F.2d 1563, 1571 (D.C.Cir.1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract).

4.On slip Opinion page 1648, line 14, insert a new paragraph after the sentence ending " Congressional intent." The new paragraph shall read as follows:

> Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that "self-interest alone gives rise to no automatic rebuttal of deference." See Independent Petroleum Ass'n of America v. DeWitt, 279 F.3d 1036, 1040 (D.C.Cir.2002).

However, Chevron deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is arguably inconsistent with Congressional intent. See Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n, 811 F.2d 1563, 1571 (D.C.Cir.1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract); Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Having made the foregoing amendments to the opinion, the panel has unanimously voted to deny Appellee's Petition for Panel Rehearing, and so that petition is DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

We are asked for the first time to review the construction and application of certain provisions of the Agricultural Adjustment Act (the "Act"), specifically 7 U.S.C. §§1359dd(b)(2)(E)-(F).[1] We conclude that the disputed provisions of the Act are unambiguous; therefore, the district court erred in granting Chevron deference to the interpretation advanced by the U.S. Department of Agriculture (the "USDA"). Within the Act, we hold that a "processor" is an entity who processes sugar, as defined by the USDA's own regulations and entirely within the natural and ordinary meaning of the word. The Act requires the USDA to eliminate a processor's sugar marketing allocation ("allocation") when the processor has "permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor)." §1359dd(b)(2)(E). We hold that Pacific Northwest Sugar Company ("Pacific") permanently terminated operations prior to and not in conjunction with the purported sale of assets to Defendant-Intervenor American Crystal Sugar Company ("American Crystal"). Therefore, we conclude that the USDA erred in approving the transfer of the allocation to American Crystal, and Pacific's sugar marketing allocation must be redistributed pro rata among all processors. §1359dd(b)(2)(E). We reverse the district court's summary judgment in favor of the USDA and American Crystal.

I. Factual and Procedural History

Pacific processed sugar beets during the 1998, 1999, and 2000 crop years at its only factory in Moses Lake, Washington. Facing substantial financial problems, Pacific wrote to one of its creditors in January 2001, describing its financial problems, stating that Pacific could not continue to operate in the coming years, and proposing liquidation of the company. Pacific stopped processing sugar at Moses Lake in February 2001, had no sugar beet crops in 2002 or 2003, and never resumed operations. In June 2001, Pacific sold the Moses Lake facility to Central

[1] All statutory references herein are to title 7, United States Code, unless otherwise noted, and therefore omit "7 U.S.C." from the citation.

Leasing for $2.1 million and leased the plant back with a twelve-month option to repurchase the facility.[2] Also in June 2001, Pacific unsuccessfully attempted to secure capital to continue as a sugar beet processor. On July 23, 2001, Pacific was administratively dissolved by the Secretary of State of the State of Washington for failure to file an annual license renewal application, as required by Washington State law. Also in 2001, Pacific terminated the majority of its employees, and by April 2002, Pacific employed no one at its only factory. In March 2002, Pacific's lease of the Moses Lake facility from Central Leasing ended when Pacific failed to pay the agreed rent, and the lease was not renewed.

On May 13, 2002, Congress amended the Act,[3] creating the Flexible Marketing Allotments for Sugar ("FMAS") program. The purpose of the program was to stabilize sugar prices by requiring the Secretary of Agriculture (the "Secretary") to determine the total amount of domestically produced sugar that can be marketed in the United States for the coming year (the "allotment") and then assign allocations for production of sugar to processing companies in the United States. §1359cc.[4] By rule, the program is administered by the CCC, an agency of the USDA. 7 C.F.R. §1435.1. Under the program, Congress directed the Secretary to make initial allocations based upon historical beet sugar production levels for the 1998 through 2000 crop years.

In June 2002, Central Leasing began disposing of the equipment formerly owned by Pacific. By July 2002, Pacific owned no sugar beet processing equipment, and its option to repurchase the Moses Lake facility had expired. Also in July 2002, Pacific's Board of Directors

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[2] Although Central Leasing acquired Pacific's plant and equipment, it never sought to acquire Pacific's sugar allocation.

[3] See Farm Security and Rural Investment Act of 2002, Pub.L. No. 107-171, 116 Stat. 134, 187-204 (May 13, 2002).

[4] The overall marketing allocation is divided between sugar derived from sugar beets and sugar derived from sugarcane. §1359cc(c). This case involves sugar beet sugar allocations. Sugar beet processors who knowingly market sugar or sugar products in excess of their allocation are liable to the Commodity Credit Corporation (the "CCC") for a civil penalty equal to three times the U.S. market value of the sugar involved in the violation. 7 C.F.R. §1435.318(a).

indicated that it would no longer expend money for financial or legal consulting. The Board also announced that Washington Sugar Company, LLC ("Washington Sugar") would succeed Pacific and assume any debts or obligations relating to reviving processing operations at Moses Lake. On September 24 and October 3, 2002, Scott Lybbert, as President of Washington Sugar,[5] wrote to the CCC to request that Pacific's allocation be transferred to Washington Sugar. The CCC responded on October 11, 2002 that, as a "new entrant," the allocation would be transferred "upon receipt of a copy of the bill of sale showing that virtually all of the assets of Pacific Northwest, including the factory, have been acquired by the Washington Sugar Company."[6] During this same period, appellant, Amalgamated Sugar Company, LLC ("Amalgamated"), and others also inquired of the CCC about acquiring Pacific's allocation.

On October 1, 2002, the CCC made the initial beet sugar marketing allocations for crop year 2002. Pacific received an allocation of 2.692 percent of the allotment, based on its production history for the 1998-2000 crop years.[7] However, the USDA immediately reassigned virtually all the allocation, because Pacific was not processing sugar and was unable to market its share.

In a December 2002 USDA audit, the USDA Inspector General reported that because of financial difficulties, Pacific defaulted on a $20 million USDA guaranteed loan, which resulted in a loss of $12.1 million to the USDA's Rural Development Agency. The USDA audit stated that in May 2001, "[t]he plant closed and the lender was forced to liquidate the company's assets."

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[5]The USDA never transferred the allocation to Washington Sugar, we assume because Washington Sugar could not provide a bill of sale showing that it had purchased virtually all of Pacific's assets.

[6] Lybbert was a former Vice-President of Pacific and a member of Columbia River Sugar Company ("CRSC"), as well as the sole owner of Washington Sugar.

[7] The USDA apparently interpreted the Act to require them to make an allocation to Pacific, despite the fact that Pacific was no longer processing sugar.

On December 3, 2002, the CRSC[8] adopted a resolution purporting to transfer its allocation to Washington Sugar, in support of Washington Sugar's efforts to revive operations at Moses Lake. The resolution stated, "CRSC has no desire, interest or ability to move forward and operate[the Pacific] processing facility."

After purporting to convey its interest in the allocation to Washington Sugar and despite the fact that Pacific never used any of its 2002 allocation, representatives of Pacific sought to have the allocation increased for crop year 2003. After a hearing on June 16, 2003, the CCC denied Pacific's request. During the hearing, several processors (including American Crystal) testified that Pacific had been dissolved or seemingly terminated operations and was unlikely to resume operations.[9]

In July 2003, American Crystal began negotiating with Lybbert (on behalf of Washington Sugar) and Central Leasing to purchase the assets previously owned by Pacific, in an effort to secure the transfer of Pacific's allocation by the CCC. On July 3, 2003, American Crystal wrote to the CCC, discussing the proposed acquisition:

> American Crystal[] is currently contemplating a transaction, which would effectively result in the allocation, currently owned by [Pacific], being transferred to [American Crystal]. As currently contemplated, substantially all of the assets of [Pacific] would be transferred to an intermediary company [, Washington Sugar]. Since [Pacific] has already transferred ownership of its former processing facility to another party (Central Leasing, LLC), substantially all of the assets of [Pacific] consists [sic] mainly of the marketing allocation and some other generally immaterial assets. The next step in the transaction would be the immediate transfer of substantially all of the assets of [Washington Sugar] to [American Crystal] The effect of the transaction would be to move the sugar marketing allocation from

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[8] CRSC is the sugar beet growers' association that wholly owned Pacific.

[9] For example, the President and CEO of Defendant-Intervenor American Crystal, wrote: "Pacific Northwest has not processed sugarbeets of the 2001 and 2002 crops, and it is our understanding that no sugarbeets have been planted for the 2003 crop. Therefore, it is a real question as to whether it will be able to continue operation in 2003"

> [Pacific], through [Washington Sugar], to [American Crystal].(emphasis added).

On July 30, 2003, American Crystal informed the CCC of American Crystal's intent to "acquire ownership or control of the assets (including the rights to the production history and the marketing allocations), associated with the Moses Lake, Washington sugarbeet processing factory." In the same letter to the CCC, American Crystal sought the CCC's preliminary approval and informed the CCC that American Crystal had no intention of ever operating the Moses Lake facility.

On August 28, 2003, the CCC replied: "We understand that American Crystal is purchasing all of the assets of Pacific Northwest, securing the rights to make sugar at the Pacific Northwest/Central Leasing factory site, and purchasing some of the sugar making equipment used by Pacific Northwest." The CCC also stated that it would condition approval of the transfer on: (1) receiving documentation of the purchase of Pacific's assets by American Crystal; (2) certification from Pacific that it had not marketed any sugar under the 2002 allocation; (3) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (4) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003.

On September 8, 2003, Pacific was reinstated as a legal corporation when it filed the necessary documents with the State of Washington. That same day, Washington Sugar also executed a cancellation agreement with Pacific, revoking the previous transfer of Pacific's allocation to Washington Sugar. These agreements were executed in conjunction with Pacific's purported conveyance of its allocation to American Crystal. That same day, American Crystal advised the CCC that it had acquired, through its wholly owned subsidiary Crab Creek Sugar Company "ownership or control of all of the assets (including the rights to the production history and the marketing allocations) associated with the production of sugar at the Moses Lake, Washington sugarbeet processing factory." American Crystal paid $6.8 million to acquire the allocation, including $2.125 million to Central Leasing, $300,000 to

Lybbert (in consideration of a non-compete agreement), and $3.025 million to Pacific. On September 16, 2003, the CCC wrote to Lybbert to inform him that Pacific's allocation would immediately be transferred to American Crystal.

On December 4, 2003, Amalgamated filed a Petition for Review, administratively challenging the CCC's transfer decision. On February 7, 2005, the USDA's Administrative Law Judge ("ALJ") issued a decision ("Initial Decision") reversing the CCC's determination, finding that the transfer was not proper because Pacific had permanently terminated operations.

On February 28, 2005, the CCC appealed the decision to the USDA Judicial Officer ("JO"). The JO reversed the Initial Decision without a hearing and affirmed the CCC's determination. The JO construed the Act to mean that as long as the CCC had not eliminated and redistributed a processor's allocation, that allocation may be sold along with the processor's assets. Amalgamated subsequently appealed to the district court, seeking judicial review of the JO's decision. On cross-motions for summary judgment, the district court deferred to the USDA's construction of the Act and entered summary judgment in favor of the USDA and American Crystal. Amalgamated now appeals.

We are asked to decide whether the JO's interpretation of the Act was reasonable, supported by the administrative record, in accordance with the law, not arbitrary or capricious, and therefore entitled to deference under Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

II.Standard of Review

We review de novo the district court's decision on cross-motions for summary judgment. Arakaki v. Hawaii, 314 F.3d 1091, 1094 (9th Cir.2002). We are governed by the same standard used by the trial court and must determine whether the district court correctly applied the relevant substantive law. See McClung v. City of Sumner, 548 F.3d 1219, 1224 (9th Cir.2008). The USDA's "interpretation or application of a statute is a question of law reviewed de novo." Earth Island Inst. v. Hogarth, 494 F.3d 757, 765 (9th Cir.2007).

The Administrative Procedure Act governs our review of agency action, and consequently, we must determine whether the USDA's decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. 5 U.S.C. §706; High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 638 (9th Cir.2004). Our review is "searching and careful, but the arbitrary and capricious standard is narrow, and we cannot substitute our own judgment for that of the [Agency]." Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 858 (9th Cir.2005) (internal quotation marks omitted).

III. The Act Guarantees an Equitable Opportunity to Market Sugar to All Processors

We begin by noting that the Act works to maintain sugar prices by limiting the total amount of sugar that can be produced and marketed, allocating the total sugar allotment for a given crop year among all sugar processors in a fair and equitable manner. See §1359bb. The Act makes clear that its purpose is to "afford all interested persons an equitable opportunity to market sugar under an allotment" and that "the Secretary shall allocate each such allotment among the processors covered by the allotment." §1359dd(a). Because the Act places significant restrictions on the freedom of processors to produce and market sugar, the Act's overarching directive is to ensure predictable, fair, and transparent allocation of the allotments to reflect industry events and changes in industry conditions. See 148 Cong. Rec. S513, S514 (Feb. 8, 2002) (statement of Sen. Conrad) ("The purpose of this amendment is to provide a predictable, transparent, and equitable formula for the Department of Agriculture to use in establishing beet sugar marketing allotments in the future [T]he formula allows for adjustments in the reallocation of beet sugar allotments to account for such industry events as the permanent termination of operations by a processor, the sale of a processor's assets to another processor, the entry of new processors, and so on. Taken together, these provisions offer the predictability, fairness, and transparency we all agree is much needed in the sugar beet industry.").

A.Permanent Termination of Operations Triggers the Requirement

that an Allocation be Redistributed or Transferred.

In construing the provisions of the Act, we first look to the language of the statute to determine whether it has a plain meaning. McDonald v. Sun Oil Co., 548 F.3d 774, 780 (9th Cir.2008). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." Id. (quoting BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (internal quotations omitted)). Here, we conclude that the statutory text is unambiguous.

To maintain an equitable allocation among processors under the FMAS program, Congress directed the USDA to eliminate the allocation of a processor that permanently terminates operations and redistribute it equitably among all processors. Section 1359dd(b)(2)(E) provides:

> If a processor of beet sugar has been dissolved, liquidated in a bankruptcy proceeding, or otherwise has permanently terminated operations (other than in conjunction with a sale or other disposition of the processor or the assets of the processor), the Secretary shall-
>
> (i)eliminate the allocation of the processor provided under this section; and
>
> (ii)distribute the allocation to other beet sugar processors on a pro rata basis.
>
> §1359dd(2)(E) (emphasis added).[10]

A single processor may receive and exclusively benefit from the

[10] The related USDA regulation in effect in 2003 provides: that the "CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. §1435.308(b) (2003). The USDA subsequently amended this regulation to conform the rule to the statute and to clarify the criteria by which a processor is determined to be permanently terminated. The rule defines permanently terminated operations as "(i) Not processing sugarcane or sugar beets for 2 consecutive years, or (ii) Notifying CCC that the processor has permanently terminated operations." See Flexible Marketing Allotments for Sugar, 69 Fed.Reg. 39,811, 39,813 (Jul. 1, 2004) (codified at 7 C.F.R. §1435.308(b)(3)) (subsequently amended by 69 Fed.Reg. 48,765 (Aug. 11, 2004) and 71 Fed.Reg. 16,198 (Mar. 31, 2006)).

allocation of another processor by acquiring the processor or all of the processor's assets. Section 1359dd(b)(2)(F) provides:

> If a processor of beet sugar (or all of the assets of the processor) is sold to another processor of beet sugar, the Secretary shall transfer the allocation of the seller to the buyer unless the allocation has been distributed to other sugar beet processors under subparagraph (E).

§1359dd(2)(F) (emphasis added).

Thus, the Act requires the USDA to eliminate and redistribute the allocation of a processor that has permanently terminated operations, except when the processor terminated operations because of a sale of the processor or all of its assets to another processor. See §1359dd(b)(2)(E).[11] Even when the USDA has not previously eliminated an allocation, the fact that a processor has permanently terminated operations (other than in conjunction with a sale of the processor or all assets of the processor) cannot be ignored when the USDA is subsequently asked to transfer the allocation pursuant to a purported sale of the processor's assets.

Reading the provisions together, before the USDA may grant an allocation transfer request pursuant to a sale, the Act requires:

> (1) that the buyer and seller are processors covered by the Act;
>
> (2) that the seller has not been dissolved, liquidated in a bankruptcy proceeding, or otherwise has not permanently terminated operations, other than in conjunction with the sale or other disposition of the processor or the assets of the processor; and
>
> (3) that the sale involves a sale of the processor or all of the assets of the processor. See §1359dd(b)(2)(E)-(F).[12]

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[11] The USDA may find that a processor has temporarily reduced or stopped processing operations, in which case the statute gives the USDA authority to temporarily reassign a processor's allocation to other processors. See §1359ee(b)(2).

[12] The related USDA regulation in effect in 2003 does not provide criteria for when a processor permanently terminates operations, but does provide: "Subject to paragraph (a) of this section [regarding requests from growers to transfer an allocation from a closed facility], CCC will eliminate the allocation of the processor who has been dissolved or liquidated in a bankruptcy proceeding and the allocation will be distributed to all other processors on a pro-rata basis." 7 C.F.R. §1435.308 (2003).

If any of these conditions is not met, the USDA cannot approve the transfer pursuant to a sale. Amalgamated argues that the transfer was not proper because Pacific was no longer a processor, since it had permanently terminated operations before (and not in conjunction with) the purported sale of assets to American Crystal. The USDA and American Crystal both argue that subparagraph (F) required the USDA to transfer Pacific's allocation because the USDA had not previously eliminated and redistributed Pacific's allocation pursuant to subparagraph (E). The district court deferred to this interpretation, concluding that it was reasonable, not arbitrary or capricious, and supported by the administrative record. We disagree with the district court and agree with Amalgamated.

B.The District Court Erred When it Deferred to the USDA's Interpretation of the Statutory Term "Processor".

The district court deferred to the USDA's interpretation of the statutory term "processor" in its decision, granting Chevron deference to the JO decision. We conclude that the district court erred. First, the term "processor" is not ambiguous as used in the Act. Second, the interpretation advanced by the USDA is not reasonable, because it is contrary to the USDA implementing regulation.

In reviewing the USDA's interpretation of a statute that it administers, the court must follow the two-step approach set out in Chevron, 467 U.S. at 842-44, 104 S.Ct. 2778. The first step is to determine whether Congress has unambiguously expressed its intent on the issue before the court. Natural Res. Def. Council v. U.S. E.P.A., 526 F.3d 591, 602 (9th Cir.2008) (citing Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778). If the intent of Congress is clear, such as when the statute expressly defines the disputed term, the court "must follow that definition, even if it varies from that term's ordinary meaning." United States v. W.R. Grace & Co., 429 F.3d 1224, 1238 (9th Cir.2005) (quoting Stenberg v. Carhart, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000)).

If the statute is silent or ambiguous, the court must then decide whether the agency's interpretation "is based on a permissible construction of the statute." Natural Res. Def. Council, 526 F.3d at 602 (citing Chevron, 467 U.S. at 843, 104 S.Ct. 2778). Where Congress

explicitly or implicitly delegates legislative authority to the agency, the court must defer to an agency's statutory interpretation so long as it is reasonable and not arbitrary and capricious. Id. The court must consider the agency's position over time, and if the agency's interpretation of a relevant provision conflicts with the agency's earlier interpretation, the agency is "entitled to considerably less deference than a consistently held agency view." Id. (citations omitted). This deference also does not extend to "'agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.'" Ashoff v. City of Ukiah, 130 F.3d 409, 411 (9th Cir.1997) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)).

The agency's own regulations are significant and cannot be disregarded when interpreting a statute. See Vance v. Hegstrom, 793 F.2d 1018, 1025 (9th Cir.1986). An agency's interpretation of its own regulation is not entitled to deference if it is "plainly erroneous or inconsistent with the regulation." See Auer v. Robbins, 519 U.S. 452, 461-63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)). "A regulation has the force of law; therefore, an agency's interpretation of a statute in a manner inconsistent with a regulation will not be enforced." Nat'l Med. Enters. v. Bowen, 851 F.2d 291, 293 (9th Cir.1988).

In this case, the Act does not define the terms "processor" or "processor of beet sugar." However, where a term is not ambiguous, its plain and ordinary meaning should be ascribed unless there is clear evidence to the contrary that Congress intended a different meaning. See Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335, 1341 (9th Cir.1990).

We note that the term "processor" does not have any independent legal significance. One dictionary defines the word to mean "one that processes agricultural products, foods, or similar products." See Webster's Third New International Dictionary 1808 (1993). Two other common dictionaries likewise define "processor" as "one that processes." See The American Heritage College Dictionary 987 (2d ed.1985); Webster's II New Riverside University Dictionary 938 (1984).

Within the relevant provisions of the Act, we read "processor" to mean an entity who processes sugar, entirely within the natural and ordinary meaning of the word. For example, the Act requires the Secretary to establish allotments of sugar for "marketing by processors of sugar processed from sugar beets" See §1359bb(b)(1). The sugar marketing allotments "shall apply to the marketing by processors of sugar " §1359bb(c)(1) (emphasis added). A "processor" is not allowed to market more sugar than it has been allocated. See id. at §1359bb(d). The Act consistently uses "processor" to exclusively refer to that class of entities who process sugar. We find the term unambiguous and nothing in the Act contradicts or confuses the ordinary meaning.

Within the Act, it is not receipt of an allocation that makes an entity a processor, but rather the processing of sugar beets that entitles one to an equitable allocation. The Act directs, and therefore presumes, that any entity that processes sugar will have an equitable opportunity to market sugar and therefore receive an allocation. §1359dd(a).[13] The initial allocations were made to processors who had actual, historical production during the 1998-2000 crop years. §1359dd(b)(2)(C). New processors, referred to as "new entrants," are equally entitled to an allocation under the Act when they start processing sugar beets or acquire an ongoing factory with a production history. §1359dd(b)(2)(H)-(I). Maintenance of the allocation is also conditioned on continuing operations and processing of sugar. Id. at §1359dd(b)(2)(E)-(F). Thus, we conclude that actual processing and capacity to produce sugar are what make an entity a processor, and it is this status as a processor that entitles it to an allocation.

The USDA argues that if the ordinary meaning of the term is applied, then Pacific could not have received the original allocation on October 1, 2002, because by that time Pacific was no longer processing sugar. Likewise, the USDA contends that if Pacific were not a "processor," the USDA could not have temporarily reassigned Pacific's allocation to

[13] The Act provides that "Whenever marketing allotments are established for a crop year under section [1359cc of this title], in order to afford all interested persons an equitable opportunity to market sugar under an allotment, the Secretary shall allocate each such allotment among the processors covered by the allotment." §1359dd(a).

other processors for crop years 2002 and 2003.[14] We are not asked to review the propriety of the original allocations or the temporary reassignments made by the USDA under the Act. Nonetheless, we find it unlikely that Congress intended that the USDA give a defunct sugar company, incapable of processing or marketing sugar, a sugar marketing allocation. The fact that the USDA gave the defunct Pacific an original allocation, which it temporarily reassigned to other processors, has no impact on our interpretation of this unambiguous statutory term.

The USDA also urges that "processor" must mean an entity with an allocation, because the provisions regarding disposition of an allocation upon termination of operations or sale of assets uses that term, and the provisions would not apply unless a "processor" had an allocation. §1359dd(b)(2)(E) & (F). This argument is not persuasive. As we stated above, the Act presumes that all processors will receive an equitable allocation, and therefore it is true that a processor would have or be entitled to an allocation. However, this does not mean that a processor is only a processor because it has an allocation.

To the extent that the USDA's argument exposes any ambiguity in the statute, which we do not believe it does, the USDA's interpretation is not reasonable and not entitled to deference, because it conflicts with the USDA's own implementing regulations. See Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054 (9th Cir.1994) (refusing to defer to the USDA's construction of a statutory term because it was inconsistent with the plain language of the statute and contrary to the agency's own regulation). The USDA implementing regulation provides, "[s]ugar beet processor means a person who commercially produces sugar, directly or indirectly, from sugar beets (including sugar produced from sugar beet molasses), has a viable processing facility, and a supply of sugar beets for the applicable allotment year." 7 C.F.R. §1435.2 (2003).[15] The

[14] If a processor with a share of the allotment will be unable to market all of the allocation during a particular crop year, the Secretary may temporarily reassign to the "deficit" for that crop year. §1359ee(b)(2). The reassignment is redistributed to the other processors depending on their capacity to fill a portion of the deficit. Id.

[15] This definition has not changed since the rule was first effected. Compare 2002 Farm Security and Rural Investment Act of 2002 Sugar Programs and Farm Facility

(continued...)

district court acknowledged this regulatory definition, but concluded that the interpretation advanced by the USDA was "reasonable given the use of the word throughout the statute." We disagree. The USDA's proposed interpretation that a processor is an entity that has an allotment, even if it is not processing anything, is not reasonable, precisely because it conflicts with its own regulation. See Nat'l Med. Enters., 851 F.2d at 293-94.

Accordingly, we hold that the district court erred in deferring to the definition of the term "processor" advanced by the USDA. Within the Act, the term is unambiguous and used in a manner consistent with its natural and ordinary meaning. The USDA's interpretation, advanced in the present dispute, not only conflicts with the ordinary meaning of the word but also conflicts with the USDA's own regulatory definition of the term.

C.Pacific Permanently Terminated Operations and Ceased Being a Processor Prior to the Purported Sale of Assets to American Crystal.

There is no dispute that Pacific was a sugar beet processor during the 1998 through 2000 crop years. Whether Pacific was a "processor" by the time it purported to sell its assets to American Crystal in September 2003 depends on when and under what circumstances Pacific permanently terminated operations. We conclude that Pacific ceased being a processor when it permanently terminated operations prior to the purported sale to American Crystal.

After five days of evidentiary hearings, the ALJ found that Pacific had permanently terminated operations before the purported sale of assets to American Crystal. The record strongly supports this finding, given that Pacific had not processed sugar beets since February 2001. Pacific sold its factory and assets in June 2001 and had no sugar beet crops in 2001, 2002 or 2003. The State of Washington administratively dissolved Pacific in July 2001, even though it was subsequently reinstated in September 2003 in connection with the transaction with American Crystal. Pacific lost its lease and option to repurchase its factory in July 2002. Pacific's Board of Directors also adopted a

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[15](...continued)
Storage Loan Program, 67 Fed.Reg. 54,926, 54,930 (Aug. 26, 2002) with 7 C.F.R. §1435.2 (2008).

December 2002 resolution purporting to convey its allocation to Washington Sugar and stating that "CRSC has no desire, interest or ability to move forward and operate [the Pacific] processing facility." The JO did not refute these findings.

Instead, the JO reasoned that as long as the USDA had not previously eliminated the allocation, it was available to be transferred pursuant to a sale. There is no basis for this reasoning. The determinative factor on the availability of the allocation is whether a processor has permanently terminated operations, not whether the USDA has failed to act. If we upheld the interpretation advanced by the USDA, the propriety of a transfer would not depend on events in the sugar beet industry, as Congress intended, but on whether the USDA has been diligent in fulfilling its statutory duties. Allowing such an interpretation would result in an arbitrary and capricious outcome that would be contrary to the intent of Congress.

We also conclude that the USDA had a self-serving and, possibly, a financial interest in interpreting the Act to allow the transfer of Pacific's allocation to American Crystal. First, the USDA gained administrative advantage by conditioning approval of the transfer on (1) waiver by American Crystal and Pacific of rights to bring any action against the USDA in the event that the USDA is required by a court to reverse the transfer of the allocation; and (2) agreement by American Crystal to drop Pacific's appeal of the CCC's June 16, 2003 adverse ruling regarding Pacific's request to increase its allocation for 2003. The record also indicates that the USDA may have had a financial interest in approving the transfer. Pacific owed the USDA as much as $12.1 million after Pacific defaulted on a $20 million loan guaranteed by the USDA. Pacific received $3.025 million in payment from American Crystal for the sale of the allocation. As a creditor of Pacific, the USDA may have had a financial interest in approving the transfer. Even if the USDA received no direct financial benefit, the existence of a possible pecuniary interest is of concern in evaluating the manner in which the USDA administered the Act and interpreted its provisions. We are troubled that the USDA may have acted more out of concern for administrative convenience and self-interest, rather than with an interest in administering the Act according to statutory requirements and

Congressional intent.

Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute. We acknowledge that "self-interest alone gives rise to no automatic rebuttal of deference." See Independent Petroleum Ass'n of America v. DeWitt, 279 F.3d 1036, 1040 (D.C.Cir.2002). However, Chevron deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is arguably inconsistent with Congressional intent. See Nat'l Fuel Gas Supply v. Fed. Energy Reg. Comm'n, 811 F.2d 1563, 1571 (D.C.Cir.1987) (noting that while an agency's interpretation of a statute incorporated into a contract may be entitled to deference, such deference may be inappropriate where the agency itself is a party to the contract); Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

The uncontradicted findings of the ALJ show that Pacific permanently terminated operations prior to the purported sale of assets to American Crystal. Accordingly, Pacific was no longer a processor at the time of the purported sale. Because the permanent cessation of operations requires redistribution, the USDA should have redistributed Pacific's allocation among all processors pro rata as required by law.

D.Termination of Operations Not in Conjunction with a Sale of All Assets.

The USDA argues that, even if Pacific terminated operations, the USDA was not required to redistribute the allocation among all processors, because Pacific permanently terminated operations in conjunction with a sale or other disposition of the processor or the assets of the processor. See §1359dd(b)(2)(E). The JO agreed. The district court expressed concern that there was no sale of "all the assets of the processor," but nonetheless affirmed, finding the JO's conclusions to be reasonable and not arbitrary or capricious. We find this conclusion to

be unreasonable and not supported by the record.

American Crystal did not purchase Pacific itself. Thus, in order to satisfy the prerequisites for transfer, American Crystal must have purchased all of Pacific's assets. See §1359dd(b)(2)(F). Yet, Pacific's assets were liquidated well before the purported sale to American Crystal. The factory and all Pacific's processing equipment had been previously liquidated and sold to Central Leasing. American Crystal acknowledged that Pacific's remaining assets largely included "the marketing allocation and some other generally immaterial assets."

The USDA and American Crystal argue that to satisfy the requirements of the Act, the asset sale need only be "a sale of those assets that the processor has at the time, not those which the processor may have owned in the past." Therefore, the USDA argues that it is not relevant that the assets sold were immaterial so long as they include all the assets Pacific had at the time of the sale. We agree that the sale of all of Pacific's assets need not include all of the assets Pacific ever owned. However, the fact that Pacific had no material assets at the time of the sale is problematic.

First, at the time of the sale to American Crystal, Pacific's only purported asset of any value was its marketing allocation. The JO concluded that "if a beet sugar processor has a beet sugar marketing allocation, that allocation can be sold in connection with a sale of the assets of the beet sugar processor." We conclude this to be an erroneous statement of the law. A marketing allocation can be transferred only upon a sale of all assets belonging to a processor. §1359dd(b)(2)(F). Under the Act, however, while an allocation inevitably adds value to a processor, it is not an asset itself that can be owned or conveyed by the processor. As Amalgamated persuasively argues, an FMAS marketing allocation is "a right in the nature of a government license; it can be conveyed only by an act of the Secretary of Agriculture." The USDA has near plenary control over the allocations, subject to the mandates of the Act. The USDA must modify the allocations whenever a processor sells a factory or a new processor enters the industry, reopens a factory, or acquires an operating factory with a production history. See §1359dd. The allocation is also subject to the requirement that it "be shared among producers served by the processors in a fair and equitable

manner." See §1359ff. When a processor closes, growers have the right to request that the USDA transfer the allocation to an alternate processor where they will deliver their crops. The USDA can also temporarily reassign an allocation when a processor is unable to fully use it in a given crop year. See §1359ee. Notably, the USDA is not required to compensate a processor for reductions in the allocation or seek the processor's permission. We conclude, as the ALJ did, that "[f]or there to be a 'sale of all assets,' more than the marketing allocation itself needs to be conveyed."[16]

Second, assuming for the sake of argument that the sale of purely immaterial assets were sufficient, the fact that Pacific did not have any tangible assets of any value confirms that it was no longer a processor and that its permanent termination of operations was not in conjunction with but prior to and independent of the sale to American Crystal. We acknowledge that, if Pacific's only remaining assets were good will, production rights, production history, books, and records, it would not be unreasonable to conclude that American Crystal purchased all of Pacific's assets. However, this does not mean that Pacific was a processor at the time of the sale or that it terminated its operations in conjunction with the sale. Rather, the absence of material assets is a strong confirmation that Pacific permanently terminated operations prior to the sale. We believe the reasoning of the ALJ is persuasive in determining that Pacific did not terminate operations in conjunction with the purported sale to American Crystal. If Pacific had retained the assets it sold to American Crystal, could it have continued operations? Pacific had no financing, no equipment, no sugar beet crop, no factory, no right to operate a factory, and had not produced sugar for over two years. As the ALJ noted, "The record in this case makes it abundantly clear that when the sale to American Crystal took place, Pacific Northwest was no longer able to ever again process beets into sugar. It had neither the

[16] The fact that American Crystal ultimately purchased from Central Leasing some of the assets formerly owned by Pacific does not affect our analysis. Central Leasing was not a sugar processor and never acquired Pacific's allocation. Therefore, a purchase of assets from Central Leasing does not entitle American Crystal to a transfer of Pacific's allocation. Under the Act, for the USDA to approve a transfer of an allocation in conjunction with the sale of assets, both the purchaser and seller must be processors. See §1359dd(b)(2)(E).

physical assets [n]or the will."

IV.Conclusion

We are sympathetic to the principals and investors of Pacific who sought to salvage what value they might from their failed investment. We also recognize that it was good business for American Crystal to seek to secure Pacific's marketing allocation solely for itself. The transaction between Pacific and American Crystal was a crafty effort to circumvent the Act's clear directive and avoid an equitable redistribution of Pacific's allocation, in favor of a single processor. However, when a sugar processor permanently terminates operations, Congress mandated that the USDA fairly and equitably redistribute the failed processor's allocation among all processors. The USDA failed to fulfill its responsibilities in this regard. It put administrative expediency ahead of the intent of Congress and sanctioned a questionable transaction that was attempting to resurrect a dead company for the sole purpose of effecting the transfer of its sugar marketing allocation.

We reverse the district court's order granting summary judgment in favor of the USDA and American Crystal. We remand for further proceedings consistent with this opinion. We award costs on appeal to Appellant, Amalgamated.

REVERSED and REMANDED.

MISCELLANEOUS ORDERS

In re: LION RAISINS, INC.
AMA-FV Docket No. 09-0050.
Miscellaneous Order.
April 15, 2009.

I&G.

Frank Martin, Jr. for AMS.
Westley T. Green for Petitioner, Lion Raisins, et al.
Order by Administrative Law Judge Peter M. Davenport.

MEMORANDUM OPINION AND ORDER

This matter is before the Administrative Law Judge upon the Respondent's Motion to Dismiss the Petition which has been filed "Challenging the Authority of the RAC President to Suspend Handlers from Participation in the Export Program, the Attempted Suspension Imposed on October 3, 2008, and the Authority of the RAC to Enact Binding Regulations with a 'Circular.'" The Petitioner has filed its Opposition to Respondent's Motion to Dismiss and the matter is now ripe for disposition at this time.

The Petitioner Lion Raisin, Inc., formerly Lion Enterprises, (hereafter "Lion") is a California corporation incorporated more than forty years ago in 1967 that describes itself as the second largest handler of raisins produced from grapes grown in California and one of the largest bulk exporters of raisins. Lion acknowledges that it is subject to the Federal raisin Marketing Order and the Regulations. The relationship between Lion and the Agricultural Marketing Service of the United States Department of Agriculture "USDA") may easily be characterized as having been more than a little acrimonious at times during recent years, with numerous actions being brought by one party or the other both at the administrative level and before the federal courts.[1]

[1] The following listing may not be exhaustive, but certainly is sufficient to reflect a portion of the history between Lion and USDA. A number of prior Section (continued...)

The current action has been brought by Lion invoking Section 8c(15)(A) of the Agricultural Marketing Agreement Act, (AMAA), 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 989.1, *et seq*. and seeks relief in the form of an order or orders (1) declaring that the Raisin Advisory Committee (the "RAC") or its agents or representatives, with or without the concurrence of USDA, has no authority to suspend handlers from the Export Program; (2) declaring that the September 24, 2008 notification from the RAC for delivery of raisins to the RAC was unreasonable and in violation of Section 989.66(b)(4) of the Order; (3) granting injunctive relief directing the RAC to remove offending language from all pending and future Circulars and/or Agreements for participation in the Export Program that confers any power to the RAC President (or any officer, agent or representative to suspend handlers from participation in the Export Program by withholding "cash back" or "raisins back" for non-compliance; (4) granting injunctive relief directing the RAC to provide

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[1](...continued)
608c(15)(A) Petitions were filed by Lion: *In re: Boghosian Raisin Packing Co. and Lion Raisin, Inc.,* 2001 AMA Docket No F & V 989-1, 60 Agric. Dec. 645 (2001); *In re: Lion Raisins, Inc.,* 2002 AMA Docket No. F & V 989-1, 66 Agric. Dec 585 (2007); *In re: Lion Raisins, Inc.,* 2003 AMA Docket No. F & V 989-7, 64 Agric. Dec. 11 (2005); *In re: Lion Raisins, Inc.,* 2005 AMA Docket No. F & V 989-1, 64 Agric. Dec. 27 (2005); *In re: Lion Raisins, Inc.,* 2005 AMA Docket No. F & V 989-2, 64 Agric. Dec. 637 (2005). Three separate debarment actions have been brought by the Department, *In re: Lion Raisins, et al*., I & G Docket No. 01-0001 (currently pending before United States Administrative Judge Jill S. Clifton; *In re: Lion Raisins, et al,* I & G Docket No.03-0001, Default entered by Judicial Officer, 63 Agric. Dec. 211 (2004), remanded upon appeal, *Lion Raisins, Inc., et al v. USDA,* No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005), *also reported in* 66 Agric. Dec. 531, on remand, further remanded by Judicial Officer to Judge Clifton, 64 Agric. Dec. 687 (2005), *See, also,* 65 Agric. Dec. 1205 (2006) and 65 Agric. Dec. 1207 (2006); *In re: Lion Raisins, et al*., I & G Docket No. 04-0001, 65 Agric. Dec. 193 (2006) (currently on appeal to the Judicial Officer). Other litigation includes: *Lion Raisins, Inc. v. United States Department of Agriculture,* No. CIV-F-01-5050 OWW DLB (E.D. Cal.); *Lion Raisins, Inc. v. United States*, 51Fed. Cl. 238 (Fed Cl. 2001); *Lion Raisins, Inc. v. USDA,* 354 F 3d 1072 (9th Cir. 2004); *Lion Raisins, Inc. v. United States,*416 F 3d 1356 (Fed Cir. 2005); *Lion Raisins, Inc. v. USDA,* No. CV F-02-5064 JKS, 2005 U.S. Dist LEXIS 29595); *Lion Raisins, Inc. v. United States,* 64 Fed Cl. 536 (Fed Cl. 2005); and *Lion Raisins, Inc. v. USDA, 231 Fed. Appx 565* (9th Cir. 2007). Although Lion has expressed its willingness to participate in arbitration or mediation to reach a "global" settlement of all pending differences, USDA has resisted such a solution.

reasonable notice (consistent with past practice) for delivery pursuant to Section 989.66(b)(4) and, in the event of non-compliance with that Section, to pursue only the exclusive remedy authorized by Section 989.166 of the Regulations and Order; (5) granting injunctive relief enjoining the RAC President (or any other RAC officer, agent or representative) from suspending handlers from participation in the Export Program; (6) awarding monetary damages for interest on export subsidy payments wrongfully withheld for the period September 12, 2008 to October 17, 2008; and (7) awarding damages according to proof in value of raisins and loss of sales and customers caused by the suspension.

The Respondent presents two arguments supporting its Motion to Dismiss, asserting first that the Petitioner's Section 608c(15)(A) Petition should be dismissed as a matter of law as the Petitioner's claims are moot. Alternatively, the Respondent asserts that the Petitioner has failed to state claim upon which relief might be granted. In asserting that the Petitioner has failed to state a claim upon which relief might be granted, the Respondent has advanced multiple points, arguing (1) the Petitioner was properly suspended from the voluntary Marketing Export Program under an agreement which was voluntarily entered into with the RAC; (2) the Petitioner cannot challenge agency enforcement decisions in a Section 608c(15)(A) proceeding; (3) the Petitioner cannot use a Section 608c(15)(A) proceeding to challenge regulations that are based upon a completely different statute; (4) the Secretary is authorized after recommendation by the RAC to approve appropriate criteria to effectively regulate projects designed to promote the consumption of raisins in foreign markets; (5) reasonable time was afforded the petitioner to allow the RAC to pick up its reserve raisins; (6) the Petitioner was not the subject of retaliatory action; and (7) the Petitioner's claims as to available remedies are not [sic] justicable.

The Petitioner has filed its Opposition to Respondent's Motion to Dismiss. In its Opposition, it initially notes that in the consideration of motions to dismiss, material facts must be construed in light most favorable to the Petitioner. It next asserts that the Respondent violated suspension regulations for non procurement transactions and that the Respondent's contention that the regulations are inapplicable as being

promulgated under a different statute than the AMAA is in error. The Petitioner then suggests that reliance upon the claim being moot is misplaced due to the existence of three recognized exceptions which are applicable to the case at issue. The exceptions include: (1) the action is capable of repetition and would evade review; (2) the action constitutes "voluntary cessation" of illegal conduct; and (3) although the primary injury has passed, there remains a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant granting relief. Last, the Petitioner argues that relief in the form of equitable restitution is clearly permissible.

When considering motions to dismiss petitions filed pursuant to Section 8c(15)(A) of the AMAA, 7 U.S.C. §608c(15)(A), allegations of material fact contained in the petitions must be construed in the light most favorable to the Petitioners. *In re: United Foods, Inc.,* 57 Agric. Dec. 329 (1998); *In re: Midway Farms, Inc.,* 56 Agric. Dec. 102, 113-14 (1997); *In re: Asakawa Farms, et al.,* 50 Agric. Dec. 1144, 1149 (1991). Here, the material facts do not appear to have been disputed or that there is any substantial dispute. On or about July 25, 2008, the RAC notified Lion by facsimile transmission that another handler had purchased 465 tons of "reserve" raisins[2]. This initial notification did not contain a removal date. A little over a month later, on August 28, 2008, the RAC sent Lion an email requesting that Lion make arrangements for the RAC to pick up the reserve raisins, with a proposed schedule for pick up starting on Tuesday, September 2, 2008. Lion apparently considered the proposed schedule onerous and responded by letter dated September 3, 2008, requesting reasonable notice.[3] Following a further exchange of letters, Lion confirmed that it had made arrangements for the pick up of the reserve raisins to begin on Wednesday, October 1,

[2] Pursuant to the Raisin Marketing Order, after Lion acquires raisins, it must "set aside" a designated percentage of "reserve" raisins and store them for the RAC. 7 C.F.R.§989.65, 989.66 and 989.166. The raisins or the income from the sale of them are used by the RAC to subsidize the price differential between exported and domestic raisins. 7 C.F.R. §989.67.

[3] It had previously taken the RAC up to nine months to deliver reserve raisins to Lion that Lion had purchased from the RAC. In the instant case, the pick up date coincided with the harvest season which is the busiest time of year. Petition ¶6.

2008 and on that date, the RAC took delivery of the first load.[4] By letter dated October 2, 2008 (received by Lion the following day), the RAC advised Lion that it had violated Section 989.66(b)(4) by failing to deliver reserve raisins to the RAC as required,[5] that Lion was suspended from the Export Program, that subsidy payments would be withheld for raisins already exported, and that the RAC would not recognize pending or future subsidy payments and app0lications therefor.[6] Exchanges between the RAC and Lion continued, with Lion demanding rescission of the suspension and the RAC advising that it would consider Lion to be in compliance only after the delivery was complete.[7] Throughout the period that the RAC was removing the reserve raisins from the reserve storage location and delivering them to the purchasing handler, the suspension continued to remain in effect. Further communications were exchanged between the RAC and Lion as a result of the purchasing handler's objections to mechanically harvested raisins; however, the RAC agreed with Lion that Sun-Maid (the purchasing handler) had no right of rejection of the raisins on that basis and by October 17, 2008, the RAC agreed that the delivery had been completed, rescinded the suspension, released Lion's pending subsidy payments, agreed to resume accepting applications for subsidy payments and further agreed to release future payments on a timely basis.[8]

Assuming *pro arguendo* the allegations of the Petition to be true and that the Petitioner can establish evidence of disparate treatment in the delivery time by the RAC of raisins which Lion had purchased, it would appear to be a matter of proof as to whether "reasonable notice" was given by the RAC of their intent to require transfer of Lion's reserve

[4] Petition, ¶7. As noted, although the raisins had recently passed inspection at the Lion facility, the first load failed reinspection at the purchasing handler's facility and the raisins were returned to Lion the following day. Removal of the reserve raisins by the RAC continued the following week.

[5] The use of the term "delivery" is somewhat misleading, as it appears that it was the RAC's obligation to arrange the pick up of the reserve raisins from Lion's storage site. While Lion was obligated to make the raisins available, it would appear that the time required to complete delivery was a factor largely, if not entirely, under the RAC's control.

[6] Petition, ¶8

[7] Petition, 13, 14.

[8] Petition, ¶16.

raisins for delivery to another handler. While it is clear that Lion was required to store "reserve" raisins at a facility separate and apart from other raisins for the RAC, 7 C.F.R. §989.66(b)(2), what is not clear at this point is what specific arrangements are required in order to make the raisins available for the RAC to take possession of the raisins for transfer to the purchasing handler. Additional questions come to mind as to whether withholding a seven figure subsidy fund remittance for a delivery date dispute with a suspension was an appropriate or an arbitrary and unauthorized sanction, given both the existence of a specified monetary remedy in the regulation and the fact that delivery of the raisins in question was being effected by the RAC on an ongoing basis contemporaneously with the continued running of the suspension.

While it will remain the obligation of the Petitioner to establish evidence of damage from the actions of the RAC, it does appear that the Petitioner's claims have not been rendered moot by the lifting of the suspension after completion of delivery and the subsequent release of subsidy funds. Even were I to find that damage, if any, to Lion was *de minimus*, the action taken by the RAC, if established to be not in accordance with law, would nonetheless come within the ambit of the one or more of exceptions to the mootness doctrine,[9] as well as being within the parameters of 8c(15)(A) of the AMAA.

Section 8c(15)(A) of the AMAA provides:

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

[9] See Argument III, Petitioner's Opposition to Respondent's Motion to Dismiss, pages 7-12

The Respondent has raised multiple alternative theories upon which it asserts that the Petitioner has failed to state a claim upon which relief might be granted. The first basis suggests that the Petitioner was properly suspended by virtue of having voluntarily entered into the Marketing Export agreement and appears to assume that Lion failed to allow the RAC to pick up the reserve raisins in a timely manner. Although Lion agreed to participate in the program, while the Circular does contain provisions for suspension from the program, failure to adhere to a delivery schedule is not one of the grounds set forth as an example justifying suspension. Whether the notice given was reasonable under the circumstances remains a factual determination reserved for the fact finder after hearing the evidence from both parties.

The Respondent next asserts that the Petitioner cannot challenge Agency Enforcement Decisions in a 8c(15)(A) Proceeding. Reliance upon this position appears misplaced as it was the suspension by the RAC and the withholding of subsidy by the RAC which is being called into question. In Marketing Orders, it has long been the position of the Department that the Secretary has retained all of the enforcement and implementation authority. To do otherwise would constitute an unlawful delegation of authority. *In re: Sequoia Orange Co.,* 47 Agric. Dec. 2, 180-185 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *on appeal affirmed in part and remanded sub nom. Riverbend Farms, Inc. v. Madigan,* 958 F. 2d 1479 (9th Cir. 1992). As noted in *In re: Asakawa Farms, Inc.,* 50 Agric. Dec. 1144 (1991), "The Committees have no lawmaking authority, therefore there is no unlawful delegation of authority." *Id.* at 1149. Should the suspension by the RAC been imposed at the suggestion of the Department, it would give credence to Lion's assertion that it has been vilipended and the action was retaliatory.

As it will be found that the Petitioner has set forth in sufficient detail the provision imposed in connection with the operation of the Raisin Marketing Order which Lion feels is not in accordance with law and has requested specific relief in connection with the action taken by the RAC to state a claim upon which relief might be granted, the other grounds upon which the Respondent asserts that a claim upon which relief cannot be granted need not be discussed and the following Order will be

entered.

The Respondent's Motion to Dismiss will be **DENIED**.

Exhibit copies, exhibit lists and witness lists will be exchanged between the parties in accordance with the following deadlines to provide disclosure of evidence that may be presented at the hearing. The exhibit copies should not be filed; however the exhibit lists and witness lists will be filed with the Hearing Clerk's Office. Exhibits shall be pre-marked, on the lower right corner, as PX-1, PX-2 *et seq*. (for Petitioner's exhibits) and RX-1, RX-2 *et seq*. (for Respondents' exhibits). Multi-page exhibits shall be paginated with numbers placed at the bottom of the pages. **At the hearing, both parties are requested to provide copies of the exhibit list and witness list for use by the judge and the court reporter.**

By **Thursday, May 14, 2009**, Counsel for the Petitioner will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to the Respondents, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of Petitioner's proposed exhibits, a list of the exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

By **Thursday, June 11, 2009**, Counsel for the Respondent will file with the Hearing Clerk Respondent's list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Petitioner, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of the Respondent's proposed exhibits, a list of exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

Failure to file the above lists, as directed, without good cause, may constitute grounds for excluding an exhibit or the testimony of a witness. Counsel shall consult with each other and advise the Administrative Law Judge whether they will be able to stipulate as to any facts, the authenticity, accuracy or admissibility of any documents, or to agree on any other matters that would expedite the resolution of the issues in this case. The parties are also requested to advise the Administrative Law Judge concerning the expected duration of any hearing, the parties' preferences as to location, any special needs that either party might have

and a list of available dates for a teleconference to set a hearing date.

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

Done at Washington, D.C.

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In re: MICHAEL LEE MCBARRON, d/b/a T&M HORSE COMPANY.
A.Q. Docket No. 06-0003.
Notice.
Filed January 28, 2009.

AQ.

Thomas Neil Bolick for APHIS.
Respondents Pro se.
Notice Order by Administrative Law Judge Jill S. Clifton.

Notice that entire $21,000.00 civil penalty is required from Respondent McBarron

1. Respondent Michael Lee McBarron was assessed a civil penalty of **$21,000.00** (twenty-one thousand dollars) by Decision and Order dated May 10, 2007. Respondent McBarron was instructed to pay the civil penalty by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," referencing **A.Q. Docket No. 06-0003**.

2. I issue this Notice to confirm that Respondent McBarron is required to pay that entire civil penalty, **$21,000.00**, plus authorized costs, interest, debt collection fees, penalties, and the like. The Application filed by APHIS on November 4, 2008, is supported by Declaration showing that a search found no record, as of October 30, 2008, of any payment (a) from Michael Lee McBarron, (b) from Trent Wayne Ward, or (c) identified by docket number A.Q. Docket No. 06-0003.

3. APHIS is represented by Thomas Neil Bolick, Esq., Office of the

General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

4. Because Respondent McBarron failed to pay the civil penalty in accordance with the Decision and Order dated May 10, 2007, he is required to pay the full **$21,000.00** civil penalty plus authorized costs, interest, debt collection fees, penalties, and the like.

Copies of this Notice shall be served by the Hearing Clerk, by ordinary delivery (NOT by certified mail), upon each of the parties. Respondent McBarron shall be served by regular mail at both his last known business mailing address (Michael Lee McBarron, 154 Stanley Road, Hamburg, Arkansas 71646) and his attorney's address (Mark J. Calabria, Esq., 201 W. Mulberry, Kaufman, Texas 75142).

Done at Washington, D.C.

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In re: TRENT WAYNE WARD, d/b/a T&M HORSE COMPANY.
A.Q. Docket No. 06-0003.
Notice.
Filed January 28, 2009.

AQ.

Thomas Neil Bolick for APHIS.
Respondents pro se.
Notice Order by Administrative Law Judge Jill S. Clifton.

Notice that entire $21,450.00 civil penalty is required from Respondent Ward

1. Respondent Trent Wayne Ward was assessed a civil penalty of **$21,450.00** (twenty-one thousand four hundred fifty dollars) by Decision and Order dated May 4, 2006. Respondent Ward was instructed to pay the civil penalty by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," referencing **A.Q. Docket No. 06-0003**.

2. I issue this Notice to confirm that Respondent Ward is required to pay that entire civil penalty, **$21,450.00**, plus authorized costs, interest, debt collection fees, penalties, and the like. The Application filed by APHIS on November 4, 2008, is supported by Declaration showing that a search found no record, as of October 30, 2008, of any payment (a) from Michael Lee McBarron, (b) from Trent Wayne Ward, or (c) identified by docket number A.Q. Docket No. 06-0003.

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

4. Because Respondent Ward failed to pay the civil penalty in accordance with the Decision and Order dated May 4, 2006, he is required to pay the full **$21,450.00** civil penalty, plus authorized costs, interest, debt collection fees, penalties, and the like.

Copies of this Notice shall be served by the Hearing Clerk by ordinary delivery (NOT by certified mail), upon each of the parties. Respondent Ward shall be served by regular mail at his last known business mailing address (Trent Wayne Ward, d/b/a T&M Horse Company, 1037 Lakeview Circle, Kaufman, TX 75142).
Done at Washington, D.C.

In re: RANDY G. SMITH AND JEFF SMITH D/B/A SMITH HORSE COMPANY.
A.Q. Docket No. 08-0146.
Miscellaneous Order.
January 30, 2009.

AQ.

Thomas Neil Bolick for APHIS.
Gregory Bell for Respondent.
Notice Order by Administrative Law Judge Jill S. Clifton.

Ruling Denying Motion to Grant Default Decision

On June 19, 2008, Kevin Shea, Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a single complaint against Randy G. Smith and Jeff Smith d/b/a Smith Horse Company, alleging a number of violations of the Animal Health Protection Act and the Commercial Transportation of Equines for Slaughter Act. Each allegation in the complaint alleged that "respondents" committed the violations alleged.

A timely handwritten answer, dated July 14, 2008, and received by the Hearing Clerk on July 23, 2008 was filed by Randy G. Smith, essentially denying commission of the alleged violations. This document had no caption, other than the number of the case, and did not specifically indicate whether it was filed on behalf of Randy G. Smith as an individual or on behalf of the partnership.

Having received no response from Jeff Smith, Complainant on November 4, 2008 filed a Motion for Adoption of Proposed Default Decision and Order, seeking $64,500 in civil penalties.

On November 24, 2008 Respondents, through counsel, objected to the Proposed Default Decision and Order. Complainant filed a response to Respondents' Objections, essentially contending that because Respondent Jeff Smith did not file an answer to the complaint, he had admitted the allegations of the complaint and waived his right to a hearing. Respondents filed a reply to Complainant's response on December 30, 2008 stating that the answer filed by Randy Smith was intended to be a response on behalf of both Respondents.

I find that, in the absence of clear evidence to the contrary, there is merit to the contention that the answer filed by Randy G. Smith was filed on behalf of the partnership, and that the Motion for a Default Decision against Jeff Smith should be denied. While no cases have been cited to me on this subject, and I am unable to locate any specific decision by the Judicial Officer or any USDA administrative law judge on this subject, a close look at the answer filed by Randy G. Smith indicates that "I" and "we" are used interchangeably, and that the explanations and denials offered apply to the allegations that were made against "respondents" in each case. Further, granting a judgment against

Jeff Smith would, since the entity is a partnership, effectively be a judgment against the partnership, and thus against Randy G. Smith, effectively denying him his right to a meaningful hearing. While it would have been better if the answer filed by Randy G. Smith clearly indicated that he was filing on behalf of the partnership, in the absence of clear law on the effect of one partner filing an answer, combined with the answer clearly addressing the allegations in a manner that would pertain to both partners to the partnership, I decline to grant the Complainant's motion. Copies of this Order will be served upon the parties by the Hearing Clerk.

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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 of Dismissal.
Filed May 27, 2009.

AQ.

Thomas Neil Bolick for APHIS.
Respondents Pro se.
Notice Order by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case ONLY Larry L. Anderson Without Prejudice as to Respondents

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 Larry L. Anderson (frequently herein "Respondent Anderson" or "Respondent") is an individual who represents himself

(appears *pro se*).

APHIS's Motion for Dismissal of the Complaint Against Respondent Larry L. Anderson, filed May 5, 2009, is GRANTED. Accordingly, as to only Respondent Anderson, this case is **dismissed without prejudice**.

Copies of this Dismissal Without Prejudice shall be served by the Hearing Clerk upon each of the parties (including the other two respondents), together with a copy of the Motion filed May 5, 2009.

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.
Dismissal Order.
Filed May 27, 2009.

AQ.

Thomas Neil Bolick for APHIS.
Respondents Pro se.
Dismissal Order by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case Without Prejudice as to ONLY James Gadberry

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 James Gadberry (frequently herein "Respondent Gadberry" or "Respondent") is an individual who is represented by

Patrick E. Richardson, Esq., P.O. Box 987, Kirksville, Missouri 63501.

APHIS's Motion for Dismissal of the Complaint Against Respondent James Gadberry, filed February 27, 2009, is GRANTED. Accordingly, as to only Respondent Gadberry, this case is **dismissed without prejudice**.

Copies of this Dismissal Without Prejudice shall be served by the Hearing Clerk upon each of the parties (including the other two respondents).

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In re: BILLY E. ROWAN.
A.Q. Docket No. 06-0006.
Post Decision Order.
Filed June 16, 2009.

AQ.

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

Post-Decision Order

1. The hearing was held on July 10, 2008, and the Decision and Order was issued on September 11, 2008.
2. 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.
3. The Respondent, Billy E. Rowan (frequently herein "Respondent Billy Rowan" or "Respondent"), appears *pro se* (represents himself).
4. APHIS's "Application for Payment of Full Civil Penalty" was filed

on March 16, 2009. APHIS's (1) photocopy of a Promissory Note dated April 6, 2009, and (2) photocopy of Respondent Billy Rowan's check #2827 in the amount of $450.00, were presented to me by Mr. Bolick during May 2009; and, later, at my request, filed by Mr. Bolick on June 8, 2009.

5. It is **not** necessary for me to order Respondent Billy Rowan to pay the full amount of $12,650.00 in civil penalties (plus interest, fees, and penalties), so long as Respondent Billy Rowan complies with the agreement expressed in the Promissory Note (paying the $7,803.01 balance), and on condition that he through July 9, 2013, commit no further violations of 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*.).

6. Consequently, APHIS's "Application for Payment of Full Civil Penalty" is DENIED, without prejudice to file anew if, in the future, it becomes necessary.

Copies of this Post-Decision Order shall be served by the Hearing Clerk upon each of the parties, together with all pages of APHIS's June 8, 2009 filing, mailing Mr. Rowan's copies by ordinary mail to his post office box.

Done at Washington, D.C.

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In re: CHRISTINE DOBRATZ, d/b/a WOLF HOWL-O EXOTIC PETS, a/k/a WOLF HOWL-O EXOTIC PETTING ZOO.
AWA Docket No. 08-0131.
Miscellaneous Order.
January 30, 2009.

AWA.

Colleen Carroll for APHIS.
Respondent Pro se.
Miscellaneous Order by Chief Administrative Law Judge Marc R. Hillson.

Order Denying Motion to Dismiss; Order Granting Request for Extension of Time to Submit Additional Witnesses and Exhibits for Trial

After a telephone conference between the parties on September 9, 2008, I issued an order on September 11, 2008 scheduling this case for hearing in Portland, Oregon beginning March 3, 2009. My order directed Complainant to submit a witness list, summary of witness testimony and exhibits to counsel for Respondents by October 24, 2008, and for Respondents to submit a similar set of documents to counsel for Complainant on December 5, 2008. On November 3, 2008, Respondents moved that the action be dismissed for failure of Complainant to comply with my order. On or about November 25, 2008 Respondent received most of the required submission from Complainant. On December 3, 2008, Complainant filed an opposition to the motion.

While Complainant has offered no reason for the late submission, I decline to dismiss the case because there is no prejudice to Respondents, and because I am granting Respondents' January 28 motion allowing them to file on that date documents listing additional witnesses to testify and documents they intend to introduce into evidence at the hearing. The purpose of my setting exchange dates is to allow the parties to be apprised of each other's case in time to adequately prepare for the hearing. Here, where counsel for Respondents has received Complainant's witness list and proposed exhibits over three months

before the onset of the hearing, dismissal would be a draconian measure, and one not justified under the Rules of Procedure. Any possible prejudice to Respondents is obviated by the substantial amount of time before the hearing remaining after they received Complainant's exchange, and my allowance of their filing a supplemental list of witnesses and documents.

Accordingly, the motion to dismiss is **denied** and the motion for an extension of time to file a list of additional witness and exhibits on January 28, 2009 is **granted**.

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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.
Order Denying Petition To Reconsider.
Filed February 11, 2009.

AWA – Petition to reconsider – Endangered Species Act – Exhibitor – License Application – Disqualification – Termination of license.

Bernadette Juarez, for the Acting Administrator, APHIS.
Ellen Mendelson, San Francisco, CA, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On November 18, 2008, I issued a Decision and Order terminating Loreon Vigne's Animal Welfare Act license and disqualifying Ms. Vigne from obtaining, holding, or using an Animal Welfare Act license for 2 years.[1] On December 31, 2008, Ms. Vigne filed a petition to reconsider the November 18, 2008, Decision and Order. On February 6, 2009, Kevin Shea, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter

[1]*In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008).

the Acting Administrator], filed a response to Ms. Vigne's petition to reconsider, and the Hearing Clerk transmitted the record to me for a ruling on Ms. Vigne's petition to reconsider. Based upon a careful review of the record, I deny Ms. Vigne's petition to reconsider and reinstate the Order in *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Ms. Vigne raises five issues in her "Petition for Reconsideration." First, Ms. Vigne contends my finding that she waived her right to an oral hearing violates due process because she was not provided with adequate notice of the procedural requirements applicable to the instant proceeding (Pet. for Recons. at 4-6).

On August 30, 2007, the Hearing Clerk served Ms. Vigne with the Order to Show Cause as to Why Animal Welfare Act License 93-C-0611 Should Not be Terminated [hereinafter Order to Show Cause], 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], and a service letter dated August 22, 2007.[2] The Rules of Practice contain the procedural requirements applicable to the instant proceeding and the Hearing Clerk's August 22, 2007, service letter specifically instructs Ms. Vigne that the Rules of Practice govern the conduct of the proceeding and that she should become familiar with the Rules of Practice. The Rules of Practice provide that failure to request a hearing within the time allowed for filing the answer constitutes a waiver of hearing (7 C.F.R. § 1.141(a)). Moreover, the Hearing Clerk explicitly states in the August 22, 2007, service letter that Ms. Vigne's answer may include a request for an oral hearing and that failure to file an answer or filing an answer which does not deny the material allegations in the Order to Show Cause constitutes an admission of the allegations in the Order to Show Cause and a waiver of the right to an oral hearing.

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[2]United States Postal Service domestic receipt for article number 7004 2510 0003 7022 9231.

I conclude the Rules of Practice and the Hearing Clerk's August 22, 2007, service letter provided Ms. Vigne with adequate notice of the procedural requirements applicable to the instant proceeding and specifically notified her that either failure to file a timely request for a hearing or admission of the allegations in the Order to Show Cause would result in the waiver of the right to a hearing. Nonetheless, Ms. Vigne failed to file a timely request for an oral hearing and admitted the material allegations in the Order to Show Cause. Under these circumstances, I find no violation of Ms. Vigne's right to due process.

Second, Ms. Vigne contends my application to her of the waiver of hearing provisions in the Rules of Practice is error because she is an elderly woman and, at the time her request for a hearing was due, she appeared pro se (Pet. for Recons. at 4-6).

The Rules of Practice do not distinguish between persons who appear pro se and persons represented by counsel,[3] and Ms. Vigne's status as a pro se litigant is not a basis on which to set aside her waiver of the right to an oral hearing.[4] Moreover, the Rules of Practice do not distinguish between elderly women and other persons, and Ms. Vigne's age and gender are not bases on which to set aside her waiver of the right to an oral hearing.[5] Therefore, I reject Ms. Vigne's contention that

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[3] *In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283, 1286 (2007); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 299 (2005); *In re Mary Meyers* (Order Denying Pet. for Recons.), 58 Agric. Dec. 861, 865 (1999).

[4] *Cf. In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 67Agric. Dec. 1283, 1286 (2007) (holding the respondent's status as a pro se litigant is not a basis on which to grant his petition for rehearing or set aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

[5] *Cf. In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. 1673, 1678 (2005) (stating, generally, physical and mental incapacity are not bases for setting aside a default decision); *In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999) (stating the respondent's automobile accident, loss of memory, payment of taxes, status as a United States citizen, and status as a veteran of the United

(continued...)

my application to her of the waiver of hearing provisions in the Rules of Practice, is error.

Third, Ms. Vigne asserts Complainant's Motion for Summary Judgment did not bear on its face the moving attorney's telephone number, fax number, and bar number or any other information which would assist Ms. Vigne in contacting the moving party (Pet. for Recons. at 5).

Ms. Vigne is correct that Complainant's Motion for Summary Judgment does not bear on its face the moving attorney's telephone number, fax number, and bar number or any other information which would assist Ms. Vigne in contacting the moving party. However, the Rules of Practice do not require that motions contain such information. Moreover, I note the Order to Show Cause, which had been served on Ms. Vigne 9 months 1 week prior to the Acting Administrator's filing Complainant's Motion for Summary Judgment, contains the name, address, telephone number, and facsimile number of counsel for the Acting Administrator. Thus, I find, while not relevant to the disposition of the instant proceeding, Ms. Vigne had sufficient information to contact counsel for the Acting Administrator.

Fourth, Ms. Vigne asserts termination of her Animal Welfare Act license breaches the terms of the plea agreement Ms. Vigne and the United States entered in *United States v. Isis Society for Inspirational Studies, Inc.*, CR-06-313-01-MO (D. Or. Jan. 5, 2007). Specifically, Ms. Vigne contends the United States agreed that she could continue to possess, breed, and exhibit ocelots and termination of her Animal Welfare Act license violates that agreement. (Pet. for Recons. at 6-9.)

I have reviewed the plea agreement filed in *United States v. Isis Society for Inspirational Studies. Inc.*, and I cannot locate any provision in which the United States agreed that Ms. Vigne could continue to exhibit ocelots. The plea agreement states "[t]he government does not

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[5](...continued)
States Army are not bases for setting aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating the respondent's age, ill health, and hospitalization are not bases for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).

object to defendant, its affiliates, or the defendant's Secretary and Treasurer, Loreon Vigne continuing to possess and breed endangered animals at its facilities in Geyersville, CA[.]" (Plea Agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*, at 7.) The termination of Ms. Vigne's Animal Welfare Act license does not prohibit Ms. Vigne from continuing to possess and breed endangered animals; therefore, I reject Ms. Vigne's assertion that termination of her Animal Welfare Act license breaches the terms of the plea agreement Ms. Vigne and the United States entered in *United States v. Isis Society for Inspirational Studies, Inc.*

Fifth, Ms. Vigne argues her guilty plea to conspiracy to violate the Endangered Species Act does not support termination of her Animal Welfare Act license under 9 C.F.R. § 2.11(a)(6) (Pet. for Recons. at 9-10).

The regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter 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 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.

Ms. Vigne was involved with violations of the Endangered Species Act, a federal law pertaining to the ownership of animals, and provided the government with false statements to conceal violations of the Endangered Species Act (Plea Agreement filed in *United States v. Isis Society for Inspirational Studies, Inc.*, at 3-4). These activities are specifically addressed in 9 C.F.R. § 2.11(a)(6) as bases for denying an initial Animal Welfare Act license application and 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). Therefore, I reject Ms. Vigne's contention that the record does not support termination of her Animal Welfare Act license under 9 C.F.R. § 2.11(a)(6).

In addition to the five issues raised by Ms. Vigne in the Petition for Reconsideration, Ms. Vigne requests permission to withdraw her guilty plea in *United States v. Isis Society for Inspirational Studies, Inc*., and return of the $60,000 monetary penalty she paid in connection with *United States v. Isis Society for Inspirational Studies, Inc*.

In January 2007, United States District Court Judge Michael W. Mosman accepted the Isis Society's guilty plea entered in *United States v. Isis Society for Inspirational Studies, Inc.* (Petition to Enter Plea of Guilty, Certificate of Counsel, and Order Entering Plea filed in *United States v. Isis Society for Inspirational Studies, Inc.*); 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. This forum is not the forum in which to lodge a request to withdraw a guilty plea entered in the United States District Court for the District of Oregon. I have no jurisdiction either to entertain Ms. Vigne's request for permission to withdraw the guilty plea entered in the United States District Court for the District of Oregon or to entertain Ms. Vigne's request for return of the $60,000 fine Ms. Vigne paid in connection with that guilty plea.

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. Ms. Vigne's petition to reconsider was timely filed and automatically stayed *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008). Therefore, since Ms. Vigne's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Loreon Vigne*, 67 Agric. Dec. 1060 (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.

For the foregoing reasons and the reasons in *In re Loreon Vigne*, 67 Agric. Dec. 1060 (2008), Ms. Vigne's petition to reconsider is denied and 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.

_____

In re: WAYNE EDWARDS, d/b/a OKLAHOMA WILDLIFE PRESERVE, INC.
AWA Docket No. D-08-0149.
Miscellaneous Order.
March 11, 2009.

AWA.

Colleen Carroll for APHIS.
Respondent Pro se.
Order by Administrative law Judge Peter M. Davenport.

ORDER

An oral hearing was scheduled in this matter on March 11, 2009 in

Washington, D.C. On the date and time set for the hearing, the Petitioner failed to appear, either in person, or by counsel. The Respondent was represented by Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. At the hearing, the Respondent moved that the Request for Hearing be Dismissed for failure to prosecute the Request for Hearing.

Being sufficiently advised, noting the Petitioner's failure to appear at the hearing, the Motion is **GRANTED**, and the case will be **DISMISSED,** with prejudice.

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

Done at Washington, D.C.

_____

In re: THUNDERHAWK BIG CAT ENCOUNTER, LLC.
AWA Docket No. D-09-0040.
Order Dismissing Case.
Filed June 4, 2009.

AWA.

Colleen Carroll for APHIS.
Respondents Pro se.
Miscellaneous Order by Administrative Law Judge Jill S. Clifton.

Petitioner's Motion to Withdraw the request for hearing, dated June 1, 2009, and filed June 4, 2009, is GRANTED. This case is **dismissed**.

Copies of this Order Dismissing Case shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.

_____

In re: WAYNE EDWARDS, d/b/a OKLAHOMA WILDLIFE PRESERVE, INC.
AWA Docket No. D-08-0149.
Order Denying Appeal Petition.
Filed June 22, 2009.

AWA – Appeal petition denied – License denial – Request for hearing – Dismissal.

Colleen Carroll, for APHIS.
Petitioner Edwards, Pro se.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision issued by William G. Jenson, Judicial Officer.

DISCUSSION

Wayne Edwards requested that the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], provide him the information necessary to obtain a license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]. On September 5, 2007, APHIS responded to Mr. Edwards' request by providing him the information and forms necessary to obtain an Animal Welfare Act license.[1] On September 19, 2007, Oklahoma Wildlife Preserve, Inc., was incorporated in the State of Oklahoma.[2] Mr. Edwards signed the articles of incorporation as one of the incorporators and was identified as one of three persons who would serve as trustee or director of Oklahoma Wildlife Preserve, Inc.[3]

On January 8, 2008, Oklahoma Wildlife Preserve, Inc., applied for an Animal Welfare Act license.[4] On June 6, 2008, pursuant to the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations], APHIS denied Oklahoma Wildlife Preserve, Inc.'s Animal Welfare Act license application on the grounds that the application was not complete and Oklahoma Wildlife

[1] "License Denial" filed June 24, 2008 [hereinafter Request for Hearing], at Exhibit 8.

[2] Request for Hearing at Exhibit 12.

[3] *Id.*

[4] Request for Hearing at Exhibit 11.

Preserve, Inc., made false statements to APHIS employees during the application process.[5]

On June 24, 2008, pursuant to section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)), Mr. Edwards, d/b/a Oklahoma Wildlife Preserve, Inc., filed a Request for Hearing to show why Oklahoma Wildlife Preserve, Inc.'s application for an Animal Welfare Act license should not be denied. On July 15, 2008, APHIS filed "Respondent's Response to Petitioner's Request for Hearing and Respondent's Motion for Summary Judgment or to Amend Case Caption" seeking summary judgment against Mr. Edwards on the ground that Oklahoma Wildlife Preserve, Inc., applied for, and was denied, an Animal Welfare Act license; thus, only Oklahoma Wildlife Preserve, Inc., is entitled to a hearing pursuant to section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)). On July 21, 2008, Mr. Edwards replied to APHIS' motion for summary judgment stating he is the president of Oklahoma Wildlife Preserve, Inc., and authorized to conduct all business on behalf of Oklahoma Wildlife Preserve, Inc., including filing a response to APHIS' denial of Oklahoma Wildlife Preserve, Inc.'s application for an Animal Welfare Act license.

On February 19, 2009, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order scheduling a hearing to commence March 11, 2009,[6] and the Hearing Clerk served Mr. Edwards and APHIS with the ALJ's February 19, 2009, Order.[7] On March 11, 2009, the ALJ conducted a hearing in Washington, DC. Colleen Carroll, Office of the General Counsel, United States Department of Agriculture, represented APHIS. Mr. Edwards did not appear at the hearing and APHIS moved to dismiss the proceeding based on Mr. Edwards' failure to prosecute his Request for Hearing.[8] During the hearing, the ALJ stated APHIS' motion to dismiss would be granted,[9] and, on March 11, 2009, after the close of the hearing, the ALJ issued a written Order dismissing the proceeding with prejudice on the

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[5]Request for Hearing at Exhibit 14.

[6]Order of Hearing Location.

[7]Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form regarding the ALJ's February 19, 2009, Order of Hearing Location.

[8]Transcript of the March 11, 2009, hearing at 3-4.

[9]*Id.*

ground that Mr. Edwards failed to appear at the hearing and prosecute his Request for Hearing.

On April 15, 2009, Richard Fischer, representing himself to be president of Oklahoma Wildlife Preserve, Inc., appealed the ALJ's March 11, 2009, Order issued against Mr. Edwards. On April 27, 2009, APHIS filed "Respondent's Response to Petition for Appeal" in which it argued that Mr. Fischer's appeal of the ALJ's March 11, 2009, Order must be denied because Mr. Fischer is not a party in the instant proceeding. On April 30, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a careful consideration of the record, I agree with APHIS that Mr. Fischer is not a party in the instant proceeding and Mr. Fischer's April 15, 2009, appeal petition must be denied.

MR. FISCHER'S APPEAL PETITION

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], provide that only a party in a proceeding may appeal an administrative law judge's decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, 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.

7 C.F.R. § 1.145(a). The parties in the instant proceeding are Mr. Edwards, d/b/a Oklahoma Wildlife Preserve, Inc., and APHIS; therefore, under the Rules of Practice, only Mr. Edwards and APHIS had

the opportunity to appeal the ALJ's March 11, 2009, Order. Mr. Fischer's appeal petition, even if filed on behalf of Oklahoma Wildlife Preserve, Inc., is denied on the ground that neither Mr. Fischer nor Oklahoma Wildlife Preserve, Inc., is a party in the instant proceeding.

Even if I were to find Mr. Fischer could substitute himself for Mr. Edwards and is a party in the instant proceeding (which I do not so find), I would deny Mr. Fischer's appeal petition. Mr. Fischer raises only one issue on appeal. Mr. Fischer asserts Oklahoma Wildlife Preserve, Inc., did not receive notice of the time and place of the March 11, 2009, hearing conducted in Washington, DC, and requests a second hearing to be held in Oklahoma City, Oklahoma.

As an initial matter, Oklahoma Wildlife Preserve, Inc., did not request a hearing pursuant to section 2.11(b) of the Regulations (9 C.F.R. § 2.11(b)) and is not a party in the instant proceeding. Instead, Mr. Edwards, d/b/a Oklahoma Wildlife Preserve, Inc., requested a hearing and was entitled to notice of the time and place of hearing. On February 19, 2009, the ALJ issued an Order of Hearing Location scheduling a hearing, as follows:

ORDER OF HEARING LOCATION

> Notice is hereby given that the hearing in this case scheduled to commence at 9:00 AM (Eastern Standard Time) on March 11, 2009 will be conducted at the following location:
>
> United States Department of Agriculture
> Room 1037, South Building
> 1400 Independence Ave., S.W.
> Washington, DC 20250
>
> Copies of this Order shall be served upon the parties by the Hearing Clerk's Office.

Done at Washington, D.C.

On February 19, 2009, in accordance with the ALJ's Order of

Hearing Location, the Hearing Clerk, by ordinary mail, served Mr. Edwards at his last known principal place of business.[10] The Rules of Practice provide that a notice of hearing is deemed to be received at the time of mailing by ordinary mail to the last known principal place of business of a party (7 C.F.R. § 1.147(c)(2)). Therefore, in accordance with 7 C.F.R. § 1.147(c)(2), Mr. Edwards is deemed to have received the notice of the time and place of the hearing on February 19, 2009. Under these circumstances, I agree with the ALJ's dismissal of the case based upon Mr. Edwards' failure to appear and prosecute his Request for Hearing; therefore, even if I were to find Mr. Fischer is a party in the instant proceeding and were to consider the merits of Mr. Fischer's appeal petition, I would deny Mr. Fischer's request to schedule a second hearing to be held in Oklahoma City, Oklahoma.

For the foregoing reasons, the following Order is issued.

ORDER

Richard Fisher's April 15, 2009, appeal petition is denied. This Order shall become effective upon service on Mr. Fischer.

_____

In re: MARY CONN.
AWG Docket No. 08-0167.
Miscellaneous Order.
February 18, 2009.

AWG.

[10]Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form indicating the ALJ's February 19, 2009, Order of Hearing Location was sent by ordinary mail to Mr. Edwards on February 19, 2009, at the following address:

Mr. Wayne Edward [sic], President
Oklahoma Wildlife Preserve, Inc.
690-B South Highway 69/75
Atoka, OK 74525

Petitioner Pro se.
Mary Kimball for RD.
Order by Administrative Law Judge Victor W. Palmer.

NOTICE TO PARTIES

I have been advised by the Hearing Clerk that Ms. Conn has not filed any documents showing she has filed for bankruptcy.

Unless such a document is filed by **March 19, 2009**, the Petition shall be dismissed with prejudice and the government will not be precluded from garnishing Ms. Conn's wages or withholding her income tax refund proceeds in payment of the debt she owes to FSA.

_____

In re: PAULA MORRISON.
AWG Docket No. 09-0059.
Miscellaneous Order.
May 6, 2009.

AWG.

Petitioner Pro se.
Mary Kimball for RD.
Order by Administrative Law Judge Peter M. Davenport.

ORDER

This matter was before the Administrative Law Judge upon the request of the Petitioner for a hearing concerning the existence or amount of the debt alleged, and if established, the terms of any repayment. A Prehearing Order was entered on February 9, 2009 directing the parties to exchange information prior to the scheduling of a teleconference to set a hearing date.

On February 24, 2009, the Respondent filed their Narrative and supporting documentation. By letter dated April 20, 2009, the Petitioner's attorney advised that the Petitioner filed a petition for relief

under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas (Case No. 09-40649) and that USDA has been listed as a creditor in that action.

As the automatic stay mandated by 11 U.S.C. §362 precludes garnishment of wages, absent relief from the stay or dismissal of the petition, this action will be **DISMISSED**, without prejudice at this time. The matter may be reinstated upon Motion should the Bankruptcy action be dismissed or upon obtaining relief from the stay.

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

Done at Washington, D.C.

_____

In re: PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY TACOMA HYDROELECTRIC PROJECT.
EPAct Docket No. 09-0055.
FERC No. 12589.
Ruling.
February 27, 2009.

Donald H Clarke, Rekha K. Roa for Petitioners
Lois G. Wittee, Steve C. Silverman, Randall J Bremer for FS.
Ruling by Chief Administrative Law Judge Marc R. Hillson.

Ruling Granting in Part and Denying in Part Motions to Dismiss and Clarifying Discovery Schedule

The United States Forest Service on February 4, 2009 filed a series of motions to dismiss all eight of the disputed issues raised by the Public Service Corporation of Colorado d/b/a Excel (PSCo), on the grounds that they each failed to identify material facts that are in dispute. PSCo filed an opposition on February 17, 2009, contending that each of the disputed issues did involve disputed material facts that could be relied on by ultimate decision makers in this matter. I find that each of the disputed issues, other than disputed issued # 6, involves facts that may be material to the ultimate decision makers, and accordingly deny the motions to dismiss disputed issues 1 through 5, 7 and 8. I grant the motion to dismiss disputed issued # 6.

Along with other administrative law judges who have ruled on similar issues, I am inclined to liberally interpret the regulations in favor of holding hearings if there is any reasonable dispute that material facts exist which could affect ultimate decisions in these cases. When Congress passed the relevant provisions of the Federal Power Act, 16 U.S.C. § 797 (e), it was because they wanted "to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the review of the Federal Courts." Idaho Power Company, Hells Canyon Complex, 65 Agric. Dec. 273 (2006). Failure to allow development of disputed facts that might be material would be counter to the intentions

of Congress in setting up this entire integrated license review process, which was clearly intended to "afford interested parties an opportunity to raise concerns and restore fairness to hydroelectric license proceedings." Klamath Hydroelectric Project, Ruling of Judge McKenna, July 13, 2006; see, also, Judge Canorro's detailed analysis in Yadkin-Pee Dee Hydroelectric Project, August 23, 2007.

With respect to all but the 6th disputed issue, I find that there appear to be disputed facts which may be material to the ultimate decision maker. For example, Issue 1, disputing the Forest Service position that there is a direct relationship between operations of the project and reduced ecosystem sustainability in Cascade Creek, cannot be simply categorized as not identifying a factual issue in dispute, as there may (or may not) be numerous facts concerning the impact of the project on Cascade Creek that would be beneficial to the ultimate decision maker. Likewise, the Forest Service's contention that because "ecosystem sustainability" is subjective and not capable of precise measurement renders it outside the scope of this hearing misreads the holdings of the above-cited rulings that would allow the development of facts which would allow the ultimate decision maker to have a basis to consider whether the ecosystem sustainability is in fact reduced, and what the effect of such reduction would be on the conditions imposed on PSCo. Similar logic can be applied to the other disputed issues raised by PSCo, other than Issue 6.

Issue 6 would require me to make findings as to whether conditions imposed by the Forest Service are inconsistent with Forest Service goals. This appears to me to be a policy determination or legal conclusion for which no new material facts could be developed, although it appears to me at this juncture that such facts that are developed under several of the other issues might have a bearing on how the ultimate decision maker rules on this issue. However, with regard to disputed issue 6, the Act does not anticipate the administrative law judge in a hearing of this nature to make a finding as to whether conditions imposed by the Forest Service are consistent with the goals of the Forest Service. Accordingly, I grant the motion to dismiss issue number 6, and deny the motions to dismiss issues 1 through 5, 7 and 8.

I note that the parties have cooperated in a manner to render moot PSCo's objections to many of the Forest Service's discovery requests. Given that the parties have agreed to discovery, there is no need for me to issue an order in this area. At this point, pursuant to the Rules of Procedure, and our prehearing conference call of February 17, 2009. I do direct that all discovery must be completed by March 16, 2009, while the written direct testimony must be filed by March 23, 2009.

_____

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.
I & G Docket No. 04-0001.
Ruling Dismissing Larry Lion's Petition to Suspend Balance of the Period of Debarment.
Filed March 19, 2009.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On February 27, 2009, Larry Lion filed "Petition to the Judicial Officer by Respondent Larry Lion to Suspend the Balance of the Period of Debarment." On March 17, 2009, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to 'Petition to the Judicial Officer'" stating I have no jurisdiction to grant Larry Lion's petition.

On June 9, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order debarring Larry Lion from receiving inspection services under the Agricultural Marketing Agreement Act of 1946, as amended (7 U.S.C. §§ 1621-1632) and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) for a period of 5 years. The ALJ also provided, after 1 year, Larry Lion may petition the Secretary of Agriculture or the Secretary's designee to suspend the balance of the

period of debarment. (ALJ's Decision and Order at 50.)

On June 16, 2006, the Hearing Clerk served Larry Lion with the ALJ's Decision and Order.[1] The rules of practice applicable to the instant proceeding[2] provide that the administrative law judge's decision shall become final and effective 35 days after service upon the respondent, unless appealed to the Judicial Officer (7 C.F.R. § 1.142(c)(4)). Larry Lion failed to file a timely appeal of the ALJ's Decision and Order,[3] and the ALJ's Decision and Order became final and effective as to Larry Lion on July 21, 2006. Therefore, Larry Lion's 5-year period of debarment began on July 21, 2006, and he became eligible to file a petition to suspend the balance of the 5-year period of debarment on July 21, 2007. However, I have not been designated by the Secretary of Agriculture to consider any petition to suspend the balance of the 5-year period of debarment ordered by the ALJ, and Larry Lion is not a party before me with respect to the pending appeal. Therefore, I have no jurisdiction to consider the February 27, 2009, Petition to the Judicial Officer by Respondent Larry Lion to Suspend the Balance of the Period of Debarment, and I dismiss the Petition.

———————

[1]United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4087 9993.

[2]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]Wesley T. Green, attorney for Lion Raisins, Inc. (Notice of Appearance and Statement of Representation filed Aug. 15, 2005), and James A. Moody, attorney for Lion Raisins, Inc., Alfred Lion, Jr., Bruce Lion, Daniel Lion, and Jeffrey Lion (Notice of Entry of Appearance filed Dec. 1, 2005), filed "Respondents' Appeal Petition to Decision and Order and Brief in Support Thereof and Respondents' Request for Oral Argument" on July 13, 2006. Mr. Moody stated his failure to enter an appearance on behalf of Larry Lion was an oversight which he would correct by filing a notice of appearance on behalf of Larry Lion (Tr. 7). Mr. Moody failed to file a corrected notice of appearance. Larry Lion appeared pro se beginning January 24, 2006, when Charles Pashayan, Jr., withdrew as his counsel (Respondents' Notice of Withdrawal as Attorney of Record; and Notice of Designations of Mr. Pashayan as Legal Counsel for Settlement Discussions). Larry Lion failed to appeal the ALJ's June 9, 2006, Decision and Order on his own behalf. Therefore, I conclude Larry Lion failed to file a timely appeal of the ALJ's Decision and Order.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.
I & G Docket No. 04-0001.
Ruling on Respondents' Petitions to Reopen Hearing.
Filed April 16, 2009.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

Introduction

The rules of practice applicable to the instant proceeding[1] provide that a party may file a petition to reopen a hearing to take further evidence, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*—. . . .
> . . . .
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the

[1]The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

> issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Respondents filed "Respondents' Motion to Reopen Administrative Hearing Held Before ALJ Davenport" on April 5, 2007; "Respondents' Second Supplemental Motion to Reopen Administrative Hearing Held before ALJ Davenport" on September 7, 2007; "Respondents' Third Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" on October 10, 2007; and "Respondents' Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" on October 15, 2007.

Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion

On June 9, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order in which he concluded that Respondents violated the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act] and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations] and debarred Respondents from receiving inspection services under the Agricultural Marketing Act and the Regulations.[2] On June 15, 2006, the Hearing Clerk served Lion Raisin Company, Lion Packing Company, and Isabel Lion with the ALJ's Decision and Order,[3] and on June 16, 2006, the Hearing Clerk served Larry Lion with the ALJ's Decision and Order.[4] Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion did not file an

[2] *In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 224, 232-33 (2006).

[3] United States Postal Service Domestic Return Receipt for article numbers 7004 1160 0004 4087 9979 and 7004 1160 0004 4087 9368.

[4] United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4087 9993.

appeal petition within 30 days after service of the ALJ's Decision and Order, and, in accordance with the Rules of Practice, the ALJ's Decision and Order became final and effective as to Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion 35 days after service of the ALJ's Decision and Order. (See 7 C.F.R. § 1.142(c)(4).)

The Rules of Practice provide that the administrative law judge shall rule on all motions made prior to the filing of the appeal of the administrative law judge's decision, except motions directly relating to the appeal, and the Judicial Officer shall rule on all motions made after the filing of an appeal. (See 7 C.F.R. § 1.143(a).) The petitions to reopen do not directly relate to an appeal. Therefore, as to Lion Raisin Company, Lion Packing Company, Isabel Lion, and Larry Lion, I lack jurisdiction to rule on the petitions to reopen.

Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion

Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion appealed the ALJ's June 9, 2006, Decision and Order and filed each of the petitions to reopen after they had filed their appeal. Therefore, as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion, I have jurisdiction to rule on the petitions to reopen.

Based upon my review of "Respondents' Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed April 5, 2007, I find Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion seek to adduce evidence that is cumulative or inadmissible. Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion had ample opportunity to obtain and present their evidence. The ALJ conducted an 8-day oral hearing. The Administrator presented his case in 3 days, calling two witnesses, who Respondents cross-examined, and introducing 74 exhibits that were admitted into evidence. Respondents presented their case during the remaining 5 days, calling 13 witnesses and introducing 22 exhibits that were admitted into evidence.

Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion identify two purposes for which they seek to reopen the hearing: (1) to establish Respondents' guarantees are "probably" reflected by the United States Department of Agriculture's [hereinafter USDA] re-inspection results and USDA withheld or destroyed documents on which re-inspection results are recorded; and (2) to establish USDA's record-keeping system was untrustworthy (Respondents' Motion to Reopen Administrative Hearing Held Before ALJ Davenport at 67). Respondents attempted to establish that their documents accurately reflected USDA inspection results and that USDA's inspection procedure was untrustworthy during the hearing. I find no reason to reopen the hearing to allow further evidence for these purposes.

The Rules of Practice do not provide an automatic right to file more than one petition to reopen the hearing.[5] Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion did not seek leave to file multiple petitions to reopen the hearing. Therefore, as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion, I deny "Respondents' Second Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed September 7, 2007; "Respondents' Third Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed October 10, 2007; and Respondents' Supplemental Motion to Reopen Administrative Hearing Held Before ALJ Davenport" filed October 15, 2007.

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[5]*Cf. In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (holding, under the Rules of Practice, a party may not file more than one petition for reconsideration of a decision of the Judicial Officer); *In re Jerry Goetz* (Order Lifting Stay), 61 Agric. Dec. 282, 286 (2002) (holding the Rules of Practice do not provide for filing more than one petition for reconsideration of a decision of the Judicial Officer); *In re Fitchett Bros., Inc.* (Dismissal of Pet. for Recons.), 29 Agric. Dec. 2, 3 (1970) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

ANIMAL QUARANTINE ACT

DEFAULT DECISIONS

In re: CHARLES A. CARTER d/b/a C.C. HORSES TRANSPORT; AND JEREMY POLLITT d/b/a WILDCAT TRUCKING.
A.Q. Docket No. 09-0024.
Default decision as to only JEREMY POLLITT.
April 8, 2009.

AQ – Default.

Thomas Neil Bolick for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Default Decision

1. The Complaint, filed on November 17, 2008, alleges, among other things, that Jeremy Pollitt, doing business as Wildcat Trucking (one of the two respondents), 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. § 88.1 *et seq*.). The Complainant seeks $7,200.00 in civil penalties (9 C.F.R. § 88.6) for Jeremy Pollitt's failures to comply on about December 16, 2004, and on or about March 30, 2005.

Parties and Counsel

2. 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 Room 2319, 1400 Independence Ave. SW, Washington, D.C. 20250.
3. The Respondent, Jeremy Pollitt, doing business as Wildcat Trucking (frequently herein "Respondent Pollitt" or "Respondent") has failed to appear.

Procedural History

4. APHIS' Motion for Adoption of Proposed Default Decision and Order (as to only Respondent Jeremy Pollitt, doing business as Wildcat Trucking), filed February 18, 2009, is before me. Respondent Pollitt was served on February 28, 2009 with a copy of that Motion and a copy of the Proposed Default Decision and Order and failed to respond.
5. Regarding service of the Complaint, on December 18, 2008, Respondent Pollitt was served[1] with a copy of the Complaint, 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*. 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 January 7, 2009. Respondent Pollitt failed to file an answer, so he is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).
6. Respondent Pollitt 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 Pollitt 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

[1] First, the certified mailing was returned, marked by the United States Postal Service "RETURN TO SENDER" "Unclaimed". *See* 7007 0710 0001 3858 8298. Remailing by ordinary mail accomplishes service. 7 C.F.R. § 1.147(c)(1).

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 also* 7 C.F.R. § 380.1 *et seq*.]

Findings of Fact and Conclusions

7. Respondent Jeremy Pollitt, doing business as Wildcat Trucking, is the owner of a company that commercially transports horses to slaughter and was, at all times material to this Decision, a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter.

8. Respondent Pollitt was an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1. The Secretary of Agriculture has jurisdiction over Respondent Pollitt and the subject matter involved herein.

9. Respondent Pollitt's last known mailing address was 7708 3rd Street, Wellington, Colorado 80549, according to APHIS's Motion filed on February 18, 2009. Respondent Pollitt's delivery address is PO Box 483, Wellington, Colorado 80549, according to the Domestic Return Receipt [7007 0710 0001 3858 8298] returned to the Hearing Clerk by the United States Postal Service on December 17, 2008.

10. Respondent Pollitt 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 Pollitt 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.

11. On or about December 16, 2004, Respondent Pollitt shipped 41 horses in commercial transportation from Loveland, Colorado, to Cavel International in Dekalb, Illinois 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 address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); and (2) the name of

the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

12. (a) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois 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 address was not properly completed, 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); and (3) the date and time when the horses were loaded onto the conveyance were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter. Respondent Pollitt and/or his driver unloaded the horses in Harlan, Iowa, and reloaded them sometime later for commercial transportation to Cavel International in Dekalb, Illinois for slaughter, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(c) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter. Respondent Pollitt's driver stated that horses fought each other constantly during said transportation. Respondent Pollitt thus failed to completely segregate each aggressive horse on the conveyance so that no aggressive horse could come into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.3(a)(2).

(d) On or about March 30, 2005, Respondent Pollitt shipped a load of 52 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois for slaughter. Respondent Pollitt's driver stated that horses fought each other constantly during said transportation. Respondent Pollitt thus failed to handle the 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).

13. During the two shipments detailed in paragraphs 11 and 12, Respondent Pollitt, doing business as Wildcat Trucking, 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 maximum civil penalty per violation is $5,000.00, and each equine transported in violation of the regulations will be considered a separate violation. Civil penalties totaling $7,200.00 are warranted and appropriate in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed February 18, 2009.

Order

14. Respondent Jeremy Pollitt, doing business as Wildcat Trucking, an owner/shipper, is assessed civil penalties totaling **$7,200.00** (seven thousand two 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 Pollitt shall include with his payments any change in mailing address (from those shown in paragraph 9) or other contact information.

15 Respondent Pollitt shall reference **A.Q. Docket No. 09-0024** 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. The provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 16 to determine when this Decision and Order becomes final.

Finality

16. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties (including the other respondent). Respondent Pollitt's copies shall be sent to both addresses in paragraph 9.

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: DENNIS R. SMEBAKKEN, d/b/a RUSHMORE LIVESTOCK, INC.; RANDALL C. BRUMBAUGH, d/b/a RANDALL'S TRANSPORTATION; and ROBERT PAULSON.
A.Q. Docket No. 09-0026.
Default Decision.
May 6, 2009.

AQ – Default.

Thomas Neil Bolick.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER AS TO ROBERT PAULSON

Preliminary Statement

This is an administrative proceeding for the assessment of a civil penalty for violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, the regulations promulgated thereunder (9 C.F.R. part 88), and in accordance with the rules of practice applicable to this proceeding as set forth in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq*.

On November 18, 2008, the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of

Agriculture (USDA), initiated this proceeding by filing an administrative complaint against Respondent Paulson. The complaint was mailed to Respondent Paulson at P.O. Box 134, Geddes, South Dakota 57342, his last known residence, via certified mail, return receipt requested. On December 1, 2008, the complaint mailed to Respondent Paulson was returned to the Hearing Clerk marked by the U.S. Postal Service as "unable to forward", and the next day the Hearing Clerk sent counsel for the complainant a notice of unsuccessful service. Counsel for the Complainant was able to secure another address for Respondent Paulson, and on December 10, 2008, the Hearing Clerk re-mailed the complaint to Respondent Paulson at 106 East 7th Street, P.O. Box 113, Platte, South Dakota 57369, via certified mail, return receipt requested. On January 7, 2009, the complaint mailed to Respondent Paulson's second address was returned to the Hearing Clerk marked by the U.S. Postal Service as as "unclaimed or refused." Section 1.147(c)(1) of the rules of practice (7 C.F.R. § 1.147(c)(1)) provides that any document that is initially sent to a person by registered mailed to make that person a party Respondent in a proceeding but is returned marked by the postal service as unclaimed or refused shall be deemed to have been received by said person on the date that it is re-mailed by ordinary mail to the same address. Accordingly, the Hearing Clerk re-mailed the complaint to Respondent Paulson at the same address via regular mail on January 8, 2009. Therefore, Respondent Paulson is deemed to have been properly served with the complaint on January 8, 2009.

Section 1.136 of the rules of practice (7 C.F.R. § 1.136) provides that an answer to a complaint 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 Paulson's answer thus was due no later than January 28, 2009, twenty days after service of the complaint (7 C.F.R. § 136(a)). Respondent Paulson never filed an answer to the complaint and the Hearing Clerk mailed him a no answer letter on January 29, 2009.

Respondent Paulson failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) and accordingly 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, because the admission of the allegations in the complaint constitutes a waiver of hearing (7 C.F.R. § 1.139) and Respondent Paulson's failure to file an answer is deemed such an admission pursuant to the rules of practice, Respondent Paulson's failure to answer is likewise deemed a waiver of hearing. Accordingly, the material allegations in the complaint are deemed admitted and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139).

Findings of Fact

1. Robert Paulson, hereinafter referred to as Respondent Paulson, is a truck driver for loads of horses being commercially transported to slaughter. He has a mailing address in Platte, South Dakota 57369.

2. (a) On or about March 28, 2005, Respondent Paulson shipped a load of 45 horses in commercial transportation from Billings, Montana, to Cavel International in Dekalb, Illinois (hereinafter, Cavel), for slaughter. Respondent Paulson unloaded the horses in Platte, South Dakota, at 2 a.m. on March 29, 2005, and reloaded them about 12 hours later for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(b) On or about March 28, 2005, Respondent Paulson shipped a load of 45 horses in commercial transportation from Billings, Montana, to Cavel for slaughter. One of the horses in the shipment, bearing USDA back tag # USBZ 6891, went down about 300 miles outside of Platte, South Dakota, indicating that it was in obvious physical distress, yet Respondent Paulson did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. §

88.4(b)(2).

3. On or about April 4, 2005, Respondent Paulson shipped a load of 56 horses in commercial transportation from Aberdeen, South Dakota, and Mobridge, South Dakota, to Cavel for slaughter. One of the horses in the shipment, an old mare bearing USDA back tag # USAW 1282, went down at least three times during said transportation, indicating that it was in obvious physical distress, yet Respondent Paulson did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

4. (a) On or about May 10, 2005, Respondent Paulson shipped a load of 44 horses in commercial transportation from St. Onge, South Dakota, to Cavel for slaughter. One of the horses in the shipment, a palomino mare bearing USDA back tag # USBJ 7961, went down right after loading and several times during said transportation, indicating that it was in obvious physical distress, yet Respondent Paulson did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(b) On or about May 10, 2005, Respondent Paulson shipped a load of 44 horses in commercial transportation from St. Onge, South Dakota, to Cavel for slaughter. One of the horses in the shipment, a palomino mare bearing USDA back tag # USBJ 7961, went down right after loading and several times during said transportation, and died while en route to the slaughter facility. Respondent Paulson 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).

5. (a) On or about June 28, 2005, Respondent Paulson shipped 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel for slaughter. Four (4) of the horses were transported inside a removable/collapsible section of the conveyance, commonly known as the "dog house" or "jail box," that did not provide the horses with adequate headroom. Respondent Paulson thus transported these four (4) horses to slaughter in a section of the conveyance that did not have sufficient interior height in its animal cargo space to allow each horse in that space to stand with its head extended to the fullest normal postural height, in violation of 9 C.F.R.

§ 88.3(a)(3).

(b) On or about June 28, 2005, Respondent Paulson shipped 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel for slaughter. Four (4) of the horses were transported inside a removable/collapsible section of the conveyance, commonly known as the "dog house" or "jail box," that did not provide the horses with adequate headroom. One of these four (4) horses, bearing USDA back tag # USCI 2393, became stuck in the "dog house" or "jail box" during the commercial transportation to slaughter and suffered cuts, scrapes, and bruises along its back and around its left eye. Respondent Paulson 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).

6. (a) On or about August 18, 2005, Respondent Paulson shipped a load of 42 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. The conveyance had an elliptical air hole/vent opening with sharp edges that was located about two feet above the top deck floor. During said transportation, one of the horses in the shipment, a gray gelding with USDA back tag # USCO 3467, caught its foot in this hole, fell down, and was trampled to death by the other horses. Respondent Paulson 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) On or about August 18, 2005, Respondent Paulson shipped a load of 42 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. The conveyance had an elliptical air hole/vent opening with sharp edges that was located about two feet above the top deck floor. During said transportation, one of the horses in the shipment, a gray gelding with USDA back tag # USCO 3467, caught its foot in this hole, fell down, and was trampled to death by the other horses. Respondent Paulson 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).

7. (a) On or about September 21, 2005, Respondent Paulson shipped 44 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. One of the horses in the shipment, bearing USDA back tag # USBP 1971, had a severe pre-existing head injury at the time that it was loaded onto the conveyance, yet Respondent Paulson failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(b) On or about September 21, 2005, Respondent Paulson shipped 44 horses in commercial transportation from Loveland, Colorado, to Cavel for slaughter. One of the horses in the shipment, bearing USDA back tag # USBP 1971, had a severe pre-existing head injury at the time that it was loaded onto the conveyance, yet Respondent Paulson shipped it with the other horses. Respondent Paulson 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).

8. (a) On or about October 2, 2005, Respondent Paulson shipped 39 horses in commercial transportation from Gordon, Nebraska, to Cavel for slaughter in a conveyance that had a loose chain hanging from the roof of the conveyance. Respondent Paulson 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) On or about October 2, 2005, Respondent Paulson shipped 39 horses in commercial transportation from Gordon, Nebraska, to Cavel for slaughter in a conveyance that had a loose chain hanging from the roof of the conveyance. One of the horses in the shipment, bearing USDA back tag # USBP 1763, suffered a head injury consistent with being struck on the head by the chain during commercial transportation to slaughter. Respondent Paulson 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).

9. On or about November 8, 2005, Respondent Paulson shipped 39 horses in commercial transportation from Sisseton, South Dakota, to Cavel for slaughter. The shipment included at least one (1) stallion bearing USDA back tag # USBS 7958, but Respondent Paulson did not load the horses on the conveyance so that the 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).

10. (a) On or about December 13, 2005, Respondent Paulson shipped 42 horses in commercial transportation from Presko, South Dakota, to Cavel for slaughter. The owner-shipper certificate, VS Form 10-13, for this shipment indicated that the horses had been loaded on the conveyance at 5 p.m. on December 13, but they were not unloaded from the conveyance until 5 a.m. on December 15, indicating that they were on the trailer for 36 consecutive hours. Respondent Paulson thus allowed the horses to be on the conveyance more than 28 consecutive hours without being offloaded and provided with food, water, and the opportunity to rest for at least six (6) consecutive hours, in violation of 9 C.F.R. § 88.4(b)(3).

(b) On or about December 13, 2005, Respondent Paulson shipped 42 horses in commercial transportation from Presko, South Dakota, to Cavel for slaughter. Respondent Paulson delivered the horses outside of Cavel's normal business hours and left the slaughter facility, but they did not return to Cavel to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

11. (a) On or about January 25, 2006, Respondent Paulson shipped 37 horses in commercial transportation from Mitchell, South Dakota, to Cavel for slaughter but did not apply USDA back tags to 28 of the horses, in violation of 9 C.F.R. § 88.4(a)(2).

(b) On or about January 25, 2006, Respondent Paulson shipped 37 horses in commercial transportation from Mitchell, South Dakota, to Cavel for slaughter. The shipment contained one (1) stallion, USDA back tag # USBS 9051, but Respondent Paulson 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).

12. On or about March 22, 2006, Respondent Paulson shipped 42 horses in commercial transportation from an unknown location to Cavel for slaughter. The shipment contained two (2) stallions, one bearing USDA back tag #s USCS 5089 and the other having no USDA backtag but bearing Cavel tag # 2535, but Respondent Paulson did not load the two stallions on the conveyance so that they were completely segregated from each other and 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).

13. On or about June 13, 2006, Respondent Paulson was the driver of a shipment of 46 horses being commercially transported from St. Onge, South Dakota, to Cavel for slaughter. The top rear deck of the conveyance used to transport the horses was so overcrowded with horses that they did not have enough room to turn around and come off the conveyance at the slaughter plant. Respondent Paulson started poking the horses with a sorting stick in an effort to make them off-load, which caused a horse bearing USDA back tag # USCS 4974 to start kicking and injure its right hind leg. Respondent Paulson thus failed to transport the injured horse and the other 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).

Conclusions of Law

The Secretary has jurisdiction in this matter.

By reason of the Findings of Fact set forth above, Respondent Paulson violated the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note).

Order

Respondent Robert Paulson is hereby assessed a civil penalty of Sixty-Four Thousand Seven Hundred Twenty Five Dollars ($64,725.00).

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 Robert Paulson shall indicate that payment is in reference to A.Q. Docket No. 09-0026.

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 Robert Paulson 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.

_____

In re: CODY D. FRAME.
A.Q. Docket No. 09-0025.
Default Decision.
June 18, 2009.

AQ – Default.

Thomas Neil Bolick for APHIS.
Respondent Pro se.
Default Order by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

1. The Complaint, filed on November 17, 2008, alleges, among other things, that Cody D. Frame, Respondent, an owner/shipper of horses (9

C.F.R. § 88.1), on or about April 28, 2005, 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. § 88.1 *et seq*.). The Complainant seeks $7,000.00 in civil penalties (9 C.F.R. § 88.6) for Cody D. Frame's failures to comply.

Parties and Counsel

2. 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 Room 2319, 1400 Independence Ave. SW, Washington, D.C. 20250.
3. The Respondent, Cody D. Frame (frequently herein "Respondent Frame" or "Respondent") has failed to appear.

Procedural History

4. APHIS' Motion for Adoption of Proposed Default Decision and Order, filed February 6, 2009, is before me. Respondent Frame was served with a copy of that Motion and a copy of the Proposed Default Decision and Order on March 28, 2009, and failed to respond.
5. Regarding service of the Complaint, Respondent Frame was served (he personally signed for delivery of the certified mailing) in late November or early December 2008. What he was served with included a copy of the Complaint, a copy of the Hearing Clerk's notice letter dated November 18, 2008, and a copy of the Rules of Practice. *See* 7 C.F.R. §1.130 *et seq*.
6. Respondent Frame'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). Respondent Frame never did file an answer to the Complaint, and he is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).
7. Respondent Frame 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.

8. 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. [*See also* 7 C.F.R. § 380.1 *et seq*.]

Findings of Fact and Conclusions

9. Respondent Cody D. Frame is a self-employed truck driver with a mailing address in Aladdin, Wyoming, who, on or about April 28, 2005, commercially transported horses to slaughter. Respondent Frame was an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1.

10. The Secretary of Agriculture has jurisdiction over Respondent Frame and the subject matter involved herein.

11. On or about April 28, 2005, Respondent Frame shipped a load of 49 horses in commercial transportation for slaughter from Billings, Montana, to Cavel International in Dekalb, Illinois:

(a) in a conveyance that had inadequate headroom for the horses. Respondent Frame 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); and

(b) at least five horses in the shipment suffered head and facial injuries during said transportation because the conveyance used for the transportation had inadequate headroom for the horses. Respondent Frame thus failed to handle these 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).

12. During the shipment detailed in paragraph 11, Respondent Frame 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 maximum civil penalty per violation is $5,000.00, and each equine transported in violation of the regulations will be considered a separate violation. Civil penalties totaling $7,000.00 are warranted and appropriate in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed February 6, 2009.

Order

13. Respondent Cody D. Frame, an owner/shipper, is assessed civil penalties totaling **$7,000.00** (seven thousand), 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 Frame shall include with his payments any change in mailing address or other contact information.

14. Respondent Frame shall reference **AQ 09-0025** 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. The provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 15 to determine when this Decision and Order becomes final.

Finality

15. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer

is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.
Administrative Law Judge

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: JACK REINERT.
A.Q. Docket No. 08-0125.
Default Decision.
Filed June 19, 2009.

AQ – Default.

Thomas Neil Bolick for APHIS.
Respondent Pro se.
Default Decision by Chief Administrative Law Judge Marc R. Hillson.

Default Decision and Order

This is an administrative proceeding for the assessment of a civil penalty for violations of the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, and 9 C.F.R. part 88 in accordance with the rules of practice in 7 C.F.R. §§ 1.130 et seq. and 380.1 et seq.

On May 22, 2008, the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), initiated this proceeding by filing an administrative complaint against Respondent. The complaint was eventually properly served on Respondent.[1]

On August 12, 2008, the Hearing Clerk received Respondent's partial answer to the complaint. Respondent's partial answer consists of an undated and unsigned handwritten statement that refers to an affidavit that respondent gave IES Investigator Don Borchert on August 24, 2006. This affidavit only addresses the violations alleged in counts XI and XII of the complaint. Respondent's answer failed to deny or otherwise address counts I through X of the complaint. Section 1.136(c) of the

[1]The Motion for Adoption of Default Decision recites the rather convulsed history of the attempts to assure that Respondent was properly served. Since Respondent did file an answer the timeliness of which is not contested, I simply note that service was accomplished.

rules of practice (7 C.F.R. § 1.136(c)) provides that the failure to deny or otherwise respond to an allegation of the complaint shall be deemed an admission of the allegations in the complaint. Section 1.139 of the rules of practice (7 C.F.R. § 1.139) further states that the admission of the allegations in the complaint constitutes a waiver of hearing. Therefore, Respondent's failure to deny or otherwise address counts I through X of the complaint thus constitutes both an admission of the allegations set forth in those counts and a waiver of hearing on those counts. Accordingly, the material allegations in counts I through X of 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. Respondent Jack Reinert is a licensed livestock buyer in South Dakota and has been buying horses since 1987. Respondent has a mailing address of 23422 329th Avenue, Reliance, South Dakota 57569. Respondent has a second mailing address of 23808 333rd Avenue, Reliance, South Dakota 57569.[2]

2. On or about July 7, 2003, respondent shipped 32 horses in commercial transportation from Sisseton, South Dakota, to Dallas Crown, Inc., in Kaufman, Texas (hereinafter referred to as 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) it listed only 23 horses rather than each horse being transported, in violation of 9 C.F.R. § 88.4(a)(3); (2) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the 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).

3. (a) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter but did not properly fill out the required owner-shipper

[2]According to the Motion for Default Decision, Respondent is currently incarcerated.

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) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter. The shipment contained a stallion but Respondent did not load it 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) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter. At least two (2) horses in the shipment went down while en route to the slaughter plant such that they were not able to get up and 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 and/or his driver thus did not check the physical condition of the horses at least once every six (6) hours or, in the alternative, did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(d) On or about February 1, 2004, Respondent shipped 47 horses in commercial transportation from Philip, South Dakota, to Dallas Crown for slaughter. At least two (2) horses in the shipment went down while en route to the slaughter plant such that they were not able to get up and had to be euthanized on the conveyance upon its arrival at Dallas Crown. Respondent 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).

4. On or about February 5, 2004, Respondent shipped 37 horses in commercial transportation from Gregory, South Dakota, 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) it listed only 35 horses rather than each horse being transported, in violation of 9 C.F.R. § 88.4(a)(3); (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); and (3) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

5. On or about February 22, 2004, Respondent shipped 28 horses in commercial transportation from Minot, North Dakota, 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) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v) 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).

6. On or about February 23, 2004, Respondent shipped 22 horses in commercial transportation from Fairbury, Nebraska, 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) it did not list the name of auction/market, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (2) it did not indicate the breed/type of any of the listed horses, physical characteristics that could be used to identify the horses, 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).

7.(a) On or about June 30, 2004, Respondent shipped 45 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter but did not apply a USDA back tag to each horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(2).

(b) On or about June 30, 2004, Respondent shipped 45 horses in commercial transportation from Rushville, Nebraska, 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) it did not indicate the color and sex of any of the listed horses, physical characteristics that could be used to identify the horses, in

violation of 9 C.F.R. § 88.4(a)(3)(v), and (2) it did not list the prefixes and numbers of the USDA back tags for any horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(c) On or about June 30, 2004, Respondent shipped 45 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter. Respondent 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).

8. (a) On or about August 8, 2004, Respondent shipped 42 horses in commercial transportation from Rushville, Nebraska, 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 shipment included a horse, USDA back tag # USBG 7801, that had a pre-existing injury to its right front leg, but there was no indication that this horse had a pre-existing injury or other unusual condition that may have caused it to have special handling needs, in violation of 9 C.F.R. § 88.4(a)(3)(viii).

(b) On or about August 8, 2004, Respondent shipped 42 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter. One of the horses, USDA back tag # USBG 7828, had a pre-existing injury to its left rear hoof and another horse, USDA back tag # USBG 7801, had a pre-existing to its right front leg such that neither horse could not bear weight on all four limbs, yet Respondent shipped them with the other horses. Respondent and/or his driver thus failed to handle the two (2) injured 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).

(c) On or about August 8, 2004, Respondent shipped 42 horses in commercial transportation from Rushville, Nebraska, to Dallas Crown for slaughter. Respondent 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).

9. On or about November 21, 2004, Respondent shipped 47 horses in commercial transportation from Fort Pierre, South Dakota, to Dallas Crown for slaughter. One horse in the shipment, a bay mare without a USDA back tag, did not want to stand during said transportation but

kept lying down, thereby causing it to be kicked and stepped on by the other horses in the shipment. By reason of the foregoing, this horse was in obvious physical distress, yet Respondent failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

10. On or about December 8, 2004, Respondent shipped 46 horses in commercial transportation from Sisseton, South Dakota, to Dallas Crown, Inc., in Kaufman, Texas (hereinafter referred to as 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).

Conclusion

By reason of the Findings of Fact set forth above, Respondent Jack Reinert violated the Commercial Transportation of Equines for Slaughter Act, 7 U.S.C. ' 1901 note. Therefore, the following Order is issued.

Order

Respondent Jack Reinert is hereby assessed a civil penalty of forty eight thousand one hundred and fifty dollars ($48,150.00). 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 Jack Reinert shall indicate that payment is in reference

to A.Q. Docket No. 08-0125.

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 Jack Reinert 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.

_____

ANIMAL WELFARE ACT

DEFAULT DECISIONS

In re: VANA M. STARK.
AWA Docket No. 08-0096.
Default Decision.
February 9, 2009.

AWA – Default.

Robert Ertman for APHIS.
Respondent Pro se.
Default Order by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

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

The Hearing Clerk sent a copy of the Complaint and the Rules of Practice governing proceedings under the Act, (7 C.F.R. § 1.130 *et seq*.) to the Respondent by certified mail, return receipt requested, on September 18, 2008. On September 19, 2008, the mailing was signed for at the address which the Respondent had provided.[1] The Respondent was informed in the accompanying letter of service that an Answer to

[1] The Hearing Clerk had previously sent a copy of the Complaint and the Rules of Practice to the Respondent by certified mail on April 4, 2008. The mailing was returned as "unclaimed" and pursuant to the Rules, the Hearing Clerk re-mailed the complaint and the accompanying materials by ordinary mail to the same address. The Respondent failed to file an Answer within the prescribed time and a Motion for entry of judgment by default was filed. The Respondent responded to the Motion by letter, in which she stated that she had not received the Complaint as she was in jail at the time. Upon receiving her response, counsel for the Complainant withdrew his Motion and asked that she be re-served with a copy of the Complaint and the Rules of Practice.

the Complaint should be filed pursuant to the Rules of Practice and that a failure to answer any allegation in the Complaint would constitute an admission of that allegation. The Respondent failed to file an Answer within the time prescribed in the Rules of Practice; thus the material facts alleged in the Complaint, which are admitted by Respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rule of Practice, 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. Respondent Vana M. Stark is an individual whose mailing address is Post Office Box 183, South Haven, Kansas 67140.

2. The Respondent, at all times material herein, was operating as a dealer as defined in the Act and the regulations.

3. On or about March 16, 2006, May 4, 2006 and May 18, 2006, Respondent sold a total of 12 puppies for resale as pets while not licensed as a dealer under the Act.

4. The Respondent made a false written statement to the purchaser stating that she was exempt from the licensing requirement as not having more than three breeding females.

CONCLUSIONS OF LAW

The Secretary has jurisdiction in this matter.

2. The sale of each dog constitutes a willful violation of Section 4 of the Act (7 U.S.C. § 2134) and Section 2.1 of the regulations (9 C.F.R. § 2.1).

ORDER

1.The Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.

2. The Respondent is assessed a civil penalty of $1,125.00. which

shall be paid by certified check or money order made payable to the Treasurer of the United States. Payment should be sent to:
Robert A. Ertman, Esquire
Office of the General Counsel
United States Department of Agriculture
Room 2014, South Building
Washington, D.C. 20250

3. The provisions of this Order shall become effective on the first day after this Decision becomes final. Pursauant to the Rules of practice, this Decision becomes final without further proceedings 35 days after service as provided in Sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. § 1. 142 and 1.145.

Copies of this Order will be served upon the parties by the Hearing Clerk.
Done at Washington, D.C.

———————

In re: GRANT WILLIAM OLY d/b/a TIGER ZONE.
AWA Docket No. 08-0122.
Default Decision.
April 6, 2009.

AWA – Default.

Bernadette R. Juarez for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

Procedural History

1. This proceeding was initiated under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*.) (herein frequently the "Act"), by a Complaint filed on May 20, 2008. The Complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United

States Department of Agriculture (herein frequently "APHIS" or "Complainant"), was represented by Bernadette Juarez, Esq., (and is believed now to be represented by Colleen A. Carroll, Esq.), with the Marketing Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250-1417.

2. The Complaint alleged that Grant William Oly, an individual, doing business as Tiger Zone, a former Minnesota nonprofit corporation, the respondent (herein frequently "Respondent Oly" or "Respondent") willfully violated the Act and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq*.) (herein frequently "Regulations" and "Standards").

3. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139. The Hearing Clerk sent to Respondent Oly a copy of the Complaint (together with the Hearing Clerk's notice letter dated May 21, 2008, and a copy of the Rules of Practice), by certified mail, return receipt requested. [*See* Domestic Return Receipt for Article Number 7004 1160 0004 4087 8606.] Although the United States Postal Service attempted to serve Respondent Oly with the Hearing Clerk's mailing, the Postal Service returned the mailing to the Hearing Clerk on June 11, 2008, marked, "MR. OLY LOOKED AT RETURN ADDRESS ON THIS LETTER & REFUSED TO ACCEPT IT." and "RETURNED TO SENDER" "REFUSED BY ADDRESSEE".

4. On June 13, 2008, the Hearing Clerk served Respondent Oly, by regular mail, with a copy of the Complaint, notice letter, and Rules of Practice, in accordance with section 1.147(c)(1) of the Rules of Practice. 7 C.F.R. § 1.147(c)(1). [*See* Memorandum to File, dated June 13, 2008.] Respondent was informed that an answer should be filed within 20 days and that failure to answer would constitute an admission of the allegations and a waiver of the right to a hearing.

5. Respondent Oly failed to file an answer. The time for filing an answer expired on July 3, 2008.

6. The Complainant's Motion for the issuance of a decision, filed December 8, 2008, is before me. The Hearing Clerk sent to Respondent Oly a copy of the Motion (together with proposed Decision and Order),

by certified mail, return receipt requested. [*See* Domestic Return Receipt for Article Number 7007 0710 0001 3860 2307.] Although the United States Postal Service attempted to serve Respondent Oly with the Hearing Clerk's mailing, it was marked "RETURNED TO SENDER, UNCLAIMED" and returned to the Hearing Clerk on January 8, 2009. The Motion (together with proposed Decision and Order) was mailed by regular mail on January 8, 2009, but that mailing was marked "RETURN TO SENDER" "REFUSED" "UNABLE TO FORWARD".
7. 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 Oly's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.

Findings of Fact and Conclusions

8. The Secretary of Agriculture has jurisdiction.
9. Respondent Grant William Oly is an individual doing business as Tiger Zone, a former Minnesota nonprofit corporation, 30840 Ski Road, Red Wing, Minnesota 55066.
10. At all times material herein Respondent Oly was operating as an exhibitor and/or dealer as those terms are defined in the Act and the Regulations, and held Animal Welfare Act license number 41-C-0124.
11. On or about March 3, 2006, Animal Welfare Act license number 41-C-0124 expired because it was not renewed.
12. Respondent Oly has had ongoing and repeated issues with the safe handling of his tigers.
13. On or about March 10, 2002, one of Respondent Oly's tigers bit a young man and, in particular, severed a portion of the left index finger.

14. On or about July 17, 2002, one of Respondent Oly's tigers (T.J.) bit a young woman and, in particular, the left arm.

15. In 2002, one of Respondent Oly's tigers bit Respondent's assistant.
16. On or about March 22, 2003, one of Respondent Oly's tigers (Nakita), during public exhibition, bit a woman who was pregnant.
17. The tiger, described above in paragraph 16, was euthanized for rabies testing.
18. On or about November 11, 2003, Complainant and Respondent entered into a stipulation, described below in paragraph 25, to resolve alleged violations involving Respondent's failure to comply with handling regulations on or about March 22, 2003.
19. On or about April 27, 2005, Respondent Oly's tigers attacked and severely injured Respondent's assistant.
20. On or about May 4, 2005, Judge Thomas W. Bibus, Minnesota District Court, First Judicial District, issued an order in *State of Minnesota v. Grant William Oly*, TA-05-2878 (MN 2005), authorizing the State of Minnesota to seize "all seven (7) tigers located on" respondent's property based, in part, on:

> On going and repeated safely [sic] problems with the physical barriers of the enclosures used to house the tigers. Improper and inadequate training and protective procedures for those assisting in the care of the tigers, as evidence by several reported incidences of tiger bites occurring on [Respondent's] premises. The latest incident involved life-threatening injuries.

VIOLATIONS

21. On or about April 27, 2005, Respondent Oly willfully violated the attending veterinarian and veterinary care regulations by failing to establish and maintain programs of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, regarding the handling of tigers and, as a result, Respondent's tigers attacked and seriously injured one of Respondent's assistants. 9 C.F.R. § 2.40(b)(4).
22. On or about April 27, 2005, Respondent Oly willfully violated the handling regulations by failing to handle tigers as carefully as possible

in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort, and specifically, Respondent placed his tigers in a position that allowed an inadequately trained assistant to contact the tigers directly and, as a result, the tigers attacked and severely injured the assistant. 9 C.F.R. § 2.131(b)(1).

SIZE OF RESPONDENT'S BUSINESS, GRAVITY OF VIOLATIONS, COMPLIANCE HISTORY, LACK OF GOOD FAITH

23. At all times material herein, Respondent Oly operated a small business.

24. The gravity of Respondent Oly's violations is great; Respondent Oly's violations of the veterinary care and handling Regulations on or about April 27, 2005 resulted in Respondent's tigers attacking and severely injuring one of Respondent's assistants. After this attack, Respondent's animals were confiscated by the State of Minnesota.

25. Respondent Oly has a history of violations. On or about November 11, 2003, Complainant and Respondent entered into a stipulation, based on the findings in animal welfare investigation MN 03-033, and pursuant to 9 C.F.R. § 4.11, in which Respondent paid $275 to resolve alleged violations involving Respondent's failure to comport with section 2.131(c)(1) of the handling regulations. Moreover, the conduct over the period described herein reveals Respondent's consistent disregard for, and unwillingness or inability to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. Accordingly, Respondent's ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

26. Under these circumstances, the remedies contained in the following Order for Respondent Oly's violations of the Animal Welfare Act on or about April 27, 2005 are reasonable and appropriate, including the $3,025.00 civil penalty. The remedies are in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

Order

27. Animal Welfare Act license number 41-C-0124 is **revoked**, effective on the day after this Decision becomes final. [*See* paragraph 32 to determine the day on which this Decision and Order becomes final and effective.] Further, Respondent Oly's privilege to engage in activities that require an Animal Welfare Act license is **revoked**, effective on the day after this Decision becomes final.

28. Respondent Oly 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.

29. Under the Animal Welfare Act, revocations and permanent disqualifications are equally permanent.

30. Respondent Oly, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, and in particular, shall cease and desist from:

failing to establish and maintain programs of adequate veterinary care that includes adequate guidance to personnel involved in the care and use of animals regarding handling, and;

failing to handle tigers as carefully as possible in a manner that does not cause trauma, behavioral stress, physical harm or unnecessary discomfort.

Respondent Oly, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.

31. Respondent Oly is assessed a civil penalty in the amount of **$3,025.00**, which he shall pay by certified check(s) or cashier's check(s) or money order(s), made payable to the order of "**Treasurer of the United States**," and forwarded within sixty (60) days from the effective date of this Decision and Order by a commercial delivery service, such as FedEx or UPS, to

United States Department of Agriculture
Office of the General Counsel, Marketing Division

Attn.: Colleen A. Carroll, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent Oly shall include **AWA Docket No. 08-0122** on the certified check(s) or cashier's check(s) or money order(s).

Finality

32. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such

briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any

right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

FEDERAL CROP INSURANCE ACT

DEFAULT DECISION

In re: BRANDON RATTRAY.
FCIA Docket No. 08-0178.
Default Decision.
January 29, 2009.

FCIA – Default.

Kimberley E. Arrigo for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, the failure of Respondent, Brandon Rattray, to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. Since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

It is further found that, pursuant to section 515(h)(3)(B) of the Act (7 U.S.C. § 1515(h)(3)(B)) and FCIC's regulations (7 C.F.R. part 400, subpart R), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(1) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);

(2) The Agricultural Market Transition Act (7 U.S.C. § 7201 et seq.), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);

(3) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 et seq.);

(4) The Commodity Credit Corporation Charter Act (15 U.S.C. §§ 714 et seq.);

(5) The Agricultural Adjustment Act of 1938 (7 U.S.C. §§ 1281 et seq.);

(6) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 et seq.);

(7) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 et seq.); and

(8) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

Therefore, unless this decision is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified individual, you will be reported to the U.S. General Services Administration (GSA) pursuant to 7 C.F.R. § 3017.505. GSA publishes a list of all persons who are determined ineligible in its Excluded Parties List System (EPLS).

It is further found that, pursuant to 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 $1,000 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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PLANT QUARANTINE ACT

DEFAULT DECISIONS

In re: S. F. B. FARMS, INC. d/b/a R & E FLORAL EXPRESS, INC.
P.Q. Docket No. 08-0084.
Default Decision.
March 3, 2009.

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 importation of cut flowers into the United States (7 C.F.R. §§ 319.74 *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 20, 2008, alleging that respondent S.F.B. Farms, Inc., d/b/a R & E Floral Express violated the Act and regulations promulgated under the Acts (7 C.F.R. §§ 319.74 et seq.).

The complaint sought civil penalties as authorized by 7 U.S.C. § 7734. This complaint specifically alleged that on or about October 25, 2004, respondent imported into the United States seven bundles of flowers, weighing approximately seventy-four kilograms, DHL Airway Bill # 992-0401-5841, which were found to be infested with injurious plant pests. An Emergency Action Notification, APHIS PPQ Form 523 was issued to respondent, informing respondent that it had 24 (twenty-four) hours to destroy the cut flowers, ship them to a point outside the

United States, move them to an authorized site, and/or apply treatments, clean, or apply other safeguards to the cut flowers as prescribed in Form 523, and that respondent did not, within the twenty-fours prescribed in Form 523, perform any of the remedial measures listed on Form 523, in violation of 7 C.F.R. § 319.74-2(b).

On March 20, 2008, the Hearing Clerk's Office mailed a copy of the complaint to respondent by certified mail. On April 22, 2008, this letter was returned to the Hearing Clerk's Office marked "unclaimed." Pursuant to section 1.147(c)(1) of the Rules of Practice applicable to this proceeding, the complaint was resent by ordinary mail to the respondent on that date, and was thereby deemed to have been received by the Respondent on April 22, 2008.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of the complaint (7 C.F.R. § 1.136(a)). Accordingly, Respondent had until May 12, 2008, to file an answer to the complaint. 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. S.F.B. Farms, Inc., hereinafter referred to as Respondent, is a

business, incorporated under the laws of the State of Florida, with a mailing address of P.O. Box 522324, Miami, FL, 33152, and that at all times material herein did business under the name of R & E Floral Express, Inc..

2. Respondent's principal place of business is located at 7371 NW 35th Street, Miami, FL, 33122.

3. On or about October 15, 2004, at Miami International Airport, Florida, the Respondent imported into the United States seven bundles of flowers, weighing approximately seventy-four kilograms, DHL Airway Bill # 992-0401-5841, which were found to be infested with injurious plant pests. An Emergency Action Notification, APHIS PPQ Form 523 was issued to Respondent,
informing Respondent that it had 24 (twenty-four) hours to destroy the cut flowers, ship them to a point outside the United States, move them to an authorized site, and/or apply treatments, clean, or apply other safeguards to the cut flowers as prescribed in Form 523. Respondent did not, within the twenty-fours prescribed in Form 523, perform any of the remedial measures listed on Form 523, in violation of 7 C.F.R. § 319.74-2(b).

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. §§ 319.74 et seq).

Order

Respondent S.F.B. Farms, Inc., d/b/a R & E Floral Express, Inc. is assessed a civil penalty of fifteen thousand dollars ($15,000). 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 P.Q. Docket No. 08-0084.

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

Northeast Nebraska Zoological Society, Inc., AWA-07-0109, 09/01/26.

Hopeful Valley Ranch, Betty Evans, Kathy Murphy, Kerry Hurley, Bert D. Murphy, Nicki Evans, Dori Smidt, and Kayla Hurley, AWA-07-0113, 09/01/27.

Jeffrey Harrod, d/b/a Vanishing Species Wildlife, Inc., and;
Barbara Hartman-Harrod, d/b/a Vanishing Species Wildlife, Inc., AWA-08-0136, 09/02/04.

Patti J. VanMeter and Greene Acres Exotics, Inc., AWA-07-0154, 09/02/23.

Pamela Sims d/b/a Pam's Cockers and Schnauzers, AWA -09-0070, 09/03/16.

Clayton and Laura Yoder, AWA-08-0072, 09/03/18.

Kathy Grigg, AWA-08-0130, 09/03/26.

Jean Hartley, AWA-08-0027, 09/04/02.

Wendy Laymon d/b/a Shadow Mountain Kennel, AWA-08-0089, 09/04/03.

Kitty Kyrklund d/b/a Kittys K-9 Korner, AWA 08-0137, 09/04/21.

Christine Dobratz d/b/a Wolf Howl-O-Exotic Petting Zoo, AWA-08-0131, 09/04/24.

Melvin A. Yoder, Delmar R. Yoder, David Yoder d/b/a MDD Kennels, AWA-08-0079, 09/05/07.

Zoological Imports 2000, Inc., AWA-09-0085, 09/05/27.

Beverly Howser, Jonathan Howser and Heather Montavy, AWA-08-0169, 09/06/23.

ANIMAL QUARANTINE ACT

Amerjet International, Inc., AQ-09-0072, 09/05/08.

FEDERAL CROP INSURANCE ACT

Rodney Groenewold, FCIA-09-0036, 09/1/15.
James J. Potase, FCIA-08-0037, 09/1/16.
Ronald Wegner, FCIA-09-0113, 09/06/19.
Thomas Stanley, IV, FCIA-09-0123, 09/06/30.
Thomas Stanley, V, FCIA-09-0124, 09/06/30.
Thomas Fleming, FCIA-09-0126, 09/06/30.
Stacy Lee Langley, FCIA-09-0125, 09/06/30.

FEDERAL MEAT INSPECTION ACT

MGF, Inc. and Douglas Mariani, FMIA-09-0074, 09/03/25.

HORSE PROTECTION ACT

Sand Creek Farms, Inc.; Billy A. Gray; Waterfall Farms, Inc., a/k/a Waterfall Farms; William B, Johnson ; and Sandra T. Johnson, HPA-01-0030, 09/02/10.

PLANT QUARANTINE ACT

TNT USA d/b/a TNT International Express, PQ-08-0116, 09/1/12.

J.A. Flower Service, Inc., PQ-09-0063, 09/02/25.

Aeropostal Airlines, Inc., PQ-07-0018, 09/03/13.

M&N Aviation, Inc., PQ-09-0030, 09/04/21.

Amerjet International, Inc., PQ-09-0072, 09/05/08.

AGRICULTURE DECISIONS

Volume 68

January - June 2009
Part Two (P & S)
Pages 438 - 476

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 available online at http://www.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Beginning in 2011, the "Certified" electonic publication of *Agriculture Decisions* [which is available at http://www.dm.usda.gov/oaljdecisions/] may be cited as" primary source" material.

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

JANUARY - JUNE 2009

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

DEFAULT DECISIONS

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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

In re: STEVE M. HAND, d/b/a STEVE HAND CATTLE COMPANY.
P. & S. Docket No. D-08-0160.
Decision and Order.
January 13, 2009.

PS – Prompt payment, failure to make.

Charles Spicknall for GIPSA.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision and Order

This proceeding was instituted under the Packers & Stockyards Act, 1921, as amended and supplemented, (7 U.S.C. § 181 *et seq*.), hereinafter referred to as the "Act," by a Complaint filed by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyard Administration, United States Department of Agriculture, on July 31, 2008. Specifically, the Complaint alleged that Respondent: 1) failed to make timely payments for livestock purchases as required by section 409 of the Act; 2) issued insufficient funds checks for livestock in violation of section 312(a) of the Act; and 3) engaged in the business of a livestock dealer without maintaining an adequate bond or its equivalent as required by the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 201.1 *et seq*.), hereinafter ref£¢erred to as the "Regulations."

Respondent filed an Answer on August 26, 2008. In his Answer, Respondent admitted that he failed to pay livestock sellers within the time period required by section 409 of the Act. Respondent failed to deny or otherwise respond to the Complaint allegations concerning insufficient funds checks that he issued in payment for livestock and such allegations are deemed admitted. *See* 7 C.F.R. § 1.136(c). Respondent also admitted that he is not bonded for the protection of

livestock sellers as alleged in the Complaint, although Respondent asserts that he is no longer in need of a bond because he is no longer operating subject to the Act.

Complainant filed a Motion for Decision on November 24, 2008. Respondent did not file a response to Complainant's Motion.

Based on Respondent's admissions in his Answer, Complainant's "Motion for Decision," filed on November 24, 2008, is hereby granted and the following Decision and Order is issued without hearing pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice").

Findings of Fact

1. Steve M. Hand, doing business as Steve Hand Cattle Company, referred to herein as the "Respondent," is an individual whose mailing address is in Ocilla, Georgia.[1]

2. Respondent was at all times material herein:

(a.) Engaged in the business of buying and selling livestock in commerce for his own account or buying livestock on a commission basis for others; and

(b.) Registered with the Secretary of Agriculture as a dealer buying and selling livestock in commerce for his own account or for the account of others.

3. Respondent failed to make timely payment for 610 head of cattle, in the amount of $256,783.01, during the period of January 17, 2007, through September 12, 2007. As of September 25, 2007, $78,920.78 of that amount remained unpaid.

4. Respondent issued checks for more than $250,000 in livestock purchases that 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 the checks when presented.

5. Respondent is not bonded for the protection of livestock sellers.

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[1] Respondent's address has been omitted to protect his privacy. Respondent's service address is on file with the Hearing Clerk's Office.

Respondent asserts that he is no longer operating as a livestock dealer subject to the Act.

Conclusions

The Complaint alleges that Respondent has engaged in the business of buying and selling livestock in commerce for his own account, or buying livestock on a commission basis for others, and that he is registered with the Secretary of Agriculture as a livestock dealer. *See* Compliant at ¶ I. Respondent fails to deny or otherwise respond to these allegations in his Answer and the allegations are deemed admitted for purposes of this proceeding. *See* 7 C.F.R. § 1.136(c). Livestock dealers are subject to the jurisdiction of the Secretary for purposes of enforcing the Packers and Stockyards Act. *See* 7 U.S.C. § 201(d) (defining "dealer").[2]

The Complaint also alleges that Respondent failed to make timely payment for 610 head of cattle, in the amount of $256,783.01, during the period of January 17, 2007 through September 12, 2007, and that as of September 25, 2007, which was the closing date of the Packers and Stockyards Program's field investigation, $78,920.78 of that amount remained unpaid. *Id*. As of August 17, 2008, the date of Respondent's Answer, he was still trying to repay that debt. *See* Answer at ¶ 1. Section 409(a) of the Act requires livestock dealers and other regulated entities to pay for their livestock purchases before the close of the next business day following the purchase. *See* 7 U.S.C. § 228b(a).[3] Payment

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[2.] Pursuant to 7 U.S.C. §§ 213(b) and 204, the Secretary is authorized to assess civil penalties for unfair trade practices by dealers and to suspend dealer registrations for violations of the Act. Section 204 of the Packers and Stockyards Act is a freestanding provision that was enacted as part of the Department of Agriculture Appropriation Act, 1944, July 12, 1943.

[3.] *See also, e.g., Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) (stating one purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock marketing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock); *Bruhn's Freezer Meats of Chicago, Inc. v USDA*, 438 F.2d 1332, 1337 - 1338 (8th Cir. 1971) (stating the purpose of the Packers and Stockyards Act is to assure fair trade practices in the livestock-

(continued...)

must be made in full. *Id.* The prompt payment requirements in the Packers and Stockyards Act are designed to protect farmers and ranchers from receiving less than fair market value for their livestock. *See In re: Fred Holmes, d/b/a Holmes Livestock*, 62 Agric. Dec. 254, 257 (2003).[4] Any delay which results in an extension of the statutory payment requirement is expressly made an unfair practice in violation of section 312(a) of Act. *See* 7 U.S.C. § 228b(c). In his Answer, Respondent admits and takes responsibility for the $78,920.78 that he owes to livestock sellers. *See* Answer at ¶ 1.

The fact that Respondent may be making monthly and weekly payments on his outstanding livestock debt, as he asserts in his Answer, does not excuse the violations of the Packers and Stockyards Act. As noted above, any delay in payment to livestock sellers, regardless of the reason for the delay, is an "unfair practice" and a violation of the Act. *See* 7 U.S.C. § 228b. After-the-fact promissory notes do not meet the express requirements of the Act. *Id.* Even if Respondent had fully repaid the livestock sellers listed in the Complaint, "it is well-settled that present compliance is irrelevant in determining the sanction for past violations." *See Fred Holmes*, 62 Agric. Dec., at 258 (*quoting In re: A.W. Schmidt & Son, Inc.*, 46 Agric. Dec. 586, 593 (1987)).

The Complaint also alleges that Respondent issued checks for more than $250,000 in livestock purchases that were returned unpaid by the bank upon which they were drawn because Respondent did not have and

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(...continued)
marketing and meat-packing industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats and other products); *Pennsylvania Agric. Coop. Mktg Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to give all possible protection to suppliers of livestock); *United States v. Hulings*, 484 F. Supp. 562, 567 (D. Kan. 1980) (memorandum opinion) (stating one purpose of the Packers and Stockyards Act is to protect farmers and ranchers from receiving less than fair market value for their livestock and to protect consumers from unfair practices); *In re: Ozark County Cattle Co.*, 49 Agric. Dec. 336, 360 (1990) (stating the primary objective of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true value of their livestock).

maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented. *See* Complaint at ¶ III. The issuance of insufficient funds checks is an unfair practice in violation of section 312(a) of the Act. *See, e.g., In re: George O. Durflinger, Jr.*, 58 Agric. Dec. 940, 942 (1999); *In re: Richard Garver*, 45 Agric. Dec. 1090, 1095 (1986). In his Answer, Respondent fails to deny or otherwise respond to the Complaint allegations concerning the insufficient funds checks that he issued in payment for livestock and such allegations are deemed admitted. *See* 7 C.F.R. § 1.136(c).

Finally, the Complaint alleges that Respondent has been put on notice of the bonding requirements in the Packers and Stockyards Act and Regulations and that Respondent has continued to engage in the business of a livestock dealer without maintaining an adequate bond. *See* Complaint at ¶ V. Livestock dealers are required to maintain registration and bonding for the protection of livestock sellers. *See* 7 U.S.C. §§ 203 and 204; 9 C.F.R. §§ 201.10 (registration requirements and procedures) and 201.29 (bonding requirements).[5] "[M]embers of the industry are entitled to rely upon the fact that all livestock dealers are required to carry an appropriate bond." *See In re: Robert F. Johnson*, 47 Agric. Dec. 436, 440 (1988).[6] Failure to maintain a bond is an unfair and deceptive practice in violation of section 312(a) the Act. *See, e.g., In re: Highmore Livestock Exchange*, 48 Agric. Dec. 329, 339 - 340 (1989); *Robert Johnson*, 47 Agric. Dec. at 441; *In re Mark V. Porter*, 47 Agric. Dec. 656, 667 (1988); *In re: Klemme Cattle Co., Inc.*, 45 Agric. Dec. 1108, 1110 (1986).

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[5] The amount of the required bond, or bond equivalent, is determined in accordance with section 201.30 of the Regulations. *See* 9 C.F.R. § 201.30. Originally, the Packers and Stockyards Act did not grant the Secretary the authority to require bonding by market agencies and livestock dealers. The authority was granted in the Annual Department of Agriculture Appropriation Act of 1924 and made permanent by the Department of Agriculture Appropriation Act of 1943, which is codified at 7 U.S.C. § 204.

[6] *See also In re: Edwards Tiemann*, 47 Agric. Dec. 1573, 1585 (1988)("sellers of livestock have a right to expect that respondent has the required [bond] coverage, and that the registrant has a secondary source of payment

In his Answer, Respondent admits that he is not bonded but asserts that he is no longer dealing cattle. *See* Answer at ¶2. According to Respondent, he is only "backgrounding" cattle on grass at his farm. *Id*. Complainant is seeking no sanction for the bonding allegation. Respondent is required to be bonded for the protection of livestock sellers if he reenters the livestock trade as a dealer. *See* 7 U.S.C. § 204; 9 C.F.R. § 201.29.

Sanctions are appropriate for serious and repeated violations of the Department's regulatory programs in order to deter the named respondent and others in the regulated industry from future violations. *See, e.g., In re: Larry F. Wooten and Roswell Livestock Auction Sales, Inc.*, 58 Agric. Dec. 944, 980 (1999).[7] In this case, Respondent's failure-to-pay and NSF check violations are serious and repeated. When livestock purchasers do not make prompt payment it forces the sellers to finance the transaction. *See Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978).

The Packers and Stockyards Program's recommendation that Respondent be ordered to cease and desist from violating the Act and suspended as a registrant under the Act for five years is consistent with the sanctions that are regularly imposed for serious and repeated violations of the Packers and Stockyards Act. *See, e.g., In re: Don Latham and Poplar Plains Livestock, Inc.,* 65 Agric. Dec. 1231, 1235 (2006) (five year suspension for failing to pay, failing to pay when due, and issuing NSF checks with a one year proviso); *Fred Holmes*, 62 Agric. Dec., at 259 - 260 (five year suspension for failing to pay, failing to pay when due, and issuing NSF checks, with a one year proviso).[8] In

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7. Current Departmental sanction guidelines are set forth in *In re: S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd* 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

8. Dec. 349, 353 (2002) (five-year suspension); *In re: Charles L. Hamborsky*, 59 Agric. Dec. 834, 838 (2000) (same); *In re: Wayne H. Crites*, 59 Agric. Dec. 333, 335 (2000) (same); *In re: Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson,* 59 Agric. Dec. 299, 332 (2000) (same); *In re: Press Harmon Andrews*, 58 Agric. Dec. 464, 465 - 466 (1999) (same); *Durflinger,* 58 Agric. Dec. at 943 (same); *In re: Hines and Thurn Feedlot, Inc., d/b/a Thurn & Hines Livestock, James L. Thurn, and Deryl D. Hines*, 57 Agric. Dec. 1408, 1431 (1998) (continued...)

this case, a five-year suspension is particularly appropriate given that Respondent is already subject to an Order of the Secretary that requires him to cease and desist from failing to pay when due and issuing NSF checks. *See In re: Steve M. Hand*, P&S Docket No. D-06-0013, slip op. (October 12, 2006) (attached to the Complaint as "Exhibit A"). Respondent violated the provisions of that Order within four months of its issuance.

Order

Respondent Steve M. Hand, doing business as Steve Hand Cattle Company, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

Purchasing livestock and failing to pay for such livestock purchases within the time period required by the Act; and

Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the accounts upon which they are drawn to pay such checks when presented.

Respondent is hereby suspended as a registrant under the Act for a period of five (5) years and thereafter until Respondent is properly bonded. Provided, however, that upon application to the Packers and Stockyards Program, a supplemental order may be issued terminating the suspension of Respondent's registration at any time after one (1) year upon demonstration by Respondent that he is in full compliance with the Act and Regulations; And provided further, that this Order may be modified upon application to the Packers and Stockyards Program to permit the salaried employment of Respondent by another registrant or packer after the expiration of one year of the suspension term upon demonstration of circumstances warranting modification of the Order.

The provisions of this Order shall become effective on the sixth (6th)

(...continued)
(same); *In re: S. Levon Owens*, 55 Agric. Dec. 499, 502 - 503 (1996) (same); *Tiemann*, 47 Agric. Dec. at 1605 (same).

day after service on Respondent.

Copies of this Decision and Order shall be served on the parties.

Issued in Washington D.C.

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PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

In re: BILL SHAFER.
P. & S. Docket No. D-08-0157.
Default Decision.
January 22, 2009.

PS – Default.

Christopher Young-Morales for APHIS.
Respondent pro se.
Default Decision by Administrative Law Judge Peter M. Davenport..

DEFAULT DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 et seq.)(the "Act"), instituted by a Complaint filed on July 30, 2008 by the Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondent Bill Shafer (hereinafter "Respondent") violated the Act.

The Complaint alleged that between August 2006 and September 2006 Respondent engaged in operations subject to the Act without maintaining adequate bond or bond equivalent. A copy of the Complaint was mailed by the Hearing Clerk to Respondent by certified mail in July of 2008, and was returned as "unclaimed" by the U.S. Postal Service to the Hearing Clerk's office. The Hearing Clerk re-mailed the Complaint and served the Respondent via regular mail on August 27, 2008 pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of that date. As the Respondent failed to file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice, the Complainant has moved for the issuance of a Decision

Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Since Respondent failed to answer the Complaint within the 20 day time period prescribed by the Rules of Practice thereby admitting the factual allegations contained in the Complaint, the following Default Decision and Order will be issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an individual proprietor whose business mailing address is in the state of Texas. Respondent's business mailing address is also a personal address, and will therefore be omitted from this decision to protect Respondent's privacy, but has been provided to the Hearing Clerk for purposes of service of this decision.

2. Respondent is, and at all times material herein, was:

(a) Engaged in the business of a market agency purchasing livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer.

3. On March 17, 2004, the Packers and Stockyards Program received notice from the International Fidelity Insurance Company of Newark, New Jersey that Respondent's bond was cancelled, effective April 19, 2004. On May 5, 2004, Respondent was notified[1] that his bond had terminated on April 19, 2004, and that unless Respondent secured a new bond or bond equivalent securing the performance of his dealer obligations, Respondent must discontinue dealer operations for which bonding is required under the Packers and Stockyards Act. Respondent was also notified that continuing operations without proof of adequate bond was a violation of 7 U.S.C. § 204 and 213(a) and 9 C.F.R. § 201.29 and 201.30.

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[1] Respondent was notified by letter dated March 19, 2004. The return receipt card of the March 19, 2004 certified letter was returned to the Packers and Stockyards Program on April 12, 2004 as "unclaimed." The letter was then delivered to Respondent by Federal Express on May 5, 2004.

4. On October 4, 2004, Respondent was notified[2] by certified letter from the Packers and Stockyards Program that Respondent was operating subject to the Packers and Stockyards Act and regulations without being properly bonded, in violation of the bonding requirements of the Act and Regulations. Respondent was informed that he must immediately cease all livestock operations subject to the Act until Respondent was properly bonded. Respondent was also required to submit to the Packers and Stockyards Program, within 30 days of receipt of the letter, a bond equivalent to his previous bond of $25,000.00, or a summary of his total dollar volume of all livestock traded and/or purchased in the past twelve months in order for the Packers and Stockyards Program to accurately assess Respondent's bonding requirement. Notwithstanding this notice, Respondent did not submit a bond equivalent to his previous bond of $25,000.00, or a summary of his total dollar volume of all livestock traded and/or purchased. Respondent continued to engage in the business of purchasing livestock in commerce, on a commission basis, without maintaining an adequate bond as required by the Act and the Regulations.

5. Respondent, between August 2006 and September 2006, engaged in the business of purchasing livestock in commerce, on a commission basis, without maintaining an adequate bond or bond equivalent. The details of the purchase transactions are more fully set forth in paragraph III of the Complaint.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts above, Respondent willfully violated section 312(a) of the Act (7 U.S.C. §§ 213(a)) and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30).

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[2] Respondent was notified by certified letter dated September 7, 2004. The signed return receipt card was received by the Packers and Stockyards Program on October 4, 2004.

Order

Respondent Bill Shafer, 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 operations subject to the act without maintaining adequate bond or bond equivalent.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to Section 1.145 of the Rules of Practice (7 C.F.R § 1.145).

Copies of this decision shall be served upon the parties.

Done at Washington, DC

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In re: JOSEPH FRANK HAUN.
P. & S. Docket No. D-08-0143.
Default Decision.
February 6, 2009.

PS – Default.

Christopher Young-Morales for APHIS.
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 (7 U.S.C. § 181 et seq.)(the "Act"), instituted by a Complaint filed on June 18, 2008 by the Deputy Administrator, Packers and Stockyards

Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, alleging that Respondent Joseph Frank Haun (hereinafter "Respondent") violated the Act.

The Complaint alleged that Respondent 1) issued checks in payment for livestock purchases that 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 the checks when presented; 2) failed to pay, and failed to pay, when due, for livestock purchases; and 3) failed to keep accounts, records, and memoranda which fully and correctly disclosed all transactions in his business as a dealer and market agency as required by Section 401 of the Act.

A copy of the Complaint was mailed by the Hearing Clerk to Respondent by certified mail in June of 2008, and was returned as "unclaimed" by the U.S. Postal Service to the Hearing Clerk's office. The Hearing Clerk re-mailed the Complaint via regular mail on July 14, 2008, and therefore served the Complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the "Rules of Practice), as of that date. Respondent did not file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Since Respondent failed to answer the Complaint within the 20 day time period prescribed by the Rules of Practice, and upon the motion of the Complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is an is an individual doing business in the State of

Tennessee. Respondent's business mailing address is also a personal address, and will therefore be omitted from this decision to protect Respondent's privacy. However, the address will be given to the Hearing Clerk for purposes of service of this decision.

2. Respondent is, and at all times material herein, was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for his own account;

(b) Engaged in the business of a market agency buying livestock on a commission basis;

(c) Registered with the Secretary of Agriculture as a dealer buying and selling livestock for his own account in commerce, and as a market agency buying livestock on a commission basis.

3. On August 14, 1998, Judge Thomas G. Hull of the United States District Court, Eastern District of Tennessee, ordered that Respondent be permanently enjoined from operating in any capacity for which registration and bonding were required under the Packers and Stockyards Act, without registering with the Secretary of Agriculture and furnishing a bond as required by the Act. Respondent was also permanently enjoined from failing to file, within the time fixed by the Secretary, such annual or special reports as the Secretary of Agriculture may require, pursuant to the Act and regulations issued thereunder.

4. On January 3, 2005, Respondent was indicted in the State of North Carolina, Buncombe County, by two separate indictments, each containing one count of worthless checks, a criminal felony. The first indictment stated that Respondent issued a check, dated March 13, 2004 and made payable to United Producers, Inc., drawn upon the National Bank of Commerce, for payment of $96,663.47. The indictment also stated that Respondent knew at the time he issued the check that there were not sufficient funds on deposit with the bank to pay the check upon its presentation. The second indictment stated that Respondent issued a check, dated March 13, 2004 and made payable to United Producers, Inc., drawn upon the National Bank of Commerce, for payment of $127,888.82. The indictment also stated that Respondent knew at the time he issued the check that there were not sufficient funds on deposit

with the bank to pay the check upon its presentation.

5. On June 27, 2008, Respondent pled guilty to two counts of misdemeanor criminal charges for obtaining property by worthless check. The misdemeanor criminal plea was made on the basis of the same checks identified in the two January 3, 2005 criminal indictments. The first count to which Respondent pled guilty involved the March 13, 2004 check made payable to United Producers, Inc., drawn upon the National Bank of Commerce, for payment of $96,663.47. The second count to which Respondent pled guilty involved the March 13, 2004 check made payable to United Producers, Inc., drawn upon the National Bank of Commerce, for payment of $127,888.82. Respondent was sentenced to a 30 day suspended jail sentence and 12 months of unsupervised probation.

6. Respondent, on March 13, 2004, issued checks in payment for livestock purchases that 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 the checks when presented. The details of the checks and the transactions for which they were written are more fully set forth in paragraph III of the Complaint.

7. Respondent, between March 8, 2004 and March 22, 2004, purchased livestock, and failed to pay for such livestock purchases. The details of the purchases are more fully set forth in paragraph III of the Complaint. As of the date of the filing of the Complaint, of the total of $356,424.31 in livestock purchases for which Respondent failed to pay, outlined in paragraph III of the Complaint, there remained unpaid a total of $156,424.31 for livestock purchases made by Respondent.

8. Respondent, between January 10, 2004 and May 5, 2004, purchased livestock, and failed to pay, when due, for such livestock purchases.

9. Respondent failed to keep accounts, records, and memoranda which fully and correctly disclosed all transactions in his business as a dealer and market agency as required by Section 401 of the Act, in that he failed to keep and maintain: cash receipts and disbursements records, credit agreements with sellers, load make-up sheets, bank statements,

cancelled checks, deposit slips, and accounts receivable records.

Conclusions

By reason of the facts alleged above, Respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228(b)), and section 201.43 of the regulations (9 C.F.R. § 201.43(b)). By reason of the facts alleged above, Respondent has failed to keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, as required by section 401 of the Act (7 U.S.C.§ 221)

Order

Respondent Joseph Frank Haun, 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) Issuing checks in payment for livestock purchases that are returned unpaid by the bank upon which they are drawn because Respondent does not have and maintain sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented;
2) Failing to pay livestock sellers for livestock purchases in accordance with the Act and regulations; and
3) Failing to pay livestock sellers, when due, for livestock purchases in accordance with the Act and regulations.

Respondent shall keep accounts, records and memoranda that fully and correctly disclose all transactions involved in his business. Specifically, Respondent shall keep and maintain cash receipts and disbursements records, credit agreements with sellers, load make-up sheets, bank statements, cancelled checks, deposit slips, and accounts receivable records.

Respondent is suspended as a registrant under the Act for a period of five (5) years. Provided, however, that upon application to Packers and

Stockyards Program, a supplemental order may be issued terminating the suspension at any time after 310 days, upon demonstration of circumstances warranting modification of the original order. Provided, further, that this order may be modified upon application to Packers and Stockyards Program to permit the salaried employment of Respondent by another registrant or packer after the expiration of 310 days of this suspension term and upon demonstration of circumstances warranting modification of the order.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to Section 1.145 of the Rules of Practice (7 C.F.R § 1.145).

Copies of this decision shall be served upon the parties.

Done at Washington, DC

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In re: LEE JOHNSON.
P. & S. Docket No. D-08-0165.
Default Decision.
February 17, 2009.

PS – Default.

Charles L. Kendall for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport..

DEFAULT DECISION AND ORDER

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 August 20, 2008, by the Deputy Administrator, Packers and

Stockyards Program, GIPSA, United States Department of Agriculture. The Complaint alleged that during the period October 23, 2007, through November 15, 2007, Lee Johnson, (hereinafter "Respondent"), Respondent issued checks in payment for five (5) livestock purchases from four (4) sellers, in a total amount of $107,229.89, 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. The Complaint further alleged that Respondent purchased livestock in the five (5) transactions above and in one (1) additional transaction with an additional seller, and failed to pay the full purchase price of such livestock, in a total amount of $127,674.66. A copy of the Complaint was mailed to Respondent by certified mail at his last known mailing address on August 21, 2008, and was returned marked "Unclaimed" to the office of the Hearing Clerk on September 22, 2008. A copy of the Complaint was remailed to Respondent at the same address by ordinary mail on September 23, 2008, pursuant to Section 1.147(c) of the Rules of Practice (7 C.F.R. § 1.147(c)) and is therefore deemed served. 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. Lee Johnson (hereinafter "Respondent") is an individual whose mailing address is 1540 AN CR 489, Montalba, Texas 75863.

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 to buy and sell livestock in commerce for his own account.

3. As set forth in paragraph II of the Complaint, during the period October 23, 2007, through November 15, 2007, Lee Johnson,

(hereinafter "Respondent"), purchased livestock and failed to pay the full purchase price of such livestock, in a total amount of $127,674.66, to five (5) sellers for six (6) transactions, and issued checks in purported payment for five (5) of those transactions 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.

Conclusions of Law

1. The Secretary has jurisdiction over this matter.

2. Respondent's failures to make full payment promptly with respect to the six (6) transactions set forth in the total amount of $127,674.66, and his issuance of insufficient funds checks, constitute willful violations of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) for which the Order below is issued.

Order

Respondent Lee Johnson, his agents and employees, directly or through any corporate or other device, in connection with operations subject to the Packers and Stockyards Act, shall cease and desist from failing to pay the full purchase price of livestock.

In accordance with 7 U.S.C. § 204, Respondent Lee Johnson is suspended as a Registrant under the Act for a period of six (6) 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: SOUTH SHORE MEATS CORPORATION
P. & S. Docket No. D-08-0126.
Default Decision.
May 4, 2009.

PS –Default.

Ciarra A. Toomey for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton..

Decision and Order by Reason of Default

1. The Respondent's name is clarified in the Status Filing filed on April 30, 2009 (*see* footnote 1), and I hereby amend the case caption accordingly. The Complaint, filed on May 22, 2008, alleged that the Respondent, in or about 2007, willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181, *et seq*.) (frequently herein the "Packers and Stockyards Act" or the "Act"), and the regulations promulgated thereunder, 9 C.F.R. § 201.1 *et seq*.

Parties and Counsel

2. The Complainant is the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture (frequently herein "Packers and Stockyards" or "Complainant"). Packers and Stockyards is represented by Ciarra A. Toomey, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309 Stop 1413, 1400 Independence Avenue S.W., Washington, D.C. 20250-1413.
3. The Respondent is South Shore Meats Corporation (herein frequently "South Shore" or "Respondent"), a corporation organized and existing

under the laws of the State of Florida, which ceased business operations in about August 2008, but had been operating at 6712 State Rd 674, Wimauma, Florida 33598 (this address is found in Online Yellow Pages, and is apparently preferred by the U.S. Postal Service); or 6712 Hwy 674 East, Wimauma, Florida 33598 (this address is in filings with the Florida Department of State, and in the Affidavit of Resident Agent Nilsa Ramos Taylor, dated April 30, 2009).

Procedural History

4. Packers and Stockyards' Motion for Decision Without Hearing by Reason of Default, filed October 20, 2008, is before me. Respondent South Shore was served on February 9, 2009, with a copy of that Motion and a copy of the proposed Decision and has failed to respond.

5. Respondent South Shore was served with a copy of the Complaint on July 16, 2008, as follows. The Hearing Clerk's certified mailing on June 16, 2008, to Respondent South Shore, of a copy of the Complaint, was sent to "South Shore Meats, Inc., 6712 State Road 674, Wimauma, Florida 33598". In the same mailing, the Hearing Clerk included a "notice letter" (Acting Hearing Clerk letter) and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) (the "Rules of Practice"). The envelope was returned as "Unclaimed" by the United States Postal Service. On July 16, 2008, the Hearing Clerk re-mailed a copy of the Complaint with the enclosures to the same address by regular mail.

6. Under the Rules of Practice, a Complaint returned "Unclaimed" "shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address." 7 C.F.R. §1.147(c) (1).

7. Further, on July 3, 2008, Complainant sent a letter to Respondent South Shore, to the same address as the July 16, 2008 mailing of the Complaint. The letter informed Respondent that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the

Complaint. The letter also informed Respondent that if this matter was to proceed to hearing, the Packers and Stockyards Program would seek a civil penalty of $43,000. On July 17, 2008, Respondent responded to Complainant's letter, but failed to file an answer.

8. 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 August 5, 2008. To date, the Respondent still has failed to file an answer. The Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

9. 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. *See* 7 C.F.R. §1.130 *et seq*.

Findings of Fact

10. Respondent South Shore Meats Corporation is a corporation organized and existing under the laws of the State of Florida with the following **current** mailing address:

South Shore Meats Corporation
c/o Mr. Richard Nusman
5465 46th Ct W
Bradenton, FL 34210-6601

11. Mr. Richard Nusman is the registered agent and 100% stockholder of Respondent South Shore Meats Corporation.

12. Respondent South Shore Meats Corporation, was, at all times

material to this Decision:

(a) Engaged in the business of buying livestock in commerce for purposes 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 that term under the Act and subject to the Act.

(c) Respondent's average annual purchases of livestock exceeded $500,000.

13. Respondent South Shore Meats Corporation, 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 Respondent 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.

Seller	**No. of Head**	**Check Amount**	**Check No.**	**Check Date**	**Date Returned**
Jolley's	225	$16,707.81	1832	2/16/07	2/27/07
Jolley's	88	$6,442.60	1834	2/20/07	2/27/07
Jolley's	193	$16,870.25	1840	2/22/07	2/27/07
Jolley's	168	$17,347.36	1855	2/28/07	3/9/07
Jolley's	178	$19,183.62	1858	3/3/07	3/9/07
Jolley's	200	$17,948.77	1871	3/14/07	3/22/07
Jolley's	188	$17,480.01	1866	3/15/07	3/22/07
Jolley's	251	$23,337.99	2021	4/5/07	4/17/07
Neely [1]	N/A	$20,156.47	2035	4/24/07	5/3/07
Jolley's	189	$18,971.81	2054	4/27/07	5/14/07
Totals	**1680**	**$174,446.69**			

[1] Respondent did not maintain an invoice for this transaction; check no 2035 was returned, not presented again. Respondent wire transferred two amounts $14,500 on 05/15/07 and $5,700 on 95/17/07 to pay this balance.

14. On or about the dates and in the transactions set forth below, Respondent purchased livestock and failed to pay, within the time period required by the Act, the full purchase price of such livestock.

Purchased From	Purchase Date	No. of Head	Invoice Amount	Payment Date	Due Date per §409	Days late
Jolley's	3/13/07	183	$17,384.49	3/16/07	3/14/07	2
Jolley's	4/18/07	180	$16,799.04	4/20/07	4/19/07	1
Jolley's	4/19/07	140	$13,116.46	4/24/07	4/20/07	4
Jolley's	4/23/07	240	$20,356.62	4/26/07	4/24/07	2
Jolley's	4/24/07	119	$12,080.44	4/30/07	4/25/07	5
Jolley's	4/30/07	160	$ 6,633.00	5/9/07	5/1/07	8
Jolley's	5/22/07	140	$16,960.80	5/24/07	5/23/07	1
Jolley's	5/24/07	140	$14,910.95	5/31/07	5/25/07	6
Jolley's	5/23/07	198	$21,600.26	5/31/07	5/24/07	7
Jolley's	5/28/07	154	$18,225.57	5/31/07	5/29/07	2
Jolley's	5/30/07	188	$21,207.38	6/15/07	5/31/07	15
Jolley's	5/31/07	200	$21,792.96	6/6/07	6/1/07	5
Jolley's	6/3/07	159	$16,636.72	6/6/07	6/4/07	2
Jolley's	6/7/07	178	$18,980.66	6/15/07	6/8/07	7
Jolley's	6/10/07	293	$23,852.97	6/15/07	6/11/07	4
Jolley's	6/11/07	125	$14,064.65	6/15/07	6/12/07	3
Jolley's	6/12/07	215	$24,710.63	6/15/07	6/13/07	2
Totals		**3012**	**$299,313.60**	**Average days late**		**4.5**

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15. Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business, as required by section 401 of the Act (7 U.S.C. § 221), including, but not limited to, all livestock invoices, written credit agreements, copies of all third party checks that were given to livestock sellers in payment for Respondent's livestock purchases, and a complete record showing the dates and amounts of all payments made for livestock purchases, including payments made using third party checks.

16. On August 8, 2007 the Packers and Stockyards Program sent Respondent a certified letter, which the Respondent received on August 17, 2007, stating that the Respondent's surety bond would be terminated on September 1, 2007. The letter referenced 9 C.F.R. § 201.29 which requires packers to file and maintain bonds and reminded the Respondent that violators are subject to disciplinary action under the Act. The letter also notified the Respondent that failure to furnish the requested bond coverage and a continuation of livestock purchases as a packer would be a violation of the Act, 7 U.S.C. § 204.

Notwithstanding such notice, Respondent continued to engage in business as a packer without maintaining an adequate bond or its equivalent as required by the Act and the regulations.

17. On or about the dates and in the transactions set forth below, Respondent purchased livestock for the purpose of slaughter without maintaining an adequate bond or bond equivalent. The transactions occurred at Neely Livestock, in Murfreesboro, Tennessee, and at Jolley's, in Doyle, Tennessee.

Seller	**Date of Purchase**	**Number of Head**	**Invoice Total**
Jolley's	09/03/2007	181	$14,320.10
Neely	09/04/2007	221	$19,289.60
Jolley's	09/04/2007	179	$14,681.42
Jolley's	09/05/2007	75	$6,021.35
Jolley's	09/09/2007	135	$11,619.27
Neely	09/11/2007	378	$27,087.60

Jolley's	09/11/2007	192	$14,728.80
Jolley's	09/12/2007	60	$4,790.40
Jolley's	09/16/2007	88	$6,667.79
Neely	09/17/2007	276	$17,055.00
Jolley's	09/18/2007	215	$13,864.87
Jolley's	09/19/2007	132	$10,097.70
Jolley's	09/24/2007	162	$11,152.86
Jolley's	09/25/2007	150	$11,880.70
Jolley's	09/26/2007	100	$6,939.26
Jolley's	09/30/2007	200	$10,523.84
Totals		**2744**	**$200,720.56**

Conclusions

18. The Secretary of Agriculture has jurisdiction over Respondent South Shore Meats Corporation and the subject matter involved herein.
19. Respondent South Shore Meats Corporation willfully violated sections 202(a) and 409 of the Act. 7 U.S.C. §§ 192(a), 228b. Paragraphs 13 and 14.
20. Respondent South Shore Meats Corporation failed to keep records as required by section 401 of the Act (7 U.S.C. §221) and therefore willfully engaged in an "unfair practice" under section 202(a) of the Act. 7 U.S.C. §192(a). Paragraph 15.
21. Respondent South Shore Meats Corporation, by failing to maintain a bond, willfully violated section 202(a) of the Act and sections 201.29 and 201.30 of the Regulations. 7 U.S.C. § 204; 9 C.F.R. §§ 201.29, 201.30. Paragraphs 16 and 17.

Order

22. Respondent South Shore Meats Corporation, and its agents and employees, directly or through any corporate or other device, in

connection with its activities subject to the Packers and Stockyards Act, shall cease and desist from: (a) failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it; (b) issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented; and (c) purchasing livestock for the purpose of slaughter without maintaining an adequate bond or bond equivalent.

23. Respondent South Shore Meats Corporation and its 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, all livestock invoices, written credit agreements, copies of all third party checks that were given to livestock sellers in payment for Respondent's livestock purchases, and a complete record showing the dates and amounts of all payments made for livestock purchases, including payments made using third party checks.

24. Respondent South Shore Meats Corporation is assessed a civil penalty in the amount of Forty Three Thousand dollars (**$43,000**), in accordance with section 203(b) of the Act. 7 U.S.C. § 193(b). The civil penalty payment instrument shall be made payable to the order of **USDA-GIPSA** and sent to:

USDA-GIPSA
P.O. Box 790335
St. Louis, Missouri 63179-0335

Payment shall be made within 30 days from the date this Order is final and effective (*see* next paragraph).

Finality

25. 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, USING the address in Paragraph 10 for Respondent.

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: TERRY LIVESTOCK, INC.
P. & S. Docket No. D-09-0034.
Default Decision.
May 5, 2009.

PS – Default.

Leah C. Battagioli for APHIS.
Respondent Pro se.
Default Decision by Administrative Law Judge Peter M. Davenport.

Default Decision

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 filed on November 21, 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 Terry Livestock, Inc. (hereinafter "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").

A copy of the Complaint was sent to Respondent by certified mail on November 24, 2008, and it was returned to the Hearing Clerk on January 2, 2009, marked "unclaimed" by the U.S. Postal Service. Accordingly, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.1301.151; hereinafter "Rules of Practice"), on January 6, 2009, the Hearing Clerk re-mailed the Complaint using regular mail. Complainant's attorney also sent a letter to Respondent dated December 2, 2008, by certified mail, informing Respondent that Complainant would seek the assessment of a civil penalty against Respondent in the amount of Thirteen Thousand and Two Hundred Dollars ($13,200.00). The letter was returned to Complainant's attorney on January 5, 2009, as "unclaimed" and pursuant to the Rules of Practice, on January 7, 2009, Complainant's attorney re-mailed the letter using regular mail. The mailing of the Complaint and letter 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.

Respondent has failed to file an answer within the time period prescribed by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth herein as findings of fact. Therefore, upon Complainant's motion, 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. Terry Livestock, Inc., is a business incorporated in the State of Texas with a mailing address of P.O. Box 258, Hargill, Texas 78549.
2. At all times material to the Complaint, Respondent was:
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 or sell livestock in commerce.

Purchase Date	Seller	No. of Head	Total Cost
Sep. 29, 2007	Edinburg	11	$5,638.55
Oct. 5, 2007	R. Y.	10	$4,621.43
Oct. 6, 2007	Edinburg	6	$2,502.03
Oct. 12, 2007	R. Y.	2	$398.50
Nov. 9, 2007	Luling	3	$1,900.00
Nov. 9, 2007	Flatonia	7	$3,404.53
Nov. 14, 2007	Seguin Cattle	4	$2,460.00
Nov. 16, 2007	Luling	I	$551.00
Dec. 14, 2007	Luling	12	$8,296.80

3. Respondent was notified by certified letter delivered on July 17, 2007, that the surety bond then maintained by Respondent would terminate on August 30, 2007. Respondent was notified that operation after August 30, 2007, without acquiring a new bond or bond equivalent would be a violation of the Act and could subject Respondent to disciplinary action. Respondent did not obtain a new bond or bond equivalent.

24. Respondent, on or about the dates and in the transactions set forth below, purchased livestock as a dealer in commerce without maintaining an adequate bond or bond equivalent.

Conclusions of Law

The Secretary has jurisdiction over this matter. By reason of the facts found in Findings of Fact 3 and 4, Respondent willfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.29, 201.30).

Order

Respondent Terry Livestock, Inc., its agents and employees, directly or through any corporate or other device, in connection with its activities subject to the Act, shall cease and desist from engaging in business in any capacity for which bonding is required under the Act and the Regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the Regulations.

Pursuant to section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent is assessed a civil penalty in the amount of Thirteen Thousand and Two Hundred Dollars ($13,200.00).

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.

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In re: ZACH A. LANDRY, SR. d/b/a COWTOWN HORSE and MULE AUCTION.
P. & S. Docket No. D-08-0039.
Default Decision.
June 16, 2009.

PS – Default.

Charles L. Kendall for APHIS.
Respondent Pro se.

Default Decision by Administrative law Judge Peter M. Davenport.

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq*.)(hereinafter referred to as the "Act"), instituted by a Complaint filed on December 28, 2007, by the Deputy Administrator, Packers and Stockyards Program, Grain Inspection Packers and Stockyards Administration (GIPSA), United States Department of Agriculture. The Complaint alleged that Zach Landry, Sr., d/b/a Cowtown Horse and Mule Auction, registered under the Act as a market agency (hereinafter "Respondent"), engaged in the business of selling livestock in commerce on a commission basis without having a sufficient bond or bond equivalent. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) ("Rules of Practice") were served on Respondent by certified mail on January 4, 2008. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all of the material allegations contained in the Complaint. Respondent has failed to file an answer within the time period required under the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the Complaint, which are admitted by Respondent's failure to file an answer, are adopted and set forth in this decision and order as findings of fact. Based on these admissions, Complainant's motion for the issuance of a Default Order, made pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), is granted and order shall be issued without further procedure.

Findings of Fact

1. Zach A. Landry, Sr., d/b/a Cowtown Horse and Mule Auction (hereinafter "Respondent") is an individual whose mailing address is 2925 South Goldenstate Blvd. Turlock, California 95380.

2. Respondent at all times material to the Complaint was engaged in the business of selling livestock in commerce on a commission basis.

3. Respondent was registered as a market agency with the Secretary of Agriculture to sell livestock in commerce on commission basis.

4. Respondent failed to secure a sufficient bond or bond equivalent, despite notification by certified mail and multiple phone communications from GIPSA personnel that GIPSA had information indicating Respondent's bond would be expiring, and that the regulations (9 C.F.R. §§ 201.29- 201.30) require that he file a bond or bond equivalent in the required coverage amount. Respondent was notified that he must refrain from engaging in activities subject to the Act until the bonding requirements had been met. Despite these notices, Respondent continued to engage in the business of a market agency selling livestock in commerce on commission without first obtaining a bond or bond equivalent.

5. Respondent's response to the Complainant's Motion for Default includes Respondent's admission that he opened a interest bearing "Time Deposit" with the F&M Bank of Central California in the original amount of $10,000 whereas Respondent was required to post a bond of $20,000 at that time.

Conclusions of Law

1. The Secretary has jurisdiction over Respondent and the subject matter involved herein.

2. By failing to secure a bond or bond equivalent in the required amount of $20,000 before engaging in business subject to the Act, Respondent willfully violated Sections 312(a) of the Act (7 U.S.C. §

213(a)) and Sections 201.29 and 201.30 of the Regulations (9 C.F.R. §§ 201.27. 201.29, 201.30).

3. Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all of the material allegations in the Complaint. Complainant has moved for the issuance of a Decision without Hearing by Reason of Default, pursuant to section 1.139 of the rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision and order is entered without hearing or further procedure.

Order

Respondent Zach A. Landry, Sr., d/b/a Cowtown Horse and Mule Auction, his successors and assigns, in whatever business form or trade name, shall cease and desist from engaging in operations subject to the Act without first obtaining the requisite bond or bond equivalent. Pursuant to section 312(b) of the Packers & Stockyards Act, Respondent's registration is suspended for 30 days, and thereafter until Respondent is properly and adequately bonded. Respondent is assessed a civil penalty of $3,000. 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

Tom Johnson a/k/a Thomas L. Johnson d/b/a Tom Johnson Livestock Co., PS-08-0135, 09/02/25.

Barber Livestock, LLC, Mark Barber and Lora Barber, PS-D-09-0018, 09/01/15.

John Connery and Mississippi Valley Livestock, Inc., PS-08-0023, 09/01/15.

Muenster Livestock Auction Commission, Inc., and Ronnie Austin, PS-D-08-0059, 09/03/25.

Premium Gold foods, LLC., PS-D-08-0123, 09/04/09.

Central Beef Ind., LLC, PS-D-09-0086, 09/05/04.

Donald D. Baker Cattle Company, LLC, and Donald D. Baker, PS-08-0133, 09/05/07.

Hereford Livestock Exchange, Inc., d/b/a Livestock Exchange, LTD; and Randy Bouldin and Portales Livestock Auction, Inc., and Randy Bouldin, PS-08-0151 & PS-08-0152, 09/06/02.

Daniel D. Miller, PS-D-08-0132, 09/06/11.

Donald W. Hallmark, Donald R. Hallmark d/b/a Hallmark Meat Packing Company, PS-D-08-0104, 09/06/23.

Clifford F. Dance, Jr., and Mike Whitfield d/b/a Gowan Stockyards, PS-D-07- 0163, 09/06/25.

Robert W. Campbell d/b/a RWC Cattle Company, PS-D-09-0108, 09/06/30.

Fergus Falls Livestock Auction Market, Inc., and Joe Varner, PS-D-09-0067, 09/06/30.

AGRICULTURE DECISIONS

Volume 68

January - June 2009
Part Three (PACA)
Pages 477 - 611

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 available online at http://www.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Beginning in 2011, the "Certified" electonic publication of *Agriculture Decisions* [which is available at http://www.dm.usda.gov/oaljdecisions/] may be cited as" primary source" material.

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

JANUARY - JUNE 2009

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

DEPARTMENTAL DECISIONS

REPARATION DECISIONS

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DEFAULT DECISIONS

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

TUSCANY FARMS, INC.; et al. v. USDA.
No. 08-75040.
Filed March 17, 2009.

[**Cite as:**]

United States Court of Appeals
for the Ninth Circuit

By: Lisa J. Evans, Circuit Mediator.

ORDER

The court is in receipt of petitioner's correspondence dated March 16, 2009, requesting voluntary dismissal of this appeal. The court construes petitioner's letter as a motion to dismiss. So construed, the motion is granted and this appeal is dismissed. Fed. R. App. P. 42(b). The parties shall bear their own costs on appeal.

This order served on the district court shall act as and for the mandate of this court.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: CHERYL A. TAYLOR.
PACA-APP Docket No. 06-0008.
Decision & Order.
March 19, 2009.
AND
In re: STEVEN C. FINBERG.
PACA-APP Docket No. 06-0009.
Decision and Order.
March 19, 2009.

PACA – Active involvement – Prompt payment, failure to make full – Responsibly connected.

Charles Spicknall for AMS.
Stephen McCarron for Respondents..
Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision & Order

Decision Summary

1. When produce buyer Fresh America Corp. violated the Perishable Agricultural Commodities Act ("the PACA"), by failing to make ***full payment promptly*** to Fresh America Corp.'s produce sellers,[1] the Chief Financial Officer of Fresh America Corp., together with others, became vulnerable to the consequences under the PACA.

2. **Decision Summary Specifically as to Cheryl A. Taylor**: I decide that the Petitioner, Cheryl A. Taylor (herein frequently "Cheryl Taylor"), under the circumstances here, was ***actively involved*** in the activities resulting in PACA violations during February 2002 through February 2003, when produce buyer Fresh America Corp. left produce sellers unpaid for more than $1.2 million in produce purchases. Cheryl Taylor's ***active involvement*** in such activities stems from her failure as Fresh America Corp.'s Chief Financial Officer (which she became in May 2001), to see that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers. Because she was actively involved,

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[1] in violation of section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4).

Cheryl Taylor was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9). I decide further that Cheryl Taylor was, during produce buyer Fresh America Corp.'s PACA violations, an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer, and Secretary) who was **NOT** "***only a nominal***" officer. Consequently, whether she was ***actively involved*** or not, Cheryl Taylor was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9).

3. **Decision Summary Specifically as to Steven C. Finberg**: I decide that the Petitioner, Steven C. Finberg (herein frequently "Steven Finberg"), under the circumstances here, was **NOT** ***actively involved*** in the activities resulting in PACA violations during February 2002 through February 2003, when produce buyer Fresh America Corp. left produce sellers unpaid for more than $1.2 million in produce purchases. Steven Finberg had no involvement in seeing that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers; Steven Finberg's responsibilities were primarily sales and management of sales. I decide, however, that Steven Finberg was, during produce buyer Fresh America Corp.'s PACA violations, an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development)[2] who was **NOT** "***only a nominal***" officer. Consequently, even though he was **NOT** ***actively involved***, Steven Finberg was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9).

Parties and Counsel

4. Cheryl Taylor and Steven Finberg are both represented by Stephen P. McCarron, Esq., McCarron & Diess, Suite 310, 4900 Massachusetts Ave. NW, Washington, D.C. 20016.

5. The Respondent, the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS"), is represented by Charles E. Spicknall, Esq., with the Trade Practices Division, Office of the General

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[2] Steven Finberg's title, beginning in October 1999, had been "Vice President of Sales and Marketing." RX 6; RX 31 at 25, 30. The corporate minutes for the October 17, 2001 meeting show Steven Finberg as "Vice President of Sales and Marketing." The SEC (Securities and Exchange Commission) annual report as of March 22, 2002, shows Steven Finberg's agreement for employment for three years commencing on October 5, 2001, "as Vice President of Sales and Marketing." RX 21 at 29. Mr. Finberg testified that the "Executive Vice President" title began in September 2001 (Tr. 791-92), and that his job responsibilities and salary remained the same.

Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

Introduction

6. The within cases are known as "***responsibly connected***" cases under the PACA, and the underlying disciplinary action is *In re Fresh America Corp.*, 66 Agric. Dec. 953, 959 (2007). The Default Decision and Order in *In re Fresh America Corp.* was issued by U.S. Administrative Law Judge Peter M. Davenport[3] and established that during February 2002 through February 2003, Fresh America Corp., a Texas corporation, left produce sellers unpaid for more than $1.2 million in produce purchases.

7. Both Cheryl Taylor and Steven Finberg had urged the Fresh America Corp. Board and specifically Chairman of the Board Arthur Hollingsworth, to pay payables more quickly for business reasons, including improving ratings in the Blue Book (Tr. 861-62) and the Red Book (Tr. 811) (two competing credit services, heavily relied on by produce companies), and including inspiring the confidence of customers and suppliers and potential creditors and investors. Mr. William Hasson of John Hancock (a creditor/investor) testified that, at one of the 10 to 12 Fresh America Corp. board meetings he attended, he had been asked "to talk a little bit about PACA one time." Tr. 88. Mr. Hasson testified he had said the following in response:

> You can't - - I said, You've got to adhere to PACA, or you're pretty much out of business, is what I told them. I said, You guys just need to follow the guidelines, do it, and that's my recommendation. And the board did not take the PACA issue seriously, which really shocked me. I communicated to them that I thought it was a mistake to be so cavalier with that issue, which I thought they were definitely being cavalier with the issue, and I also believed that over a period of time if that continued, that would be the downfall of the company.

Tr. 88-89.

Mr. McCarron: And when you say, that issue, what issue under PACA were you talking about?

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[3] The Default Decision and Order, issued on January 19, 2007 in PACA Docket No. D-06-0002, concluded that Fresh America Corp. violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4).

Mr. Hasson: Well, simply delaying payment to suppliers. It's just not something that obviously - - that is the reason PACA's issued - - or written - - excuse me. And I just explained to them that, you know, if you want to be a successful company in this industry, you have to adhere to the rules of PACA.
Tr. 88-89.

8. Cheryl Taylor and Steven Finberg were NOT directors of the corporation, or members of the board, that Mr. Hasson was referring to. But they were officers of the corporation that violated 7 U.S.C. § 499b(4), and every such officer is held to be ***responsibly connected*** (which has licensing and employment restrictions ramifications under the PACA), unless he or she can prove that he or she should be excepted (by proving both prongs of the *Norinsberg*[4] two-prong test).

9. Cheryl Taylor and Steven Finberg had worked heroically to save Fresh America Corp. - - to keep the business operating. Even though Fresh America Corp. was in severe financial trouble, Cheryl Taylor and Steven Finberg did not "abandon ship" - - they continued to work for Fresh America Corp. Nevertheless, neither of them was effective in getting the produce sellers ("suppliers") paid promptly.

10. All efforts to keep Fresh America Corp. afloat failed, and Fresh America Corp. ceased operations on January 22, 2003. RX 41 at 2. Cheryl Taylor and Steven Finberg saw their work through, essentially to the end (through January 2003 for Steven Finberg, Tr. 810; longer for Cheryl Taylor who continued to respond to inquiries regarding Fresh America Corp. Tr. 622-24). The steadfast dedication of each of them was laudable (for example, *see* Tr. 648-53, 874-75) but can be hazardous under the PACA to one's career in PACA licensed ventures, if one worked as an officer, as they did, for a produce buyer such as Fresh America Corp. that left produce sellers unpaid.

11. Cheryl Taylor and Steven Finberg took nothing more from Fresh America Corp. than the compensation for their work to which they were entitled ($175,000 per year salary for Ms. Taylor; $145,000 per year salary for Mr. Finberg). Tr. 856. Each had a three-year employment agreement that began October 5, 2001. RX 31 at 30. Their compensation was, in my opinion, reasonable in amount, considering their responsibilities and the risks they undertook staying with a company that was so distressed.

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[4] 58 Agric. Dec. 604, 610-611 (1999).

Procedural History

12. The Chief, PACA Branch, Fruit and Vegetable Programs, determined on June 23, 2006, that Cheryl A. Taylor was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during February 2002 through February 2003. Cheryl Taylor filed her Petition for Review on July 27, 2006. The agency record was filed on August 8, 2006. 13. The Chief, PACA Branch, Fruit and Vegetable Programs, determined on August 11, 2006, that Steve C. Finberg was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during February 2002 through February 2003. Steven C. Finberg, also known as Steve C. Finberg, filed his Petition for Review on September 13, 2006. The agency record was filed on September 21, 2006.

14. The within cases, that is, *In re Cheryl A. Taylor*, PACA APP Docket No. 06-0008, and *In re Steven C. Finberg*, PACA APP Docket No. 06-0009, were joined for hearing by Order of Judge Davenport dated March 27, 2007. The hearing was held on January 29-30, 2008, in Dallas, Texas, before me, Jill S. Clifton, U.S. Administrative Law Judge. Witnesses testified and exhibits were admitted into evidence. The transcript, in two volumes, is referred to as "Tr."

15. Cheryl Taylor and Steven Finberg called eight witnesses: (1) William H. Hasson, Tr. 60-133; (2) Colon Otho Washburn, Tr. 137-193; (3) Mark Prowell, Tr. 196-244; (4) Jerry Campbell, Tr. 247-263; (5) Nancy Blakney, Tr. 265-289; (6) Julie Ann Anderson, Tr. 291-325; (7) Cheryl Ann Taylor, Tr. 329-412, 465-750; and (8) Steven Craig Finberg, Tr. 752-884.

16. Petitioners' exhibits are designated by "PX". Cheryl Taylor and Steven Finberg submitted exhibits PX 1 through PX 14 [note, PX 11 has 15 tabs], each of which was admitted into evidence.

17. AMS called one witness: Josephine E. Jenkins, Tr. 885-900.

18. Respondent AMS submitted the following exhibits, each of which was admitted into evidence, each marked as "RX", found in 5 rust-colored binders. I refer to them this way:

> TRX 1 through TRX 26 ("T" for Taylor), labeled: "In re: Cheryl A. Taylor" with "PACA copy" written on label.
> TRX 27 through TRX 40 ("T" for Taylor), labeled: "In re: Cheryl A. Taylor," Respondent's Supplemental Exhibits.
> FRX 1 through FRX 17 ("F" for Finberg), labeled: "In re: Steven C. Finberg" with "PACA copy" written on label.
> FRX 18 through FRX 25 ("F" for Finberg), labeled: "In re: Steven C. Finberg," Respondent's Supplemental Exhibits.

JRX 41 through JRX 45 ("J" for Joint), labeled: "In re: Cheryl A. Taylor and Steven C. Finberg," Respondent's Supplemental Exhibits.

19.I took official notice of the Default Decision and Order issued on January 19, 2007 in PACA Docket No. D-06-0002, *In re Fresh America Corp*., together with the Hearing Clerk's cover letter and subsequent Notice of Effective Date.

20.Neal R. Gross and Co., Inc. did excellent work preparing the hearing transcript, and few corrections were requested. AMS filed no request for transcript corrections. Cheryl Taylor's and Steven Finberg's (Petitioners') Corrections to Transcript, filed April 23, 2008, are accepted, and I have made the changes accordingly, EXCEPT that, regarding Tr. 195:4, ~~malleable~~ is corrected to "valuable" on my own motion; and regarding Tr. 483:1, I made no change ("Hasson" was already there). Also, on my own motion, on page 2 of the first volume of transcript, and on pages 460 & 462 of the second volume, I hereby correct the references to counsel's clients as follows: On behalf of the ~~Complainant~~ "Respondent" is Mr. Spicknall; On behalf of the ~~Respondent~~ "Petitioners" is Mr. McCarron. Lastly, on my own motion, regarding Tr. 149:10, ~~mean~~ is corrected to "meant"; and regarding Tr. 101:6, ~~laid~~ is corrected to "late".

21.Cheryl Taylor's and Steven Finberg's Brief of Petitioners was timely filed on April 23, 2008. Cheryl Taylor's and Steven Finberg's (Petitioners') Reply Brief was timely filed on May 22, 2008.

22.AMS's (Respondent's) Proposed Findings of Fact, Conclusions of Law, and Order; and Post-Hearing Brief In Support, were timely filed on April 23, 2008. AMS's Reply Brief was timely filed on May 22, 2008.

Discussion

23.Mr. McCarron (counsel for Cheryl Taylor and Steven Finberg) in his opening statement refers to Cheryl Taylor and Steve Finberg as the "poster child" of the people that fit within the exception (the exception to being found to be ***responsibly connected***, by proving both prongs of the *Norinsberg*[5] two-prong test). Tr. 41.

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[5] *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

24. Mr. McCarron stated that Cheryl Taylor and Steven Finberg were not actively involved, were officers only nominally, and that NTOF[6] was the alter ego of Fresh America (Tr. 38-41). After careful study of the evidence, I conclude otherwise. I concede that Cheryl Taylor and Steven Finberg may be "poster children" for "no good deed goes unpunished."

25. The term ***responsibly connected*** means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association. 7 U.S.C. § 499a(b)(9).

26. A petitioner must meet a two-prong test in order to demonstrate he or she was not ***responsibly connected***. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies that first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. 7 U.S.C. § 499a(b)(9).

27. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved

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[6] By "NTOF," Mr. McCarron was referring to North Texas Opportunity Fund. Such reference could mean North Texas Opportunity Fund LP OR its general partner North Texas Opportunity Fund Capital Partners LP; OR its general partner NTOF Fund LLC; OR North Texas Investment Advisors LLC; or some combination thereof. RX 31 at 32-33; RX 29 at 63-64.

in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

28. Mr. Colon Washburn had been a Director of Fresh America Corp. from 1993 to about September 2002 (Tr. 144, 184), and he was Fresh America Corp's Chief Executive Officer for nearly 2 years (October 1999 - August 2001). PX 14 at 3; Tr. 144, 154; TRX 31 at 25. Mr. Washburn's resumé shows the following Fresh America Corp. accomplishments during his time as CEO:

> **Chief Executive Officer** 10/99 - 8/01
> Reduced debt from $49 million to $5.4 million.
> Divested 7 non-performing or non-strategic operating units.
> Retained all key personnel.
> Implemented supply chain and "value-add" strategy.
> Relocated HR, Accounting and IT to corporate.
> Reduced overhead from $13 million (1999) to $5 million (2001).
>
> Identified and executed "seamless" transition to new owners.

PX 14 at 3.

29. AMS began its cross-examination of Mr. Washburn with Mr. Washburn's acknowledgment that Fresh America Corp. had financial problems during Mr. Washburn's time as CEO (Tr. 151-52):

Mr. Spicknall: Okay. As I understand it, there was - - Fresh America was experiencing some pretty significant financial problems in the late '90s and early 2000, 2001, prior to the NTOF transaction. Is that accurate?

Mr. Washburn: Yes, sir.

Mr. Spicknall: Okay. And during part of that time, at least, 1999 to 2001, you were the CEO, the chief executive officer. Right?

Mr. Washburn: Yes.

Mr. Spicknall: Okay. Now, tell me about - - there was a number of the older management who had been there for quite a period of time that were leaving the company during that late '90s, early 2000 time frame, for instance, John Gray. Why were people leaving?

Mr. Washburn: John actually didn't leave until May of 2001, and John left because he had an incredible opportunity with another company.

Mr. Spicknall: Okay. It didn't have anything -- --

Mr. Washburn: In fact --

Mr. Spicknall: Go ahead.

Mr. Washburn: John and I were personal friends, and he was very reluctant to leave, but he had a great opportunity. Prior to John leaving,

he promised the company and fulfilled it that he would find someone - - find his replacement. In fact, he was really instrumental in us finding Cheryl Taylor.
Tr. 151-52.
30. Again, AMS on cross-examination of Mr. Washburn, established that Fresh America Corp. was "in fairly significant financial trouble" (Tr. 156- 57) :
Mr. Spicknall: Right. Now, Fresh America, though was in fairly significant financial trouble by 2000, 2001. Is that accurate?
Mr. Washburn: That's accurate.
Mr. Spicknall: Okay. And, in fact, that's the reason that really it had to take the NTOF transaction. It had to have that cash. Is that accurate?
Mr. Washburn: That's accurate.
Mr. Spicknall: Okay. Or it would have shut down. Is that true?
Mr. Washburn: I don't know whether we would have shut down. I felt two responsibilities in the summer of 2001 is that we keep everybody's job, and two, could we pay all our vendors. And I felt that was the best option was to go to NTOF. And there may have been other options, but we chose NTOF.
Tr. 156-57.
31. NTOF invested substantial amounts of money in Fresh America Corp. ($5 million). Tr. 103, 145. In the end, NTOF and Arthur Hollingsworth, who was placed by NTOF as Chairman of the Board, lost their investment. During their tenure, they kept a tight rein on Fresh America Corp.'s operation (Tr. 145-46):

> Mr. McCarron: All right. Now I'd like to take you to the point when the North Texas Opportunity Fund, NTOF, became involved with Fresh America. Do you recall that?
> Mr. Washburn: Yes.
> Mr. McCarron: All right. And do you recall them becoming - - investing $5 million and obtaining a number of shares of stock in Fresh America?
> Mr. Washburn: Yes.
> Mr. McCarron: All right. Now, do you recall as part of the deal how many board positions NTOF was allotted?
> Mr. Washburn: I recall four positions.
> Mr. McCarron: An then did you fill the fifth one?
> Mr. Washburn: Yes.
> Mr. McCarron: All right. Do you remember who was on the board there at NTOF?
> Mr. Washburn: Yes.
> Mr. McCarron: Can you tell us those names?

Mr. Washburn: Yes. Arthur Hollingsworth, Darren Miles, Luke Sweetser, Greg Campbell.

Mr. McCarron: All right. And can you tell us how the - - what changes were made in the operation of the company from the time that NTOF became involved in 2001.

Mr. Washburn: In effect, the board meetings became the management of the company. Steve and Cheryl and others had no operating authority with the company. We discussed - - everything was, the way I described it, is managed at board level.

Tr. 145-46.

32. Further (Tr. 146-47):

Mr. McCarron: All right. And what decisions were made by - - well, who actually made the decisions - - when you say, management by the board, who was actually making the decisions, the management decisions, at the board?

Mr. Washburn: Arthur Hollingsworth.

Tr. 146-47.

33. Further (Tr. 148-50):

Mr. McCarron: What about bills to pay? Who decided that?

Mr. Washburn: In essence, the board decided. There was a point during one meeting when we were getting - - burning through the $5 million quicker than anyone had anticipated, and the comment was made, Well, what do we need to do. And Arthur Hollingsworth said, Well, we need to delay paying our vendors. And both Cheryl and Steve commented, well, was Arthur aware of PACA and what that meant.

And Arthur said initially that it didn't really make any difference, that he'd managed and run other companies, and he was able to extend payments without any problem. And we got into a rather lengthy discussion about what that meant on PACA. In essence, Arthur was going to decide who was going to get paid, when, and how, and what kind of terms those payment terms would be.

Mr. McCarron: What authority did either Cheryl Taylor or Steve Finberg have over any decisions - - what decision-making authority, if any, did they have at Fresh America after NTOF came in?

Mr. Washburn: Cheryl virtually had no authority. Steve had some authority. I think he could book trips and pretty much see the customers he wanted to, but beyond that, he had no authority.

Tr. 148-50.

34. Finally (Tr. 179):

> Mr. Washburn: During the NTOF, it was very obvious that it was difficult, if not impossible, to make any decisions on a day-to-day basis in Fresh America, that they needed to be handled by Arthur during the board, or if there was a decision that needed to be made before a board meeting, they would contact Arthur to get the decision made.

Tr. 179.

35. **Discussion Specifically as to Cheryl Taylor** (paragraphs 32 through 68): Cheryl Taylor was, among other things, the Chief Financial Officer. If it was not ***her*** job to see that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers, then whose job was it?

36. The chief financial officer of a produce buyer is in a unique position to see that ***full payment promptly*** is made to produce sellers. The privilege of buying produce may be lost under the PACA (through license suspension or revocation) if produce buyers do not pay produce sellers ***full payment promptly***.

37. Cheryl Taylor concluded that she, Cheryl Taylor, never had the authority to get the produce sellers paid. Cheryl Taylor compared her own authority with that of others in management of Fresh America Corp. that had greater authority. Cheryl Taylor described her helplessness to affect the agenda of (1) Arthur Hollingsworth (Chairman of the Board beginning October 2001, TRX 31 at 25); (2) Darren Miles (President and Chief Executive Officer beginning in August of 2001; also Director beginning October 2001, TRX 31 at 25), and (3) Cheryl Taylor's subordinate Helen Mihas (Vice President, Treasurer, Controller, and Assistant Secretary, beginning in May 2001 according to TRX 4; and in April 2001 according to TRX 31 at 25).

38. Cheryl Taylor worked for Fresh America Corp. to obtain financing, including filing required SEC (Securities and Exchange Commission) documents. She began as a consultant, April 23, 2001, having committed to working for a minimum of 30 hours per week, for three months. Tr. 364-65. PX 1. Cheryl Taylor's good work - - she tried valiantly to keep Fresh America Corp. from failing; she worked hard to find financing - - is irrelevant to whether she is found to have been ***responsibly connected***.

39. Cheryl Taylor was to report to John Gray. Within the first month of her work as a consultant, during May 2001, John Gray resigned as Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., and Cheryl Taylor was "elected to the offices of Executive Vice President, Chief Financial Officer and Secretary of the

Company" (Fresh America Corp.). TRX 4. Cheryl Taylor was no longer a consultant but an employee. Cheryl Taylor had become part of Fresh America Corp.'s management. The effective date shown on TRX 4 was May _____, 2001. Simultaneously, Cheryl Taylor picked up another of John H. Gray's responsibilities, that of being the registered agent: "it is in the best interest of the Company to change the registered agent of the Company from John H. Gray to Cheryl Taylor." TRX 4. There is nothing "nominal" about these responsibilities.

40. Had Cheryl Taylor remained a consultant on contract, one who was **not** an officer, director, or holder of more than 10 per centum of the outstanding stock, it is true that there would be no basis for finding her to be responsibly connected. Cheryl Taylor's analysis is, that her job responsibilities did not change from those she was hired to do as a consultant. Tr. 635-38. I disagree. When Cheryl Taylor became Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., with respect to the Perishable Agricultural Commodities Act, everything changed.

41. Cheryl Taylor's counsel, Mr. McCarron, is extremely capable in addressing the evidence and the law. Here, he attempted to "shoehorn" Cheryl Taylor's role within Fresh America Corp. into ***exceptions*** that would allow her to escape a ***responsibly connected*** finding. Exceptions to being found to be ***responsibly connected*** are rare.

42. Before addressing counsel's attempt to fit Cheryl Taylor's work into an exception, I address the general rules that are pertinent here. Generally under the PACA, officers are ***responsibly connected*** with the corporation they serve. 7 U.S.C. § 499a(b)(9). Every officer of a corporation that violates 7 U.S.C. § 499b(4) is held to be ***responsibly connected***, unless she can prove that she should be excepted (by proving both prongs of the *Norinsberg*[7] two-prong test).

43. **Was Cheryl Taylor Actively Involved?** (paragraphs 43 through 51). Fresh America Corp. did not pay its produce sellers ***full payment promptly***, as required by the PACA. *See* 7 C.F.R. § 46.2(aa), which contains definitions of "Full payment promptly". While I do not have the details of Fresh America Corp.'s arrangements with its produce sellers, produce sellers are entitled to be paid quickly, as quickly as ***within 10 days*** after the produce is accepted. Not only were produce sellers to Fresh America Corp. not paid quickly; they were not paid ever,

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[7] *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

to the tune of $1.2 million.[8] 44. Fresh America Corp. was disintegrating. Fresh America Corp. was losing half-a- million dollars a month. Tr. 742. Under the PACA, especially under such circumstances, financial management is required to see that the produce sellers are paid. Fresh America Corp. had taken the produce; Fresh America Corp. was required to pay for the produce. Under the PACA, other payments should have taken a lower priority than paying the produce sellers. Cheryl Taylor's failure to exercise authority over the payables, at least to see that the produce was paid for, constituted ***active involvement*** under the PACA under these circumstances.

45.Cheryl Taylor is found to have been ***actively involved*** in Fresh America Corp.'s activities that led to the PACA violations, even though she herself did not buy produce, and she herself did not pay for other items in preference to paying for the produce.

46. I am sympathetic to Cheryl Taylor in the predicament she was in. Cheryl Taylor testified that she was the chief financial officer in name only, so that she could be the "signer" of documents prepared by lawyers who understood why the documents were needed (Tr. 365-66), that her function as the signer was merely administrative. Tr. 362. The documents might be needed to dissolve or transfer entities that would no longer be connected to Fresh America Corp. Tr. 358-59. The documents might be related to obtaining financing, which was what she had been hired to do (Tr. 361-62). Cheryl Taylor had her hands full, with her efforts to obtain financing, including filing required SEC documents.[9] Her work also required her to be involved in severing or modifying connections with numerous entities. Cheryl Taylor worked also in preparation for taking the Fresh America Corp. private, to cut expenses.

47.Cheryl Taylor maintains that she was shut out of the bill-paying process. Cheryl Taylor disputes that she was able to "exercise judgment, discretion, or control" with regard to whether produce would be paid for promptly. Cheryl Taylor testified that Helen Mihas (her subordinate), was very protective over her (Helen Mihas's) work, walled Cheryl Taylor out, and controlled such decisions (Tr. 531-33); that Arthur

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[8] This could have been worse. When Fresh America Corp. ceased operations on or about January 22, 2003 (JRX 41 at 2), produce sellers to Fresh America Corp. were owed about $13 million. Distributions reducing that amount were made from the PACA trust, United States District Court for the Norther District of Texas.

[9] Cheryl Taylor: I would say 90 to 95 percent of my time at any given week or time was devoted to trying to get the company refinanced and working on the SEC documents. Tr. 738. *See also* Tr. 349.

Hollingsworth (Chairman of the Board) controlled such decisions (Tr. 544-46); that Darren Miles (President and Chief Executive Officer) had more control over such decisions than she had.

48. Cheryl Taylor's name and title were used by Fresh America Corp. to pay bills. Cheryl Taylor signed signature cards of corporate checking accounts, and her signature was stamped on corporate checks by machine; after all, she was the Chief Financial Officer. Cheryl Taylor neither bought produce nor paid for it. Cheryl Taylor did not determine the preference or priority for paying for produce compared to other payables. Cheryl Taylor did not exercise authority over the payables.

49. Nevertheless, Cheryl Taylor was the "Executive Vice President, Chief Financial Officer, and Secretary," and regardless of why she had ascended to those responsibilities, they were hers. Where, as here, produce sellers were left unpaid for more than $1.2 million in produce purchases, the chief financial officer of the produce buyer was ***actively involved*** in the produce buyer's activities that resulted in PACA violations, because the chief financial officer was uniquely positioned to see that ***full payment promptly*** was made to produce sellers.

50. Cheryl Taylor's failure to see that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers, constituted ***active involvement*** in the activities resulting in the produce buyer's PACA violations (violations of section 2 of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4)). This is consistent with *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999), because the chief financial officer of a produce buyer is expected to "exercise judgment, discretion, or control" with regard to whether produce will be bought and whether produce will be paid for promptly.

51. Cheryl Taylor cannot prove the first prong of the exception, because she was **actively involved**, within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Fresh America Corp.'s PACA violations. Thus, Cheryl Taylor must be determined to be ***responsibly connected*** with Fresh America Corp. during its PACA violations.

52. **Was Cheryl Taylor "*Only a Nominal*" Officer?** (paragraphs 52 through 57). As indicated in paragraph 32, there was nothing "nominal" about Cheryl Taylor's responsibilities as Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp. Whatever was said to Cheryl Taylor to induce her to accept the responsibilities, once she did, she became part of Fresh America Corp.'s management.

53. Cheryl Taylor testified that her responsibilities did not change from those she had undertaken when she was not an employee of Fresh America Corp. but a contractor. Tr. 362, 749. Her compensation also

did not change. Tr. 362, 749. Cheryl Taylor was a certified public accountant who had worked her way up in Coopers & Lybrand, auditing, and had valuable public company experience and valuable bankruptcy experience as controller with the Great Train Store and valuable refinancing experience with Intellisys Group. Tr. 331-34. Cheryl Taylor's compensation, $175,000 per year salary (RX 31 at 30, Tr. 663), was commensurate with her responsibilities. Tr. 740.

54. Cheryl Taylor testified that neither her reporting to the Board nor her signing of Board minutes (which were severely edited by Chairman Arthur W. Hollingsworth to exclude details she believed should be included) was more than administrative. Tr. 526. 55. Cheryl Taylor is an admirable and impressive professional, and I appreciate the courage she exhibited in taking on and in persisting in the work for Fresh America Corp. Her courage and her ethical nature were also exhibited in about October 2002, when she blocked $868,000 from going out of Fresh America Corp. Had those funds gone out, she testified, that would have been in violation of Fresh America Corp.'s covenant with its senior lender, Bank of America, and would have had to be disclosed in SEC reports. PX 3 at 1, Tr. 407-11.

56. I appreciate the difficult situation Cheryl Taylor found herself in at Fresh America Corp. and would prefer that she not be subjected to licensing restrictions under the PACA and employment restrictions under the PACA. Nevertheless, it is obvious that when Cheryl Taylor became Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., in May 2001, she was from then on vital to Fresh America Corp. and an important and influential officer. There is no question that Cheryl Taylor had "an actual, significant nexus with the violating corporation during the violation period." Thus, she cannot demonstrate that she was only nominally an officer of a corporation. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

57. By being the Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., who was **NOT** "***only a nominal***" officer, Cheryl Taylor was **responsibly connected** with Fresh America Corp. as defined by 7 U.S.C. § 499a(b)(9), when Fresh America Corp. violated the PACA.

58. **Was Fresh America Corp. the "*Alter Ego of Its Owners*"?** (paragraphs 58 through 68). Cheryl Taylor was not an owner of Fresh America Corp. She had stock options, but she did not exercise them. During the time she held them, Cheryl Taylor's stock options were or became worthless. Tr. 705.

59. Mr. McCarron's opening statement asserted that **NTOF** (*see* footnote 6) was the dominating influence over Fresh America Corp.; Mr. McCarron's post-hearing briefs asserted that **Arthur Hollingsworth** was the dominating influence over Fresh America Corp.

60. Here, to prove the **alter ego** exception under 7 U.S.C. § 499a(b)(9), Cheryl Taylor must prove that NTOF, or Arthur Hollingsworth, or both, so dominated Fresh America Corp. as to negate its separate identity. *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000).

61. When NTOF arrived with its infusion of $5 million (Tr. 376), NTOF did influence the way Fresh America Corp. did business. NTOF had influence in placing the Chairman of the Board (Arthur Hollingsworth), and 3 additional board members, including one who was also the President and Chief Operating Officer (Darren Miles). Tr. 145-46. (If John Hancock had placed a Board member of its choice, NTOF would have placed only three, instead of four, but John Hancock chose not to. Tr. 111.)

62. Mr. Washburn, as CEO of Fresh America Corp., was optimistic about bringing in NTOF (Tr. 157-58):

Mr. Washburn: * * * I felt two responsibilities in the summer of 2001 is that we keep everybody's job, and two, could we pay all of our vendors. And I felt that was the best option was to go to NTOF. And there may have been other options, but we chose NTOF.

Mr. Spicknall: Okay. And when you say, you chose NTOF, you just talked about the fact that as a result of that transaction, they got 50,000 shares of that Series D preferred stock that was created, which gave them significant voting rights in the company, and that it - - is that accurate?

Mr. Washburn: I don't recall the specific number, sir.

Mr. Spicknall: Okay. But essentially you knew at the time of the NTOF transaction before it was signed that they were going to appoint - - they were going to replace you as the CEO. Is that accurate?

Mr. Washburn: Please restate that question.

Mr. Spicknall: You knew prior to the signing of the NTOF transaction that Darren Miles was going to be the new CEO of the company if the company went through with the NTOF transaction. Is that accurate?

Mr. Washburn: That's accurate.

Tr. 157-58.

63. Cheryl Taylor had helped bring NTOF in (Tr. 159):

Mr. Spicknall: Well, who was responsible for briefing the board on the details of the NTOF transaction? Would that be Cheryl Taylor?

Mr. Washburn: It would have been a combination of myself and Cheryl.

Tr. 159.

64.Cheryl Taylor personally executed the agreement with NTOF on behalf of Fresh America as the company's Chief Financial Officer. TRX 29 at 63.

65. After NTOF's and Arthur Hollingsworth's arrivals at Fresh America Corp., other important influences on Fresh America Corp. remained. Fresh America Corp. had and needed creditors and/or investors beyond NTOF. For example, Bank of America was Fresh America Corp.'s senior debt holder; and John Hancock had invested a $15 million subordinated debt tranche with Fresh America Corp. in about 1997 or 1998 (Tr. 61), with another $5 million added later, which together added up to $20 million. For its $20 million, John Hancock got 27,000 shares of preferred Series D stock. RX 30, p. 2. Tr. 699. TRX 31 at 7. The John Hancock shares were owned by three distinct corporate entities: (1) the John Hancock Life Insurance Company, which held 24,840 shares; (2) the John Hancock Variable Life Insurance Company, which held 1,620 shares; and (3) the Investors Partner Life Insurance Company, which held 540 shares. TRX 29 at 65-66. Mr. William Hasson of John Hancock started attending (to observe, rather than participate in) Fresh America Corp. board meetings after NTOF made their investment in the company. He attended probably 10 to 12 such board meetings. Tr. 64-66, 70-71.

66.John Hancock lost the $20 million (Tr. 93-94) it had loaned to Fresh America Corp., and the John Hancock Board was already prepared to write off its $20 million loan, even when NTOF was bringing $5 million (Tr. 103-05):

Mr. Hasson: Well, you know, the recommendation of John Hancock at the time (when NTOF came in) was to write off the loan and let it go, and I asked them if I could have permission to at least try to get something for our investment. But the board's (John Hancock's board) decision at that time was to write if off and forget about it, and I chose not to do that, tried to at least get something out of it. I ended up not doing - - getting anything out of it. They were right; I was wrong, but I just didn't want to give up.

Mr. Spicknall: What was the mood at Fresh America at the time? Was there real hope that the company could be turned around with the money from NTOF?

Mr. Hasson: There was. Yes.

Mr. Spicknall: Okay. And why was that hope alive, considering the state of the company at that time?

Mr. Hasson: Well, I think they felt with the liquidity, which obviously is the driver of these types of companies, they could rebuild the business at each location with the new management team they had and survive. That just didn't seem to work out for them.

Tr. 103-05.

67. Fresh America Corp.'s articles of incorporation permitted the company to issue 10,000,000 shares of common stock. TRX 31 at 7. Fresh America Corp. had 8,410,098 shares of common stock outstanding as of March 22, 2002. TRX 31 at 1, TRX 32 at 6. While NTOF owned no shares of common stock, the common stock was widely held as of March 15, 2002. Entities that owned 5% or less of the outstanding common stock owned roughly 45% of all the outstanding common stock; and the other 55% of all the outstanding common stock was owned by three entities, none of which was NTOF: an individual named Larry Martin owned 37.7% of the outstanding common stock; Gruber & McBaine Capital Management owned 10.6% of the outstanding common stock; and DiMare Homestead, Inc. owned 6.3% of the outstanding common stock. TRX 31 at 33-34.

68. Cheryl Taylor cannot prove that Fresh America Corp.'s owners were NTOF, or Arthur Hollingsworth, or both. Cheryl Taylor also cannot prove that Fresh America Corp. lost its separate identity as a result of the influence of NTOF, or Arthur Hollingsworth, or both. Fresh America Corp.'s distinct identity is evident, for example, to those who lost their investment in Fresh America Corp. (Bank of America presumably salvaged something by selling its receivable). The others described in paragraphs 65 and 67, plus others not specifically mentioned (Fresh America Corp.'s owners, shareholders and other investors, including lenders) lost their investment.

69. **Discussion Specifically as to Steven Finberg** (paragraphs 69 through 87): Fresh America Corp. had exciting roots. Its predecessor, Gourmet Packing Company (frequently herein, "Gourmet Packing"), had been created to supply Sam's Club with produce and to run those departments. Tr. 756, 752. Sam's Club was about 99.9% of Gourmet Packing's business. Tr. 756.

70. Gourmet Packing became Fresh America Corp. through an IPO (initial public offering), in about 1993. Tr. 758.

71. At its peak, Fresh America Corp. provided produce to 375 Sam's Club locations throughout the country. TRX 31 at 6.

72. Steven Finberg first worked for Gourmet Packing beginning when he was still in college, during summers when he was in Houston Texas. Tr. 752. Steven Finberg then "resigned" to return to college, but before his two weeks "notice" was effective, Gourmet Packing called to put him to work as general manager of two locations in Austin, Texas, while he was completing college. Tr. 753-54. Three days after that call, Gourmet Packing called again to make Steven Finberg district manager of three

additional locations, in San Antonio, Texas. I believe this was about August 1989. Tr. 753.

73. Sam's Club was growing, Gourmet Packing was growing, and Steven Finberg was growing. Steven Finberg's description is helpful. This excerpt of Steven Finberg's testimony begins about 1992 (Tr. 756-59):

> To make a long story short, out of about 400-plus employees of Gourmet Packing at the time, I was selected and offered a position to go work in the Sam's Club home office in Bentonville, Arkansas, as the corporate liaison and to learn supply chain. Sam's Club wanted someone to understand the mentality and their culture and be able to convey that throughout our organization.
>
> And at that time, again, Sam's Club was our business. I usually say 99.9 percent. We were created to supply Sam's Club with produce and run those departments. We may have had some outside business, but it would barely register a percentage point of the overall sales contribution.
>
> I was in Bentonville, Arkansas, moved there July of 1992, less about two weeks prior to my getting married in Austin, and started my career, that phase of my career, as the customer service manager of Gourmet Packing.
>
> In December of 1992, I was promoted to director of customer service. My role as director of customer service was to work closely and coordinate the different initiatives of the Sam's Club buyers within our own organization, and at that time, the one distribution center in Houston, Texas had expanded to also include locations in Dallas and Atlanta.
>
> By 1995, when I departed Bentonville, Arkansas, to return to what was still our corporate office of Gourmet Packing in Houston, Texas, I was now, I believe, director of national programs. Sam's Club was still in the high 90s as far as the percent of our business. I was with - - at that time, the Sam's Club program - -
>
> It's very important, if I could have a little latitude to explain this - - we mentioned the Sam's - - we mentioned Wal-Mart quite frequently throughout the last two days'

> testimonials. There is a distinction. Gourmet Packing had and built distribution centers - - I'm sorry. And there was also an IPO [Initial Public Offering] where we became Fresh America in 1993.
>
> Gourmet Packing, now Fresh America, built distribution centers to function as a perishable distribution center for the Wal-Mart Corporation, to supply Sam's Clubs with perishable commodities. These were large distribution centers that would do in excess of about $50 million a sale. This is before Sam's Club and Wal-Mart got into the business of perishable distribution. They used to have dry and select freezer and refrigerated capabilities. Now they were starting to build perishable distribution centers.
>
> We entered into an agreement in 1995, a five-year agreement, which was going to allow our company enough time to divest our business, knowing that the Sam's Club distribution piece of the business was going away, not because of any performance issues, but the parent company, Wal-Mart, was building distribution centers. So that's why I returned back in 1995 to our corporate office.
>
> In December of 1995, I was hired and promoted to general manager of our Arlington, Texas, distribution center, right up the road. For two years, I was the general manager of that location, responsible for the entire P&L, under parameters set by corporate of that operation. At that time, all of my business was to supply the neighboring Sam's Clubs in this part of the state of Texas and Oklahoma and, I believe, Arkansas with product for the Sam's Club produce departments.

Tr. 756-59.

74. During 1995, Steven Finberg went from being Fresh America Corp.'s director of national programs (with Sam's Club still being in the "high 90s" percentage of Fresh America Corp.'s business), to being promoted to general manager of the Arlington, Texas distribution center. Tr. 757-59.

75. Fresh America Corp. was at a crossroads in 1995. When Wal-Mart / Sam's Club entered into a 5-year contract with Fresh America Corp. to

cover 1995 through 2000, everyone understood that at the end of that 5 years, Fresh America Corp. would lose its Sam's Club business, because Sam's Club would be doing internally what Fresh America Corp. had been doing for Sam's Club. Tr. 758-59.

76. Gourmet Packing, and then Fresh America Corp., had built perishable distribution centers to serve the Wal-Mart corporation, to supply Sam's Club with perishable commodities. Tr. 758. Fresh America Corp. had about 8 such distribution facilities by the end of 2001. TRX 31 at 3.

77. The "Acquisitions/Divestitures" section of Fresh America Corp.'s SEC Annual Report for the year ending December 2001, includes the following:

> Because the Company understood the Sam's Agreement would expire in 2000, in 1995 the Company began to implement a strategy to attract new customers over a wider geographical area and diversify its customer base into other areas of produce distribution. In executing its strategy, the Company completed 16 acquisitions from 1995 through 1998 and added various customer alliances involving fresh produce procurement, warehousing, distribution and/or marketing. Through these acquisitions and new customer relationships, the Company expanded its cold chain distribution network to become national in scope, diversified its customer and supplier relationships and expanded its value-added processing capabilities. Six of these acquisitions in the specialty food service business never achieved sufficient market presence and were closed or sold during the period from September 1999 to May 2001.

TRX 31 at 6.

78. Fresh America Corp. had to operate "full speed ahead" for the 5 years 1995-2000, to take good care of Sam's Club, its primary customer. At the end of that 5 years, Fresh America Corp. needed to have "divest"ed the business: closed down, scaled back, or otherwise changed proportions to match the loss of Sam's Club; or, Fresh America Corp. needed to have developed additional customers, to replace the Sam's Club business, and Fresh America Corp. tried. Losing the Sam's Club business was the beginning of the end, looking back at Fresh America Corp.'s boom-to-bust. 79. **Was Steven Finberg Actively Involved?** (paragraphs 79 through 81). Fresh America Corp. did not pay its produce sellers ***full payment promptly***, as required by the PACA.

AMS argues that Steven Finberg was actively involved by virtue of his oversight responsibilities including his participation in Board meetings. I disagree. Steven Finberg was not a Director; he was not a Board member. He was invited to the meetings to report the state of sales. Steven Finberg did not purchase product; he did not issue purchase orders. Tr. 835. Steven Finberg had no authority to determine payment priorities. I am persuaded that Steven Finberg worked valiantly to increase sales, trying to replace the loss of most of the Wal Mart business. Mr. Finberg testified about some of the happenings that interfered with his attempts to improve the "top" line (Tr. 846), but I need not detail those here. Steven Finberg's responsibilities, as Vice President of Sales and Marketing OR Executive Vice President of Business Development, did not ***actively involve*** him in the activities that resulted in the PACA violations.

80. I am reminded of *Philip J. Margiotta*, who, even though he was the manager of the business (who was also a corporate officer), was not ***actively involved*** when, unbeknownst to Mr. Margiotta, another employee paid unlawful bribes and gratuities to a USDA produce inspector:

> . . . Being actively involved in innocent activities can result in a violation of the PACA; however, I find, under the circumstances in the instant proceeding, Petitioner's management of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility alone is not sufficient to constitute active involvement in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

65 Agric. Dec. 622, 638 (2006).

81. Steven Finberg's circumstances can of course be distinguished from those of *Philip J. Margiotta*, in part regarding awareness. Steven Finberg was aware that Fresh America Corp. was not timely paying its produce sellers ("suppliers"); *Philip J. Margiotta* was unaware that M. Trombetta & Sons, Inc., through an employee, was paying unlawful bribes and gratuities. Nevertheless, I cite *Philip J. Margiotta* to show that being a highly responsible, highly placed corporate officer does not automatically make one "***actively involved***."

82. **Was Steven Finberg "*Only a Nominal*" Officer?** (paragraphs 82 through 85): During produce buyer Fresh America Corp.'s PACA violations, that is, from February 2002 through February 2003, Steven Finberg was Vice President of Sales and Marketing OR Executive Vice President of Business Development (*see* footnote 2). There was nothing "nominal" about Steven Finberg's responsibilities. There is no question

whether he had "an actual, significant nexus with the violating corporation" - - clearly, he did. He was a valuable member of the team that tried to keep Fresh America Corp. in business (*see* paragraphs 8 through 11). Steven Finberg cannot prove the second prong of the two-prong exception; he cannot demonstrate that he was only nominally an officer of a corporation. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

83.I would prefer that Steven Finberg not be subjected to licensing restrictions under the PACA and employment restrictions under the PACA. I agree with Mr. Spicknall, though, that the PACA Act and regulations are "tough" for good reason (AMS's initial Brief at 10):

> The PACA "is admittedly and intentionally a 'tough' law," that was "designed primarily for the protection of the producers of perishable agricultural products -- most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing. . . ." *See* S. Rep. No. 2507, 84th Cong., 2d Sess. at 3 (1956). Any person who is or has been responsibly connected with a business entity that has been found to have committed any flagrant or repeated violations of Section 2 of the PACA may not be employed by any PACA licensee for at least one year. *See* 7 U.S.C. § 499h(b).[10] After one year, if the prospective employer furnishes and maintains a surety bond in an amount set by the Secretary, the responsibly connected person may be employed by a PACA licensee. *See id*.[11] The Secretary

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[10] The Secretary's power to refuse to issue a PACA license to individuals responsible for PACA violations was initially limited to situations in which the applicant or one closely connected with the applicant was responsible for any violation that had led to the prior revocation of a PACA license. *See* H.R. Rep. No. 1041, 71st Cong., 2d Sess. at 3-4. Over time, the PACA was amended to increase the Secretary's power in order to prevent individuals who were responsible for violations of the PACA from evading the statute's penalties. *See* H.R. Rep. No. 489, 73rd Cong., 2d Sess. at 2-3 (1934); H.R. Rep. No. 2116, 70th Cong., 2d Sess. at 1-2 (1936); S. Rep. No. 2233, 70th Cong., 2d Sess. at 1-2 (1936); S. Rep. No. 956, 75th Cong., 1st Sess. at 1-3 (1937); S. Rep. No. 2507, 84th Cong., 2d Sess. at 3 (1956).

[11] "Employment" is defined by the PACA as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." *See* 7 U.S.C. § 499a(b)(10).

may approve employment of the responsibly connected person without a bond after two years. *See id*.

AMS's initial Brief at 10.

84. The PACA, by "casting a wide net," deters people in responsible positions from allowing produce sellers to go unpaid - - nay, from allowing produce sellers even to wait for the prompt payments to which they are entitled. These people in responsible positions include all partners, officers, directors, and holders of more than 10 percent of the outstanding stock of a corporation.

85. By being the Vice President of Sales and Marketing OR Executive Vice President of Business Development of Fresh America Corp., who was **NOT** "***only a nominal***" officer, Steven Finberg was **responsibly connected** with Fresh America Corp. as defined by 7 U.S.C. § 499a(b)(9), when Fresh America Corp. violated the PACA.

86. **Was Fresh America Corp. the "*Alter Ego of Its Owners*"?** (paragraphs 86 through 87). Steven Finberg was an owner of Fresh America Corp., but the parties stipulated that he owned less than 10% per cent of the outstanding common stock; in fact, Steven Finberg owned far less than 5% of the outstanding common stock. Steven Finberg also had stock options that he did not exercise, which, during the time he held them, were or became worthless. Nevertheless, for the "**alter ego**" analysis, Steven Finberg was an owner.

87. The remainder of the "**alter ego**" analysis with regard to Steven Finberg is identical to that for Cheryl Taylor, and I incorporate paragraphs 59 through 68, applying them to Steven Finberg rather than Cheryl Taylor.

Findings of Fact and Conclusions

88. Paragraphs 88 through 108 contain intertwined Findings of Fact and Conclusions.

89. The Secretary of Agriculture has jurisdiction over Cheryl A. Taylor, over Steven C. Finberg, also known as Steve C. Finberg, and over the subject matter involved herein.

90. Fresh America Corp., a Texas corporation, "ceased operations January 22, 2003," according to the PACA License Renewal Application form marked "NOT RENEWING," received by AMS December 2, 2003. JRX 41.

91. During February 2002 through February 2003, Fresh America Corp. failed to make full payment promptly in the amount of $1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that it received and accepted in interstate and

foreign commerce, in willful, repeated and flagrant violation of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). *See* Default Decision and Order issued on January 19, 2007 against Fresh America Corp. by U.S. Administrative Law Judge Peter M. Davenport. *In re Fresh America Corp.*, 66 Agric. Dec. 953, 959 (2007).

92. Fresh America Corp. was not the alter ego of Arthur Hollingsworth. Paragraphs 58 through 68.

93. Fresh America Corp. was not the alter ego of North Texas Opportunity Fund LP. Paragraphs 58 through 68.

94. An officer need not control a company to be found ***responsibly connected***.

95. During Fresh America Corp.'s failure to pay produce sellers (as specified in paragraph 91), Cheryl Taylor was an officer of Fresh America Corp., to-wit: Executive Vice President, Chief Financial Officer, and Secretary of Fresh America Corp. TRX 4.

96. During Fresh America Corp.'s failure to pay produce sellers (as specified in paragraph 91), Steven Finberg was an officer of Fresh America Corp., to-wit: Vice President of Sales and Marketing OR Executive Vice President of Business Development (*see* footnote 2).

97. Cheryl Taylor was not a director of Fresh America Corp.

98. Steven Finberg was not a director of Fresh America Corp.

99. Cheryl Taylor did not own Fresh America Corp. stock. [Cheryl Taylor had stock options, never exercised.]

100. Steven Finberg owned Fresh America Corp. stock, but the parties stipulated that he owned less than 10% per cent of the outstanding common stock (Tr. 851-52); in fact, Steven Finberg owned far less than 5% of the outstanding common stock (TRX 31 at 33-34). Steven Finberg also had stock options that he never exercised.

101. The burden is on each Petitioner to demonstrate by a preponderance of the evidence that he or she was not responsibly connected with Fresh America Corp., despite being an officer of Fresh America Corp.

102. Cheryl Taylor failed to prove that, while she was an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer, and Secretary), **she was not *actively involved*** in Fresh America Corp.'s activities that resulted in Fresh America Corp.'s PACA violations. Paragraphs 43 through 51.

103. Steven Finberg carried his burden of proof and proved that, while he was an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development), **he was not *actively involved*** in Fresh America Corp.'s activities that

resulted in Fresh America Corp.'s PACA violations. Paragraphs 79 through 81.

104. In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

105. Cheryl Taylor failed to prove that, while she was an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer and Secretary), **she was *only a nominal*** officer of Fresh America Corp. Paragraphs 52 through 57.

106. Steven Finberg failed to prove that, while he was an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development), **he was *only a nominal*** officer of Fresh America Corp. Paragraphs 82 through 85.

107. Cheryl Taylor was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9), during February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)). Paragraphs 43 through 57.

108. Steven Finberg was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9)), during February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)). Paragraphs 79 through 85.

Order

109. This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated June 23, 2006, that Cheryl A. Taylor

was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during Fresh America Corp.'s PACA[12] violations.

110. Accordingly, Cheryl A. Taylor 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 35 days after service of this Order on Cheryl A. Taylor.

111. This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated August 11, 2006, that Steven C. Finberg, also known as Steve C. Finberg, was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during Fresh America Corp.'s PACA[13] violations.

112. Accordingly, Steven C. Finberg, also known as Steve C. Finberg, 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 35 days after service of this Order on Steven C. Finberg.

113. This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

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[12] when Fresh America Corp. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during February 2002 through February 2003.

[13] when Fresh America Corp. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during February 2002 through February 2003.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the

Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: PERFECTLY FRESH FARMS, INC.
PACA Docket No. D-05-0001
In re: PERFECTLY FRESH CONSOLIDATION, INC.
PACA Docket No. D-05-0002 and
In re: PERFECTLY FRESH SPECIALTIES, INC.
PACA Docket No. D-05-0003
In re: JAIME O. ROVELO
In re: JEFFREY LON DUNCAN
In re: THOMAS BENNETT
PACA-APP Docket No. 05-0010
PACA-APP Docket No. 05-0011
PACA-APP Docket No. 05-0012
PACA-APP Docket No. 05-0013
PACA-APP Docket No. 05-0014
PACA-APP Docket No. 05-0015
Decision and Order as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialities, Inc.; Jeffrey Lon Duncan; and Thomas Bennett.
Filed June 12, 2009.

PACA – Responsibly connected – Willful, flagrant and repeated violations – Failure to pay full payment promptly – Facts and circumstances published – Licensing restrictions – Employment restrictions – Right to judicial review – Preponderance of the evidence – Nominal – Alter ego.

Christopher Young-Morales, for the Associate Deputy Administrator, AMS.
Jonathan Barry Sexton, Orange, CA, for Petitioner Thomas Bennett.
Christopher F. Bryan, Los Angeles, CA, for Respondents Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; and Petitioner Jeffrey Lon Duncan.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

This proceeding originated as three disciplinary proceedings along with six responsibly connected proceedings, all brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [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]. Because the companies were inter-related, the proceedings were consolidated for hearing. On October 28, 2008, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] issued a consolidated decision in which he found that Perfectly Fresh Consolidation, Inc. [hereinafter Consolidation]; Perfectly Fresh Farms, Inc. [hereinafter Farms]; and Perfectly Fresh Specialties, Inc. [hereinafter Specialties], each committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers for produce purchased in interstate and foreign commerce. The Chief ALJ further found: (1) Jaime Rovelo was responsibly connected with Consolidation, Farms, and Specialties; (2) Jeffrey Lon Duncan was responsibly connected with Consolidation, but was not responsibly connected with Specialties; and (3) Thomas Bennett was responsibly connected with Farms.

On January 8, 2009, Consolidation, Farms, Specialties, and Jeffrey Lon Duncan appealed the Chief ALJ's decision. On January 9, 2009, Thomas Bennett appealed the Chief ALJ's decision that he was responsibly connected with Farms when it committed willful, flagrant, and repeated violations of the PACA.[1] I have reviewed the record, filings, and arguments in this case. I have read the Chief ALJ's

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[1] Counsel for Mr. Bennett also appealed the Chief ALJ's findings regarding Farms. However, Farms was not represented by Mr. Bennett's counsel; therefore, the arguments raised by Mr. Bennett's counsel could be struck from the record. However, in an effort to ensure Mr. Bennett receives fair treatment, I reviewed his arguments regarding Farms. The arguments have no merit.

decision. I find the Chief ALJ's decision to be well-reasoned and complete. Therefore, I adopt with minor changes the Chief ALJ's decision as my own.

On October 1, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], filed separate disciplinary Complaints against Consolidation, Farms, and Specialties. Each separate Complaint alleged that one of the respondent companies, Consolidation, Farms, and Specialties, had committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly to sellers of perishable agricultural commodities. Consolidation, Farms, and Specialties each had received a PACA license which had expired subsequent to the date of the alleged violations. Consolidation, Farms, and Specialties had each filed a voluntary bankruptcy petition after the date of the alleged violations and before the filing of the Complaints in the instant consolidated proceeding.

In particular, the three separate Complaints alleged that Consolidation, during the period November 17, 2002, through February 15, 2003, failed to make full payment promptly of the agreed purchase prices 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 promptly of the agreed purchase prices 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 promptly of the agreed purchase prices 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 Consolidation, Farms, and Specialties on May 22, 2006.[2] Each company answered on June 8, 2006, denying the alleged violations.

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[2] Administrative Law Judge Peter M. Davenport granted AMS' motions for default decisions with respect to Consolidation and Specialties on March 31, 2005, and subsequently vacated his decision in 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, Consolidation, Farms, and Specialties were served/re-served with their respective Complaints.

Meanwhile, on June 1, 2005, Bruce W. Summers, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the PACA Branch Chief], issued six letters informing three individuals that he found that each individual was responsibly connected with one or more of the three respondent companies at the time the alleged violations, which are the subject of the disciplinary Complaints, were committed. The PACA Branch Chief found Jaime O. Rovelo to have been responsibly connected with Consolidation, Farms, and Specialties; found Thomas Bennett to have been responsibly connected with Farms; and found Jeffrey Lon Duncan to have been responsibly connected with Consolidation and Specialties. Mr. Rovelo, Mr. Bennett, and Mr. Duncan each filed a Petition for Review of the PACA Branch Chief's responsibly connected determinations. The three disciplinary proceedings and the six responsibly connected proceedings were consolidated for hearing pursuant to section 1.137 of the Rules of Practice (7 C.F.R. § 1.137). Following the deployment of Administrative Law Judge Peter M. Davenport to Iraq, the Chief ALJ re-assigned the matter to himself.

The Chief ALJ conducted a hearing in these consolidated proceedings in Los Angeles, California, on September 24-27, 2007. Christopher Young-Morales and Tonya Keusseyan represented AMS and the PACA Branch Chief. Christopher S. Bryan represented Consolidation, Farms, and Specialties in the disciplinary proceedings and Mr. Duncan in his responsibly connected proceeding. Douglas B. Kerr represented Mr. Bennett in his responsibly connected proceeding.[3] Jaime O. Rovelo did not respond to any motions or orders after filing his Petition for Review and did not appear at the hearing.

Eight witnesses, including Mr. Duncan and Mr. Bennett, testified at the hearing. Over 120 exhibits, as well as the six "official agency records" in the responsibly connected proceedings, 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 PACA governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, the PACA defines, and provides a sanction for, "unfair conduct"

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[3] Subsequent to the hearing, Jonathan Barry Sexton entered his appearance on behalf of Mr. Bennett. Mr. Sexton replaced Mr. Kerr. Mr. Sexton is Mr. Bennett's counsel on appeal.

in transactions involving perishables agricultural commodities. Section 2(4) of the PACA provides:

> **§ 499b. Unfair conduct**
>
> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499b(4).

When the Secretary of Agriculture determines that a "commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title":

> **§ 499h. Grounds for suspension or revocation of license**
>
> **(a) Authority of Secretary**
>
> . . . 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.

7 U.S.C. § 499h(a).

The Regulations define "full payment promptly":

§ 46.2 Definitions.

. . . .

(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(aa)(5), (11).

The PACA also imposes on every PACA 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 PACA also imposes severe sanctions against any person "responsibly connected" with an establishment that has had its PACA license revoked or suspended or has been found to have committed flagrant or repeated violations of section 2 of the PACA. (7 U.S.C. § 499h(b).) The PACA prohibits any PACA licensee from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as 2 two years, and then only upon approval of the Secretary. (*Id.*)

Section 1(a) of the PACA defines the term "responsibly connected," as follows:

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

BACKGROUND

A. The Investigation

Upon receiving notification that four related companies, Consolidation, Farms, Specialties, 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 many of the assets of the companies had been purchased by another company, Hidden Villa Ranches. In late April 2003, Ms. Kondora spoke to Phil Brundt, the chief financial officer of Hidden Villa Ranches, and he informed her that Hidden Villa Ranches was in possession of all documents of the four companies. (Tr. 33-35, 163.) Ms. Kondora faxed him a Notice of Investigation (CX-5) and, in early May 2003, traveled to Los Angeles to meet with Mr. Brundt. He directed her to 50 boxes of records (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 alleged violating companies.

Gary Tice indicated to Ms. Kondora that the companies owed a total of about $1.2 or $1.3 million in produce debt. (Tr. 46-48.)

Ms. Kondora 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.[4] Ms. Kondora prepared a "no-pay" table for each of the three respondent companies.[5] According to her tables, Consolidation owed 24 produce sellers a total of $373,944.19 for 286 lots of perishable agricultural commodities (CX-02-7[6]); Farms owed 14 produce sellers a total of $442,023.12 for 142 lots of perishable agricultural commodities (CX-01-7); and Specialties owed 28 produce sellers a total of $263,801.40 for 796 lots of perishable agricultural commodities (CX-03-7). Ms. Kondora also compared her lists to Schedule F of the consolidated voluntary bankruptcy filing made on behalf of Consolidation, Farms, and Specialties and found the amounts in the Schedule F were generally equal to or greater than the amounts included in her list with respect to those produce sellers. (Tr. 131-33.)

Ms. Kondora also secured written sworn statements from a number of the produce sellers indicating that the transactions she cited were in interstate or foreign commerce (Tr. 189-95). She verified with these produce sellers that the amounts listed in the vouchers were still unpaid before she prepared her no-pay list (Tr. 186-87). She also indicated that these produce sellers generally believed they were dealing with an entity they called "Perfectly Fresh" and did not realize the existence of the individual corporate entities (Tr. 184-86). Ms. Kondora also testified that Consolidation, Farms, and Specialties each 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, Consolidation, Farms, and Specialties still owed significant amounts to the produce sellers listed in the Complaints and that approximately 52 percent of the valid PACA Trust Claims recognized by the bankruptcy court remained unpaid.

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[4] The large majority of AMS' and the PACA Branch Chief's exhibits consists of these paired invoices and vouchers.

[5] There were no apparent unpaid invoices under the name of Perfectly Fresh Marketing, Inc., or Perfectly Fresh Florals, LLC.

[6] CX indicates that the exhibit was offered by AMS and the PACA Branch Chief, the two digit number beginning with "0" represents the last two digits of the case docket number, and last number is the exhibit number.

B. 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, Inc., with Jeffrey Lon Duncan, who had been in the produce business for about 15 years. Mr. Tice had expertise in managing and owning businesses and had more recently helped other companies for which he worked with strategic planning and with modernizing their business techniques. (Tr. 295-300.) In 2000-2001, Mr. Tice worked as a consultant for Fresh Point, where he met Mr. Duncan, whose principal job involved servicing the produce needs of cruise lines (Tr. 300-01). They worked together on special projects involving inventory and purchasing. While Mr. Tice had been a manager for many years, Mr. Duncan did not, in Mr. Tice's opinion, perform managerial duties. However, Mr. Tice thought Mr. Duncan's managerial skills were "quite adequate." (Tr. 305-07.) Mr. Tice wanted Mr. Duncan as a partner to take advantage of his sales skills with cruise lines, while Mr. Tice was working on developing a relationship supplying tomatoes to Taco Bell (Tr. 307-09). Perfectly Fresh Marketing, Inc.'s PACA license indicated that 51 percent was owned by Tice, Inc., which was a company developed by Mr. Tice and his wife, Erin Tice, and that 49 percent was owned by Mr. Duncan. Mr. Tice testified that he managed the day-to-day accounts payable and receivable with Mr. Duncan. (Tr. 309.)

In July 2002, the operating agreement of Perfectly Fresh Marketing, Inc., 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 percent equity share in Perfectly Fresh Marketing, Inc., while Tice, Inc., now owned 30 percent and Mr. Duncan now owned 20 percent.[7] 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. 317-20, 330.) John Norton was granted preferred member status, in that his capital investment would be returned to him before capital was returned to the other investors (RX 13 at 5, ¶ 3.4; Tr. 328). Gary Tice testified that the plan to establish the three operating companies was devised by himself, Mr. Duncan, and Mr. Tice's attorney (Tr. 325).

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[7] However, documents filed with the four companies' bankruptcy documents indicated that Mr. Duncan owned 49 percent of Perfectly Fresh Marketing, Inc.

Specialties was formed on July 18, 2002, and received PACA license 021539 (CX-03-1, 3). That PACA license indicates that Perfectly Fresh Marketing, Inc., owned 90 percent of Specialties. The PACA license does not account for the remaining 10 percent ownership. Mr. Duncan is listed as the chief financial officer and a director, Gary Tice is listed as secretary and a director, and Erin Tice is listed as president and a director. Specialties was formed to sell produce directly to supermarkets. (Tr. 336-38.)

Consolidation was the second company formed on July 18, 2002, and received PACA license 021540 (CX-02-1, 3). The PACA license indicates that: Mr. Duncan owned 10 percent of the stock in Consolidation and was president and a director; Perfectly Fresh Marketing, Inc., owned 90 percent 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 Mr. Duncan's forte.

Farms was the third company formed on July 18, 2002, and received PACA license 021541 (CX-01-1, 3). That PACA license indicates that Perfectly Fresh Marketing, Inc., owned 90 percent of Farms and that Thomas Bennett owned the remaining 10 percent. Mr. Bennett was the president and a director of Farms. Gary Tice was listed as secretary and a director, and Erin Tice was listed as chief financial officer and a director. Farms was particularly involved in establishing grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride. (Tr. 615.)

The four companies were to be run as one entity, with Perfectly Fresh Marketing, Inc., essentially managing the overall operations, and Consolidation, Farms, and Specialties handling sales, each in its own sphere of specialization (Tr. 320-22). Mr. Tice indicated that the management of Perfectly Fresh Marketing, Inc., was generally under his control, although Mr. Norton had some control (Tr. 413-14). Mr. Tice, Mr. Bennett, and Mr. Duncan all considered that the three new companies were sales entities, with Perfectly Fresh Marketing, Inc., handling all the operations including the purchasing; Perfectly Fresh Marketing, Inc., would buy all the produce and transfer it to the appropriate company; Perfectly Fresh Marketing, Inc., leased all the warehouse space; and Perfectly Fresh Marketing, Inc., handled the receiving when produce arrived at the warehouse (Tr. 354-58). 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 Mr. Rovelo with

input from Mr. Tice. Generally, checks from customers went first into the individual company's bank accounts, but were then transferred into Perfectly Fresh Marketing, Inc.'s account to keep the other accounts at a virtual zero balance. (Tr. 366-69.) According to Mr. Tice, all the purchasing was done by Perfectly Fresh Marketing, Inc., even though the accounts payable documents examined by Ms. Kondora 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 those accounts payable documents, in terms of which company purchased which lot of produce (Tr. 354).

Shortly after Consolidation, Farms, and Specialties were formed, Mr. Norton placed Jaime O. Rovelo as the head of the accounting department and chief financial officer for all four entities (Tr. 372-77). Although the PACA licenses indicate otherwise, Mr. Tice testified there was no chief financial officer before Mr. Rovelo. Mr. Rovelo wrote all the checks for the companies on a day-to-day basis, and Mr. Rovelo reported to Mr. Tice, not to Mr. Duncan or Mr. Bennett. (*Id.*) Until the businesses began to collapse in December 2002, Mr. Rovelo made the decisions on who to pay; subsequent to that date, Mr. Tice made those decisions.

John Norton, the principal financial resource supporting the expansion of the companies, was seeking to compete against Ready Pac, a large supplier of produce to chain stores. Mr. Norton apparently had some issues with Ready Pac and its chief executive officer, and competing with Ready Pac was a significant aspect of his motivation for investing in Perfectly Fresh. (Tr. 317-20, 330.) Further, Erin Tice, the spouse of Gary Tice, was an officer with Ready Pac and joined Specialties (and became a co-owner of all four companies as a result of her co-ownership of Perfectly Fresh Marketing, Inc., with her husband) with the idea of using her personal relationships with Ready Pac clients to bring those customers over to Specialties (Tr. 336-38). When Ms. Tice joined Specialties, Ready Pac became concerned that the employees she had managed at Ready Pac would move with her and Ready Pac attempted to get those employees to sign contracts. Specialties hired 15 or 16 Ready Pac employees, even though Specialties had planned to hire employees at a much slower rate as the business expanded. (Tr. 336-38.)

At around the same time, the entire warehouse where Perfectly Fresh Marketing, Inc., had rented a small amount of space became available, and Perfectly Fresh Marketing, Inc., took that over. Much of the money

Mr. Norton invested was devoted to improving the warehouse. (Tr. 331-33.)

C. 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 Mr. Norton and the Tices for tampering with its employees. According to Mr. Tice, the chief executive officer of Ready Pac was seeking to bankrupt Perfectly Fresh. (Tr. 343.) During the litigation, which was settled in November 2002, Mr. Norton decided he wanted to be treated as a lender, rather than as an owner/shareholder (Tr. 343-45).

With funding from Mr. Norton stopped as of November 2002, Mr. 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 2002, with Consolidation doing particularly well. (Tr. 349-50.) However, in December 2002, with no new funding, and Farms having significant problems due to issues with Hawaiian Pride, it became difficult to pay debts. (*Id.*) Mr. Tice testified that, at first, Mr. Rovelo made the decisions as to which produce sellers should be paid, but that sometime in December 2002, Mr. Tice made all those decisions on his own (Tr. 380-81). He further testified that Mr. Bennett and Mr. Duncan had no role in deciding who would be paid. (*Id.*)

With no funding immediately at hand, Mr. 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.[8] The same day (February 3, 2003), the four companies moved that their separate bankruptcy petitions be consolidated for "joint administration." (RX 4.) The record contains no evidence that Mr. Bennett or Mr. Duncan participated in any aspect of the bankruptcy filings, and most of the bankruptcy documents were signed either by Gary Tice or by Jaime Rovelo.

As part of the bankruptcy filing, Consolidation, Farms, and Specialties each filed a "Schedule F, Creditors Holding Unsecured Nonpriority Claims." These schedules included both produce and non-produce payables. Every one of the unpaid produce sellers listed in the three disciplinary Complaints is listed in the corresponding Schedule F,

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[8] Shortly before filing for bankruptcy, Perfectly Fresh Marketing, Inc., transferred its operations to Perfectly Fresh Florals, LLC, based on advice from counsel (Tr. 352-54).

owing an amount equal to or greater than that alleged in the disciplinary Complaints to be unpaid.

In filing for bankruptcy, Mr. Tice indicated that he thought all the produce sellers would be paid from the proceeds of the bankruptcy auction, but the attorneys representing the produce sellers negotiated for a 60 percent cash payment of the amounts owed (Tr. 405-09). Mr. Tice also stated, in a letter to Ms. Kondora (RX 1 at 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.

D. The Petitioners in the Responsibly Connected Proceedings

1. Jaime Rovelo—After filing his three petitions to review the determinations of the PACA Branch Chief that he was responsibly connected with Consolidation, Farms, and Specialties, Mr. 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, Mr. Rovelo apparently relocated without notifying the Hearing Clerk and without leaving a forwarding address. He did not participate further in the proceedings. Because the petitioner carries the burden of proof in a responsibly connected proceeding and because no evidence was presented that would indicate that Mr. Rovelo was not responsibly connected with Consolidation, Farms, and Specialties, I must find that Mr. Rovelo was responsibly connected with the three companies. In any event, the evidence demonstrated clearly that Mr. Rovelo was: the chief financial officer of each of the three respondent companies in the disciplinary proceedings; the individual who established and administered the accounting system and signed the great majority of checks; a participant in many of the decisions as to whom to pay; and the signatory of many of the bankruptcy related documents (Tr. 372-81).

2. Jeffrey Lon Duncan—Mr. Duncan is a high school graduate who has been working in the produce industry since 1986 (Tr. 703-06). He held 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. 708-10). Mr. Duncan testified that he had no managerial responsibilities before he joined Mr. Tice (Tr. 706). He was a participant in Perfectly Fresh Marketing, Inc., when it was first organized, and was an officer, a director, and 49 percent shareholder in Perfectly Fresh Marketing, Inc. After the operating agreement was amended in July 2002, Mr. Duncan's ownership share in Perfectly Fresh Marketing, Inc., was reduced to 20 percent. He testified that, even though he was listed as supplying capital for several companies, he did not actually invest any money. (Tr. 898.) Mr. Duncan indicated his work at Perfectly Fresh, both when it was only Perfectly Fresh Marketing, Inc., and then later when he was in charge of Consolidation, was the same work that he had been doing earlier—selling to cruise lines (Tr. 850-51).

Mr. Duncan indicated he had many discussions with Mr. Tice before they decided to join forces and form their own company and he was impressed with Mr. Tice's vast knowledge of, and success in, the produce industry (Tr. 715). Mr. Duncan stated he was not involved in filing for the PACA licenses, either for Perfectly Fresh Marketing, Inc., or Consolidation, and 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 Mr. Tice. (Tr. 833-40.)

Mr. Duncan did not have any role in bringing Mr. Norton into the business, although the modified business plan, including the decision to establish Consolidation, Farms, and Specialties was discussed with him (Tr. 833-34). Mr. Duncan understood that Mr. Norton was going to invest substantial funds in the companies and become a partner Perfectly Fresh Marketing, Inc. (*Id.*) Mr. Duncan did not recall being involved in any discussions concerning the Amended Operating Agreement that he signed in July 2002, stating 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. 853-54). When Ready Pac filed suit, neither Mr. Duncan nor Mr. Bennett was a party to the litigation (Tr. 856-57).

Mr. Duncan 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 Mr. Duncan's end of the business was profitable and Consolidation's profits were used in effect to subsidize the other companies. (Tr. 899-900.) Mr. Duncan 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 available to sign the check (Tr. 951).

Mr. Duncan first became aware that his suppliers were not 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 Mr. Rovelo and tell Mr. Rovelo to take care of it. Mr. Rovelo told Mr. Duncan that produce sellers were not paid due to lack of money caused by overhead and that Gary Tice told him that he was trying to obtain additional investors and reassured him that he would find the investors. (Tr. 890-92.) Mr. Duncan had no role with respect to the decision to file for bankruptcy or the actual filing of bankruptcy papers.

3. Thomas Bennett—Mr. 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. 1085-86.) When Mr. Bennett was running Francisco Distributing as general manager, Mr. Tice, on behalf of Perfectly Fresh Marketing, Inc., was renting office space from Francisco Distributing (Tr. 1037-39). When Fresh America, the company that owned Francisco Distributing, decided to close down the Los Angeles division, and Mr. Bennett was told to shut down the company, he told Mr. Tice that the building was going to be available, and Mr. Tice successfully negotiated with the landlord for lease of the warehouse space (Tr. 1037-38). After that, Mr. Tice offered Mr. Bennett the position as president of Farms, along with a 10 percent ownership interest in the company (Tr. 1039). Mr. Bennett did not pay anything for the shares and stated he was involved in sales and 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).

Mr. Bennett said he considered the Tices to be his immediate supervisors (Tr. 1042). When Farms was being formed, Mr. Bennett 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 he had never signed a check on behalf of Farms (Tr. 1045).[9] When Mr. Bennett 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. He spent most of his time working with the rental clients. (Tr. 1041-42.)

Mr. Bennett stated he did not recall having any involvement in obtaining the PACA license for Farms, did not know of Mr. Norton's involvement until a few months after he began working for Farms, and

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[9] However, he did in fact sign a card authorizing him to write checks (Bennett RX 23).

did not understand how the accounting system worked or how the vouchers and invoices were coordinated (Tr. 1048-49). Mr. Bennett began hearing about slow payment issues from his salesmen in December 2002. When Mr. Bennett asked Mr. Tice or Mr. Rovelo about the slow payment of produce sellers, he was told not to worry and the receivables would catch up. (Tr. 1049-50.) Mr. Bennett thought he could probably have found out more about the financial condition of Farms 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).

When it became evident to Mr. Bennett that the business was not doing well, he sensed that it was time to leave (Tr. 1055). Mr. Bennett suggested to Mr. Tice in early January 2003, that it was time for him (Bennett) to resign (Tr. 1056-57). He stated he resigned orally but that he subsequently wrote a letter to Mr. Tice's attorney asking that his name be removed from all corporate documents (Tr. 1058).[10] He stated that he was concerned for his reputation and did not want to be part of a sinking ship (Tr. 1056-57).

DISCUSSION

A. Consolidation, Farms, and Specialties Violated the PACA

With respect to the disciplinary counts, AMS and the PACA Branch Chief introduced numerous documents which Ms. Kondora 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 Complaints. Further, AMS and the PACA Branch Chief introduced bankruptcy schedules, prepared by Consolidation, Farms, and Specialties, which confirmed that these (and other) debts existed at the time they filed for bankruptcy. In each of their answers, the respondent companies admitted they filed the bankruptcy schedules referred to in the Complaints, but also denied each and every allegation that they had failed to make full payment promptly to the sellers of the produce. Consolidation, Farms, and Specialties contend the allocation of debts among the companies was essentially an artifice and that all the debts were actually incurred by Perfectly Fresh Marketing, Inc., which is not a party to the instant consolidated proceeding. For the reasons discussed in this Decision and Order, *infra*, I reject the contention that the debts were not incurred by each of the respondent companies and find Consolidation, Farms, and Specialties

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[10] However, Mr. Bennett testified he did not have a copy of that letter.

each violated the PACA by failing to make full payment promptly for produce as listed in the three Complaints.

1. Consolidation's, Farms', and Specialties' own records clearly establish the unpaid debts. Each of the three respondent companies had clearly marked accounts payable files containing linked invoices and vouchers establishing the purchase 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. Consolidation, Farms, and Specialties are in the peculiar position of denying the validity of their own records.

Gary Tice, who was clearly the single person most responsible for establishing and operating the three respondent companies, admitted in a May 16, 2003, letter to Ms. Kondora that from September 1, 2002, when the operations of the three companies started, Perfectly Fresh Marketing, Inc., did none of the actual buying and selling of produce (RX 1). This letter is inconsistent with Mr. Tice's attempts at the hearing to explain away this statement and his contention that Perfectly Fresh Marketing, Inc., did all the buying and the other operations did all the selling. No explanation for this inconsistency was offered other than Mr. Tice's statement that in reality Perfectly Fresh Marketing, Inc., "incurred all debts." Since this statement is inconsistent with Mr. Tice's letter and the documentary evidence gathered by Ms. Kondora, it is not entitled to much credibility. Indeed, the written statement, prepared a month after Mr. Tice met with Ms. Kondora, is more consistent with the large majority of evidence received at the hearing.

The testimony of both Mr. Bennett and Mr. Duncan also supports the contention that the entities they ran were not making full payments promptly. Mr. Bennett testified he was made aware by his salesman in early December 2002 that some of Farms' vendors were not getting paid on time; he inquired of Mr. Tice, and sometimes Mr. Rovelo, and was told not to worry because receivables would catch up with payables. (Tr. 1049-50.) Similarly, Mr. Duncan began receiving calls from the produce sellers complaining about slow payments in December 2002 and January 2003. When Mr. Duncan received a payment complaint from a vendor, he would get the invoice, give it to Mr. Rovelo, and tell him to take care of it. (Tr. 890-92.)

One of the principal arguments made by counsel for Consolidation, Farms, Specialties, Mr. Duncan, and Mr. Bennett is that the law firm handling the bankruptcy advised Mr. Tice and Mr. Rovelo to associate

payables with receivables for each of the three entities (Tr. 402-03), 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.) Mr. 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 3 days later. If Consolidation, Farms, and Specialties are trying to imply that over that weekend an entire voucher system was created along with the more than 1,000 vouchers that were linked with the pre-existing invoices, they are unpersuasive. Mr. Tice's uncertain and 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 entities purchased the produce for which payment was not forthcoming.

Thus, the accounts payable documents of Consolidation, Farms, and Specialties establish 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 were signed under penalty of perjury. Consolidation's, Farms', and Specialties' arguments that the bankruptcy filings, particularly Schedule F, do not constitute admissions of the existence of the listed debts or that they indicate that Perfectly Fresh Marketing, Inc., and not the entity filing the Schedule F actually incurred the debt, are unconvincing and inconsistent with the documents. Moreover, these arguments are inconsistent with established United States Department of Agriculture precedent holding that documents filed in bankruptcy proceedings may constitute an admission of the filing party.

The creditors listed as holding unsecured claims in each of the Schedule F's are remarkably similar to the produce sellers listed in the accounts payable. Further, in each of their answers, Consolidation, Farms, and Specialties 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."[11] While this consolidated proceeding would appear to be open and shut,[12] Consolidation, Farms, and Specialties, in their answers, also denied the allegations that they failed to make full payment promptly. Although Consolidation, Farms, and Specialties contend otherwise, I find the admissions in the bankruptcy filings do constitute admissions that these debts for produce did exist at the time of the filings, and Consolidation's, Farms', and Specialties' 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 produce sellers holding claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings. *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993). Consolidation, Farms, and Specialties contend that these and other cases cited by AMS and the PACA Branch Chief are distinguishable because only a single entity was involved in the cited cases. They argue these cases do not apply when there are multiple entities involved and application of these cases to a situation where multiple entities have allocated their debt would be an unwarranted "dramatic extension of the law." (Respondents' and Petitioners' Reply Brief at 3-5.) However, I agree with AMS and the PACA Branch Chief that the cases actually do support a finding that, when a bankruptcy filer acknowledges the existence, under oath, of certain debts, then the bankruptcy filer has admitted that those debts exist and generally cannot deny them in subsequent proceedings.

Likewise, I reject the notion raised by Consolidation, Farms, Specialties, and Mr. Duncan in their reply brief (Respondents' and Petitioners' Reply Brief at 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 by the operation of the debtor's business pursuant to . . . [the PACA]" constitutes "clear" evidence that the produce sellers listed in each Schedule F were not produce sellers of the company that listed them as a creditor. Just because those who sold produce to the various entities

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[11] I quote 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.

[12] AMS and the PACA Branch Chief filed a Motion for Expedited Decision Without Hearing in the instant consolidated proceeding on this issue.

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 the companies' request for ease in administration in the bankruptcy court was obviously nothing more than a procedural matter; if the court considered the consolidation an indicator that the bankruptcy schedules filed by each company meant something other than what the Schedule F plainly indicated, such a finding by the bankruptcy court is not anywhere in the evidence submitted in this consolidated proceeding.

3. I also find considerable merit in the assertion, raised by AMS and the PACA Branch Chief, that Consolidation, Farms, and Specialties should be estopped from claiming that their own records, and particularly their own bankruptcy filings, have a meaning other than that indicated on the face of their records and bankruptcy filings. 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 that preserves 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 Consolidation's, Farms', and Specialties' position in the disciplinary proceedings—that all the debts were incurred by Perfectly Fresh Marketing, Inc.—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 (6th Cir. 1982). Here, if I find that all the debts were only owed by Perfectly

Fresh Marketing, Inc., and that Consolidation, Farms, and Specialties are debt free, I would be making a finding utterly inconsistent with the documents Consolidation, Farms, and Specialties filed with the bankruptcy court, 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 Consolidation, Farms, and Specialties in fact did not owe produce sellers, then they would not be liable for violations of the PACA, a position that would make it difficult for AMS and the PACA Branch Chief to ensure that they carry out their statutory mandate of policing the produce industry. Consolidation, Farms, and Specialties cannot be allowed to list one set of creditors in the bankruptcy court and totally repudiate that list in the instant consolidated proceeding. This inconsistency would undermine the integrity of the judicial process.

4. The violations were willful, flagrant, and repeated. Consolidation, Farms, and Specialties vigorously contend that, even if there were violations, they were not willful or flagrant. However, long-standing case law interpreting these terms makes 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 Scamcorp, Inc.*, 57 Agric. Dec. 527, 551-53 (1998); *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 713-14 (1994). The fact that each of the three respondent companies continued to order and receive, and not pay for, produce, putting numerous growers and sellers at risk, establishes they were clearly operating in disregard of the payment requirements of the PACA and committing willful violations. Principals of the companies involved, including Mr. Tice, Mr. Bennett, and Mr. Duncan, knew that payments were not being made in a timely fashion. Mr. Bennett and Mr. Duncan, in particular, did little more than inquire of Mr. Rovelo and Mr. Tice concerning the status of payments to their produce sellers and took no actions to correct the situation. Consolidation's, Farms', and Specialties' attempts to find new investors and concern about paying the produce sellers 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 PACA.

Likewise, the conduct of Consolidation, Farms, and Specialties was flagrant as that term is used in the PACA. In determining whether a violation is flagrant, I factor in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551 (1998). The number of violations (286 for Consolidation, 142 for Farms, and 796 for Specialties), the amount unpaid (over $373,000 for Consolidation, over $442,000 for Farms, 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. Consolidation, Farms, and Specialties attacked aspects of the investigation, both in terms of methodology and thoroughness. The PACA Branch investigation in this case followed the same general methodology employed in numerous other non-payment cases and has been approved in my 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. Consolidation, Farms, and Specialties contended in their reply brief that it was "amazing" for AMS to rely on Ms. Kondora's findings to establish that Consolidation, Farms, and Specialties had entered into the transactions that are the subject of these consolidated matters because Ms. Kondora had no first-hand knowledge of Consolidation's, Farms', and Specialties' operations. (Reply Brief at 8.) Of course, such first-hand knowledge would have been somewhat difficult to obtain, given that Consolidation, Farms, and Specialties had ceased doing business by the time the investigation was commenced.

Instead, Ms. Kondora 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 produce sellers who confirmed that the purchases were made in interstate commerce and were still unpaid, and prepared no-pay tables indicating which produce sellers were not paid by the respective entity and in what amount. That the produce sellers Ms. Kondora talked with did not necessarily know which Perfectly Fresh entity with which they were dealing, or that these produce sellers generally did not even know that there was more than one Perfectly Fresh entity, does not alter the fact that the produce sellers confirmed that the particular Perfectly Fresh entity with which they dealt

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 Ms. Kondora created. I find no basis for concluding that Ms. Kondora's investigation was inappropriate.

B. The Responsibly Connected Cases

1. Jaime Rovelo Was Responsibly Connected With Consolidation, Farms, and Specialties

Jaime Rovelo was notified by the PACA Branch Chief that he was found to be responsibly connected with Consolidation, Farms, and Specialties. In June 2005, Mr. Rovelo filed a petition challenging all three determinations. Subsequent to that filing, Mr. Rovelo had no further participation in these proceedings. Since the burden of proof is on the petitioner in a responsibly connected proceeding, and since Mr. Rovelo did not introduce any evidence that would refute the PACA Branch Chief's determinations, the Chief ALJ found that Mr. Rovelo was responsibly connected with Consolidation, Farms, and Specialties. Mr. Rovelo did not appeal the Chief ALJ's decision; therefore, the responsibly connected determinations regarding Mr. Rovelo are not before me.

2. Jeffrey Lon Duncan Was Responsibly Connected With Consolidation

Jeffrey Lon Duncan, who was president, a board member, and a 10 percent shareholder in Consolidation (he was also a 20 percent shareholder in Perfectly Fresh Marketing, Inc., which owned 90 percent of 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 the PACA and (2) was only nominally a director and officer of a violating PACA 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 percent owner of Perfectly Fresh Marketing, Inc., when that company was established and signed the Amended Operating Agreement that changed the organization of that company on July 28, 2002, and reduced his share of ownership to 20 percent, with the

addition of John Norton to the ownership team. When establishing Perfectly Fresh Marketing, Inc., Consolidation, Farms, and Specialties, Mr. Duncan relied heavily on the expertise and experience of Gary Tice. Both Mr. Duncan and Mr. Tice portrayed Mr. Duncan as somewhat naive in the area of founding and managing a business. Mr. Duncan testified he signed whatever documents Mr. Tice or the attorney told him to sign and all he really did with Consolidation was to continue the business he was most familiar with—servicing the needs of cruise lines. Mr. Duncan stated he might have perused the Amended Operating Agreement, but he believed Mr. Tice and his attorney would not take advantage of him (Tr. 846-49). Mr. Duncan was in his office most days and managed the cruise business.

Under the Amended Operating Agreement, Mr. Duncan was appointed president and a director, and was made 10 percent owner, of Consolidation. He testified he never made any capital investment in Consolidation; therefore, 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 Mr. Duncan, understood Mr. Duncan was taking care of his own cruise accounts and stated Mr. Duncan had his own strong customer base. Mr. Hinderer also speculated that his company stopped selling to Perfectly Fresh relatively early, but stated he thinks Produce International was paid in full because Mr. Duncan "took care of us." (Tr. 801.) He speculated that Mr. Duncan "exerted pressure somehow" to keep the payments coming. (Tr. 802.)

When Consolidation's produce sellers began complaining about slow payments in December 2002 or January 2003, Mr. Duncan would get the invoices and give them to Mr. Rovelo and tell him to take care of the customer (Tr. 890-92). Even though he knew Consolidation was not making payments promptly, he continued working on his sales (Tr. 893-94). Mr. Duncan indicated he did not decide which produce sellers should be paid, but he gave Mr. Rovelo individual invoices and asked him to take care of things. No evidence was introduced as to whether Mr. Rovelo did, in fact, pay the produce sellers that Mr. Duncan requested be paid.

I find Jeffrey Lon Duncan was actively involved in activities resulting in violations of the PACA. While he clearly was not a 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 produce sellers were not paid either fully or promptly, is sufficient to constitute active

involvement. In *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999), I 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 produce sellers are not getting paid pursuant to the requirements of the PACA has been held to constitute involvement in activities resulting in a violation of the PACA. *In re Janet S. Orloff* (Order Denying Pet. for Reconsideration), 62 Agric. Dec. 281, 290-92 (2003). That Mr. Duncan had employees working under his direction who continued to order 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 Mr. Duncan's participation in activities resulting in a violation of the PACA. Each of the unpaid obligations listed in Consolidation's own records and in its bankruptcy filing constituted a debt incurred when Mr. Duncan was managing the sales operations of Consolidation. In this position, Mr. Duncan inherently exercised "judgment, discretion, or control" as those terms are used in *Norinsberg*.

Even if Mr. Duncan were to be found not actively involved in the activities that resulted in violations of the PACA, he failed to meet his burden of proving that he was only a nominal president and director of Consolidation. Mr. Duncan, whose entire 15-year career (as of the time Perfectly Fresh Marketing, Inc., 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 Mr. Tice's judgment and expertise. Mr. Duncan was hardly a novice in the business, and although much has been made of Mr. Tice's dominance in decision-making matters, I find Mr. 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 his or her 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. U.S. Dep't of Agric.*, 711 F. 2d 406, 409 (D.C. Cir. 1983). However, Mr. Duncan was an experienced operator who entered into a business with Mr. Tice in order to earn more money when the business became profitable.

That Mr. Duncan 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 established to conduct. He had the authority to sign checks, although it is clear that with the exception of one check he signed shortly before the violative period, he did not handle the check-writing duties.

3. Jeffrey Lon Duncan Was Not Responsibly Connected With Specialties

Unlike with Consolidation, where Mr. Duncan ran the day-to-day operations of the cruise supply business, Mr. 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. Mr. Duncan had no direct ownership in Specialties and owned 18 percent of Specialties indirectly through his 20 percent ownership in Perfectly Fresh Marketing, Inc., which owned 90 percent 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 officer during the period when Specialties violated the PACA and that no board of directors meetings of Specialties ever occurred. The record contains no evidence that Mr. Duncan was even aware he was listed as a director or chief financial officer of Specialties. Other than his indirect 18 percent ownership of the company, Mr. Duncan appears to have no relationship with Specialties. Furthermore, I do not find, based on the facts before me, that indirect ownership meets the responsibly connected ownership requirement of the PACA, *i.e.*, "holder of more than 10 per centum of the outstanding stock of a corporation or association." (7 U.S.C. § 499a(b)(9).)

The record contains no evidence that Mr. 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 Mr. Duncan was unquestionably the expert and manager of the business and

where Mr. Duncan or those under his direction continued to order produce well after he knew produce suppliers were not being paid fully and promptly, Specialties presents a situation in which Mr. Duncan had no control over pertinent events. The employees at Specialties were employed by Erin Tice and had no connection with Mr. Duncan.

While Mr. Duncan did not oppose the creation of Specialties and was aware that many of Erin Tice's Ready Pac employees joined Specialties, he clearly had no power or authority over the situation given the fact that Gary Tice and Mr. Norton wielded the majority vote of Perfectly Fresh Marketing, Inc., and that he had no knowledge of, or planned role in, the business. Mr. Duncan was only an indirect shareholder in Specialties and he neither acted as nor was aware of his listed titles as chief financial officer and director of Specialties. The fact that Mr. Duncan had absolutely no discernible role in the operation of Specialties supports a finding that he was only a nominal director and officer of Specialties.

4. Thomas Bennett Was Responsibly Connected With Farms

Thomas Bennett, who was a 10 percent shareholder, president, and a director of 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 the PACA and (2) was only nominally a director and officer 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.

Mr. 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 Sysco, and then ran Francisco Distributing for 11 years. He had known Gary Tice on a professional level. Mr. Tice (actually Perfectly Fresh Marketing, Inc.) was leasing space from Francisco Distributing when Mr. Bennett was told that Francisco Distributing was closing down; Mr. Bennett told Mr. Tice that the whole building would be available. In addition to leasing the additional space, Mr. Tice offered positions to Mr. Bennett and some of the sales force that he had managed at Francisco Distributing. Mr. Bennett was offered the position of president of Farms, along with a 10 percent ownership share in the new company. He never actually invested 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 Mr. Tice and Mr. Tice's attorney told him to sign. Mr. Bennett 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. Mr. Bennett stated 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 managed the sales staff who worked for him and did contact the clients. When Mr. Bennett realized that Farms had excess storage space, he started an outside storage business on behalf of Farms and spent more time working on that enterprise than on Farms' produce business. (Tr. 1041-42.) Mr. Bennett stated he first heard about slow payments from his salesmen in December 2002, and he would inform Mr. Tice or Mr. Rovelo who told him not to worry. He testified he probably could have found out more about the financial condition of Farms and the other companies had he asked. (Tr. 1049-50.) David Hewitt, one of Farms' former employees, confirmed that Mr. Bennett hired him (Mr. Hewitt was one of the Francisco Distributing employees that Mr. Bennett brought to Farms), was his manager, and oversaw the operations of Farms. Mr. Hewitt stated that Mr. Bennett apparently reported to others. (Tr. 604-07, 612.)

I find Thomas Bennett was actively involved in the activities resulting in violations of the PACA. As the president of Farms, he managed 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 Mr. Duncan, Mr. Bennett allowed his employees to continue ordering produce even after he became aware that his produce sellers were getting paid slowly, if at all. This activity, in itself, constitutes active involvement.

Even if Mr. Bennett could be found not to be actively involved in activities resulting in violations of the PACA, he would only avoid responsibly connected status if his positions as president and director in Farms were nominal. I find his position as president was 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

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[13] He stated he resigned in early January 2003, but there is no evidence supporting a specific date.

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, Mr. 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, Mr. Duncan, Mr. Bennett was hardly the type of unknowledgeable, powerless individual the court was contemplating in the *Minotto* decision. In fact, Mr. Bennett alerted Mr. Tice that some office space in the building that Perfectly Fresh Marketing, Inc., was leasing was going to be vacated by Francisco Distributing, his then current employer. As a result of ensuing discussions with Mr. Tice, Mr. Bennett became the president of, and 10 percent shareholder in, Farms and found immediate employment for many of the people who worked for him at Francisco Distributing, who would otherwise be terminated when that operation ceased. Such was the extent of Mr. Bennett's participation in the operation of Farms that, on his own, he sub-let 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 Farms. In addition, as a 10 percent shareholder, Mr. Bennett was presumably in line to get a percentage of profits once Farms became profitable.

I am mindful that Mr. Bennett played a lesser overall role with respect to Farms than Mr. Duncan did with respect to both Consolidation and Perfectly Fresh Marketing, Inc., and that both Mr. Bennett and Mr. Duncan were rather gullible and trusting for individuals with their years of experience in the produce industry. However, neither Mr. Bennett nor Mr. Duncan was able to demonstrate that he was not actively involved in activities resulting in a violation of the PACA. And neither Mr. Bennett nor Mr. Duncan was able to demonstrate that his role as president was nominal.

ISSUES ON APPEAL

Consolidation, Farms, and Specialties argue on appeal that there is not substantial evidence to support the Chief ALJ's decision that they violated the PACA. The companies rely extensively on the testimony of Gary Tice to support their version of the case. The problem the companies have with this position is that the Chief ALJ found that Mr. Tice's testimony was contradictory, inconsistent, unsupportable and it lacked credibility. After reviewing Mr. Tice's testimony and the other evidence, I agree with the Chief ALJ.

Furthermore, Consolidation, Farms, and Specialties, on appeal, do nothing more than rehash their unsuccessful arguments made before the Chief ALJ. They provide no new reasoning, argument, or support for me to reverse the Chief ALJ's decision. As I note in this Decision and Order, *supra*, the Chief ALJ amply discussed the reasons why Consolidation, Farms, and Specialties violated the PACA. I include those discussions in this decision.

However, I do find important a discussion of the companies' position that Perfectly Fresh Marketing, Inc., made all purchases, and therefore, Perfectly Fresh Marketing, Inc., is the firm that failed to make payments in accordance with the PACA. This argument provides Consolidation, Farms, and Specialties little comfort. The business structure established for the Perfectly Fresh family of companies appears to be a scheme and device which attempts to insulate Consolidation, Farms, and Specialties and their officers and shareholders, from any liability for violations under the PACA. I find Perfectly Fresh Marketing, Inc., in essence, serves as the respondent companies' agent and the responsibility for payments under the PACA rests not only with Perfectly Fresh Marketing, Inc., but also flows through Perfectly Fresh Marketing, Inc., and rests with Consolidation, Farms, and Specialties. Therefore, I find the Chief ALJ correctly held that Consolidation, Farms, and Specialties committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of perishable agricultural commodities.

The Chief ALJ found that Mr. Duncan and Mr. Bennett were responsibly connected and I agree. Their arguments on appeal raise no issues that were not addressed by the Chief ALJ. As I state in this Decision and Order, *supra*, 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 was 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, 109 Stat. 424.) The amendment now gives an individual who is found to be responsibly connected, based on the

records at the agency, the opportunity to demonstrate that he is "not responsible" for the violation of the PACA. (H.R. Rep. No. 104-207, at 11, *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 [the PACA] and 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. U.S. Dep't of Agric.*, 162 F.3d 1194 (1998). The Court articulated the basic 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).)

Next, the Court indicated that, 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 the violation of the PACA and that the individual was a nominal officer, nominal director, or nominal shareholder of the violating company. In the alternative to proving that the individual nominally held the statutory role, 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 Mr. Duncan, he is responsibly connected and subject to the licensing and employment restrictions unless he demonstrates by a preponderance of the evidence:

1. that he was not actively involved in any of the activities resulting in the PACA violations; and

2. that he was either a nominal shareholder, nominal director, and nominal officer of Consolidation or that Consolidation was the alter ego of its other owners.[14]

Similarly, Mr. Bennett must satisfy the requirements of this test regarding his relationship with Farms if he is to avoid a responsibly connected determination.

The Chief ALJ's discussion of prong one, the actively involved test, is complete and needs no expansion. Mr. Duncan, Mr. Bennett, and other participants in responsibly connected proceedings fail to comprehend the critical component of being nominal – that the individual becomes the officer, director, or shareholder for the convenience and benefit of the company or the owners of the company, not because of his own ambition or entrepreneurial desires. "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, 1231 (D.C. Cir. 1997), quoting *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983).

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[14] The two prongs of the test are joined by the conjunctive "and." If Mr. Duncan 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 a 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.

Mr. Duncan and Mr. Bennett each was the president of his respective company. Each owned 10 percent of the shares of the company.[15] Mr. Duncan was a founding member of the Perfectly Fresh family of companies. When Mr. Duncan and Mr. Tice founded Consolidation, Farms, and Specialties as subsidiaries of Perfectly Fresh Marketing, Inc., Mr. Duncan became president of Consolidation. This appointment of Mr. Duncan as president was done not to make it easier for Mr. Tice and Perfectly Fresh Marketing, Inc., but rather with entrepreneurial intent. Under this circumstance, I find Mr. Duncan had an "actual, significant nexus with" Consolidation.

Mr. Bennett assisted Mr. Tice in obtaining a facility for Perfectly Fresh Marketing, Inc., that was being vacated by Mr. Bennett's employer. Mr. Tice offered Mr. Bennett the president's job at Farms and allowed Mr. Bennett to hire and manage a sales force and initiate a storage business for the benefit of Farms. These actions show Mr. Bennett had an "actual, significant nexus with" Farms.

Another aspect of the concept of nominal that is rarely, if ever, discussed is disparate levels of power and authority between the nominal officer and the individual who appoints him. Lilly Minotto was a secretary who was made director of a PACA licensee to ensure that a quorum existed for board meetings. *Minotto*, 711 F.2d at 408; Jean-Pierre Bell was a salesman who was made president of a PACA licensee to mediate disputes between the two owners, *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994); Carl Quinn was a truck driver who was made vice president of a PACA licensee to satisfy the statutory requirement for specific numbers of officers, *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); and Michael Norinsberg was the son of the president of a PACA licensee who was made secretary and treasurer of the corporation so somebody was available to sign checks. *Norinsburg,* 162 F.3d at 1198. In each of these cases, the nominal officer had no power and was an officer in name only to solve a corporate need. Mr. Duncan and Mr. Bennett were real officers, even if they chose not to exercise that authority. As the United States Court of Appeals for the District of Columbia Circuit noted, a situation in which the affiliation is purely nominal and the so-called officer had no powers at all is radically

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[15] These ownership interests bar Mr. Duncan and Mr. Bennett 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*, 63 Agric. Dec 388, 411 n.5 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005).

different from one in which a genuine officer simply does not use the powers of his office. *Quinn*, 510 F.2d at 756.

Mr. Duncan and Mr. Bennett had the burden to overcome this evidence. They failed to do so. Therefore, Mr. Duncan was a true, not nominal, officer of Consolidation and was responsibly connected with Consolidation and Mr. Bennett was a true, not nominal, officer of Farms and was responsibly connected with Farms.

FINDINGS OF FACT

1. Perfectly Fresh Marketing, Inc., was a California corporation established in June 2001 to engage in the produce business. Initially, 51 percent of Perfectly Fresh Marketing, Inc., was owned by Tice, Inc. (which was owned by Gary and Erin Tice), and 49 percent was owned by Jeffrey Lon Duncan.

2. In July 2002, the operating agreement of Perfectly Fresh Marketing, Inc., was amended so that 50 percent of the company was owned by Perfectly Fresh, LLC, a holding company controlled by John Norton, 30 percent was owned by Tice, Inc., and 20 percent was owned by Jeffrey Lon Duncan. Gary Tice, John Norton, and Jeffrey Lon Duncan each signed the Amended Operating Agreement on July 18, 2002.

3. Perfectly Fresh Farms, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc., and 10 percent owned by Thomas Bennett, was the holder of PACA license 021541 from August 2002 until the PACA license expired on August 21, 2003.

4. During the period October 27, 2002, through February 21, 2003, Perfectly Fresh Farms, Inc., 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. Perfectly Fresh Consolidation, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc., and 10 percent owned by Jeffrey Lon Duncan, was the holder of PACA license 021540 from August 2002 until the PACA license expired on August 21, 2003.

6. During the period November 17, 2002, through February 15, 2003, Perfectly Fresh Consolidation, Inc., 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. Perfectly Fresh Specialties, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc. (and whose PACA license did not account for the remaining 10 percent ownership), was the

holder of PACA license 021539 from August 2002 until the PACA license expired on August 21, 2003.

8. During the period November 1, 2002, through February 20, 2003, Perfectly Fresh Specialties, Inc., 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 of, and a 10 percent shareholder in, Perfectly Fresh Farms, Inc., during much of the time period when Perfectly Fresh Farms, Inc., was ordering produce and failing to fully and promptly pay for such produce. As of the date of the hearing, Thomas Bennett had been employed in the produce industry for 45 years. He was actively involved in the day-to-day operations of Perfectly Fresh Farms, Inc., throughout the period he was employed there. He signed numerous corporate documents and was involved in decisions consistent with a position of responsibility.

10.Jeffrey Lon Duncan was president of, and a 10 percent shareholder in, Perfectly Fresh Consolidation, Inc., from the time when Perfectly Fresh Consolidation, Inc., was created through the time it filed for bankruptcy. As of the date of the hearing, Jeffrey Lon Duncan had been employed in the produce industry for over 20 years. He was actively involved in the day-to-day operations of Perfectly Fresh Consolidation, Inc., 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.Jeffrey Lon Duncan was not actively involved in the operations of Perfectly Fresh Specialties, Inc., during the time that Perfectly Fresh Specialties, Inc., committed violations of the PACA. Even though the PACA license application listed Mr. Duncan as chief financial officer and a director of Perfectly Fresh Specialties, Inc., his role with that company, if any, was purely nominal.

CONCLUSIONS OF LAW

1. Perfectly Fresh Farms, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities in the amount of $442,023.12, during the period October 27, 2002, through February 21, 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 of the PACA.

3. Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities in the amount of $373,944.19, during the period November 17, 2002, through February 15, 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 of the PACA.

5. Perfectly Fresh Specialties, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities in the amount of $263,801.40, during the period November 1, 2002, through February 20, 2003.

6. The appropriate sanction for Perfectly Fresh Specialties, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations of the PACA.

7. Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., during the time Perfectly Fresh Farms, Inc., committed violations of the PACA. As such, Mr. Bennett is subject to the licensing and employment restrictions of the PACA.

8. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., during the time Perfectly Fresh Consolidation, Inc., committed violations of the PACA. As such, Mr. Duncan is subject to the licensing and employment restrictions of the PACA.

9. Jeffrey Lon Duncan was not responsibly connected with Perfectly Fresh Specialties, Inc., during the time Perfectly Fresh Specialties, Inc., committed violations of the PACA.

ORDER

1. Perfectly Fresh Consolidation, 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 Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Consolidation, Inc.

2. Perfectly Fresh Farms, 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 Perfectly Fresh Farms, Inc.'s violations

of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Farms, Inc.

3. Perfectly Fresh Specialties, 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 Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Specialties, Inc.

4. Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., when Perfectly Fresh Farms, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Thomas Bennett is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Mr. Bennett.

5. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Jeffrey Lon Duncan is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Mr. Duncan.

RIGHT TO JUDICIAL REVIEW

Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; Thomas Bennett; and Jeffrey Lon Duncan each 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. Judicial Review must be sought within 60 days after entry of the Order in this Decision and Order.[16] The date of entry of the Order in this Decision and Order is June 12, 2009.

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[16] 28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

DEPARTMENTAL DECISIONS

CHARLES JOHNSON COMPANY v. THE ALPHAS COMPANY, INC.
PACA Docket No. R-07-114.
Decision and Order.
Filed August 22, 2008.
[Editor's Note: This case was on appeal see case below].

Practice and Procedure – Recovery of Unpaid Obligations Allowed.

Where Complainant sought recovery of the f.o.b. plus freight contract price of lettuce sold to Respondent, but Complainant admitted that it had not yet paid the freight, we found that where the freight invoice was in evidence, and the record lacked any evidence to substantiate Respondent's claim of freeze damage in transit, Complainant remained obligated to pay the freight invoice and was therefore entitled to recover the full f.o.b. plus freight price of the lettuce from Respondent.

Patrice H. Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant: Pro Se.
McCarron & Diess, Respondent's Attorney.
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 $66,370.00 in connection with six truckloads of iceberg lettuce 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, admitting liability to Complainant in the amount of $34,259.60. In accordance with Section 7(a) of the Act, an Order Requiring Payment of Undisputed Amount was issued on October 4, 2007, requiring the payment by Respondent to Complainant of the undisputed amount of $34,259.60, with interest thereon at the rate of 4.05 percent per annum from June 1, 2007, until

paid, plus the amount of $300.00. Respondent's liability for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for payment of the undisputed amount had been issued.

Although the remaining amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. 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, Charles Johnson Company, is a corporation whose post office address is P.O. Box 95, Las Cruces, New Mexico, 88004-0095. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, The Alphas Company, Inc., is a corporation whose post office address is 87-89 New England Produce Center, Chelsea, Massachusetts, 02150-1703. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On April 26, 2007, Complainant shipped one truckload of lettuce, under pickup number 104, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-6 billing Respondent for 660 cartons of naked lettuce 24's at $7.50 per carton, or $4,950.00, and 240 cartons of cello lettuce 24's at $10.50 per carton, or $2,520.00, plus $23.50 for a temperature recorder and $3,700.00 for freight, for a total f.o.b. plus freight invoice price of $11,193.50.
4. Respondent reported selling the lettuce mentioned in Finding of Fact 3 at an average sales price of $14.21 per carton for the 660 cartons of naked lettuce 24's, and $13.55 per carton for the 240 cartons of cello lettuce 24's, for a gross sales amount of $12,634.00. From this amount, Respondent deducted commission at a rate of 20 percent, or $2,526.80, and paid Complainant the balance of $10,107.20.
5. On April 26, 2007, Complainant shipped one truckload of lettuce, under pickup number 108, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant

thereafter prepared invoice number LCS-8 billing Respondent for 670 cartons of naked lettuce 24's at $7.50 per carton, or $5,025.00, and 220 cartons of cello lettuce 24's at $10.50 per carton, or $2,310.00, plus $23.50 for a temperature recorder and $3,700.00 for freight, but less $1,500.00 for a "claim against trucker as reported by Alphas," for a net f.o.b. plus freight invoice price of $9,558.50.

6. Respondent reported selling the lettuce mentioned in Finding of Fact 5 at an average sales price of $3.12 per carton for the 670 cartons of naked lettuce 24's, and $9.17 per carton for the 220 cartons of cello lettuce 24's, for a gross sales amount of $4,259.00. From this amount, Respondent deducted commission at a rate of 20 percent, or $851.80, and paid Complainant the balance of $3,407.20.

7. On April 28, 2007, Complainant shipped one truckload of lettuce, under pickup number 113, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-39 billing Respondent for 215 cartons of naked lettuce 24's at $7.50 per carton, or $1,612.50, and 700 cartons of cello lettuce 24's at $10.50 per carton, or $7,350.00, plus $23.50 for a temperature recorder and $3,700.00 for freight, for a total f.o.b. plus freight invoice price of $12,686.00.

8. Respondent reported selling the lettuce mentioned in Finding of Fact 7 at an average sales price of $9.06 per carton for the 700 cartons of cello lettuce 24's, and $0.00 per carton for the 215 cartons of naked lettuce 24's, for a gross sales amount of $5,980.00. From this amount, Respondent deducted commission at a rate of 20 percent, or $1,196.00, and paid Complainant the balance of $4,784.00.

9. On May 2, 2007, Complainant shipped one truckload of lettuce, under pickup number 121, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-74 billing Respondent for 960 cartons of cello lettuce 24's at $10.50 per carton, or $10,080.00, plus $23.50 for a temperature recorder and $3,700.00 for freight, for a total f.o.b. plus freight invoice price of $13,803.50.

10. Respondent reported selling the 960 cartons of cello lettuce 24's mentioned in Finding of Fact 9 at an average sales price of $22.42 per carton, for a gross sales amount of $14,796.00. From this amount, Respondent deducted commission at a rate of 20 percent, or $2,959.80, and paid Complainant the balance of $11,836.80.

11. On May 2, 2007, Complainant shipped one truckload of lettuce, under pickup number 122, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant thereafter prepared invoice number LCS-75 billing Respondent for 940

cartons of liner palletized lettuce 24's at $9.25 per carton, or $8,695.00, plus $23.50 for a temperature recorder and $3,700.00 for freight, for a total f.o.b. plus freight invoice price of $12,418.50.

12. On May 7, 2007, at 9:25 a.m., a U.S.D.A. inspection was performed on 320 cartons of the lettuce mentioned in Finding of Fact 11, at the place of business of Respondent, in Chelsea, Massachusetts, the report of which disclosed, in pertinent part, as follows:

Temperatures: 29 to 31ºF		**NUMBER OF CONTAINERS:** 320 CARTON(S)		**ORIGIN:** CA
Markings: MARKINGS: CHARLEY 24 HEADS LINER PRODUCE OF USA SHIPPED BY CHARLES JOHNSON CO SCOTTSDALE AZ				
INJURY	**DAM**	**SER. DAM**	**V.S.DA M**	**OFFSIZE/DEFECTS**
GRADE:				
LOT DESC:	INSPECTION: RESTRICTED TO FREEZING ONLY AT APPLICANT'S REQUEST TEMPERATURES(4): 30°F, 29°F, 31°F, 31°F ALL PALLETS IN NOSE OF TRAILER SOME TO ALL CARTONS SCATTERED (MIXED) THOUGHT [sic] LAYERS PRODUCT IS FROZEN AND OR SHOW FREEING [sic] INJURY. FREEZING INJURY BEING A DARK GLASSY TRANSLUCENT APPEARENCE [sic] EXTENDING INWARD FROM TOP SIDES AND OR ENDS 1/2" TO COMPLETE CARTON. AFFECTING SOME TO ALL HEADS. SO LOCATED TO INDICATE FREEZING OCCURRED AFTER PACKING.			

13. Respondent reported selling the 940 cartons of liner palletized lettuce 24's mentioned in Finding of Fact 11 at an average sales price of $7.02 per carton, for a gross sales amount of $4,633.00. From this amount, Respondent deducted commission at a rate of 20 percent, or $926.60, the U.S.D.A. inspection fee of $56.00, and a disposal fee of $550.00, and paid Complainant the balance of $3,100.40.

14. On May 10, 2007, Complainant shipped one truckload of lettuce, under pickup number 159, from loading point in the state of New Mexico, to Respondent, in Chelsea, Massachusetts. Complainant

thereafter prepared invoice number LCS-186 billing Respondent for 320 cartons of cello lettuce 24's at $8.00 per carton, or $2,560.00, and 600 cartons of liner palletized lettuce 24's at $6.75 per carton, or $4,050.00, plus $23.50 for a temperature recorder and $3,800.00 for freight, for a total f.o.b. plus freight invoice price of $10,433.50.

15. Respondent reported selling the lettuce mentioned in Finding of Fact 14 at an average sales price of $1.94 per carton for the 320 cartons of cello lettuce 24's, and $0.00 per carton for the 600 cartons of naked lettuce 24's, for a gross sales amount of $1,280.00. From this amount, Respondent deducted commission at a rate of 20 percent, or $256.00, and paid Complainant the balance of $1,024.00.

16. The informal complaint was filed on June 14, 2007, which is within nine months from the accrual of the cause of action.

Conclusions

This dispute concerns Respondent's liability for six truckloads of iceberg lettuce purchased from Complainant. Complainant asserts that Respondent purchased and accepted the six loads of lettuce in question at f.o.b. plus freight prices totaling $66,370.00. Respondent asserts, to the contrary, that the loads were not ordered and that it only agreed to accept the lettuce on a "P.A.S." (price after sale) basis. Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence. *Vernon C. Justice v. Eastern Potato Dealers of Maine, Inc*., 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Bert Guerin*, 27 Agric. Dec. 384 (1968).

We will first consider the evidence submitted by Complainant to substantiate its contention that the lettuce was sold at the f.o.b. plus freight prices billed to Respondent. Attached to the Complaint are copies of the invoices Complainant prepared for each of the six loads of lettuce in question.[1] Each invoice lists fixed f.o.b. prices for the lettuce and includes an additional charge for freight, in accordance with Complainant's allegation of f.o.b. plus freight terms. Complainant's President, Charles Johnson, asserts in Complainant's Opening Statement that, "My procedure is to have invoices prepared and mailed the day after shipment, but there are Sunday exceptions."[2] Complainant also submitted copies of the "Sales Order and Passing" that it prepared for

[1] See Complaint Exhibits 1, 7, 14, 20, 24, and 32.
[2] See Opening Statement ¶8.

each shipment.[3] Complainant's Charles Johnson describes these documents in his sworn Opening Statement, wherein he states, in pertinent part, as follows:

> …I and all other salesman, prepare a Sales Order and Passing document. That document is then passed to the person in my office who hires trucks and then to the dispatcher who prepares the loading order for the cooler. The next morning the manifest and truck name is written on the Sales Order and passing and then, with my final approval, is faxed by Judy Sosa in my office to the customer. This procedure was followed on all of The Alphas Company shipments. The right hand column of that document is for price and terms of sale and charges for freight and temperature recorders. Alphas was faxed all of that information on every load and not once did anyone call objecting to the "Terms of Sale". That was an ideal time for Alphas to object and that is one reason I use this particular document – I want everybody to be on the same page and all details of the sale confirmed in writing.

Complainant also submitted copies of the bills of lading and load confirmations for the shipments, the latter of which bear a preprinted statement that reads "ALL LETTUCE IS SHIPPED FOB PLUS FREIGHT."[4] These documents are, however, evidence of the freight terms negotiated between Complainant and the carrier, so they do not directly pertain to the contracts negotiated between Complainant and Respondent.

As we mentioned, Respondent denies purchasing the lettuce at the f.o.b. plus freight prices billed by Complainant and asserts that the price terms of the contracts were "P.A.S." (price after sale). The term "price after sale" is not defined in either the Uniform Commercial Code (U.C.C.) or the Act and Regulations. It is considered a subcategory of the "open price term" (U.C.C. Section 2-305(1)), and is generally understood as meaning that the parties will agree upon a price after the buyer effects its resales.[5] Aside from its sworn allegation

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[3] See Complaint Exhibits 2, 13, 15, 25, and 33, and Opening Statement Exhibit 37.

[4] See Complaint Exhibits 4-6, 8, 9-9A, 16-17, 19, 21-22, 28, 34, and 36.

[5] UCC Section 2-305(1), "Open Price Term," provides that, "the parties if they so intend can conclude a contract for sale even though the price is not settled."

to this effect, the only other evidence offered by Respondent to support its contention that the lettuce was sold price after sale are copies of lot settlement reports and accounts of sale showing the results of its resale of the lettuce. The term "P.A.S." does not, however, appear on any of these documents.[6]

With respect to the documentation submitted by Complainant, Respondent denies receiving Complainant's "Sales Order and Passing," and states that the only paperwork received were the bills of lading that were received upon receipt of the loads.

We note, however, that Respondent also acknowledges receiving Complainant's invoices billing Respondent for the lettuce at f.o.b. plus freight prices. In his sworn Answering Statement, Respondent's President, John ("Yanni") Alphas, states specifically that "[w]e were only aware of the cost applied to these loads once we received the invoices generated by [Complainant]."[7] While it is apparently Mr. Alphas' contention that the invoices were used only to inform Respondent of the cost of the lettuce,[8] there is no indication of this on the invoices. Therefore, when Respondent received these invoices indicating the sale of the lettuce at the f.o.b. plus freight prices listed thereon, Respondent had an obligation to promptly notify Complainant that it understood the price terms of the contract to be other than what was reflected on the invoice. Respondent's failure to do so is considered strong evidence that such terms were correctly stated. See *Pemberton Produce, Inc. v. Tom Lange Co., Inc*., 42 Agric. Dec. 1630 (1983); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co*., 19 Agric. Dec. 218 (1960). We also note that while Respondent states it did not issue any purchase orders for the lettuce, Respondent submitted several copies of Complainant's invoices whereon there are handwritten purchase order numbers and lot numbers that were presumably added by Respondent.[9] Respondent's Yanni Alphas also asserts in his sworn Answering Statement that three of the loads were shipped to Respondent's New York facility in the Bronx, and that all three loads had to be diverted because the New York facility could not take them in. Mr. Alphas maintains that if the loads were ordered, Respondent would not have had

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[6] See Answer Exhibits 15, 17-19, 22-24, 27-29, 31-32, 35, 37-38, and 41-42.

[7] See Answering Statement ¶9.

[8] The invoice amounts billed by Complainant are used as the product cost on the lot settlement reports prepared by Respondent. See Answer Exhibits 17-18, 22-23, 27-28, 31, 37, and 41-42.

[9] See Answer Exhibits 16, 20, and 30.

to divert them to Chelsea, Massachusetts.[10] In response to this allegation, Complainant's Charles Johnson asserts in Complainant's sworn Statement in Reply that Respondent's Yanni Alphas instructed him to ship all loads to the facility in Chelsea, Massachusetts. Mr. Johnson refers to the documents submitted with the Complaint, including the bills of lading, load confirmations and freight invoices, to substantiate this allegation. None of these documents indicate that the shipments were ever destined for anywhere except Respondent's Massachusetts facility.[11] Complainant also attached to its Statement in Reply a sworn statement from its transportation manager, Patricia Quintanilla, wherein Ms. Quintanilla states, in pertinent part, "I was never asked by Charles Johnson or Yanni Alphas to hire trucks for New York City. My confirmations and bills of lading show only Boston as the destination."[12] Therefore, since there is no indication that the lettuce was ever diverted from New York to Massachusetts, Respondent's argument that the alleged diversion supports its allegation that the lettuce was not ordered is without merit.

Finally, we note that Complainant's Charles Johnson asserts in Complainant's sworn Opening Statement that he called Yanni Alphas when Respondent's payments were past due, at which time Mr. Johnson states Mr. Alphas made no mention of having a problem with the terms of sale. Mr. Johnson alleges Mr. Alphas said, "I will drag this out, which will give me longer to pay."[13] In response to this allegation, Yanni Alphas asserts in Respondent's sworn Answering Statement that he never made this statement and that he wants his files cleaned up off his desk and the shippers paid as soon as possible.[14] Complainant thereafter attached to its Statement in Reply a sworn statement from Judy Sosa, an employee of Complainant whose responsibilities include collecting past due invoices, wherein Ms. Sosa states she called Yanni Alphas and was told that "I will pay when they make me." Ms. Sosa states Mr. Alphas "said nothing about having a dispute with Charley Johnson over Terms of Sale."[15]

Based upon our review of the evidence submitted as detailed above, we find that the preponderance of the evidence supports Complainant's contention that the six loads of lettuce in question were sold to Respondent at the f.o.b. plus freight amount invoiced. Moreover, as

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[10] See Answering Statement ¶5.

[11] See Complaint Exhibits 3-6, 8, 9-9A, 12, 16-18, 19, 21-23, 28, 31, and 34-36.

[12] See Statement in Reply Exhibit 57. Respondent's Massachusetts facility is in Chelsea, which is an inner urban suburb of Boston.

[13] See Opening Statement ¶9.

[14] See Answering Statement ¶10.

[15] See Statement in Reply Exhibit 58.

there is no dispute that Respondent accepted and resold the subject loads of lettuce, Respondent is liable to Complainant for the lettuce it accepted at the agreed purchase prices totaling $70,093.50,[16] less any damages resulting from any breach of contract by Complainant. In this regard, Respondent asserts in its sworn Answer that one load arrived warm and that two other loads arrived frozen.[17] We have already determined that lettuce was sold under f.o.b. terms.[18] The Regulations (7 C.F.R. § 46.43(i)) define f.o.b. as meaning:

> . . . that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that *the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.* (Emphasis supplied).

> Both parties attribute the temperature problems with the shipments in question to mishandling by the carrier in transit.[19] Therefore, since Respondent, as buyer, assumed the risk of any in-transit damage under the f.o.b. terms of these sales, Respondent is obligated to pay Complainant the agreed purchase price of the lettuce it accepted, and may seek redress from the carrier for any damages allegedly sustained as a result of the improper carriage of the product. If, however, the seller procures an adjustment from the carrier because of the transportation loss, the seller is, as a matter of law, the agent of the buyer, and the seller must pass on to the buyer all of the proceeds of the adjustment, less any agreed and disclosed service charge. *In re Ben Gatz Company*, 38 Agric. Dec. 1038 (1979). In the instant case, the record shows Complainant adjusted the invoice price of the lettuce shipped under pickup number 108 (invoice number LCS-8) by $1,500.00 to account for a "claim against trucker as

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[16] This amount differs from the amount sought in the Complaint because Complainant is not seeking recovery of the freight and recorder fees totaling $3,723.50 billed on invoice number LCS-75.

[17] See Answer ¶5.

[18] We note that in connection with its argument that the lettuce was purchased price after sale, Respondent asserts that it did not purchase the lettuce f.o.b.; however, these terms are not mutually exclusive. A sale of goods on a price after sale basis may be f.o.b., delivered, or some variation thereof, in accordance with the parties' agreement. *See Eustis Fruit Co., Inc. v. The Auster Co., Inc*., 51 Agric. Dec. 865 (1991).

[19] See Answering Statement p. 3 and Statement in Reply p. 1.

reported by Alphas."[20] As Complainant's Charles Johnson explains in Complainant's Statement in Reply:

> A deduction was made from the truck broker and was shown as a line item deduction on the corrected invoice to Alphas. The deduction amount was confirmed by Yanni Alphas with Patty Quintanilla, transportation manager.[21]

Accordingly, we find that Respondent is liable to Complainant for the adjusted invoice price of $9,558.50 for the lettuce in this shipment.

For the lettuce shipped under pickup number 122 (invoice number LCS-75), Complainant states:

> Upon delivery a USDA inspection revealed freeze damage caused by the truck. As an FOB sale and as the in-transit risk lies with the receiver, complainant expects payment of the FOB price of $8,695.00. Complainant also asks for an account of sales to determine if any additional monies are due.[22]

It appears based on this statement that Complainant is only seeking to recover the f.o.b. price of the lettuce because of the freight claim, but that if the proceeds from the sale of the lettuce are sufficient to pay all or some of the freight cost as well, then those proceeds should be remitted to Complainant to be applied to the freight bill. After Complainant made this statement in the Complaint, Respondent submitted a sworn Answer to which it attached an account of sales that reflects a net return of only $3,100.40. As this amount is substantially less than the $8,695.00 f.o.b. price of the lettuce, there are no additional proceeds available to pay the freight. Complainant's Charles Johnson explains in Complainant's Statement in Reply that:

> A claim was filed against the trucker…, but so far no settlement has been reached. My office did not have any idea of the deduction amount until Alphas paid the undisputed amount due Charles Johnson Company. That delayed payment has delayed settlement of this file. Alphas may have to go after the trucker in court to settle this.[23]

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20 See Complaint Exhibit 7.
21 See Statement in Reply ¶4.
22 See Complaint ¶8.
23 See Statement in Reply ¶5.

It therefore appears that while Complainant has initiated a claim against the carrier on Respondent's behalf, it has no intention of pursuing the claim any further. Moreover, since no proceeds from the claim have been collected, Complainant would normally be entitled to recover the full f.o.b. plus freight price of the lettuce of $12,418.50. However, since Complainant has only requested payment of the $8,695.00 f.o.b. price of the lettuce, and Respondent's account of sale indicates that there are no additional proceeds available from the sale of the lettuce to pay the freight, Complainant's recovery should be limited to the $8,695.00 f.o.b. amount requested. Any issues regarding the payment of freight or the damages allegedly caused by in-transit freezing should be resolved between Respondent and the carrier in a different forum.

Finally, for the lettuce shipped under pickup number 159 (LCS-186), Complainant's Charles Johnson states, "I did not pay any freight to the trucker and I have filed a claim for any loss… There was no USDA inspection which makes any claim very dubious."[24] While it therefore appears that Complainant has at least initiated a claim against the carrier on Respondent's behalf, there is no indication that any proceeds from the claim have been collected. Consequently, no deduction from the invoice price of the lettuce is warranted. Although the invoice price of the lettuce includes freight that Complainant has not yet paid, the record includes a copy of the freight company's invoice billing Complainant for freight.[25] In the absence of an inspection or other evidence to show that the lettuce arrived with freeze damage as alleged, we presume that Complainant remains obligated to pay the carrier its contracted freight rate. Therefore, Complainant's attempted recovery of the f.o.b. plus freight amount billed to Respondent for this shipment of lettuce is entirely appropriate under the circumstances.

Based on our review of the evidence and for the reasons cited, we conclude that the total amount due Complainant from Respondent for the six truckloads of iceberg lettuce in question is the $66,370.00 claimed in the Complaint. This amount should, however, be reduced by the $34,259.60 that Respondent paid Complainant pursuant to the Order Requiring Payment of Undisputed Amount issued on October 4, 2007. This leaves a balance due Complainant from Respondent of $32,110.40.

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[24] See Statement in Reply ¶6.

[25] See Complaint Exhibit 35.

Respondent's failure to pay Complainant $32,110.40 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, 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. Respondent has, however, already paid Complainant the $300.00 handling fee pursuant to the Order Requiring Payment of Undisputed Amount issued on October 4, 2007. Therefore, recovery of the $300.00 handling fee will not be awarded here.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $32,110.40, with interest thereon at the rate of 2.18% per annum from June 1, 2007, until paid.
Copies of this Order shall be served upon the parties.

Done at Washington, DC.

CHARLES JOHNSON COMPANY v. THE ALPHAS COMPANY, INC.
PACA Docket No. R-07-114.
Filed April 21, 2009.

Practice and Procedure – Recovery of Unpaid Obligations Allowed.

Where Complainant sought recovery of the f.o.b. plus freight contract price of lettuce sold to Respondent, but Complainant admitted that it had not yet paid the freight, we found that where the freight invoice was in evidence, and the record lacked any evidence to substantiate Respondent's claim of freeze damage in transit, Complainant remained obligated to pay the freight invoice and was therefore entitled to recover the full f.o.b. plus freight price of the lettuce from Respondent.

Patrice H. Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant: Pro Se.
McCarron & Diess, Respondent's Attorney.
Decision and Order issued by William G. Jenson, Judicial Officer.

Order on Reconsideration

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on August 22, 2008, in which Respondent was ordered to pay Complainant, as reparation, $32,110.40, with interest thereon at the rate of 2.18% per annum from June 1, 2007, until paid. On October 6, 2008, the Department received from Respondent a Petition for Reconsideration of the Order. Complainant was served with a copy of the Petition and afforded the opportunity to submit a reply. On October 27, 2008, Complainant notified the Department it did not intend to submit a reply to Respondent's Petition. Before we consider the issues raised by Respondent in its Petition, we should briefly review of the details of this case. The dispute involves six

truckloads of iceberg lettuce Complainant allegedly sold to Respondent at f.o.b. plus freight prices totaling $66,370.00. In defense of its failure to pay Complainant this amount, Respondent asserted the terms of sale were "P.A.S." (price after sale), and that it owed Complainant only $34,259.60 on this basis. Respondent was ordered to pay Complainant the undisputed amount owed of $34,259.60 before the Decision and Order issued. In the Decision and Order we determined the preponderance of the evidence, including invoices, sales orders, and affidavit testimony, supported Complainant's allegations with respect to the contract terms. Accordingly, Respondent was ordered to pay Complainant the disputed invoice balance of $32,110.40.

In its Petition, Respondent argues first that Complainant, as the proponent of the claim and the essential term at issue in this case, has the burden of proving a fixed sales price agreement by a preponderance of the evidence. Respondent cites our decision in *Del Rio Growers, Inc. v. Anthony Gagliano & Company, Inc*., 47 Agric. Dec. 476 (1988), as supporting this contention. We note, however, that in *Del Rio*, the Complainant asserted the existence of a contract of sale, whereas the Respondent maintained it only agreed to handle the goods on consignment. In other words, in *Del Rio,* there was a dispute as to whether a contract of sale was effected, or whether the goods were merely consigned. In the instant case, on the other hand, there is no dispute a contract of sale was effected. Only the terms of sale are in controversy. Under such circumstances, we have repeatedly held the burden rests upon each party to prove their respective allegations with respect to the terms of the contract by a preponderance of the evidence. *See, e.g., Justice v. Eastern Potato Dealers*, 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Geurin*, 27 Agric. Dec. 384 (1968); *Israel Klein Co. v. S. Otis Sullivan & Company,* 17 Agric. Dec. 500 (1958). Applying this standard, the evidence submitted by Complainant supporting its allegation of f.o.b. plus freight sale terms clearly preponderated over Respondent's allegation of price after sale terms, as the latter was not supported by any ancillary evidence.

Respondent next refers to the testimony of Complainant's Charles Johnson wherein he asserted, "My procedure is to have invoices prepared and mailed the day after shipment, but there are Sunday exceptions" (D&O, p.7, citing Opening Statement, p.2). Respondent contends the most noteworthy aspect of this statement is that it does not specifically state the invoices here in question were actually prepared and mailed the day after shipment. We note, however, that earlier in Mr. Johnson's statement, where he describes the procedure for preparing and issuing Complainant's sales order and passing documents, Mr. Johnson

affirmed the procedure was "followed on all of The Alphas Company shipments." (See Opening Statement, p.2). We believe it is reasonable to infer from this that Mr. Johnson's statement concerning the procedure for preparing and mailing invoices was intended to apply to the sales of lettuce at issue in this dispute.

Respondent next argues that further doubt is cast upon Mr. Johnson's contention the invoices were mailed the day after shipment by the fact that Complainant generated different invoices for at least three of the loads of lettuce. Specifically, Respondent states that as part of its informal complaint, Complainant submitted invoices for the first three shipments of lettuce which included a notation that reads "LESS 1.00 ALLOWANCE ON NAKED." Respondent states these invoices suggest there were prior invoices which were later adjusted to reflect the $1.00 allowance. While this is certainly possible, it does not appear to be the case here. Review of the record discloses the sales order and passing documents Complainant prepared for these shipments include a similar notation concerning an allowance on the naked lettuce (see Complaint Exhibits 2, 13 and 15). As the sales order and passing documents were, according to Complainant's Charles Johnson, prepared prior to the invoices, we can reasonably presume the first invoices prepared by Complainant included the allowance notation. While it is true that Complainant subsequently prepared revised invoices showing the price of the lettuce reduced by $1.00 per carton without any mention of the allowance (see Complaint Exhibits 1, 11 and 14), the invoices Respondent submitted with its Answer, which are presumably the invoices that Respondent received from Complainant, include the allowance notation (see Answer Exhibits 16, 20 and 25). Therefore, whether or not Complainant prepared multiple versions of the invoice, it appears Respondent received the earliest invoices Complainant prepared.

Along the same vein, Respondent states the invoice for LCS-8 contains the wording "LESS CLAIM AGAINST TRUCKER AS REPORTED BY ALPHAS ($1,500.00)," and argues that this invoice could not have been generated until the load arrived (see Complaint Exhibit 7). While that is certainly true, the copy of invoice LCS-8 submitted with Respondent's Answer (Answer Exhibit 20) does not bear any mention of the truck claim. It is therefore apparent once again that Respondent received the earliest version of the invoice prepared by Complainant.

Respondent next argues Complainant's failure to submit necessary evidence, such as fax transmittal records, phone records, or a statement from the individual who purportedly faxed Complainant's sales order

and passing documents to Respondent, should lead to the conclusion that these documents were never faxed. We hasten to point out, however, that a determination was never made as to whether Complainant sustained its burden to prove these documents were sent to Respondent; so Respondent's alleged receipt of these documents was not a factor that was considered in determining whether Complainant had sustained it burden of proof concerning the alleged terms of sale. Nevertheless, to the extent the sales order and passing documents memorialized Complainant's understanding of the terms of sale at the time the contract was formed, there was additional evidence in support of Complainant's allegations with respect to the contract terms.

Respondent next takes issue with our finding that Respondent's admitted receipt of Complainant's invoices billing it at f.o.b. plus freight prices placed an obligation upon Respondent to promptly notify Complainant that the terms were not correctly stated. Citing *Merit Packing Company v. Pamco Airfresh, Inc*., 47 Agric. Dec. 1345 (1988) and *Del Rio Growers, Inc. v. Anthony Gagliano & Company, Inc.*, 47 Agric. Dec. 476 (1988), Respondent argues that merely sending an invoice with terms of sale does not prove there was a contract. There is, however, no dispute that a contract of sale existed in the instant case. Moreover, we note that in *Merit Packing,* the Complainant was not able to establish the Respondent had any other involvement in the transaction aside from receiving an invoice; whereas here, the Respondent admits purchasing the lettuce but asserts the price terms were different from those asserted by Complainant. Similarly, in *Del Rio*, there is a dispute as to the existence of a contract of sale, with the Complainant asserting the goods were sold at a fixed price, and the Respondent asserting the goods were received on consignment. In addition, in *Del Rio*, the Respondent submitted evidence that it took prompt exception to the invoice received from the Complainant. Here, Respondent has admitted to the purchase of the lettuce and has failed to offer any evidence showing it took exception to the invoices received from Complainant showing the sale of the lettuce at fixed f.o.b. plus freight prices.

Respondent next argues that *Pemberton Produce, Inc. v. Tom Lange Co., Inc*., 42 Agric. Dec. 1630 (1983), the case cited to support our conclusion the invoices received without objection by Respondent should be considered evidence of the contract terms agreed upon between the parties, is not relevant to the case at hand. Specifically, Respondent states the circumstances in *Pemberton* are substantially different from the case at issue here, because in *Pemberton*, the Respondent buyer had received numerous invoices from the Complainant seller in earlier transactions reflecting the exclusion of

certain defects, and the Respondent had not objected to those invoices. We note, however, that while the time span at issue in the instant case is substantially less than that in *Pemberton*, the transactions in question nevertheless covered a span of two weeks, so if the invoices were issued promptly as Complainant asserts, Respondent may have been in receipt of the invoices for the initial transactions before the later transactions took place. More importantly, we note Respondent asserts in connection with this argument that it repeatedly advised Complainant it understood the sales terms to be P.A.S., and that Complainant's Charles Johnson never denied that past sales to Respondent were on a P.A.S. basis. Review of the evidence discloses, however, that while Mr. Yanni Alphas of Respondent asserts P.A.S. terms were discussed with Mr. Johnson and agreed upon (see Answer, p.1), Mr. Alphas never claims he repeatedly advised Complainant the terms were P.A.S. Moreover, Mr. Johnson clearly refutes Respondent's contention that past sales were P.A.S. when he states in his Opening Statement: "I have never offered lettuce to The Alphas Company on a price after sale basis." (See Opening Statement, p.1).

Finally, Respondent argues the decision's findings were incorrect with respect to the terms of sale because the prices asserted by Complainant would have guaranteed that Respondent would lose money on each load. Respondent bases this argument on the USDA Market News prices for the Boston Terminal Market on the date the lettuce was delivered. We note, however, that if Respondent was basing its purchasing decisions on Boston market prices, the prices at the time of delivery would not have been available to Respondent at the time of sale. Therefore, if such a comparison is to be made, the Boston market prices on the date of sale must be used. Those prices are not, however, in evidence. Moreover, we are also aware that purchase decisions are made for a variety of reasons, so there may have been other factors more important than market price that influenced Respondent's decision to purchase the lettuce. For this reason, we are very hesitant to base our determination as to what was agreed upon at the time of sale on what appears to have been reasonable based on market circumstances. Furthermore, we hasten to point out that such speculation would not be necessary if Respondent had provided any evidence to substantiate its allegation that the contract terms were price after sale. Complainant, on the other hand, supplied copies of invoices that were admittedly received by Respondent, and that clearly reflect the f.o.b. plus freight fixed price terms that Complainant alleges were agreed upon.

In order to satisfy its burden in this case, the evidence submitted by Complainant needed only to preponderate in its favor by the narrowest

of margins. See 9 Wigmore, *Evidence*, § 2483 *et seq. (Chadbourne rev.* 1981). On the basis of the evidence submitted, we conclude that Complainant satisfied that burden.

Upon reconsideration of the evidence and for the reasons cited, we are denying Respondent's Petition. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in Section 7 of the Act.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $32,110.40, with interest thereon at the rate of 2.18% per annum from June 1, 2007, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

NEW GENERATION PRODUCE CORP. v. NEW YORK SUPERMARKET, INC.
PACA Docket No. R-09-011.
Decision and Order.
Filed June 26, 2009.

Estoppel to Deny Agency – Collection Agency - Authority.

Where Respondent remitted payment to a collection agent in settlement of its indebtedness to Complainant, but Respondent failed to establish that the agent was bestowed by Complainant with either actual or apparent authority to collect on Complainant's behalf, held that Respondent's sole reliance on the representation of the agent that it was authorized to settle the indebtedness on Complainant's behalf was neither reasonable nor legally sufficient to absolve it of liability to Complainant.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Lawrence Meuers for AMS.
Avi Rosengarten for Respondent.
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 $108,994.00 in connection with 85 truckloads of mixed produce shipped in the course of interstate commerce.

A copy of the Complaint was served upon the Respondent, who was afforded twenty days from receipt of the Complaint to file an Answer. Respondent failed to submit an Answer within the requisite period of time, so a Default Order was issued on December 18, 2007, awarding Complainant the full amount of its claim. The Department subsequently received from Respondent a Petition to Reopen the Complaint. In the Petition, Respondent offered a defense that could at least mitigate the award requested by Complainant. Therefore, in order to properly determine the validity of the allegations made by the parties, and to weigh all the facts on the merits, it was necessary to reopen the Complaint. Accordingly, on April 10, 2008, an Order granting Respondent's Petition to Reopen the Complaint was issued.

Although the amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 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), however, no ROI was prepared in this case.[1] In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Complainant also submitted a Brief.

Findings of Fact

1. Complainant, New Generation Produce Corp., is a corporation whose post office address is 195 Lombardy Street, Brooklyn, New York,

[1] Where the informal handling of the claim by a P.A.C.A. Branch office generates correspondence and other documents pertinent to the dispute, a Report of Investigation is prepared by the Department. These documents become a part of the record considered by the Presiding Officer in deciding the case. In the instant case, Respondent did not respond to the informal complaint submitted by Complainant, so no Report of Investigation was prepared.

11222-5417. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, New York Supermarket, Inc., is a corporation whose post office address is 8266 Broadway, Elmhurst, New York, 11373-3353. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On July 8, 2006, Complainant sold to Respondent under invoice number 72177, and delivered to one of Respondent's retail locations in the greater New York City area, 49 cartons of Fuji apples at $26.00 per carton, or $1,274.00, 12 cartons of bananas at $12.50 per carton, or $150.00, 16 cartons of white peaches at $22.00 per carton, or $352.00, and 20 cartons of kiwis at $11.00 per carton, or $220.00, for a total invoice price of $1,996.00. Respondent has not paid this invoice.

4. On July 8, 2006, Complainant sold to Respondent under invoice number 72202, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Hass avocados at $32.00 per carton, for a total invoice price of $320.00. Respondent has not paid this invoice.

5. On July 9, 2006, Complainant sold to Respondent under invoice number 72240, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at $12.50 per carton, for a total invoice price of $225.00. Respondent has not paid this invoice.

6. On July 10, 2006, Complainant sold to Respondent under invoice number 72267, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at $22.00 per carton, or $220.00, 10 cartons of papayas at $11.50 per carton, or $115.00, 12 cartons of bananas at $12.50 per carton, or $150.00, 14 cartons of cantaloupes at $13.00 per carton, or $182.00, 5 cartons of pineapples at $17.00 per carton, or $85.00, and 10 cartons of black seedless grapes at $28.00 per carton, or $280.00, for a total invoice price of $1,032.00. Respondent has not paid this invoice.

7. On July 11, 2006, Complainant sold to Respondent under invoice number 72398, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at $12.50 per carton, for a total invoice price of $225.00. Respondent has not paid this invoice.

8. On July 12, 2006, Complainant sold to Respondent under invoice number 72468, and delivered to one of Respondent's retail locations in the greater New York City area, 54 cartons of Navel oranges at $18.50

per carton, or $999.00, 10 cartons of papayas at $11.50 per carton, or $115.00, 5 cartons of white peaches at $21.00 per carton, or $105.00, 7 cartons of Packham pears at $28.00 per carton, or $196.00, 6 cartons of Maradol papayas at $23.00 per carton, or $138.00, 10 cartons of gold kiwis at $18.00 per carton, or $180.00, and 10 cartons of cherries at $27.00 per carton, or $270.00, for a total invoice price of $2,003.00. Respondent has not paid this invoice.

9. On July 12, 2006, Complainant sold to Respondent under invoice number 72477, and delivered to one of Respondent's retail locations in the greater New York City area, 25 cartons of Fuji apples at $29.00 per carton, for a total invoice price of $725.00. Respondent has not paid this invoice.

10.On July 12, 2006, Complainant sold to Respondent under invoice number 72506, and delivered to one of Respondent's retail locations in the greater New York City area, 16 cartons of Saturn peaches at $19.00 per carton, for a total invoice price of $304.00. Respondent has not paid this invoice.

11.On July 13, 2006, Complainant sold to Respondent under invoice number 72585, and delivered to one of Respondent's retail locations in the greater New York City area, 49 cartons of Braeburn apples at $21.00 per carton, for a total invoice price of $1,029.00. Respondent has not paid this invoice.

12.On July 14, 2006, Complainant sold to Respondent under invoice number 72624, and delivered to one of Respondent's retail locations in the greater New York City area, 7 cartons of Red Delicious apples at $27.00 per carton, or $189.00, 10 cartons of Red Globe grapes at $21.00 per carton, or $210.00, 10 cartons of papayas at $12.00 per carton, or $120.00, 18 cartons of bananas at $12.00 per carton, or $216.00, 20 cartons of kiwis at $12.00 per carton, or $240.00, 15 cartons of gold kiwis at $18.00 per carton, or $270.00, 10 cartons of Superior grapes at $16.00 per carton, or $160.00, 10 cartons of black seedless grapes at $26.00 per carton, or $260.00, and 5 cartons of pineapples at $16.00 per carton, or $80.00, for a total invoice price of $1,745.00. Respondent has not paid this invoice.

13.On July 15, 2006, Complainant sold to Respondent under invoice number 72730, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at $11.50 per carton, for a total invoice price of $207.00. Respondent has not paid this invoice.

14.On July 16, 2006, Complainant sold to Respondent under invoice number 72795, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of papayas at $11.50 per

carton, or $115.00, 10 cartons of bananas at $11.50 per carton, or $115.00, and 24 cartons of white peaches at $21.50 per carton, or $516.00, for a total invoice price of $746.00. Respondent has not paid this invoice.

15.On July 17, 2006, Complainant sold to Respondent under invoice number 72835, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at $11.50 per carton, or $172.50, 12 cartons of bananas at $12.00 per carton, or $144.00, 5 cartons of grapefruits at $16.00 per carton, or $80.00, 10 cartons of Saturn peaches at $18.00 per carton, or $180.00, 10 cartons of honeydews at $12.00 per carton, or $120.00, and 10 cartons of Packham pears at $30.00 per carton, or $300.00, for a total invoice price of $996.50. Respondent has not paid this invoice.

16.On July 18, 2006, Complainant sold to Respondent under invoice number 72966, and delivered to one of Respondent's retail locations in the greater New York City area, 45 cartons of Navel oranges at $17.00 per carton, or $765.00, 12 cartons of bananas at $11.00 per carton, or $132.00, 36 cartons of Korean melons at $10.00 per carton, or $360.00, 16 cartons of Wickson plums at $28.00 per carton, or $448.00, and 10 cartons of Golden Delicious apples at $23.00 per carton, or $230.00, for a total invoice price of $1,935.00. Respondent has not paid this invoice.

17.On July 19, 2006, Complainant sold to Respondent under invoice number 73024, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at $20.00 per carton, or $200.00, 12 cartons of bananas at $11.00 per carton, or $132.00, 5 cartons of pineapples at $16.00 per carton, or $80.00, 10 cartons of grapefruits at $16.00 per carton, or $160.00, 5 cartons of gold kiwis at $18.00 per carton, or $90.00, and 5 cartons of cantaloupes at $17.00 per carton, or $85.00, for a total invoice price of $747.00. Respondent has not paid this invoice.

18.On July 21, 2006, Complainant sold to Respondent under invoice number 73159, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of Red Delicious apples at $27.00 per carton, or $135.00, 10 cartons of papayas at $11.50 per carton, or $115.00, 10 cartons of mangos at $6.00 per carton, or $60.00, 7 cartons of bananas at $10.00 per carton, or $70.00, 5 cartons of pineapples at $16.00 per carton, or $80.00, 10 cartons of Thompson seedless grapes at $14.00 per carton, or $140.00, 10 cartons of Saturn peaches at $14.50 per carton, or $145.00, 10 cartons of gold kiwis at $18.00 per carton, or $180.00, 10 cartons of loose kiwis at $12.00 per

carton, or $120.00, 10 cartons of kiwis at $11.00 per carton, or $110.00, and 10 cartons of black seedless grapes at $10.00 per carton, or $100.00, for a total invoice price of $1,255.00. Respondent has not paid this invoice.

19.On July 21, 2006, Complainant sold to Respondent under invoice number 73199, and delivered to one of Respondent's retail locations in the greater New York City area, 2 bins of watermelons at $230.00 per bin, for a total invoice price of $460.00. Respondent has not paid this invoice.

20.On July 22, 2006, Complainant sold to Respondent under invoice number 73213, and delivered to one of Respondent's retail locations in the greater New York City area, 12 cartons of bananas at $11.50 per carton, or $138.00, 5 cartons of cantaloupes at $17.00 per carton, or $85.00, 10 cartons of strawberries at $13.00 per carton, or $130.00, and 5 cartons of Granny Smith apples at $24.00 per carton, or $120.00, for a total invoice price of $473.00. Respondent has not paid this invoice.

21.On July 23, 2006, Complainant sold to Respondent under invoice number 73332, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at $12.00 per carton, or $180.00, 24 cartons of bananas at $11.50 per carton, or $276.00, and 20 cartons of mangos at $10.00 per carton, or $200.00, for a total invoice price of $656.00. Respondent has not paid this invoice.

22.On July 24, 2006, Complainant sold to Respondent under invoice number 73367, and delivered to one of Respondent's retail locations in the greater New York City area, 53 cartons of Fuji apples at $27.00 per carton, or $1,431.00, 10 cartons of Saturn peaches at $14.50 per carton, or $145.00, 5 cartons of sugar plums at $38.00 per carton, or $190.00, 7 cartons of Golden Delicious apples at $22.00 per carton, or $154.00, 5 cartons of cantaloupes at $17.00 per carton, or $85.00, 5 cartons of pineapples at $16.00 per carton, or $80.00, 16 cartons of dapple fruits at $24.00 per carton, or $384.00, and 28 cartons of Fuji apples at $31.00 per carton, or $868.00, for a total invoice price of $3,337.00. Respondent has not paid this invoice.

23.On July 24, 2006, Complainant sold to Respondent under invoice number 73428, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of papayas at $11.50 per carton, or $115.00, 16 bins of watermelons at $220.00 per bin, or $3,520.00, and 14 cartons of "Hammie" at $18.00 per carton, or $252.00, for a total invoice price of $3,887.00. Respondent has not paid this invoice.

24.On July 25, 2006, Complainant sold to Respondent under invoice number 73523, and delivered to one of Respondent's retail locations in

the greater New York City area, 12 cartons of bananas at $11.50 per carton, for a total invoice price of $138.00. Respondent has not paid this invoice.

25.On July 26, 2006, Complainant sold to Respondent under invoice number 73568, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at $16.00 per carton, or $160.00, 10 cartons of mangos at $9.50 per carton, or $95.00, 5 cartons of pineapples at $15.00 per carton, or $75.00, and 10 cartons of gold kiwis at $18.00 per carton, or $180.00, for a total invoice price of $510.00. Respondent has not paid this invoice.

26.On July 26, 2006, Complainant sold to Respondent under invoice number 73628, and delivered to one of Respondent's retail locations in the greater New York City area, 14 bins of watermelons at $240.00 per bin, or $3,360.00, and 10 cartons of sugar plums at $35.00 per carton, or $350.00, for a total invoice price of $3,710.00. Respondent has not paid this invoice.

27.On July 27, 2006, Complainant sold to Respondent under invoice number 73711, and delivered to one of Respondent's retail locations in the greater New York City area, 12 cartons of bananas at $11.00 per carton, or $132.00, 5 cartons of cantaloupes at $17.00 per carton, or $85.00, and 10 cartons of kiwis at $12.00 per carton, or $120.00, for a total invoice price of $337.00. Respondent has not paid this invoice.

28.On July 28, 2006, Complainant sold to Respondent under invoice number 73735, and delivered to one of Respondent's retail locations in the greater New York City area, 7 cartons of Red Delicious apples at $26.00 per carton, or $182.00, 12 cartons of papayas at $11.50 per carton, or $138.00, 10 cartons of golden kiwis at $18.00 per carton, or $180.00, 5 cartons of pineapples at $14.00 per carton, or $70.00, 7 cartons of Granny Smith apples at $29.00 per carton, or $203.00, 7 cartons of Golden Delicious apples at $25.00 per carton, or $175.00, 5 cartons of grapefruits at $16.00 per carton, or $80.00, 10 cartons of loose kiwis at $19.00 per carton, or $190.00, and 10 cartons of black plums at $22.00 per carton, or $220.00, for a total invoice price of $1,438.00. Respondent has not paid this invoice.

29.On July 28, 2006, Complainant sold to Respondent under invoice number 73795, and delivered to one of Respondent's retail locations in the greater New York City area, 34 cartons of Valencia oranges (Sunkist) at $28.00 per carton, or $952.00, 18 cartons of bananas at $11.00 per carton, or $198.00, 27 cartons of Valencia oranges (Ultimate) at $20.00 per carton, or $540.00, 10 cartons of kiwis at $12.00 per

carton, or $120.00, and 10 cartons of black seedless grapes at $24.00 per carton, or $240.00, for a total invoice price of $2,050.00. Respondent has not paid this invoice.

30.On July 29, 2006, Complainant sold to Respondent under invoice number 73865, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at $11.00 per carton, or $198.00, 10 cartons of yellow peaches at $16.00 per carton, or $160.00, 5 cartons of Hass avocados at $31.00 per carton, or $155.00, and 16 cartons of Saturn peaches at $16.00 per carton, or $256.00, for a total invoice price of $769.00. Respondent has not paid this invoice.

31.On July 30, 2006, Complainant sold to Respondent under invoice number 73935, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at $11.50 per carton, or $172.50, and 10 cartons of mangos at $10.00 per carton, or $100.00, for a total invoice price of $272.50. Respondent has not paid this invoice.

32.On July 31, 2006, Complainant sold to Respondent under invoice number 74021, and delivered to one of Respondent's retail locations in the greater New York City area, 18 cartons of bananas at $11.00 per carton, or $198.00, 10 cartons of mangos at $10.00 per carton, or $100.00, and 10 cartons of white nectarines at $20.00 per carton, or $200.00, for a total invoice price of $498.00. Respondent has not paid this invoice.

33.On August 1, 2006, Complainant sold to Respondent under invoice number 74089, and delivered to one of Respondent's retail locations in the greater New York City area, 15 cartons of papayas at $11.50 per carton, or $172.50, 12 cartons of bananas at $11.00 per carton, or $132.00, 35 cartons of "Hammie" at $18.00 per carton, or $630.00, 5 cartons of pineapples at $14.00 per carton, $70.00, 5 cartons of Hass avocados at $31.00 per carton, or $155.00, 5 cartons of grapefruits at $16.00 per carton, or $80.00, 10 cartons of loose kiwis at $19.00 per carton, or $190.00, 10 cartons of honeydews at $10.00 per carton, or $100.00, 10 cartons of yellow peaches at $16.00 per carton, or $160.00, and 30 cartons of clementines at $4.00 per carton, or $120.00, for a total invoice price of $1,809.50. Respondent has not paid this invoice.

34.On August 1, 2006, Complainant sold to Respondent under invoice number 74132, and delivered to one of Respondent's retail locations in the greater New York City area, 4 bins of watermelons at $230.00 per bin, for a total invoice price of $920.00. Respondent has not paid this invoice.

35.On August 2, 2006, Complainant sold to Respondent under invoice number 74206, and delivered to one of Respondent's retail locations in

the greater New York City area, 15 cartons of papayas at $11.50 per carton, or $172.50, 10 cartons of black plums at $22.00 per carton, or $220.00, and 5 cartons of sugar plums at $27.00 per carton, or $135.00, for a total invoice price of $527.50. Respondent has not paid this invoice.

36. On August 4, 2006, Complainant sold to Respondent under invoice number 74365, and delivered to one of Respondent's retail locations in the greater New York City area, 7 cartons of Red Delicious apples at $27.00 per carton, or $189.00, 27 cartons of Valencia oranges at $17.50 per carton, or $472.50, 10 cartons of Red Globe grapes at $10.00 per carton, or $100.00, 15 cartons of kiwis at $12.00 per carton, or $180.00, 10 cartons of Golden Delicious apples at $25.00 per carton, or $250.00, 10 cartons of black seedless grapes at $26.00 per carton, or $260.00, 10 cartons of gold kiwis at $18.00 per carton, or $180.00, and 24 cartons of mangos at $10.00 per carton, or $240.00, for a total invoice price of $1,871.50. Respondent has not paid this invoice.

37. On August 5, 2006, Complainant sold to Respondent under invoice number 74498, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Globe grapes at $25.00 per carton, or $250.00, 10 cartons of papayas at $12.00 per carton, or $120.00, 10 cartons of yellow peaches at $16.00 per carton, or $160.00, 5 cartons of Friar plums at $24.00 per carton, or $120.00, and 5 cartons of Granny Smith apples at $19.00 per carton, or $95.00, for a total invoice price of $745.00. Respondent has not paid this invoice.

38. On August 7, 2006, Complainant sold to Respondent under invoice number 75488, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of papayas at $20.00 per carton, or $100.00, 10 cartons of papaya 8's at $11.50 per carton, or $115.00, 10 cartons of loose kiwis at $19.00 per carton, or $190.00, 6 cartons of grapefruits at $16.00 per carton, or $96.00, and 7 cartons of yellow peaches at $16.00 per carton, or $112.00, for a total invoice price of $613.00. Respondent has not paid this invoice.

39. On August 9, 2006, Complainant sold to Respondent under invoice number 74662, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of longan nuts at $90.00 per carton, or $450.00, 2 cartons of papayas at $18.00 per carton, or $36.00, 5 cartons of Golden Delicious apples at $28.00 per carton, or $140.00, 5 cartons of pineapples at $14.00 per carton, or $70.00, 40 cartons of clementines at $4.25 per carton, or $170.00, 10 cartons of black seedless

grapes at $26.00 per carton, or $260.00, and 10 cartons of [illeg] at $11.50 per carton, or $115.00, for a total invoice price of $1,241.00. Respondent has not paid this invoice.

40.On August 11, 2006, Complainant sold to Respondent under invoice number 74819, and delivered to one of Respondent's retail locations in the greater New York City area, 28 cartons of Fuji apples at $31.00 per carton, or $868.00, 27 cartons of $25.00 per carton, or $675.00, 10 cartons of kiwis at $16.00 per carton, or $160.00, 10 cartons of loose kiwis at $19.00 per carton, or $190.00, 10 cartons of gold kiwis at $19.00 per carton, or $190.00, 10 cartons of black seedless grapes at $26.00 per carton, or $260.00, 7 cartons of Golden Delicious apples at $28.00 per carton, or $196.00, 8 cartons of Granny Smith apples at $26.00 per carton, or $208.00, and 10 cartons of pineapples at $14.00 per carton, or $140.00, for a total invoice price of $2,887.00. Respondent has not paid this invoice.

41.On December 9, 2006, Complainant sold to Respondent under invoice number 83673, and delivered to one of Respondent's retail locations in the greater New York City area, 28 cartons of Gala apples at $25.00 per carton, for a total invoice price of $700.00. Respondent has not paid this invoice.

42.On December 11, 2006, Complainant sold to Respondent under invoice number 83765, and delivered to one of Respondent's retail locations in the greater New York City area, 27 cartons of tangerines at $21.00 per carton, or $567.00, 20 cartons of Red Globe grapes at $20.00 per carton, or $400.00, 60 cartons of papayas at $10.50 per carton, or $630.00, 24 cartons of "Korean Golden [illeg]" at $19.50 per carton, or $468.00, 10 cartons of kiwis at $20.00 per carton, or $200.00, and 20 cartons of Red Navel oranges at $15.00 per carton, or $300.00, for a total invoice price of $2,565.00. Respondent has not paid this invoice.

43.On December 11, 2006, Complainant sold to Respondent under invoice number 83790, and delivered to one of Respondent's retail locations in the greater New York City area, 54 cartons of Navel oranges at $14.50 per carton, or $783.00, 57 cartons of Red Navel oranges at $15.00 per carton, or $855.00, 30 cartons of red pommelos at $10.00 per carton, or $300.00, 8 cartons of loquats at $20.00 per carton, or $160.00, and 36 cartons of mangos at $12.00 per carton, or $432.00, for a total invoice price of $2,530.00. Respondent has not paid this invoice.

44.On December 11, 2006, Complainant sold to Respondent under invoice number 83805, and delivered to one of Respondent's retail locations in the greater New York City area, 42 cartons of "Korean Golden [illeg]" at $19.50 per carton, for a total invoice price of $819.00. Respondent has not paid this invoice.

45.On December 11, 2006, Complainant sold to Respondent under invoice number 83818, and delivered to one of Respondent's retail locations in the greater New York City area, 30 cartons of durian at $28.00 per carton, or $840.00, and 30 cartons of clementines at $4.00 per carton, or $120.00, for a total invoice price of $960.00. Respondent has not paid this invoice.

46.On December 13, 2006, Complainant sold to Respondent under invoice number 83892, and delivered to one of Respondent's retail locations in the greater New York City area, 51 cartons of "Korean Golden [illeg]" at $16.00 per carton, or $816.00, 7 cartons of loquats at $21.00 per carton, or $147.00, and 10 cartons of grapefruits at $12.00 per carton, or $120.00, for a total invoice price of $1,083.00. Respondent has not paid this invoice.

47.On December 13, 2006, Complainant sold to Respondent under invoice number 83917, and delivered to one of Respondent's retail locations in the greater New York City area, 54 cartons of tangerines at $18.00 per carton, or $972.00, 126 cartons of papayas at $11.50 per carton, or $1,449.00, 5 cartons of Ataulfo mangos (baby) at $19.00 per carton, or $95.00, 60 cartons of Ataulfo mangos at $13.00 per carton, or $780.00, 36 cartons of mangos at $13.50 per carton, or $486.00, and 20 cartons of pommelos at $22.00 per carton, or $440.00, for a total invoice price of $4,222.00. Respondent has not paid this invoice.

48.On December 13, 2006, Complainant sold to Respondent under invoice number 83925, and delivered to one of Respondent's retail locations in the greater New York City area, 49 cartons of Fuji apples at $23.00 per carton, for a total invoice price of $1,127.00. Respondent has not paid this invoice.

49.On December 14, 2006, Complainant sold to Respondent under invoice number 83947, and delivered to one of Respondent's retail locations in the greater New York City area, 30 cartons of mangos at $9.50 per carton, or $285.00, 10 cartons of loquats at $15.00 per carton, or $150.00, 30 cartons of clementines at $4.00 per carton, or $120.00, and 24 cartons of "Korean Shingo" at $16.00 per carton, or $384.00, for a total invoice price of $939.00. Respondent has not paid this invoice.

50.On December 15, 2006, Complainant sold to Respondent under invoice number 84067, and delivered to one of Respondent's retail locations in the greater New York City area, 120 cartons of Fuyu persimmons at $5.75 per carton, or $690.00, 58 cartons of blackberries at $10.00 per carton, or $580.00, and 20 cartons of "stem & leaf"

tangerines at $19.00 per carton, or $380.00, for a total invoice price of $1,650.00. Respondent has not paid this invoice.

51.On December 16, 2006, Complainant sold to Respondent under invoice number 85329, and delivered to one of Respondent's retail locations in the greater New York City area, 35 cartons of Fuji apples at $28.00 per carton, or $980.00, 36 cartons of tangerines at $20.00 per carton, or $720.00, and 30 cartons of papayas at $10.50 per carton, or $315.00, for a total invoice price of $2,015.00. Respondent has not paid this invoice.

52.On December 16, 2006, Complainant sold to Respondent under invoice number 85345, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of pommelos at $22.00 per carton, for a total invoice price of $440.00. Respondent has not paid this invoice.

53.On December 17, 2006, Complainant sold to Respondent under invoice number 85421, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of Navel oranges at $16.00 per carton, or $320.00, 30 cartons of Red Navel oranges at $15.00 per carton, or $450.00, and 20 cartons of clementines at $5.00 per carton, or $100.00, for a total invoice price of $870.00. Respondent has not paid this invoice.

54.On December 18, 2006, Complainant sold to Respondent under invoice number 85447, and delivered to one of Respondent's retail locations in the greater New York City area, 120 cartons of Fuyu persimmons at $6.00 per carton, or $720.00, 24 cartons of Hass avocados at $19.00 per carton, or $456.00, and 54 cartons of Red Navel oranges at $15.00 per carton, or $810.00, for a total invoice price of $1,986.00. Respondent has not paid this invoice.

55.On December 18, 2006, Complainant sold to Respondent under invoice number 85440, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Red Delicious apples at $24.00 per carton, or $240.00, 30 cartons of papayas at $10.50 per carton, or $315.00, 10 cartons of Hass avocados at $19.00 per carton, or $190.00, and 14 cartons of bagged Gala apples at $26.00 per carton, or $364.00, for a total invoice price of $1,109.00. Respondent has not paid this invoice.

56.On December 18, 2006, Complainant sold to Respondent under invoice number 85455, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Granny Smith apples at $25.00 per carton, for a total invoice price of $250.00. Respondent has not paid this invoice.

57.On December 18, 2006, Complainant sold to Respondent under invoice number 85503, and delivered to one of Respondent's retail locations in the greater New York City area, 35 cartons of Autumn Royal grapes at $30.00 per carton, for a total invoice price of $1,050.00. Respondent has not paid this invoice.

58.On December 19, 2006, Complainant sold to Respondent under invoice number 85541, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of clementines at $5.00 per carton, for a total invoice price of $300.00. Respondent has not paid this invoice.

59.On December 19, 2006, Complainant sold to Respondent under invoice number 85550, and delivered to one of Respondent's retail locations in the greater New York City area, 9 cartons of "stem & leaf" tangerines at $19.00 per carton, or $171.00, and 28 cartons of Gala apples at $25.00 per carton, or $700.00, for a total invoice price of $871.00. Respondent has not paid this invoice.

60.On December 20, 2006, Complainant sold to Respondent under invoice number 85601, and delivered to one of Respondent's retail locations in the greater New York City area, 36 cartons of Navel oranges at $16.00 per carton, or $576.00, 30 cartons of papayas at $10.50 per carton, or $315.00, 30 cartons of durian at $28.00 per carton, or $840.00, 10 cartons of Golden Delicious apples at $24.00 per carton, or $240.00, and 32 cartons of "Golden Korean" at $17.00 per carton, or $544.00, for a total invoice price of $2,515.00. Respondent has not paid this invoice.

61.On December 20, 2006, Complainant sold to Respondent under invoice number 85610, and delivered to one of Respondent's retail locations in the greater New York City area, 24 cartons of green seedless grapes at $24.00 per carton, or $576.00, 64 cartons of "Korean Golden" at $20.00 per carton, or $1,280.00, 63 cartons of pommelos at $22.50 per carton, or $1,417.50, and 6 cartons of "stem & leaf" tangerines at $19.00 per carton, or $114.00, for a total invoice price of $3,387.50. Respondent has not paid this invoice.

62.On December 20, 2006, Complainant sold to Respondent under invoice number 85646, and delivered to one of Respondent's retail locations in the greater New York City area, 36 cartons of pommelos at $22.50 per carton, for a total invoice price of $810.00. Respondent has not paid this invoice.

63.On December 21, 2006, Complainant sold to Respondent under invoice number 85688, and delivered to one of Respondent's retail locations in the greater New York City area, 14 cartons of Red Delicious

apples at $22.00 per carton, or $308.00, 14 cartons of Golden Delicious apples at $24.00 per carton, or $336.00, and 14 cartons of Granny Smith apples at $25.00 per carton, or $350.00, for a total invoice price of $994.00. Respondent has not paid this invoice.

64.On December 22, 2006, Complainant sold to Respondent under invoice number 85745, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of longan nuts at $90.00 per carton, or $1,800.00, 10 cartons of star fruit at $20.00 per carton, or $200.00, 10 cartons of kiwis at $18.00 per carton, or $180.00, 10 cartons of bagged clementines at $34.00 per carton, or $340.00, and 10 cartons of grapefruits at $13.00 per carton, or $130.00, for a total invoice price of $2,650.00. Respondent has not paid this invoice.

65.On December 22, 2006, Complainant sold to Respondent under invoice number 85775, and delivered to one of Respondent's retail locations in the greater New York City area, 5 cartons of longan nuts at $90.00 per carton, or $450.00, 21 cartons of blueberries at $25.00 per carton, or $525.00, 10 cartons of bagged clementines at $34.00 per carton, or $340.00, 10 cartons of "stem & leaf" tangerines at $15.00 per carton, or $150.00, 10 cartons of kiwis at $18.00 per carton, or $180.00, and 10 cartons of star fruit at $20.00 per carton, or $200.00, for a total invoice price of $1,845.00. Respondent has not paid this invoice.

66.On December 23, 2006, Complainant sold to Respondent under invoice number 85810, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of papayas at $11.50 per carton, for a total invoice price of $690.00. Respondent has not paid this invoice.

67.On December 23, 2006, Complainant sold to Respondent under invoice number 85835, and delivered to one of Respondent's retail locations in the greater New York City area, 96 cartons of papayas at $11.50 per carton, for a total invoice price of $1,104.00. Respondent has not paid this invoice.

68.On December 24, 2006, Complainant sold to Respondent under invoice number 85935, and delivered to one of Respondent's retail locations in the greater New York City area, 21 cartons of Fuji apples at $27.00 per carton, for a total invoice price of $567.00. Respondent has not paid this invoice.

69.On December 25, 2006, Complainant sold to Respondent under invoice number 85962, and delivered to one of Respondent's retail locations in the greater New York City area, 35 cartons of Fuji apples at $27.00 per carton, or $945.00, 27 cartons of Red Navel oranges at $16.00 per carton, or $432.00, and 32 cartons of "Korean Golden" at

$19.00 per carton, or $608.00, for a total invoice price of $1,985.00. Respondent has not paid this invoice.

70.On December 26, 2006, Complainant sold to Respondent under invoice number 86007, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of Fuyu persimmons at $5.50 per carton, or $330.00, and 32 cartons of "Korean Golden" at $16.50 per carton, or $528.00, for a total invoice price of $858.00. Respondent has not paid this invoice.

71.On December 26, 2006, Complainant sold to Respondent under invoice number 86012, and delivered to one of Respondent's retail locations in the greater New York City area, 120 cartons of Fuyu persimmons at $5.50 per carton, or $660.00, 32 cartons of cherries at $33.00 per carton, or $1,056.00, 32 cartons of loose kiwis at $17.00 per carton, or $544.00, 10 cartons of kiwis at $18.00 per carton, or $180.00, and 7 cartons of Granny Smith apples at $25.00 per carton, or $175.00, for a total invoice price of $2,615.00. Respondent has not paid this invoice.

72.On December 26, 2006, Complainant sold to Respondent under invoice number 86057, and delivered to one of Respondent's retail locations in the greater New York City area, 94 cartons of papayas at $10.50 per carton, for a total invoice price of $987.00. Respondent has not paid this invoice.

73.On December 27, 2006, Complainant sold to Respondent under invoice number 86092, and delivered to one of Respondent's retail locations in the greater New York City area, 27 cartons of Navel oranges at $15.00 per carton, or $405.00, 120 cartons of Fuyu persimmons at $5.50 per carton, or $660.00, and 24 cartons of "Korean [illeg]" at $15.00 per carton, or $360.00, for a total invoice price of $1,425.00. Respondent has not paid this invoice.

74.On December 27, 2006, Complainant sold to Respondent under invoice number 86103, and delivered to one of Respondent's retail locations in the greater New York City area, 130 cartons of papayas at $11.50 per carton, or $1,495.00, and 25 cartons of pommelos at $12.00 per carton, or $300.00, for a total invoice price of $1,795.00. Respondent has not paid this invoice.

75.On December 27, 2006, Complainant sold to Respondent under invoice number 86128, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of Golden Delicious apples at $24.00 per carton, or $240.00, and 32 cartons of

"Korean Golden" at $16.50 per carton, or $528.00, for a total invoice price of $768.00. Respondent has not paid this invoice.

76.On December 28, 2006, Complainant sold to Respondent under invoice number 86155, and delivered to one of Respondent's retail locations in the greater New York City area, 24 cartons of "Korean Golden" at $19.00 per carton, or $456.00, and 16 cartons of cherries at $29.00 per carton, or $464.00, for a total invoice price of $920.00. Respondent has not paid this invoice.

77.On December 28, 2006, Complainant sold to Respondent under invoice number 86174, and delivered to one of Respondent's retail locations in the greater New York City area, 24 cartons of mangos at $7.50 per carton, for a total invoice price of $180.00. Respondent has not paid this invoice.

78.On December 29, 2006, Complainant sold to Respondent under invoice number 86216, and delivered to one of Respondent's retail locations in the greater New York City area, 10 cartons of durian at $29.00 per carton, or $290.00, 60 cartons of [illeg] at $6.25 per carton, or $375.00, and 40 cartons of clementines at $5.00 per carton, or $200.00, for a total invoice price of $865.00. Respondent has not paid this invoice.

79.On December 29, 2006, Complainant sold to Respondent under invoice number 86252, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of mangos at $7.50 per carton, or $450.00, 120 cartons of Fuyu persimmons at $6.25 per carton, or $750.00, 60 cartons of strawberries at $11.00 per carton, or $660.00, 90 cartons of "Fragrant" at $17.00 per carton, or $1,530.00, and 15 cartons of blackberries at $13.00 per carton, or $195.00, for a total invoice price of $3,585.00. Respondent has not paid this invoice.

80.On December 30, 2006, Complainant sold to Respondent under invoice number 86327, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of papayas at $10.00 per carton, or $200.00, and 36 cartons of Red Navel oranges at $16.00 per carton, or $576.00, for a total invoice price of $776.00. Respondent has not paid this invoice.

81.On December 30, 2006, Complainant sold to Respondent under invoice number 86343, and delivered to one of Respondent's retail locations in the greater New York City area, 48 cartons of bananas at $13.50 per carton, or $648.00, 10 cartons of blackberries at $13.00 per carton, or $130.00, and 24 cartons of loquats at $28.00 per carton, or $672.00, for a total invoice price of $1,450.00. Respondent has not paid this invoice.

82.On December 30, 2006, Complainant sold to Respondent under invoice number 86369, and delivered to one of Respondent's retail locations in the greater New York City area, 76 cartons of Fuyu persimmons at $6.50 per carton, for a total invoice price of $494.00. Respondent has not paid this invoice.

83.On December 31, 2006, Complainant sold to Respondent under invoice number 86397, and delivered to one of Respondent's retail locations in the greater New York City area, 60 cartons of clementines at $5.00 per carton, for a total invoice price of $300.00. Respondent has not paid this invoice.

84.On December 31, 2006, Complainant sold to Respondent under invoice number 86406, and delivered to one of Respondent's retail locations in the greater New York City area, 100 cartons of mangos at $7.00 per carton, or $700.00, 38 cartons of bananas at $13.00 per carton, or $494.00, 50 cartons of Autumn Royal grapes at $30.00 per carton, or $1,500.00, and 20 cartons of clementines at $34.00 per carton, or $680.00, for a total invoice price of $3,374.00. Respondent has not paid this invoice.

85.On January 1, 2007, Complainant sold to Respondent under invoice number 86429, and delivered to one of Respondent's retail locations in the greater New York City area, 30 cartons of Fuji apples at $20.00 per carton, or $600.00, 60 cartons of papayas at $11.50 per carton, or $690.00, 20 cartons of apricots at $7.00 per carton, or $140.00, 5 cartons of Granny Smith apples at $22.00 per carton, or $110.00, 32 cartons of "Korean Golden" at $19.00 per carton, or $608.00, and 10 cartons of loquats at $28.00 per carton, or $280.00, for a total invoice price of $2,428.00. Respondent has not paid this invoice.

86.On January 1, 2007, Complainant sold to Respondent under invoice number 86441, and delivered to one of Respondent's retail locations in the greater New York City area, 20 cartons of Autumn Royal grapes at $30.00 per carton, or $600.00, and 10 cartons of Hass avocados at $25.00 per carton, or $250.00, for a total invoice price of $850.00. Respondent has not paid this invoice.

87.On January 1, 2007, Complainant sold to Respondent under invoice number 86479, and delivered to one of Respondent's retail locations in the greater New York City area, 19 cartons of Fuji apples at $28.00 per carton, or $532.00, 32 cartons of "Korean Golden" at $16.50 per carton, or $528.00, and 10 cartons of Hass avocados at $22.00 per carton, or $220.00, for a total invoice price of $1,280.00. Respondent has not paid this invoice.

88.The informal complaint was filed on January 17, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the agreed purchase price for 85 loads of fresh produce sold and shipped to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling $108,994.00. As evidence in support of this contention, Complainant submitted copies of its invoices billing Respondent for the commodities, each of which Complainant states is "initialed by New York Supermarket's buyer acknowledging receipt of the Produce and agreement to the prices listed on the invoice."[2]

Respondent, in its Motion to Reopen the Complaint, asserts that Complainant breached its contracts with Respondent by consistently failing to deliver the agreed upon quantity, type and quality of commodity.[3] Notably, Respondent does not deny purchasing and accepting the commodities at the contract prices asserted by Complainant. Rather, Respondent merely asserts that the commodities did not comply with the contract requirements. Consequently, we find that the preponderance of the evidence supports Complainant's contention that Respondent purchased and accepted the 85 loads of produce in question at agreed purchase prices totaling $108,994.00.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller.[4] Where goods are accepted the buyer has the burden of proof to establish a breach of contract.[5] While Respondent asserts that the commodities it purchased from Complainant did not comply with the contract requirements, Respondent did not submit any evidence to substantiate this contention. In the absence of any evidence showing that the commodities Respondent purchased did not conform

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[2] See Opening Statement ¶22.

[3] See Respondent's Petition to Reopen Proceeding Following Order of Default, p.5.

[4] *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc*., 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co*., 47 Agric. Dec. 353 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

[5] See U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

to the contract requirements, Respondent is liable to Complainant for the commodities at the full purchase prices totaling $108,994.00.

In further defense of its failure to pay Complainant for the subject loads of produce, Respondent's Quan Yang asserts in his sworn Answering Statement that on March 18, 2008, he was contacted by counsel for Complainant, Mr. Ronald Hager, of the law firm Cox, Wells & Associates. During the course of the conversation, Mr. Yang states Mr. Hager proposed that Respondent tender $25,179.25 to Complainant in settlement of the matter. In return, Mr. Yang states Mr. Hager represented that Complainant would withdraw the Complaint. On March 18, 2008, Mr. Hager prepared a letter memorializing this offer, a copy of which is attached to the Answering Statement and reads, in pertinent part, as follows:

> Pursuant to our phone conversation this morning, please be advised that my firm represents New Generation Produce, on a past due account in the amount of $50,358.50.
>
> On behalf of my client my firm will accept the sum of $25,179.25 as settlement in full of any and all monies due.
>
> It is my understanding that for this settlement to be in effect a check in the amount of $25,179.25 must be picked up at your office no later than tomorrow March 19, 2008, between the hours of 12:00 and 3:00 p.m. via my courier Federal Express at my firm's expense. My Federal Express account # is 3690-5020-6. I will make the necessary arrangements.
>
> Please make your check payable to the firm of Cox Wells & Associates and forward to the above referenced address.[6]

As per the letter's instructions, Mr. Yang states on March 19, 2008, Respondent sent two checks made out in equal amounts totaling $25,179.26 to Mr. Hager's attention via Federal Express. Copies of the both the front and back of the checks are attached to Respondent's Answering Statement as Exhibit B. The backs of the checks show that the checks were deposited into the account of Cox, Wells & Associates. Respondent asserts that since it has already tendered the agreed upon

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[6] See Answering Statement Exhibit A.

amount in satisfaction of the claims made herein, Complainant should be forced to stand by its promise by having the Complaint dismissed and the matter closed.

In response to Respondent's allegation of a settlement agreement, Complainant's Andrew Chau asserts in his sworn Statement in Reply that Complainant's receipt of Respondent's Answering Statement was the first time Complainant became aware that any such payment had been made. Mr. Chau explains that on or about March 12, 2008, he received a solicitation call from Frances Gennino, who said she was from a company named Creditors Service Bureau (hereafter "CSB"). According to Mr. Chau, Ms. Gennino said the company was a collection agency that had developed a very successful program to recover past due accounts receivable and had very good luck in its collection efforts. Mr. Chau states Ms. Gennino requested the names of some companies from which Complainant had been having difficulty collecting and requested that Complainant send CSB some past due statements. Mr. Chau states further that Ms. Gennino stated that CSB would review the statements and get back to Complainant with a claims proposal. At that time, Mr. Chau states Complainant faxed CSB statements regarding five of its delinquent accounts, including Respondent and Kessina Farms. Mr. Chau states CSB followed up its phone call with a letter, a copy of which is attached to the Answering Statement as Exhibit B. The letter sets forth in detail the services that CSB offers and the terms under which it conducts its collection efforts on behalf of its clients. Attached to the letter is a Power of Attorney addressed to Cox, Wells & Associates (hereafter "Cox"), from Complainant, which reads as follows:

> Please accept this letter as appointment to act as agent for New Generation Produce, on all matters relating to the $92,398.00 owed by NY Supermarkets. We hereby grant you Power of Attorney to carry out your duties to resolve this claim.
>
> Very Truly Yours,
>
> _____
> Katherine Chau

At the time Complainant received the letter and Power of Attorney from CSB, Mr. Chau states Complainant began to believe that

something was not quite "above board" about CSB, so Complainant did not sign the Power of Attorney for Cox or agree to hire CSB. On May 1, 2008, Mr. Chau states Complainant received the following fax from CSB[7]:

> March 12, 2008
> TO: Adrian Produce Inc.
>
> ATTN: Katherine Chau
>
> FROM: Frances Gennino
> FILE: 23222
> RE: CONFIRMATION
>
> Thank you for allowing Creditors Service Bureau to serve as your collection agent for the following account(s). Your debtor(s) have already been contacted by our collection department "Cox, Wells & Associates". Should they contact you, please refer them back to our company. There will be no charge to you if we do not collect. 15% on collections over $10,000.00, under one year old; 20% over one year old, 25% on collections under $10,000.00 under one year old, 33 1/3 % over one year old. If client terminates our services during period of debtor's partial payments, then client owes 50% to Creditors Service Bureau of outstanding debt placed for collection. When accounts require skip-tracing, second placements, attorney litigation, settlements, installments, debts under $300.00, partial payments, and bad checks, the fee is 50% of the monies recovered. Creditors Service Bureau reserves the right to settle accounts. Should checks be received by you in our name, endorse as our agent and deposit TODAY. We will do the same, time is of the essence. Remittances will be forwarded 90 days from receipt of full and final payment. If anything does not comport with your understanding of our arrangement, please contact our offices by the end of this business day. Unless you do so, this confirmation will constitute our full and final agreement concerning this matter. We know you will be satisfied with our service.

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[7] See Statement in Reply ¶15 and Exhibit B.

NAME OF DEBTOR	AMOUNT DUE
NY Supermarkets	$92,398.00
Kessina Farms	$21,964.50
Jump Tech Construction	$500,000.00
Fat Kee	$23,020.00
TNP Food Market	$26,822.00

Please sign and return this confirmation if corrections are needed.

/s/ _____

Frances Gennino
National Accounts Director

Katherine Chau
Owner

Because Complainant had not hired CSB, and the fax was not addressed to Complainant, Mr. Chau states Complainant ignored this fax. On or about May 7, 2008, Mr. Chau states Complainant received a letter from CSB informing Complainant that CSB had collected $4,258.75 from Kessina Farms, from which it was deducting $2,129.38 for its services and enclosing a check made payable to Complainant in the amount of $2,129.38.[8] A copy of this letter is attached to the Statement in Reply as Exhibit C. On the same date, Mr. Chau states Complainant sent a fax to CSB informing them to cease all collection as of May 7, 2008. A copy of the fax is attached to the Statement in Reply as Exhibit D. Mr. Chau states Complainant was never informed by CSB or Cox that they were attempting to collect against Respondent or that they were going to attempt to settle with Respondent. Mr. Chau states further that Complainant was unaware that CSB or Cox had received any money from Respondent and that Complainant has not received any money from CSB or Cox from the alleged settlement with Respondent. Mr. Chau states he believes Respondent has been scammed by CSB and Cox, and notes that while there is a valid Pennsylvania corporation by the name of "Cox, Wells & Associates,"[9] there is no attorney named

[8] Statement in Reply ¶16.
[9] See Statement in Reply Exhibit E.

Ronald Hager in Pennsylvania, and there are also no attorneys named Cox or Wells in Erie, Pennsylvania, or the surrounding area. To substantiate this contention, Mr. Chau attached as Exhibits F and G to his Statement in Reply copies of attorney listings from the Disciplinary Board of the Supreme Court of Pennsylvania. Finally, Mr. Chau states Complainant has sent a demand letter to CSB and Cox demanding repayment to Complainant or Respondent of the $25,179.25 that was wrongly paid to Cox. A copy of the demand letter, which was prepared by Complainant's attorney, is attached to the Statement in Reply as Exhibit H.

Counsel for Complainant subsequently submitted a Brief asserting that since Respondent has raised no other defense other than the alleged settlement with Cox, there are essentially only two issues that remain to be considered: 1) whether Respondent had a reasonable basis to rely upon the representations of Cox; and 2) whether the alleged payment of $25,179.25 by Respondent to Cox relieves it of liability to Complainant for the outstanding invoices. Complainant submits that the answer to both of these questions is "no." To support this contention, Complainant asserts first that there is no direct evidence of any agency relationship between Complainant and Cox. In the absence of direct evidence of an agency relationship, Complainant states Respondent must argue that Cox had the apparent authority to act on behalf of Complainant when it negotiated the alleged compromise settlement of the outstanding invoices. Citing *Sunny Sally, Inc. v. Ray Burke Farmer*, 23 Agric. Dec. 268 (1964), Complainant states it has long been held that the necessary elements to establish apparent authority are "that the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent, **there must be a representation of the agency by the principal, there must be reliance upon such representation by a third party,** and such representation must have been acted upon in good faith to the injury of that third party." (Emphasis added).[10]

In the instant matter, Complainant states it never authorized Cox to act as its agent for the purpose of collecting past due accounts, nor did it knowingly permit Cox to appear to be its agent. Even assuming that Cox was under the mistaken impression that it was operating as Complainant's agent, Complainant states a representation of such agency must be made by the principal (Complainant), to the third party

[10] See Brief p.5.

(Respondent), and that Respondent has offered no evidence of a representation by Complainant that Cox was acting as its agent. Complainant states Respondent has put forth only one item of evidence regarding an alleged connection between Complainant and Cox, that being the correspondence from Mr. Hager. Complainant states it is obviously Respondent's contention that it relied in good faith upon Mr. Hager's representation of acting on behalf of Complainant because it sent two checks via Federal Express to Mr. Hager's attention the day after receiving his correspondence. Complainant also states, however, that it is difficult to accept this contention given that approximately three months prior to receiving Mr. Hager's correspondence, Respondent had received notice of a Default Order entered against it by the Department, requiring Respondent to pay Complainant $108,994.00, plus interest and the $300.00 filing fee. Complainant states that when Respondent received correspondence advising that Cox was retained to collect a past due account of less than half that amount, $50,385.50, Respondent should have first asked whether Cox was referring to a different account than the one Respondent had just defaulted on. Instead, Complainant states Respondent apparently never questioned the discrepancy and agreed to pay the even lower amount of $25,179.25. Supposing for the sake of argument that Cox was acting as Complainant's agent, Complainant poses the following questions:

> Why would it state the past due account as being $50,358.50?
>
> Why would it agree to take half that amount in settlement of the debt when Complainant already had a Default Order against Respondent for the full amount of the debt?
>
> Why would it agree to settle with Respondent for any amount less than the full reparation award prior to the Department's decision to reopen the proceeding?

Complainant asserts that the only logical and reasonable answer to these questions is that Cox was acting on its own accord, with no express or implied authority from Complainant, and without even having correct information with regard to the past due amount owed by Respondent.

Complainant next asserts that this matter is analogous to *Floriza Sales Company, Inc. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328 (1988), wherein a third party purchased produce from Floriza Sales Company, Inc. ("Floriza"), but advised the seller that it was affiliated

with Pamco Air Fresh, Inc. ("Pamco") and instructed Floriza to send its invoices to Pamco for payment, which it did. When the invoices went unpaid, Floriza filed a Complaint against Pamco, who in response denied responsibility for the invoices and denied any agency relationship with the third party. Complainant states PACA found no direct evidence of an agency relationship between Pamco and the third party, but held that if apparent authority of the third party could be demonstrated from the facts, Pamco would be estopped from denying responsibility for the invoices. In applying the four elements set forth in Sunny Sally,[11] Complainant states PACA found no evidence that Pamco represented to Floriza, or any other entity, that the third party had authority to act as its agent in directing Floriza to send invoices to Pamco. Similarly here, Complainant states Respondent has offered no evidence that Complainant represented to it, or any other entity, that Cox had authority to act as its agent in negotiating the alleged compromise settlement of the outstanding invoices. Moreover, even if Cox was under the false impression that it was acting as Complainant's agent, Complainant states it had no authority to resolve the outstanding invoices with Respondent. Citing *Pasco County Peach Ass'n v. J.F. Solley & Co., Inc.*, 146 F.2d 880,883 (4th Cir. 1945), *et al*, Complainant states "(w)hen one deals with or through an agent, he assumes all the risks of lack of authority in the agent." Complainant states further that "(t)he burden of any necessary diligence to ascertain the agent's authority rests on the party dealing with the agent." *Id*. at 883. Complainant states Respondent has offered no proof that it met the burden of "necessary diligence to ascertain" Cox's authority, if any, and asserts that Respondent's mistaken reliance upon Cox's representations does not relieve it of liability for payment of the outstanding invoices to Complainant.

Finally, Complainant states that since both parties are located in the state of New York, it is pertinent to review New York State Court cases for guidance on the issue of apparent authority. In this regard, Complainant cites *Hallock v. State of New York*, 64 N.Y.2d 224 (1984), wherein the court held that "(e)ssential to the creation of apparent authority are **words or conduct of the principal, communicated to a third party**, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. **The agent cannot by his own acts imbue himself with apparent authority**."[12] Applying these principals to the instant matter, Complainant states it is clear that

[11] Supra.
[12] *Id*. at 231 (emphasis added).

Respondent may not rely upon a claim that Cox had the apparent authority to act on behalf of Complainant, as Respondent provided no evidence of words or conduct communicated by Complainant suggesting Cox was acting as its agent. Further, Complainant states Respondent may not rely, as it attempts to do in its Answering Statement, upon Mr. Hager's correspondence of May 18, 2008, as Cox could not vest itself with apparent authority.

While Complainant cites a number of other New York cases to substantiate its claims, we need not delve any further into precedent to determine that Respondent has not established any basis for finding that Cox had either actual or apparent authority to settle the subject transactions on behalf of Complainant. First, on the issue of actual authority, although Complainant has admitted sending copies of its receivables to CSB, including those for Respondent, Complainant has also stated that further discussions were to take place and that no agreement for CSB or Cox to handle collections on behalf of Complainant was ever reached. This claim is supported by the fact that the documents Complainant received from CSB include a place for Complainant to sign indicating its acquiescence to the terms stated in the document, and none of the documents in question are signed.[13] Absent any other evidence showing that Complainant specifically authorized CSB or Cox to act as its agent in collecting the receivables owed by Respondent,[14] we conclude that neither CSB nor Cox was bestowed with such authority.

On the issue of apparent authority, Respondent offers no evidence indicating that Complainant directly communicated to Respondent that CSB or Cox had authority to act on Complainant's behalf. Without such evidence, Respondent cannot reasonably argue that it relied on representations made by Complainant when it made the alleged settlement payment to Cox to satisfy its indebtedness to Complainant. Hence, we are in agreement with Complainant's argument in its Brief that Respondent's sole reliance on representations made by Cox was neither reasonable nor legally sufficient to absolve it of liability to Complainant.

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[13] See Statement in Reply Exhibits A and B.

[14] Although Complainant's apparent acceptance of a check from CSB representing payment of 50 percent of the debt owed by Kessina Farms may be seen as evidence that Complainant authorized CSB to make collection efforts on its behalf (see Statement in Reply Exhibit C), Complainant vehemently denies hiring CSB or Cox to act as its collection agent and has shown that upon receipt of the check in question, on or about May 7, 2007, it promptly notified CSB via fax to cease all collection efforts (see Statement in Reply Exhibit D).

Although we have not found evidence sufficient to support Respondent's implicit contention that CSB or Cox had actual or apparent authority to settle Respondent's indebtedness on behalf of Complainant, there remains for our consideration the issue of whether Respondent's payment to Cox meets the criteria for an accord and satisfaction. In order to find that the matter was settled through an accord and satisfaction, the following elements must be established: (1) Respondent must show that it in good faith tendered an instrument to Complainant as full satisfaction of the claim; (2) the amount of the claim must be unliquidated or subject to a bona fide dispute; (3) and Complainant must have obtained payment of the instrument.[15]

Respondent issued the two alleged settlement checks on March 19, 2008. At that time, Complainant had been served with Respondent's Motion to Reopen and was therefore aware that Respondent was disputing the claim on the basis of Complainant's alleged failure to ship the proper quantity, type and quality of fruit. Although Respondent did not submit any evidence to substantiate this contention, we find that the allegation alone is sufficient to establish the existence of a bona fide dispute. We have, however, already determined that Cox, the third party to whom the checks were issued, did not have actual or apparent authority to act on behalf of Complainant. Therefore, the acceptance of the checks by Cox does not constitute acceptance by Complainant. Consequently, without evidence that Complainant obtained payment from the checks tendered by Respondent, we conclude that Respondent has failed to sustain its burden to prove that the matter at issue herein was settled through accord and satisfaction.

As Respondent raises no other defense for its failure to pay Complainant for the commodities it purchased and accepted, we conclude that Respondent is liable to Complainant for the 85 truckloads of mixed produce in question at the agreed purchase prices totaling $108,994.00.

Respondent's failure to pay Complainant $108,994.00 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.*

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[15] U.C.C. § 3-311.

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. , 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e*., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, 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 $108,994.00, with interest thereon at the rate of 0.51 % 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

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

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.
Order Granting Joint Motion for Modification of October 15, 2008, Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova.
Filed March 10, 2009.

PACA.

Eric Paul and Jonathan Gordy, for Associate Deputy Administrator and Acting Chief, AMS.
Gina Genova, Santa Barbara, CA, for Tuscany Farms, Inc.; Joe Genova & Associates, Inc; and Joe A. Genova.
Order issued by William G. Jenson, Judicial Officer.

On October 15, 2008, I issued a Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova, all of whom filed a timely appeal of the Decision and Order with the United States Court of Appeals for the Ninth Circuit. In February 2009, the parties entered an agreement for settlement of the appeal to the United States Court of Appeals for the Ninth Circuit. The settlement agreement provides that Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova "agree to request a dismissal, with prejudice, of their Petition for Review in the U.S. Court of Appeals for the Ninth Circuit within five days after the Judicial Officer enters an order modifying the date when Decision and Order becomes final and effective to April 30, 2009.

On March 9, 2009, the parties filed a Joint Motion for Modification of the Final and Effective Date of the October 15, 2008, Decision and Order. For good reason shown, I grant the March 9, 2009, Joint Motion for Modification of the Final and Effective Date and modify the Order

in the October 15, 2008, Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova, as follows:[1]

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 April 30, 2009.

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 April 30, 2009.

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 April 30, 2009.

In re: BRIAN O'D. WHITE, a/k/a BRIAN O. WHITE.
PACA-APP Docket No. 03-0019.
Dismissal Order.
April 2, 2009.

PACA.

Christopher P Young-Morales for AMS.
Luis A. Toro for Respondent..
Dismissal Order by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case.

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[1] On January 13, 2009, Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova filed a motion for stay of the October 15, 2008, Decision and Order pending review by the United States Court of Appeals for the Ninth Circuit. The Hearing Clerk did not previously transmit the Motion for Stay Pending Review to the Office of the Judicial Officer for a ruling. In light of the instant Order Granting Joint Motion for Modification of Decision and Order as to Tuscany Farms, Inc.; Joe Genova & Associates, Inc.; and Joe A. Genova, I find the Motion for Stay Pending Review moot.

Petitioner Brian O'D. White, also known as Brian O White ("Petitioner White"), is represented by Luis A. Toro, Esq. (and Joel Kiesey of the same law firm). Respondent Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS"), is represented by Christopher P. Young-Morales, Esq.

Regarding the underlying disciplinary action, on October 28, 2008, I issued an Order Dismissing Case. That case was PACA Docket No. D-03-0005, In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce. AMS confirms, by letter filed April 1, 2009, that no employment or licensing restrictions under the PACA (7 U.S.C. § 499d(b), 499h(b)) are sought against Petitioner White; that AMS regards as moot the issue of Petitioner White's responsibly connected status (7 U.S.C. § 499a(b)(9)); and that Petitioner White, accordingly, withdraws his petition for review filed August 20, 2003.

Consequently, I order this case DISMISSED. Copies of this Dismissal shall be served (by regular mail) by the Hearing Clerk upon each of the parties.
Done at Washington, D.C.

In re: MARK R. LARAMIE.
PACA-APP Docket No. 04-0002.
Dismissal Order.
April 2, 2009.

PACA.

Christopher P. Young-Morales for AMS.
Luis A. Toro for Respondent.
Dismissal Order by Administrative Law Judge Jill S. Clifton.

Order Dismissing Case

Petitioner Mark R. Laramie ("Petitioner Laramie") is represented by Luis A. Toro, Esq. (and Joel Kiesey of the same law firm). Respondent Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("AMS"), is represented by Christopher P. Young-Morales, Esq.

Regarding the underlying disciplinary action, on October 28, 2008, I issued an Order Dismissing Case. That case was PACA Docket No. D-03-0005, In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce. AMS confirms, by letter filed April 1, 2009, that no employment or licensing restrictions under the PACA (7 U.S.C. § 499d(b), 499h(b)) are sought against Petitioner Laramie; that AMS regards as moot the issue of Petitioner Laramie's responsibly connected status (7 U.S.C. § 499a(b)(9)); and that Petitioner Laramie, accordingly, withdraws his petition for review filed November 7, 2003.

Consequently, I order this case DISMISSED. Copies of this Dismissal shall be served (by regular mail) by the Hearing Clerk upon each of the parties.
Done at Washington, D.C.

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In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
In re: KEITH K. KEYESKI.
PACA-APP Docket No. 04-0020.
Order Lifting Stay Order as to Donald R. Beucke.
Filed May 19, 2009.

PACA-APP – Perishable agricultural commodities – Order lifting stay order.

Charles L. Kendall, for Respondent.
Effie F. Anastassiou, Salinas, CA, for Petitioner Beucke.
Order issued by William G. Jenson, Judicial Officer.

On November 8, 2006, I issued a Decision and Order: (1) concluding Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Beucke to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).[1]

On November 28, 2006, in response to "Petitioner Donald Beucke's Expedited Motion to Stay Imposition of Licensing and Employment Restrictions Pending Judicial Review," I stayed *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for

[1] *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006).

judicial review.[2] On April 23, 2009, the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Respondent's Motion to Lift Stay Order." On May 18, 2009, Petitioner Beucke filed a response in opposition to the motion to lift stay. On May 19, 2009, the Hearing Clerk transmitted the record to me for a ruling on Respondent's Motion to Lift Stay Order.

Proceedings for judicial review are concluded. Petitioner Beucke has raised no meritorious basis for my denying Respondent's Motion to Lift Stay Order. Therefore, the November 28, 2006, Stay Order as to Donald R. Beucke is lifted and the order issued in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), as it relates to Donald R. Beucke, is effective, as follows.

ORDER

I affirm Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Beucke.

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[2] *In re Donald R. Beucke* (Stay Order as to Donald R. Beucke), 66 Agric. Dec. 932 (2006).

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: OCEAN VIEW PRODUCE, INC.
PACA Docket No. D-08-0064.
Default Decision.
January 15, 2009.

PACA – Default.

Ciarra A. Toomey for AMS.
Respondent Pro se.
Default Decision by Administrative Law Judge Victor W. Palmer.

Decision Without Hearing by Reason of Admissions

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter "PACA"), the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-46.45; hereinafter "Regulations"), instituted by a Complaint filed on February 22, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter "Complainant").

Complainant alleged that Respondent Ocean View Produce, Inc., a corporation organized and existing under the laws of the State of Florida (hereinafter "Respondent"), committed willful, flagrant, and repeated violations section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to make payment promptly to 19 sellers in the amount of $208,863.17 for 58 lots of perishable agricultural commodities that the Respondent had purchased, received, and accepted in interstate commerce during the period August 20, 2005 through July 13, 2007. Because Respondent's license had terminated due to Respondent's failure to pay the required annual renewal fee, Complainant requested the issuance of a finding that Respondent committed willful, flagrant, and repeated violations section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances be published. Complainant has filed a Motion for a Decision Without Hearing by Reason of Admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.139; hereinafter "Rules of Practice").

On March 21, 2008, Respondent, acting though counsel, filed an Answer to Complaint admitting that it "owes 7 suppliers an estimated

total of $67,647.10." (Answer ¶ III.) Respondent further admitted that "the remaining suppliers listed in the Complaint have either been paid in full or have settled or otherwise compromised their claims." (*Id.*) These admissions demonstrate that Respondent is in violation of the prompt payment requirements of the PACA.

Under section 2(4) of the PACA, it is unlawful for any commission merchant, dealer, or broker to fail or refuse truly and correctly to account and make full payment promptly in respect to any transaction involving a perishable agricultural commodity purchased, received, or accepted in interstate or foreign commerce. 7 U.S.C. § 499b(4); *see also Magnolia Fruit & Produce Co. v. U.S. Dep't of Agric.*, 50 Agric. Dec. 854, 857 (5th Cir. 1991) ("[A] merchant violates the PACA simply by failing to 'Make full payment promptly' in an interstate transaction, for any perishable agricultural commodity." (citing 7 U.S.C. § 499b(4))); "Full payment promptly" is defined by the Regulations as payment within 10 days of acceptance, unless the parties agree in writing to different payment terms *before entering into the transaction* and full payment occurs within the period upon which the parties agree. 7 C.F.R. § 46.2(aa)(5), (11). In other words, the prompt payment provisions of the statute and the Regulations apply to all transactions subject to the PACA unless there is "an express agreement at the time the contract is made . . . [and] the agreement [is] in writing." *In re: The Caito Produce Co.,* 48 Agric. Dec. 602, 610 (1989) (citing 7 C.F.R. § 46.2(aa)(11)).

There is no evidence that Respondent and its produce sellers had written agreements at the time of the transactions allowing for a different payment schedule then that specified in the PACA and the Regulations, nor was this defense offered by Respondent in its Answer. Instead, Respondent admitted it "incurred significant debt through non-payment by [its] clients, some of whom have simply vanished or otherwise gone out of business, and that [it has] instituted credit and collection procedures to avoid such problems in the future." (Answer, page 2).

Settlement or compromise of a PACA produce debt for a reduced amount based on the receiver's financial difficulties does not constitute full payment under the Act. *In re: Tuscany Farms, Inc.*, 2007 WL 3170429, 11 (U.S.D.A. Aug. 2007); *United Fruit and Vegetable Co., Inc. v. Director of the Fruit and Vegetable Division, et al.*, 41 Agric. Dec. 89, 91 (1982) (finding that even if United Fruit had provided the court with records proving the company had entered into compromises with the sellers, "such compromises would not have changed the fact that United Fruit had, on numerous occasions, failed to pay in full for perishables that had been ordered and delivered. Thus, there were still

violations of 7 U.S.C. § 499b (4) which makes it unlawful "to fail or refuse truly and correctly to account and make full payment promptly * * *.").

Respondent admitted in its Answer that although "there are monies owed on certain listed accounts…the remaining suppliers listed in the Complaint have either been paid in full or have settled or otherwise compromised their claims." (*Id*.) The settlement and/or compromise of several of the outstanding claims by the shippers does not ameliorate Respondent's violations of the PACA.

On March 17, 2006, Evans Fruit Company, Inc., (hereinafter "Evans") filed a PACA trust action against Respondent and Manuel Lopez in the United States District Court, Southern District of Florida (Case No. 06-20679). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of $80,206.25 due and owing to Evans. On April 6, 2006, Respondent entered a Stipulation and the Court issued an Order for Judgment against Respondent. The Order states that Respondent has stipulated and agreed that "judgment shall be entered in favor of Evans in the aggregate amount of $95,150.46, inclusive of interest and attorney's fees."

On January 8, 2007, Western Pacific Produce (hereinafter "Western") filed a PACA trust action against Respondent in the United States District Court, Southern District of Florida (Case No. 07-20043). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of $81,383.67 due and owing to Western. On February 1, 2008, the United States District Court, Southern District of Florida, entered an Order Granting Motion for Entry of Default Final Judgment against Respondent. The Judgment was entered on behalf of Western Pacific Produce against Respondent "in the amount of $72,991.27 (from the invoices), $5,638.00 in interest through July 1, 2007, and an additional $4,708 in interest through today's date." The total judgment amounted to $83,337.27. On April 9, 2008, Corona College Heights Orange and Lemon Association (hereinafter "CCH") filed a PACA trust action against Respondent and Manuel Lopez in the United States District Court, Southern District of Florida (Case No. 08-20962). The trust complaint alleged that Respondent failed to make full payment promptly for produce debt, leaving the principal sum of $11,911.60 due and owing to CCH. On June 13, 2008, CCH and Respondent entered into a Stipulation for Entry of Judgment. The parties stipulated that on or about August 2007, Respondent paid CCH "the sum of $2,000.00, thereby reducing the principal amount owed to CCH to $9,911.60." The parties further stipulated that "the total balance due to Plaintiff CCH from Defendant

Ocean View is $18,740.89, including principal in the amount of $9,911.60 and interest in the amount of $3,074.92, plus attorneys' fees and costs totaling $5,754.37." On June 19, 2008, the Court entered an Order of Judgment against Respondent stating that CCH "is a valid trust beneficiary under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §449e(c), against [Respondent] and Manuel Lopez in the aggregate amount of $18,748.89."

On December 6, 2006, Del Monte Fresh Produce N.A., Inc., (hereinafter Del Monte) and Associated Potato Growers, (hereinafter "Associated") filed an Amended PACA trust complaint in an action against Respondent in the United States District Court, Southern District of Florida (Case No. 06-22636). In its Complaint, Del Monte alleged that it sold and shipped to Respondent perishable agricultural commodities in the course of interstate and/or foreign commerce from July 14, 2006 through September 7, 2006. Associated alleged it sold and shipped to Respondent perishable agricultural commodities in the course of interstate and/or foreign commerce on January 17, 2006. The trust complaint further alleged that Respondent failed to make full payment promptly, leaving the combined sum of $27,786.60 due and owing to Del Monte and Associated.

On October 25, 2007, Del Monte and Associated moved for Entry of Judgment against Respondent for $35,000 in the United States District Court, Southern District of Florida. Attached to the motion was a stipulated judgment signed by Respondent which stated that "between January 17, 2006 and July 14, 2006, Plaintiff[s] sold on credit and delivered perishable agricultural commodities to [Ocean View Produce], all of which remains due and owing." However, on October 31, 2007, the motion was denied because the parties failed to file the settlement agreement in a timely manner. As to all of the sellers identified in the above stipulations and Orders, the amounts identified and allowed pursuant to the judgments and stipulations were greater than or equal to the amounts alleged as owed to PACA produce sellers in disciplinary complaint:

Seller	***Amount of Produce Debt Alleged in Complaint***	***Amount Admitted in Answer***	***Amount of Produce Debt in Stipulation and/or Court Judgment***	***Amount Claimed by Sellers as still owing as of 11/4/08***
Evans	$14,399.30	$7,000	$80,206.25	
Les Jardins	***$3,125.50***	***$3,125.50***		***$13,665.00***

Seller	*Amount of Produce Debt Alleged in Complaint*	*Amount Admitted in Answer*	*Amount of Produce Debt in Stipulation and/or Court Judgment*	*Amount Claimed by Sellers as still owing as of 11/4/08*
Associated Potato Growers	$9,194.00		$9,275.00	**$11,164.75**
Del Monte	***$8,045.50***		***$18,511.60***	
Gemini Farms	$11,469.20	$9,469.20		**$24,000.00**
Nuchief	***$18,847.00***	***$15,847.00***		
Western Pacific	$72,548.57		$72,991.27 [1]	
Corona-College	***$11,911.60***	***$9,991.60***	***$9,991.60***	
Pismo-Oceano	$13,383.30	$13,383.30		
New Limeco	***$13,870.00***	***$8,710.50***		
Sun America	$4,233.40			
Global Unlimited	***$2,545.50***			
De Bruyn	$22,565.05			**$166,450.43**
Chicago Produce	***$758.25***			
A&A Produce	$297.00			
National Garden	***$15.00***			
Cuba Tropical	$655.00			
Naam Produce	***$616.00***			
La Dona American	$384.00			
TOTALS	***$208,863.17***	***$67,647.10***	***$190,975.72***	***$215,280.18***

[1] Default Judgment

Respondent's admitted failures to pay are willful, repeated, and flagrant as a matter of law. In its Answer to Complaint, Respondent

admitted failing to make full payment promptly to at least 7 of the 19 sellers for purchases of perishable agricultural commodities. (Answer ¶ 4.) Respondent's admitted failures to pay are violations of section 2(4) of the PACA (7 U.S.C. § 499(b)(4)). In its Answer, Respondent stated that "any failure to promptly resolve delinquencies was not willful nor delayed for a fraudulent purpose." (*Id.*) However, Respondent's violations are willful, repeated, and flagrant as a matter of law.

Violations are repeated when they include multiple, non-simultaneous violations. *See Zwick v. Freeman,* 373 F.2d 110, 115 (2d Cir. 1967); *In re: Scarpaci Bros.*, 60 Agric. 874, 882 (2001); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (1997). Respondent's violations are repeated because it failed to pay or promptly pay 19 individual sellers for a total of 58 lots of perishable agricultural commodities for a two-year period.

Whether a violation is flagrant is determined by looking at "the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred." *In re: Five Star Food Distrib., Inc.*, 56 Agric. Dec. (1997) at 895; *see also Reese Sales Co. v. Hardin,* 458 F.2d 183, 185, 187 (9th Cir. 1972) (finding that a respondent who failed to pay $19,059.08 to nine sellers involving 26 separate transactions over two and one-half months committed repeated and flagrant violations of the PACA); *In re: Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1205, 1232 (1996) (finding that a respondent who failed to pay $245,873.41 to 11 sellers involving 113 separate transactions over a one year period committed repeated and flagrant violations of the PACA). Decisions have held "that whenever the total amount due and owing for produce exceeds $5,000, an order should be entered finding the indebted produce dealer to have committed a flagrant violation of the Act." *In re: Veg-Mix., Inc.*, 48 Agric. Dec. 595, 599 (1989) (citing *Fava & Co.*, 46 Agric. Dec. 79, 81 (1984)). Respondent has admitted in its Answer that it "owes suppliers an estimated total of $67,647.10." (Answer ¶3.) By failing to pay $67,647.10, a sum well over $5,000, to 7 sellers in 20 separate transactions over an eleven month period, Respondent committed flagrant violations of the PACA.

The Department's policy regarding willfulness is that "[a] violation is willful under the Administrative Procedure Act, (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996). Willfulness is determined by looking at a respondent's violations of the provisions of the PACA and the Regulations, the length of the time period in which the violations occurred, and the number and total dollar amount of the transactions at

issue. *In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998). A more stringent definition of "willfulness" is used in the Fourth and Tenth Circuits where willfulness is defined as "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." *E.g., Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. U.S. Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Regardless of the standard applied, Respondent's violations are willful.

Respondent's violations are willful because, based on the large number of transactions, the size of the debt, and the continuation of these violations over two-year period, Respondent knew or should have known that it did not possess sufficient funds to comply with the prompt payment provisions of the PACA. *See Five Star Food Distribs.*, 56 Agric. Dec. (1997) at 897 (finding that a respondent willfully violated the PACA when it knew or should have known that it could not make prompt payment for the produce that it ordered, yet continued to make orders over an 11 month period thereby deliberately shifting the risk of nonpayment onto the produce sellers). Respondent began failing to pay for produce in August 2005 and continued to accept shipments of produce, for which it could not pay, through July 2007. Respondent's failure to pay its produce debt is a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), which requires full payment promptly. Under these circumstances, Respondent's violations, in addition to being repeated and flagrant, are willful.

In its Answer, Respondent states that its "failure to promptly resolve delinquencies was not willful nor delayed for a fraudulent purpose." (Answer, p. 1.) Intentionality is relevant to a finding of willfulness, but "[i]t is not necessary to find that Respondent made any of the purchases alleged with a deliberate intent not to pay for such purchases in order to conclude that its actions were willful." *In re: Scarpaci Bros., Inc.,* 60 Agric. Dec. (2001) at 883. A finding of willfulness is warranted solely by a showing that Respondent "recklessly and negligently" or with "careless disregard" of the payment requirements of the PACA continued to purchase produce for many months after it knew it could not pay for its prior purchases. *See id.* at 884; *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. (1997) at 897. The Department's Judicial Officer has determined that payment violations similar to the violations established by Respondent's admissions would be willful as both intentional acts and acts performed with careless disregard of statutory requirements. *See In re: Tolar Farms and/or Tolar Sales, Inc.,* 57 Agric. Dec. 775, 782-83 (1998) (finding that a respondent who failed to pay seven sellers fully and promptly for 46 lots of produce totaling

$192, 089.03 over a three month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA); *In re: Five Star Food Distribs., Inc.*, 56 Agric. Dec. (1997) at 896-97 (finding that a respondent who failed to pay 14 sellers fully and promptly for 174 lots of produce totaling $238,374.08 over an 11 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA); *In re: Hogan Distrib., Inc.*, 55 Agric. Dec. (1996) at 631 (finding that a respondent who still owed $283,201.12 to 9 sellers on purchases of 224 lots of produce over a 16 month period committed willful violations by both intentionally violating the PACA and acting in reckless disregard of the payment requirements of the PACA).

III. The issuance of a Decision Without Hearing by Reason of Admissions is warranted

Respondent has admitted in its Answer that it has failed to make full payment promptly as required by section 2(4) of the PACA (7 U.S.C. § 499b(4)). It has been repeatedly held that a hearing may be dispensed with when no material issues of fact are in dispute. *E.g., Veg-Mix, Inc. v. U.S. Dep't of Agric.,* 832 F.2d 601, 607-08 (D.C. Cir. 1987); *In re: H. Schnell & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (1998). The Rules of Practice section 1.139 (7 C.F.R. § 1.139) provide for a decision without hearing when no answer is filed, or when the answer contains admissions to all the material allegations of fact contained in the complaint. Decisions without hearing by reason of admissions have been granted upon the motion of a complainant based on admissions made in a respondent's answer. *E.g., In re: Tolar Farms and/or Tolar Sales, Inc.*, 57 Agric. Dec. 775, 776-77 (1998); *In re: Adan O. Tinajera d/b/a Inter-Distribs.*, 56 Agric. Dec 1040, 1040-41 (1996); *In re: Nationwide Produce Co., d/b/a/ Natural Choice*, 55 Agric Dec 1412, 1412-13 (1996); *In re: Austin J. Merkel Co.,* 54 Agric. Dec. 759, 759, 763 (1995). Accordingly, based on Respondent's admissions that it failed to pay 7 sellers for produce it had purchased in interstate or foreign commerce, there is no material fact in dispute warranting a hearing and the issuance of a Decision Without Hearing By Reason of Admissions is warranted.

The appropriate sanction is the finding of repeated and flagrant violations of the PACA and the publication of the facts and circumstances of those violations. Cases involving the failure to pay produce debt are classified as either "slow pay" or "no-pay." *See In re:*

Scamcorp, Inc., 57 Agric. Dec. 527, 562 n.13 (1998). In determining whether a violation should be classified as a "no-pay" violation, the Department follows the following policy:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked. *Id.*

As stated in *Scamcorp*, the appropriate sanction in this case is revocation of Respondent's PACA license. However, the PACA license of Respondent terminated on August 23, 2007, pursuant to section 4(a) of the PACA (7 U.S.C. § 499a), when Respondent failed to pay the annual required fees, and thus, publication is the appropriate sanction in this disciplinary case.

The Complaint in this matter was filed on February 22, 2008. According to the Judicial Officer's policy set forth in *Scamcorp (Id*. at 548-549) Respondent had 120 days from the date the Complaint was served upon it, or until on or about June 30, 2008, to come in full compliance with the PACA. The Judicial Officer stated in *Scamcorp* that "full compliance" requires "not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpentino Bros., Inc., supra*, that a respondent have no credit agreements with produce sellers for more than 30 days." *Id* at 549.

As indicated in the affidavit of Josephine Jenkins of the PACA Branch, Agricultural Marketing Service (attached hereto as Attachment 1 and incorporated by reference), follow-up investigation revealed that as of November 4, 2008, Respondent still owed at least 6 sellers $78,584.05 of the amount listed in the Complaint. Therefore, pursuant to *Scamcorp*, Respondent was not in full compliance with the PACA by June 30, 2008 and this case should be treated as "no-pay" case for purposes of sanction. *In re: Scamcorp,* 57 Agric. Dec. (1998) 548-9.

Respondent's violations in this case were flagrant and repeated. *In re: D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (1994) (a finding of repeated violations is appropriate whenever there is more than one violation of the Act, and a finding of flagrant violation of the Act is

appropriate whenever the total amount due and owing exceeds $5,000.00). Respondent's violations were also willful. *In re: D.W. Produce,* 53 Agric. Dec. (1994) at 1678 (a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute). Here, Respondent knew or should have known that it could not make prompt payment for the large amount of perishables it ordered, yet it continued to make purchases over a lengthy period of time, and could not pay produce suppliers. Respondent's actions in this case constitute violations that were willful. *See In re: D.W. Produce,* 53 Agric. Dec. (1994) at 1678.

Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's Motion for a Decision Without Hearing by Reason of Admissions is granted and the following Decision and Order is issued in the disciplinary case against Respondent without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R § 1.139).

Findings of Fact

1. Ocean View Produce, Inc. is a corporation organized and existing under the laws of the state of Florida. Respondent's business and mailing address is 1201 NW 23rd Street, Miami, Florida 33142-7622. Respondent's mailing address, through counsel, is c/o David P. Reiner, Reiner & Reiner, P.A., 9100 South Dadeland Boulevard, Suite 901, Miami, Florida, 33156-7415.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20051197 was issued to Respondent on August 23, 2005. This license was suspended on February 23, 2007 pursuant to section 7(d) of the PACA (7 U.S.C. § 499g (d)), when Respondent failed to pay a reparation reward. The license was subsequently terminated on August 23, 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 failed to make full payment promptly to 19 sellers in the amount of $208,863.17 for 58 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period August 30, 2005 through July 25, 2007.
4. Respondent failed to pay at least $78,554.05 as of 120 days after service of the Complaint.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions alleged in the Complaint 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: ROGERS PRODUCE, INC.
PACA Docket No. D-09-0006.
Default Decision.
April 6, 2009.

PACA – Default.

Eric Paul for AMS.
Respondent pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

1. The Complaint, filed on October 6, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq*.) (herein frequently the "PACA"). The Complaint alleged that Rogers Produce, Inc., the Respondent, willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Parties and Counsel

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "Complainant" or "AMS"). AMS is represented by Eric Paul, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309 Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. The Respondent is Rogers Produce, Inc. (herein frequently "Rogers Produce" or "Respondent"), a corporation registered in the State of Texas. The Respondent's business address, until it ceased operations on or about October 1, 2007, was 1015 South Harwood Street, Dallas, TX, 75201.

Procedural History

4. AMS's Motion for Decision Without Hearing by Reason of Default, filed February 19, 2009, is before me. Respondent Rogers Produce was served on February 26, 2009, with a copy of that Motion and a copy of the proposed Decision and has failed to respond.

5. Regarding service of the Complaint, on October 10, 2008, Respondent Rogers Produce was served with a copy of the Complaint by certified mail, 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*. 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 October 30, 2008. The Respondent failed to file an answer, so the Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice. 7 C.F.R. § 1.136(c).

6. 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

7. Rogers Produce, Inc. is a corporation registered in the State of Texas. Respondent's business address, until it ceased operations on or about October 1, 2007, was 1015 South Harwood Street, Dallas, TX, 75201.

8. Respondent can be served by delivery made to:

(a) Roger M. Sutton, Respondent's president, director, and 100% stockholder, at his current residence address; and

(b) Robert Milbank, Jr., Respondent's Chapter 7 Trustee, at law offices of Robert Milbank, Jr., 500 N. Akard, Suite 2980, Dallas, TX 75201.

9. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 1997-1788 was issued to Respondent on July 9, 1997. This license terminated on July 9, 2008, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)),when Respondent failed to pay the required renewal fee.

10. Respondent, during the period November 23, 2006 through October 7, 2007, failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $597,428.10 for 116 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate commerce. The transactions are as follows:

SELLER'S NAME	LOTS	COM-MODITY	DATES ACCEPTED	DATES DUE	AMOUNT PAST DUE
Golman-Hayden Company Dallas, TX	116	Mixed Fruits & Vegetables	11/13/06 to 09/27/07	11/23/06 to 10/07/07	$597,428.10

11. On October 10, 2007, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §701 et seq.) in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. This petition was designated case number 07-34995. Respondent admits in bankruptcy Schedule D. Creditors Holding Secured Claims that it owed 32 "Produce Vendors with trust fund claims pursuant to the Perishable Agricultural Commodities Act of 1930 (PACA)" undisputed amounts that totaled $1,758,475.87, including $652,830.75 which Respondent acknowledged that it owed to produce vendor Golman-Hayden Company.

12. On June 17, 2008, the United States Bankruptcy Judge issued an Order approving a settlement reached between Robert J. Milbank, Jr., Chapter 7 Trustee and certain PACA trust claimants pursuant to which

at least $40,000.00 [50 % of the amounts recovered by the Chapter 7 Trustee] would be remitted to the PACA Claimants c/o Meuers Law Firm, P.L. to be held in trust for pro-rata distribution to all qualified PACA trust beneficiaries of the Debtor.

13. The gross pro-rata share of PACA trust proceeds to be distributed to seller Golman-Hayden Company will be about 3 % of its trust claim, or approximately $18,000, before the payment of this seller's share of legal fees and expenses.

Conclusions

14. The Secretary of Agriculture has jurisdiction over Respondent Rogers Produce, Inc. and the subject matter involved herein.

15. Rogers Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during November 23, 2006 through October 7, 2007, by: (1) failing to make full payment promptly of the purchase prices, or balances thereof, in the total amount of $597,428.10 to seller Golman-Hayden Company for 116 lots of fruits and vegetables, all being perishable agricultural commodities, which Rogers Produce, Inc. purchased, received, and accepted in interstate and/or foreign commerce; (2) failing to pay 32 produce vendors with PACA trust claims amounts totaling $1,758,475.87 (including $652,830.75 owed to Golman-Hayden Company), which were scheduled as undisputed secured claims in Respondent's bankruptcy proceeding; and (3) because an approved gross pro-rata distribution of at least $40,000.00 to certain qualified PACA trust beneficiaries in Respondent's bankruptcy will only pay about 3 % of their trust claim amounts.

Order

16. Rogers Produce, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

17. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

18. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with

the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing

Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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AGRICULTURE DECISIONS

Volume 68

January - June 2009
Part Four
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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions.*

Beginning in 1989, *Agriculture Decisions* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively.

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions.*

Consent decisions entered subsequent to December 31, 1986, are no longer published in *Agriculture Decisions.* However, a list of consent decisions is included in the printed edition. Since Volume 62, the full text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are available online at http://www.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Beginning in 2011, the "Certified" electonic publication of *Agriculture Decisions* [which is available at http://www.dm.usda.gov/oaljdecisions/] may be cited as" primary source" material.

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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