AGRICULTURE DECISIONS

Volume 69

January– June 2010

UNITED STATES DEPARTMENT
OF AGRICULTURE

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

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AGRICULTURE DECISIONS

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Part One (General)
Pages 1- 675

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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Gloria Derobertis, Legal Assistant

Gloria Derobertis has been a Legal Assistant with the Office of the Judicial Officer (JO) since 1983. She began her federal career as a Coding Clerk with the Federal Bureau of Investigation during the period 1970 to 1975. Ms. Derobertis joined the U.S. Department of Agriculture in 1975 - first in the Office of the General Counsel from 1975 to 1980 and then in the Extension Service from 1980 to 1983. Ms. Derobertis earned an AA degree at Sierra College, Rocklin, California, in 1969.

Gloria worked for 2 JOs – Donald A. Campbell and William Jenson. She has worked for 13 Secretaries of Agriculture, beginning with Earl L. Butz, 1971-76, John Knebel (Our former General Counsel) 1976-77, Robert Bergland 1977-81, John Block 1981-86, Richard Lyng 1986-89, Clayton Yeutter 1989-91, Edward Madigan 1991-94, A. Michael Espy 1993-94, Daniel Glickman 1995-2000, Ann Veneman 2001-04, Mike Johanns 2005-08, Ed Shafer 2008-09, Tom Vilsack 2008 -Present.

Her assistance and attention to detail has greatly assisted this Editor in maintaining a consistent high quality output in Agriculture Decisions.

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LIST OF DECISIONS REPORTED

JANUARY - JUNE 2010

AGRICULTURE MARKETING AGREEMENT ACT

COURT DECISIONS

ANIMAL QUARANTINE ACT

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COURT DECISION

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DEFAULT DECISION

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DEFAULT DECISION

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ARKANSAS DAIRY COOPERATIVE ASSOCIATION, et al. v. USDA, et al.
No. 09-487.
Filed January 11, 2010.

[Cite as: 130 S. Ct. 1066].

AMAA – MMA.

Supreme Court of the United States

Case below, 573 F.3d 815.

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

_____

GERALD CARLIN, JOHN RAHM, PAUL ROZWADOWSKI, AND BRIAN WOLFE et al. v. DAIRY AMERICA, INC., AND CALIFORNIA DAIRIES, INC.
No. 1:09-CV-00430-AWI-DLB.
Filed February 9, 2010.

[Cite as: 690 F.Supp.2d 1128].

United States District Court,
E.D. California.

AMAA – MMO– Filed rate doctrine – Raw milk pricing.

Court granted motion to dismiss and found that "filed rate doctrine" barred producers' (Dairy farmers) claim in a class action which alleged that handlers (purchasers of milk) misreported pricing data for raw milk. "Filed rate" doctrine is a judicial creation that arises from interpretations that give federal agencies exclusive jurisdiction to set rates. Keogh, 260 U.S. 156, (1922).

ORDER ON DEFENDANTS' MOTION TO DISMISS

ANTHONY W. ISHII, Chief Judge.

This is a putative class action in diversity arising from the alleged misreporting of pricing data by Defendants Dairy America, Inc., ("Dairy America") and California Dairies, Inc. ("California Dairies") (collectively "Defendants") which resulted in depressed prices paid to plaintiffs for raw milk during the period between January 1, 2002, through April 30, 2007. This case is the lead case of four cases that were consolidated by an order filed on May 29, 2009, 2009 WL 1518058. In this memorandum opinion and order, the court considers the separate motions of Dairy America and California Dairies to dismiss all claims set forth in the First Amended Complaint ("FAC") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Diversity jurisdiction exists pursuant to 28 U.S.C. § 1391(a). Venue is proper in this court.

FACTUAL BACKGROUND

I. The Parties The named plaintiffs are five dairy farmers located in states other than California who sold raw milk that was priced according to Federal Milk Marketing Orders ("FMMO's") during the time period between January 1, 2002, and April 30, 2007. The FAC asserts claims on behalf of a class of plaintiffs that sold raw milk under the same FMMO's during the same time period. The Plaintiffs in the cases that were consolidated by the court's order of May 29, 2009, are similarly situated dairy farmers whose complaints allege claims that are substantially similar to those set forth in the FAC. Although there is some disagreement as to the specific details of its business identity, it is not disputed that Dairy America is an entity established by a group of nine dairy cooperatives for the purpose of marketing dairy products manufactured by the cooperatives. Relevant to this action, the products manufactured by the cooperatives and marketed by Dairy America include nonfat dry milk ("NFDM"), buttermilk and whole milk powder. California Dairies is a dairy cooperative formed in 1999 as a result of the

merger of California Milk Producers and Danish Creamery Association. The parties agree that California Dairies is a major, but not the sole, stakeholder in the Dairy America marketing cooperative. Plaintiffs allege, and California Dairies vigorously disputes, that Dairy America is an agent of California Dairies.

II. Raw Milk Pricing Procedures

Pursuant to the Agricultural Marketing Agreement Act of 1937 ("AMAA"), the United States Department of Agriculture supports milk prices by establishing a minimum price structure for milk and milk products. The method by which this is accomplished is admittedly complex. The FAC, as well as the parties' pleadings describe the system in a level of detail that need not be repeated here. The parties appear to agree at least as to the general means by which the minimum price for raw milk is determined. The following is an abbreviated version of that process drawn primarily from the FAC. The AMAA establishes ten geographical regions in which minimum milk pricing structures are determined by separate FMMO's[1] for each area. FMMO's set minimum prices for categories of products made from raw milk. Class I includes beverage products; Class II includes soft manufactured products, such as ice cream, cottage cheese and yoghurt; Class III includes hard cheese and cream cheese; and Class IV includes butter and dry milk products. Although FMMO's set minimum prices according to a tiered pricing system that is based on end use of the milk, a region-specific single minimum price for raw milk at the farm is determined by a weighted average of prices for milk products in categories I through IV.

During the period of time relevant to this action, the methods for calculating the minimum prices reflected in the FMMO's were mandated through the Dairy Market Enhancement Act of 2000 ("DMEA").

[1]The court infers from the facts set forth in the FAC that the term FMMO refers to both the geographical area and the Federal Milk Marketing Order that sets the minimum pricing structure in that area.

Pursuant to the DMEA, weekly surveys are conducted by the National Agricultural Statistics Service ("NASS") to collect wholesale prices for representative products within each category. The survey information is gathered from product manufacturers (sometimes referred to in pleadings as milk "handlers") who produce a million pounds or more of manufactured product per year. The FMMO minimum prices for milk for class III (hard cheese) and IV (dry milk and butter) products are determined by applying the wholesale prices reported in the weekly surveys to formulae specified by the FMMO. The FMMO minimum prices for products in Classes I and II are derived by mathematic formulae from the prices determined in Classes III and IV.

Of significance to this action, one of the major wholesale pricing inputs collected by NASS for computation of the FMMO minimum price for milk for Class IV products is the wholesale price for NFDM. The DMEA requires handlers to submit NASS survey information according to instructions that, among other things, direct the handler to exclude from the survey wholesale prices for NFDM for forward sales contracts. Forward sales contracts are defined as contracts in which the selling price is set more than 30 days before the completion of the transaction. It appears undisputed that forward sales contracts generally reflected lower prices for NFDM than were reflected in contracts that were completed at or near the time of the transaction during the time period in question.

It is not disputed that, during the time in question, Dairy America submitted pricing information to the NASS survey that improperly included wholesale prices for forward contracts for NFDM. Plaintiffs allege, and Defendants do not appear to dispute, that approximately ninety percent of the contracts executed by Dairy America and reported in the weekly NASS surveys were forward contracts that should not have been reported in the NASS surveys according to DMEA procedures. Plaintiffs contends that, because forward contract prices were significantly below spot prices during the time period in question, the minimum prices set by the FMMO's for raw milk were significantly lower than would have been the case if the information provided by Dairy America to NASS had been provided according to instructions.

The FAC alleges four claims for relief; each claim appears to be

alleged against both Defendants. The first and second claims for relief allege negligent misrepresentation and Negligent Interference with Prospective Economic Advantage, respectively, both under California common law. Plaintiffs' third claim for relief alleges violation of California's Unfair Business Practices Law, California Business and Professions Code § 17200, et seq. Plaintiffs' fourth claim for relief alleges unjust enrichment under California common law.

PROCEDURAL HISTORY

The complaint in this action was filed on March 6, 2009. The currently operative FAC was filed on April 3, 2009. On April 15, 2009, Plaintiffs in this case moved for consolidation of five related cases: 09-CV-0607, 09-CV-0558, 09-CV-0237, 09-CV-0556, and 09-CV-0233. Plaintiffs' motion to consolidate was granted on May 29, 2009. Defendants California Dairies and Dairy America filed separate motions to dismiss on June 2, 2009. Defendant Dairy America filed a request for judicial notice on the same date. Plaintiffs filed separate oppositions to both motions on July 16, 2009. Defendants' replies were filed on August 13, 2009. Plaintiffs moved to file a sur-reply to address additional case authority on August 31, 2009. California Dairies filed an opposition to Plaintiffs' sur-reply on September 2, 2009. The hearing on Defendants' motion to dismiss was vacated and the matter was taken under submission as of August 31, 2009.

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure can be based on the failure to allege a cognizable legal theory or the failure to allege sufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 533-34 (9th Cir.1984). To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must be set forth factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("*Twombly* "). While a court considering a motion to dismiss must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees,* 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), and must construe the pleading in the light most favorable to the party opposing the motion, and resolve factual disputes in the pleader's favor, *Jenkins v. McKeithen,* 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404, reh'g denied, 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123 (1969), the allegations must be factual in nature. *See Twombly,* 550 U.S. at 555, 127 S.Ct. 1955 ("a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). The pleading standard set by Rule 8 of the Federal Rules of Civil Procedure "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("*Iqbal* ").The Ninth Circuit follows the methodological approach set forth in *Iqbal* for the assessment of a plaintiff's complaint:

"[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."*Moss v. U.S. Secret Service,* 572 F.3d 962, 970 (9th Cir.2009) (quoting *Iqbal,* 129 S.Ct. at 1950).

"As a general rule, 'a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.' [Citation.]" *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir.2001). However, a district court may consider materials in a 12(b)(6) motion to dismiss that are not part of the pleadings but that are 'matters of public record' of which the court may take judicial notice pursuant to Federal Rule of Evidence 201. *Id.* Specifically, a district court may take judicial notice of public records related to legal proceedings in both state courts and in the district court. *See Miles v. State of California,* 320 F.3d 986, 987

(9th Cir.2003) (district court taking judicial notice of related state court proceedings); *Scott v. Kuhlmann,* 746 F.2d 1377, 1378 (9th Cir.1984) (district court takes notice of prior related proceedings in the same court).

DISCUSSION

Defendant Dairy America asserts five grounds for dismissal of Plaintiffs' claims generally and also asserts grounds for dismissal of each of Plaintiffs' state law claims individually. In moving for dismissal of the entirety of the complaint, Dairy America contends Plaintiffs' action: (1) is barred by the filed rate doctrine; (2) must be dismissed because the DMEA confers no right of private enforcement; (3) must be dismissed for failure to join USDA, an "indispensable party immune from suit;" (4) must be dismissed because the price reporting program created no legal obligation on Defendants' part; and (5) Plaintiffs' state law claims are preempted by DMEA. For the reasons that follow, the court will find that Plaintiffs are barred from recovering damages against Defendants under the filed rate doctrine. Because the court will find that the issues presented by Defendants' motion to dismiss are settled by reference to the filed rate doctrine, the other bases Defendants advance in support of their motion to dismiss will not be addressed.

I. Filed Rate Doctrine

"The [filed rate] doctrine is a judicial creation that arises from decisions interpreting federal statutes that give federal agencies exclusive jurisdiction to set rates ...." *E. & J. Gallo Winery v. Encana Corp.,* 503 F.3d 1027, 1033 (9 Cir.2007) ("*Gallo* "). The doctrine is closely related to principles of federal preemption in that it bars "challenges under state law and federal antitrust laws to rates set by federal agencies." *Id.* "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other

than the rate adopted by the federal agency in question. [Citation.]" *Ark. La. Gas Co. v. Hall,* 453 U.S. 571, 580, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981); *Transmission Agency of N. Ca. v. Sierra Pacific Power Company,* 295 F.3d 918, 929 (9th Cir.2002). "Since the 1920s, the 'filed rate' or 'filed tariff' doctrine has barred antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services. [Citation.]" *County of Stanislaus v. Pacific Gas and Electric Co.,* 114 F.3d 858, 862 (9th Cir.1997). The filed rate doctrine was first formally recognized in the context of rates set by the Interstate Commerce Act. *See Keogh v. Chicago & Nw. Ry. Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). Since then, the doctrine has been applied in the context of challenges to rates set by the Natural Gas Act, the Federal Power Act, and the Communications Act, among others. *Gallo,* 503 F.3d at 1033.From the court's perspective, Defendants' contention that the filed rate doctrine bars Plaintiffs' claims resolves into two separate questions: first, whether the minimum rates for raw milk set by the Secretary are the sort of rates that would generally be insulated from challenge by the filed rate doctrine; and second, whether the filed rate doctrine should apply in the particular factual circumstances of this case.

A. The Filed Rate Doctrine Applies Generally to Minimum Rates for Raw Milk

The duty and authority of the Secretary of the Department of Agriculture (hereinafter, the "Secretary") to determine and enforce minimum prices for milk and milk products arises from the enforcement provisions of the Agricultural Adjustment Act, 7 U.S.C. § 601 et seq. Specifically, the Secretary's authority to set and enforce minimum prices is found in section 608c. *See United States v. Rock Royal Co-op., Inc.,* 307 U.S. 533, 574-575, 59 S.Ct. 993, 83 L.Ed. 1446 (1939) (noting purpose of act to maintain orderly markets in commodities); *United States v. Mills,* 315 F.2d 828, 833 (4th Cir.1963) (noting obligation of Secretary to set reasonable minimum commodity prices in consideration of price levels for farm inputs). It is important to note that the authority granted in section 608c is broad and an order promulgated pursuant to that section may contain, in addition to rates, other provisions that are not the subject of the filed rate doctrine. Thus, while the court may use

the term "FMMO" in reference to a minimum rate contained therein, the court does not mean to imply that the FMMO and the rate set forth in it are the same thing.Since the filed rate doctrine was first articulated in the *Keogh* decision in 1922, it has been applied in a variety of contexts. However, case authority supporting the application of the doctrine in the context of the Agricultural Adjustment Act is, at best, sparse and federal cases that apply the doctrine in the context of FMMO's are non-existent. *See In re Southeastern Milk Antitrust Litigation,* 2008 WL 2368212 at *7 (E.D.Tenn.2008) (noting the lack of binding or persuasive authority applying doctrine to preclude challenge to rates paid for raw milk sales). As in *Southeastern Milk Antitrust Litigation,* the only case cited by Defendants that illustrates the use of the filed rate doctrine to preclude an action attacking a rate set by a governmental agency for the sale of raw milk is found in a Wisconsin State case that borrowed the doctrine for application in an action that challenged a rate set by a state agency under a state marketing law. *See id.* (Citing *Servais v. Kraft Foods, Inc.,* 246 Wis.2d 920, 631 N.W.2d 629 (Wis.App.2001)).

While case authority affirmatively applying the filed rate doctrine in the context of wholesale of raw milk is lacking, cases that mention the doctrine without applying it are instructive. In *Southeastern Milk Antitrust Litigation,* the court declined to apply the filed rate doctrine where the rates being challenged were not the minimum blend rate determined by the Secretary, but were over-order premiums above the minimum rates that were allegedly manipulated by the defendants anti-competitive behavior. *Id.* at *7. Similarly, in *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.,* 253 F.Supp.2d 262 (D.Conn.2003), the court declined to apply the filed rate doctrine to preclude an action alleging antitrust manipulation of prices charged by handlers to wholesale purchasers of manufactured, finished, dairy products where the rates for such charges were not set as part of the FMMO. *Id.* at 275-276. Of some significance, the court in *Ice Cream Liquidation* acknowledged in dictum that "any claim challenging [rates actually set by an FMMO] would be barred by the filed rate doctrine." *Id.* at 275-276.

Legal authority points to two possible sources of immunity from

liability for actions, such as those alleged against Defendants, that affect wholesale milk commodity prices. The first source is statutory immunity under the DMEA and the second is the filed rate doctrine. For the sake of clarity, the court will briefly address statutory immunity under the DMEA and why it does not apply in this case. Section 608(b) of title 7 grants antitrust immunity to "marketing agreements" between the Secretary and milk producers. In *Cow Palace, Ltd. v. Associated Milk Producers,* 390 F.Supp. 696 (D.Colo.1975), and *In re Midwest Milk Monopolization Litigation,* 380 F.Supp. 880 (W.D.Mo.1974), district courts demonstrated reluctance to extend the immunity from liability under the Sherman Act to anti-competitive activities by defendants that did not directly involve marketing agreements between the Secretary and producers or handlers. Both cases noted that the Supreme Court's decision in *United States v. Borden Co.,* 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939), later affirmed by *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States,* 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960), held that the antitrust immunity provided by section 608(b) extends no further than to the marketing agreements. Other forms of anti-competitive behavior may be challenged under the Sherman Act or similar antitrust law. *See Midwest Milk,* 380 F.Supp. at 885-886; *Cow Palace,* 390 F.Supp. at 699-700 (both refusing to extend immunity where alleged antitrust violations were not alleged to have involved marketing agreements).

While neither *Cow Palace* or *Midwest Milk* directly address the issue of whether a minimum price set pursuant to section 608(c) is a "marketing agreement" within the meaning of section 608(b), both strongly suggest that the two are distinct. The court concludes that for purposes of application of the filed rate doctrine, the minimum raw milk prices set by the FMMO's are not marketing agreements within the meaning of section 608(b). This conclusion neither negates or supports the application of the filed rate doctrine in the instant case, it merely serves the interest of clarity.

As Plaintiffs point out in their opposition to Defendants' motion to dismiss, "[t]he 'animating purposes' of the filed rate doctrine are to address: '(1) a concern with potential discrimination in rates between ratepayers, also known as the "nondiscrimination" strand,' and '(2) a

concern with preserving the exclusive role of agencies in approving reasonable rates, the "nonjusticiability" strand.' [Citation.]" Doc. # 65 at 12:4-7 (quoting *Blaylock v. First Am. Title Ins. Co.,* 504 F.Supp.2d 1091, 1102 (W.D.Wash.2007)). The power of the Secretary to regulate market conditions for the sale of raw milk is rooted in the Commerce Clause as expressed in the Declaration of Conditions for the Agricultural Adjustment Act at 7 U.S.C. § 601. Section 602 sets forth the policy considerations that animate the exercise of that regulatory power. Among other purposes, the Act seeks to "maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1302(a)A(1) of this title." 7 U.S.C. § 602(1). At the same time the Act seeks to "protect the interests of the consumer" by "authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section." § 602(2).

Application of the filed rate doctrine to rates set by the Secretary for minimum prices for raw milk is consistent with both the purposes of the Agricultural Adjustment Act and the animating purposes of the filed rate doctrine. The purpose of the Act to achieve both parity pay for farmers and reasonable prices for consumers is consistent with the purpose of the filed rate doctrine to avoid discriminatory or predatory pricing arrangements. Likewise, the nonjusticiability strand of the filed rate doctrine supports Congress's right to allocate jurisdiction, and therefore justiciability, of commodity pricing for goods flowing in interstate commerce away from courts and to an agency of the federal government.

The court concludes that, in general, the filed rate doctrine does apply narrowly to bar claims challenging only minimum rates set pursuant to the Agricultural Adjustment Act.

Plaintiffs oppose the general applicability of the filed rate doctrine to minimum milk prices set by FMMO's by contending that the doctrine itself stands on shaky ground and should not be "expanded" to cover

minimum rates for the sale of raw milk. The court disagrees. First, notwithstanding Plaintiffs' contention that the filed rate doctrine should not be "expanded," there is no indication that courts have been reluctant to apply the filed rate doctrine in any context where legislature has allocated rate-setting authority to a federal agency. Second, there is no basis upon which the court can make a distinction between rate-setting in the context of minimum prices for raw milk pursuant to 7 U.S.C. § 608c and rate setting in any other context where courts have historically applied the doctrine. Third, the court can find nothing in existing case authority to suggest that courts of this circuit would be reluctant to apply the filed rate doctrine in an instance where an action challenged a rate for raw milk that was set by the Secretary pursuant to section 608c.

B. The Filed Rate Doctrine Applies Under the Facts of this Case

Plaintiffs' claims for monetary damage are, so far as the court can discern, solely the product of minimum prices for raw milk set by FMMO's that were artificially depressed by Defendants' misreporting of prices for NFDM. The crux of Plaintiffs' claims is that the minimum raw milk prices set forth in the FMMO's would have been higher had Defendants not misreported forward contract prices for NFDM. The monetary damages Plaintiffs' claim are to be determined, as the court understands it, by calculating the difference between raw milk minimum prices as set forth in the FMMO's and what those prices would have been had Defendants not submitted unauthorized forward contract sales prices. In other words, Plaintiffs' damages can only be ascertained by reference to rates set by the Secretary pursuant to the FMMO's during the time period in question. This is precisely what the filed rate doctrine forbids.

Plaintiffs argue that, notwithstanding the general applicability of the filed rate doctrine to raw milk prices set in FMMO's, the filed rate doctrine should not be applied to bar Plaintiff's claims in *this* case. Plaintiffs' first argument is that the filed rate doctrine should not apply because the USDA "never meaningfully approved the NFDM prices submitted by Defendants nor the monthly minimum milk prices." The crux of Plaintiffs' argument is that the Secretary never meaningfully approved the rates because the Secretary did not audit Defendants'

submitted pricing reports to determine if the reports represented proper pricing inputs. In a similar vein, Plaintiffs' contend the filed rate doctrine should not apply here because the rates were improperly filed. Finally, Plaintiffs contend the filed rate doctrine should not apply in this case because the Secretary, upon notification that Defendants' pricing inputs were improperly submitted, disapproved the rates for the time period in question. The court will consider each contention in turn.

1. Meaningfully Reviewed

Although the "meaningfully reviewed" requirements has been recognized as a basis for refusing application of the filed rate doctrine, *In re Southeastern Milk Antitrust Litigation,* 2008 WL 2368212 at *7 (E.D.Tenn.2008), the cases applying the "meaningfully reviewed" requirement are distinguishable from the instant case. The common theme that appears in cases where the filed rate doctrine is not applied because the rates filed are not meaningfully reviewed is the existence of some feature of the regulatory system itself that prevents review of those rates. For example, in *Brown v. Ticor Title Ins. Co.,* 982 F.2d 386 (9th Cir.1992), the Ninth Circuit held the filed rate doctrine did not apply where rates were filed in accordance with state regulations where some of the states required only non-disapproval of filed rates. *Id.* at 393. The *Brown* court noted that " '[t]he *mere fact of failure to disapprove, however, does not legitimize otherwise anticompetitive conduct ....*' " *Id.* (quoting *Wileman Bros. & Elliott, Inc. v. Giannini,* 909 F.2d 332, 337-338 (9th Cir.1990)). Similarly, in *Security Servs., Inc. v. Kmart Corp.,* 511 U.S. 431, 114 S.Ct. 1702, 128 L.Ed.2d 433 (1994) (*Kmart*), the Supreme Court held the filed rate doctrine inapplicable were filed rates were " 'void-for-nonparticipation' " under the rules of the governing commission where the carrier seeking to apply the filed rate was not a participant. *Id.* at 438-439, 114 S.Ct. 1702; *but see Norwest Transportation, Inc. v. Horn's Poultry, Inc.,* 37 F.3d 1237, 1238-1239 (7th Cir.1994) (holding *Kmart* inapplicable where there was no commission rule voiding filed tariffs for non-participation).In their

sur-reply, Plaintiffs elaborate on their "not meaningfully reviewed" argument as well as on their "not properly filed" argument. Plaintiffs' sur-reply attaches two cases which Plaintiffs claim provide recent authority supporting their contention that the filed rate doctrine should not apply under the facts of this case. The cases submitted as attachments to Document # 72 are *In re: Pennsylvania Title Ins. Antitrust Litig.,* 648 F.Supp.2d 663 (E.D.Penn.2009) ("*Penn. Title* "), and *McCray v. Fidelity Nat'l Title Ins. Co.,* 636 F.Supp.2d 322 (D.Del.2009). The court has reviewed both cases and finds neither lends support for Plaintiffs' contentions. To the contrary, as this court sees it, it is Defendants' contentions that appear to be supported.

Both *McCray* and *Penn. Title,* are cases that examine the impact of the filed rate doctrine on claims challenging rates for mortgage title insurance policies. In *McCray,* plaintiffs claimed insurance rates promulgated by a state regulatory agency were unlawfully inflated because they included costs of "kickbacks," gifts and "other financial enticements." While the *McCray* courted noted that some courts have declined to apply the filed rate doctrine where the reviewing agency's role is confined to disapproval only of filed rates, *McCray,* 636 F.Supp.2d at 329 (citing *Brown v. Ticor* and *Wileman Bros.* as examples of court decision denying application of filed rate doctrine in "file and use" regulatory schemes); the court declined to apply the Ninth Circuit's holdings in those cases to the file and use regulatory scheme in force in Delaware. *Id.* at 329-30.

The *Penn. Title* court similarly addressed contentions that the filed rate doctrine should not apply to the "file and use" regulatory scheme in question in that case. The court observed that for meaningful review to occur, a "statutory scheme must provide the regulatory agency with authority to assess rates' compliance with the statutory requirements for filed rates." *Penn. Title,* 648 F.Supp.2d at 674 (citing *Tex. Commercial Energy v. TXU Energy, Inc.,* 413 F.3d 503, 510 (5th Cir.2005)). However, the *Penn. Title* court also observed that no particular level of assessment was required by case law, *id.* at 677, and concluded that "as long as the regulatory scheme requires the filing of rates with a government agency that has legal authority to review those rates, the filed rate doctrine applies regardless of the actual degree of agency

review of those filed rates." *Id.* at 674-74. The essence of Plaintiffs' contention that the filed rate doctrine should not apply for lack of meaningful review is that USDA lacked authority to audit Defendants' pricing inputs. There is absolutely no support, in *Penn. Title, McCray,* or any other source cited by Plaintiffs to indicate that authority to conduct meaningful review must include authority to audit.

2. Procedurally/Technically Improper

The issue of whether the filed rate doctrine applies where, as here, rate data is improperly filed with the regulatory agency is closely related to the issue of failure of the regulatory agency to conduct meaningful review. As the court in *Penn. Title* points out, the Supreme Court's decision in *Kmart* delineated the scope of the "properly filed requirement." *See Penn. Title,* 648 F.Supp.2d at 678 (finding that, pursuant to *Kmart*, filed rate "doctrine does not apply where improperly filed rates: (1) make it impossible for the purchaser to calculate the rate to be charged [...]; or (2) are void per se under a statutory or regulatory scheme"). The *Kmart* Court held that "neither procedural irregularity nor unreasonableness nullifies a filed rate;...." *Kmart,* 511 U.S. at 441, 114 S.Ct. 1702. Courts in this circuit have relied on this holding in *Kmart* to support the conclusion that a rate that is merely improperly filed does not render the filed rate doctrine inapplicable. *See, e.g., In re Hawaiian & Guamanian Cabotage Antitrust Lit.,* 647 F.Supp.2d 1250, 1265-67 (W.D.Wash.2009). Indeed, if, as was held in *County of Stanislaus v. Pac. Gas & Elec. Co.,* 114 F.3d 858 (9 Cir.1997), the filed rate doctrine bars a plaintiff's recovery where the rates filed were deliberately inflated in a price fixing scheme, there is no logical justification for holding the filed rate doctrine inapplicable where the defendant's conduct is merely erroneous. *See id.* at 1043; *See also AT & T Corp. v. JMC Telecom, LLC,* 470 F.3d 525, 535 (3rd Cir.2006) ("there is no fraud exception to the filed rate doctrine").The conduct complained of here amounts to the filing of rates that were technically improper. In the instant case, there are no agency regulations that invalidate filed rates or tariffs nor is there

any indication that the misreported data invalidated the minimum rates calculated by the Secretary as a matter of law. There is nothing in the statutory scheme that indicates that the misfiling of pricing information with the USDA invalidates the rates promulgated in FMMO's or makes the minimum rates for raw milk per se invalid.

Plaintiffs' reliance on *E. & J. Gallo Winery v. Encana Corp.,* 503 F.3d 1027 (9th Cir.2007) ("*Gallo* ") is similarly unavailing. In *Gallo,* the rates in question were based on indices calculated by the publisher of a trade magazine according to proprietary formulae based on pricing inputs that were voluntarily submitted by natural gas wholesalers. *See id*. at 1031 (discussing the role and origin of the natural gas price indices). Notwithstanding the degree of separation between actual administrative oversight by the Federal Energy Regulatory Commission ("FERC") and the rates themselves, the Ninth Circuit held that the rates published in the indices could not be challenged under the filed rate doctrine to the extent those rates were the result of price inputs from *jurisdictional* sales. However, the *Gallo* court also held that the defendants in that case had failed to prove that all of the pricing inputs into the indices were the result of sales subject to FERC's jurisdiction. Specifically, the *Gallo* court held that certain sales of natural gas, such as first sales and so-called "wash trades" were not FERC-authorized sales and that index rates could be challenged to the extent they reflected such non-jurisdictional sales. *See id*. at 1045-1048 (discussing whether the filed rate doctrine applies to damage claims based on natural gas price indices).

The facts of the instant case bear little resemblance to those in *Gallo*. There is no allegation that any of the pricing inputs in this case were outside USDA's jurisdiction, nor is there any indication that any portion of the process by which the rates were established outside USDA's jurisdiction. The court concludes the filed rate doctrine is not inapplicable in this case on the ground that the rates filed were improperly filed.

3. Disapproval of the Rates by the Secretary Due to Defendants' Mis-filings

The third reason Plaintiffs advance to support their contention that the filed rate doctrine should not apply under the particular facts of this case is that the filed rate doctrine does not apply to rates that are disapproved by the regulating agency as unreasonable. Plaintiffs' complaint alleges that Defendants' misreporting of NFDM forward pricing contracts was discovered on or about April 12, 2007, and that subsequent correction of the pricing inputs produced corrected prices for NFDM for the period from April 29, 2006, through April 14, 2007, that were higher by about two cents per pound than were the prices that had been calculated using Defendants' erroneous pricing data. These facts are not disputed by Defendants.It is not disputed that USDA determined that the rates calculated in the FMMO's between April 29, 2006, and April 14, 2007, were erroneous and that other rates should have applied based on corrected pricing inputs. It is also true, as Plaintiffs contend, that filed rates are not enforceable where the regulating agency disapproves those rates. *City of Groton v. Connecticut Light & Power Co.,* 662 F.2d 921, 931 (2nd Cir.1981). However, as the court in *City of Groton* observed, under the filed rate doctrine, rates that have been published but not acted upon by the regulatory agency may not be challenged because those rates "are the legal rates until suspended or set aside." *Id.* at 929. Thus, the issue raised by Plaintiffs' argument is not whether the filed rate doctrine applies to rates that have been disapproved, rather the issue before the court is whether the disapproval of rates by the regulating agency can be held by the courts to operate retroactively. For the reasons that follow, the court concludes that the USDA's disapproval of rates cannot be applied retroactively by the court to make the filed rate doctrine inapplicable over the time period in question.

In *Interstate Commerce Comm'n v. American Trucking Ass'n,* 467 U.S. 354, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984) ("*American Trucking* "), the Supreme Court addressed the issue of whether the Interstate Commerce Commission ("ICC") could implement regulations pursuant to the Motor Carrier Act of 1980, Pub.L. 96296, 94 Stat. 793, that would allow the ICC to retroactively "reject" filed tariffs "submitted in

substantial violation of a rate-bureau agreement once that tariff ha[d] gone into effect." *Id.* at 360, 104 S.Ct. 2458. The *American Trucking* Court differentiated "rejection" from other actions the ICC could take with respect to tariffs-such as recision, modification or cancellation-by noting that "rejection" renders a tariff void *ab initio*. *Id.* at 358, 104 S.Ct. 2458. The *American Trucking* Court held that the ICC was not empowered under the Motor Carrier Act to reject effective tariffs, *id.* at 363-364, 104 S.Ct. 2458, but held the ICC could reject a tariff that was submitted in "substantial violation of rate-bureau agreements." *Id.* at 370-371, 104 S.Ct. 2458; *see also Cooperative Power Ass'n v. FERC,* 739 F.2d 390, 391 n. 3 (8th Cir.1984) (noting the *American Trucking* Court "approved retroactive tariff rejection as a sanction for knowing violation of agreements.") The Supreme Court later noted in *Security Servs., Inc. v. Kmart Corp.,* 511 U.S. 431, 441, 114 S.Ct. 1702, 128 L.Ed.2d 433 (1994), that the Court's decision in *American Trucking* "held that the [ICC] could retroactively void effective tariffs *ab initio* only if the action 'further[s] a specific statutory mandate of the Commission' and is 'directly and closely tied to that mandate.' " *Id.* at 441, 114 S.Ct. 1702 (quoting *American Trucking,* 467 U.S. at 367, 104 S.Ct. 2458).

The case at bar is distinguishable from *American Trucking* in a number of critical ways. First, in the instant case, while the DMEA sets forth procedures for the submission and collection of milk pricing survey data, there is nothing to indicate a "statutory mandate" that would be furthered by the retroactive "rejection" of the minimum pricing structures set forth in the FMMO's in question. Further, even if there were such a statutory basis for application of the holding in *American Trucking* in the context of milk pricing, there is no allegation that the misreporting alleged against Defendants rises to the level of "knowing violation" that would justify the rejection of the minimum prices set forth in the FMMO's. Finally, and most significantly, there is no indication of the intent of the regulatory agency, in this case the Department of Agriculture, to establish a disciplinary sanction for violations of the sort that are alleged against Defendants.

It is highly significant that the action in *American Trucking* was brought by an association of haulers as a response and a challenge to the

announced intent of the ICC to establish the retroactive rejection of tariffs as a sanction for collusive pricing activities that were specifically prohibited by the Motor Carrier Act. Here, in contrast, Plaintiff is asking the court to administer such a sanction on its own, without any indication of the intent of the Secretary to make such a sanction generally applicable. While *American Trucking* stands for the proposition that a regulatory agency may sanction knowing violation of established rules governing the filing of tariffs by retroactively rejecting the filed tariffs, there is absolutely no support for the proposition that courts could impose such sanctions.

Based on the available authority, the court concludes that *American Trucking* constitutes the only exception to the generally established principle that the impact of the invalidation, recision, modification, or disapproval of filed rates is prospective only. The court concludes that the facts of this case are distinguishable from those of *American Trucking* and that the holding of *American Trucking* does not apply in this case. The court further concludes that it lacks authority to invalidate minimum rates for raw milk that were in force prior to the time those rated were disapproved or modified by the Secretary.

The court finds that, contrary to Plaintiffs' assertions, the filed rate doctrine operates to bar state claims that challenge minimum rates for raw milk established by FMMO's during the time period in question and that the application of the filed rate doctrine is not prevented because of the failure of the USDA to adequately audit pricing inputs or because of the USDA's ultimate disapproval of those rates. The court further finds that, because all of Plaintiffs' claims for money damages are state law claims that challenge the validity of minimum rates approved by the Secretary those claims are barred by the filed rate doctrine. Plaintiffs' claims for money damages will therefore be dismissed.

II. Injunctive Relief

The filed rate doctrine does not bar claims for equitable relief. *Georgia v. Pennsylvania R.R. Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed.

1051 (1945). Plaintiffs' third claim for relief for unfair business practices under Cal. Bus. & Prof.Code §§ 17200 et seq. includes a request for injunctive relief. Plaintiffs' claim does not set forth any specifics regarding what injunctive relief is requested nor can the court guess what might be warranted given the fact Defendants' erroneous pricing inputs have been corrected and the rates recalculated. Neither party addresses Plaintiffs' request for injunctive relief in their pleadings. The court will therefore dismiss Plaintiffs' request for injunctive relief as inadequately pled with leave to amend.

CONCLUSION AND ORDER

So long as Plaintiffs' claims for monetary relief are predicated on the assertion that the prices Plaintiffs received for raw milk were the minimum prices set in FMMO's approved by the Secretary, and so long as the basis for Plaintiffs' claims for damages are based on the assertion that those prices would have been higher but for Defendants' misreporting of NFDM prices, Plaintiffs' state law claims are barred by the filed rate doctrine. While the court is mindful that this state of affairs leaves Plaintiffs without a means of redress under the FAC, the court observes that the non-justiciability of Plaintiffs' claims for monetary damages is the price the filed rate doctrine extracts for the administration of a scheme of federal price supports that provides necessary market security for milk producers. Because the filed rate doctrine renders Plaintiffs' state law claims for money damages non-justiciable under the currently-pled facts, the court declines to address Defendants' other grounds for dismissal."If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.,* 806 F.2d 1393, 1401 (9th Cir.1986). The claims for money damages Plaintiffs have alleged are non-justiciable under the facts that have been alleged in the FAC. Because the filed rate doctrine applies narrowly to bar only claims that are based on minimum prices paid for raw milk, the court is not willing at this point to make the determination that there are no other facts that Plaintiffs could possibly

plead that would cure the deficiency. Further, as noted, the court cannot determine at this point that there is no non-money equitable remedy available to Plaintiffs. For that reason the FAC will be dismissed with leave to amend.

The court is also mindful that the filed rate doctrine consists of a body of law that has been the subject of conflicting interpretations. The court will therefore give favorable consideration to the motion of either party for interlocutory appeal on the issue of whether the filed rate doctrine bars Plaintiffs' claims in this case.

THEREFORE, Defendants' motion to dismiss Plaintiffs First Amended Complaint in its entirety is hereby GRANTED. Plaintiffs' First Amended Complaint is hereby DISMISSED in its entirety. Leave to amend is granted. Any amended complaint or motion for interlocutory appeal shall be filed and served not later than thirty (30) days from the date of service of this order.

IT IS SO ORDERED.

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VAQUERÍA TRES MONJITAS, INC.; SUIZA DAIRY, INC. v. CYNDIA E. IRIZARRY-ADMINISTRATOR, JOSÉ O. FABRE-LABOY - SECRETARY; INDUSTRIA LECHERA DE PUERTO RICO, INC. (INDULAC), PUERTO RICO DAIRY FARMERS ASSOCIATION, VAQUERÍA TRES MONJITAS, INC.
Nos. 07-2240, 07-2369.
Decided March 11, 2010.

(Cite as: 360 Fed.Appx. 451, 2010 WL 107340 (C.A.4 (N.C.))).

AMAA – MMO.

United States Court of Appeals,
First Circuit.

Before LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ, and

HOWARD, Circuit Judges.

ORDER OF COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied. TORRUELLA, Circuit Judge (Concurring in the denial of en banc review).

Although "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman v. Jordan,* 415 U.S. 651, 667, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), I believe that the panel opinion in this case is eminently correct in holding that the Eleventh Amendment does not bar the relief afforded by the district court. This ruling is correct because it is consistent with well-established precedent that places decisive weight on the impact a judgment has on the state treasury. *See Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 49, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) ("[T]he vast majority of Circuits ... have concluded that the state treasury factor is the most important factor to be considered ... and, in practice, have generally accorded this factor dispositive weight") (first alteration in the original) (internal quotation marks omitted); *Libby v. Marshall,* 833 F.2d 402, 406 (1st Cir.1987)(stating that "[t]he damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief"). In this case the Eleventh Amendment poses no bar to relief because there is simply no impact on the state fisc, *at present or in the future.*In our November 23, 2009 opinion, we affirmed the district court's grant of a preliminary injunction against the Milk Industry Regulation Administration for the Commonwealth of Puerto Rico ("ORIL" by its Spanish acronym). In its opinion and order, the district court found that Plaintiffs had shown a likelihood of success on the merits of their claim that ORIL put into place an arbitrary and

discriminatory regulatory scheme that violated the Due Process, Equal Protection and Takings clauses of the United States Constitution. As part of the preliminary injunction, the district court directed ORIL to adopt a regulatory mechanism to compensate Plaintiffs for the deficient rate of return that was imposed by ORIL's regulatory scheme from the year 2003. In compliance with the district court's injunctive order, ORIL adopted an administrative order which directed that 1.5 cents from the sale of each quart of milk be earmarked for the purpose of complying with the regulatory accrual mechanism. That is, the money used to comply with the district court's injunction would be paid by the consumers of milk in Puerto Rico. ORIL also adopted Regulation No. 12, which established that the monies raised from the sale of milk be deposited in a special account within the Milk Industry Development Fund.[1]

The dissent from denial of en banc review argues that the injunction issued by the district court contravenes the strictures of the Eleventh Amendment because it makes the Commonwealth liable for payment of monetary relief. There is no basis in the record for this conclusion. The dissent bases this conclusion on two mistaken assumptions: (1) that the monies raised by the regulatory accrual are public funds and (2) that the Commonwealth is or would be required to expend public funds or resources to compensate Plaintiffs. I write separately to dispel these assumptions and to clarify that the Commonwealth's dignitary and fiscal interests are not implicated in this case as to require this court to conclude that sovereign immunity poses a bar to relief.

The dissent suggests that funds deposited in the Milk Industry Development Fund are considered public funds of the Commonwealth, and that therefore, the monies deposited in the special account should be considered public funds. However, we are dealing in this case with

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[1] The Fund was created to "promot[e] the production, sale, processing and consumption of fresh milk and its byproducts, and ... any other activity necessary for the advancement of the milk industry." P.R. Laws Ann. tit. 5, § 1099. It is "supported by contributions from milk producers at the rate of one-half (1/2) cent for each quart of milk produced and accepted by the processors for pasteurizing." *Id*.

monies paid by consumers of milk which can only be used for the purposes designated by the injunction. There is no indication that the funds deposited in the special account would be or can be commingled with the Commonwealth's general revenues, or with the monies deposited in the Milk Industry Development Fund according to the law. More importantly, *the Defendants have not argued on appeal that the monies raised by the regulatory accrual are public in nature.* On the basis of the record before us, it is therefore impermissible to suggest, as the dissent does, that the injunction reaches the Commonwealth's funds.

Secondly, there is simply no indication in the record or in the Regulations adopted by ORIL that an eventual judgment ordering disbursal of the monies raised pursuant to the regulatory accrual would be satisfied by public funds or that the Commonwealth's resources would be affected if in due course the Plaintiffs are found entitled to the monies raised by the regulatory accrual.[2] *Neither the Commonwealth nor ORIL have been adjudged responsible for contributing funds to the special account,* and the contributions made to the account are kept separate from the Commonwealth's general revenues and from the Milk Industry Development Fund's monies. Thus, the revenues raised by the regulatory accrual are special funds that do not make the Commonwealth the real party in interest for Eleventh Amendment purposes. *See Hudson v. City of New Orleans,* 174 F.3d 677, 689 (5th Cir.1999) (reasoning that, for Eleventh Amendment purposes, the fact that an entity receives state funds which are earmarked for specific or special purposes counsels against finding that the state would be responsible for the entity's debts and obligations); *Brown v. Porcher,* 660 F.2d 1001, 1006-07 (4th Cir.1981) (holding that the Eleventh Amendment posed no bar to compensation payable from South Carolina's unemployment compensation fund which was a special fund "insulated" from public monies and separately financed). *Cf. Austin v.*

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[2] The intricacies of the regulatory mechanism that Defendants adopted have not been challenged by the parties. Defendants have not argued on appeal or in their petition for rehearing en banc, that the regulatory mechanism forces the Commonwealth to expend public funds or resources in violation of the Eleventh Amendment. Therefore, any arguments raised by the dissent *sua sponte* regarding the details of the regulatory accrual are insufficient to justify rehearing in this case.

Berryman, 862 F.2d 1050, 1056 (4th Cir.1988) (holding that the Eleventh Amendment barred monetary relief against Virginia's unemployment compensation fund which was "integrated" into the state's treasury).

The fact that the special account was created within the Milk Industry Development Fund is insufficient to conclude that the Commonwealth would be required to expend state funds to comply with the injunction. The Commonwealth simply has not been required to appropriate *its funds* to comply with the regulatory accrual, and given that the funds deposited in the special account are earmarked to comply with the regulatory mechanism, there is no basis to conclude that a final judgment in favor of Plaintiffs would amount to a judgment against the Commonwealth.[3]

The dissent rightly cautions that the analysis of an entity's entitlement to sovereign immunity should not be transformed into a formalistic inquiry. However, the dissent mistakenly criticizes the panel for engaging in this type of inquiry. Far from adopting a formalistic approach towards Eleventh Amendment analysis, the panel's decision considers, from a practical perspective, the Commonwealth's immediate and ultimate liability and holds that sovereign immunity poses no bar to the relief ordered by the district court, precisely because the Commonwealth was not adjudged liable for payment of a monetary judgment, or held in any fashion subsidiarily responsible for providing the funds that nurture the special account.

Likewise, the dissent errs in asserting that the panel's decision is inconsistent with the Supreme Court's decision in *Regents of the University of California v. Doe,* 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). In *Doe,* the Supreme Court held that the Eleventh Amendment barred a claim for monetary relief against the State of

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[3] In fact, the precise compensation that Plaintiffs will be entitled to receive has not been determined as of yet, nor can it be gleaned from the record that the Commonwealth will bear any type of subsidiary monetary liability in this case. Thus, any contention that such an impermissible outcome is within the realm of possibility on the present record, is beyond speculation.

California, even though the damages would be paid by a third party. For Eleventh Amendment purposes, the Supreme Court found it irrelevant that the State of California had been relieved of its obligation to pay a judgment because a third party would cover the state's liability. In *Doe,* the State of California assumed an obligation upon a finding of liability. In contrast, the district court has never adjudged the Commonwealth liable for monetary relief in this case. Thus, while the Supreme Court clarified in *Doe* that the state's potential legal liability was the relevant factor in the Eleventh Amendment question regardless of the possibility of third-party indemnification, in this case the Commonwealth *has not been held legally or potentially liable* for compensatory damages. That is, the consumers of milk in Puerto Rico are not relieving the Commonwealth of its liability, since the Commonwealth has not been adjudged liable for the type of compensatory damages that the State of California was potentially liable for in *Doe*.[4] Rather than contravening our panel decision, the Supreme Court's decision in *Doe* supports the conclusion that where there is no basis to find that the state is potentially liable for monetary compensation, the Eleventh Amendment poses no bar to relief, such as the one ordered by the district court in this case.

Doe established that the state's legal liability is a crucial consideration in Eleventh Amendment analysis. But that liability is inextricably bound to the overriding question of whether the state would be "legally and practically" required to pay a monetary judgment. *See Hess,* 513 U.S. at 51, 115 S.Ct. 394 (stating, that where "legally and practically" the state would not be required to cover the entity's indebtedness, "the Eleventh Amendment's core concern is not implicated"). In this case, however, it is pure speculation to state that the Commonwealth is legally, practically or potentially bound to expend funds in the event that the monies raised from milk sales prove insufficient to compensate the milk producers. Unlike *Doe* where the

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[4] The Supreme Court's decision in *Doe* is distinguishable because it dealt with an indemnification agreement between the State and a third party. This contractual relationship had nothing to do with the relationship between the state and the plaintiff who sought relief against the state in federal court. That is, the presence of third-party indemnitor in *Doe* failed to alter the state's liability towards the plaintiff.

State of California was considered to be *potentially liable to plaintiffs,* the Commonwealth's liability in this case is *speculative* in nature. As I have stated, the funds used to comply with the district court's injunction are raised from the price consumers pay for milk and the revenues are kept in a special account which is segregated from the Commonwealth's funds. Rather than imposing potential liability on the Commonwealth or its agencies, this regulatory mechanism imposes an obligation on the consumers of milk and carefully shields the Commonwealth's funds and resources from potential liability. Therefore, the dissent's claim that the Commonwealth would be required to pay a monetary judgment is speculative and is insufficient to conclude that the district court's order violates the Eleventh Amendment.

Pursuant to the Supreme Court's decision in *Doe,* the issue of whether a monetary judgment against a state official is enforceable against the state is still a crucial consideration in Eleventh Amendment analysis. 519 U.S. at 430, 117 S.Ct. 900 (explaining that the Court in *Hess* "focused particular attention" on the fact that the states would not have been obligated to pay the judgment). *See, e.g., Fresenius Med. Care Cardiovascular Res. Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.,* 322 F.3d 56, 65 (1st Cir.2003)(explaining that the vulnerability of the state's purse is a salient factor in Eleventh Amendment arm-of-the-state analysis and stating that where it is clear that the state's treasury is not at risk, the control exerted by the state over the entity does not entitle the state to immunity); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.,* 991 F.2d 935, 939 (1st Cir.1993)("The Eleventh Amendment's primary concern is to minimize federal courts' involvement in disbursal of the state fisc."). Thus, the panel's opinion is consistent with settled precedent that examines an entity's entitlement to sovereign immunity through the prism of the financial burden actually or potentially imposed on the state.

Finally, the dissent mistakenly contends that the panel's decision ignores the Commonwealth's dignitary interests, which are protected by the Eleventh Amendment. In examining the contours of the state's sovereign immunity, the Supreme Court has explained that the Eleventh Amendment confirms the very essence of the principle of dual

sovereignty embedded in the nation's constitutional structure. *Blatchford v. Native Vill. of Noatak & Circle Vill.,* 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991). Though the injunction requires ORIL to adopt the regulatory mechanism, ORIL was not stripped of its power to set the price of milk and to regulate the Milk Industry. Given that ORIL retains control over the milk industry, the panel rightly concluded that the regulatory accrual has not burdened the Commonwealth's entitlement to respect as a sovereign entity in a manner that contravenes the Eleventh Amendment.

In sum, the panel's decision in this case evaluates the substance of the relief afforded by the district court and draws the line against the application of sovereign immunity. This case simply does not involve a monetary award against the state that burdens the state's treasury, nor does it implicate the Commonwealth's dignitary interests in a manner offensive to the Eleventh Amendment. I therefore concur with the majority in denying en banc review.

LYNCH, Chief Judge, dissenting from the denial of en banc review.

With the greatest respect for my colleagues, I disagree with the decision to deny en banc review and think the serious issues raised deserve greater attention from this court and, failing that, from the Supreme Court.Review en banc is sought by defendant state officials from Puerto Rico's Milk Regulatory Board (Spanish acronym “ORIL”), and the Commonwealth's Secretary of Agriculture, on the ground that the Eleventh Amendment prohibits the remedy ordered by the district court and affirmed by the panel. That remedy was an injunction that forces the Administrator of ORIL, a state administrative agency, to retroactively compensate plaintiffs for the profits they say ORIL deprived them of from 2003 to the time the injunction went into effect in 2007. Under that compulsion the defendant state officials imposed a new surcharge on consumers, the funds from which go into a state-administered public fund and are to be used for the sole purpose of paying plaintiffs for their compensatory damages. Surely this raises significant Eleventh Amendment immunity concerns.

The panel held that there is no Eleventh Amendment bar because the relief took the form of an injunction and the injunction did not force the

Commonwealth to satisfy the judgment with funds directly paid from or funneled through the state treasury. That is not, in my view, the appropriate test under the Supreme Court's Eleventh Amendment jurisprudence, and it will lead to federal court orders designed to evade the requirements of the Eleventh Amendment.

I believe the panel has misread *Hess v. Port Authority Trans-Hudson Corp.,* 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), and has done so in a way which is inconsistent with more than a decade's worth of subsequent Supreme Court precedents, including *Regents of the University of California v. Doe,* 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), and *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002), as well as our circuit precedent in *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.,* 322 F.3d 56 (2003), and precedent from other circuits. The importance of this issue and its stakes for the states in the many cases in which individuals seek compensation for past constitutional violations make this, in my view, a case warranting en banc review. The issues raised are admittedly difficult, and there is no Supreme Court case directly on point.

I. Facts

Like many states in the United States, the Commonwealth of Puerto Rico extensively regulates its dairy industry. ORIL, a division of the Puerto Rican Department of Agriculture, is the relevant administrative agency performing this function. Through its regulations, ORIL controls all aspects of the Puerto Rican milk industry. *See generally* J.W. Gruebele and L.F.C. Barahona, *Growth of the Dairy Industry in Puerto Rico,* 14 Illinois Agric. Econ. 32 (1974). Among the ways it does so are by setting the price Puerto Rican consumers pay for processed fresh milk, the margins that all domestic dairy farmers, milk processors, retailers, and distributors receive from the consumer price, and the internal price that milk processors pay to buy raw milk from dairy farmers. *See* P.R. Laws Ann. tit. 5, §§ 1096, 1107.The plaintiffs, Puerto

Rico's two fresh milk processors, brought a civil rights suit under 42 U.S.C. § 1983 against the Administrator of ORIL and the Secretary of Agriculture in their official capacities, claiming that ORIL's pricing scheme was unconstitutionally arbitrary and had, since 2003, deprived them of profits to which they were entitled.[5] Plaintiffs' requested relief included "a temporary mechanism for plaintiffs to recover the losses they have experienced on account of the unconstitutional regulation herein under attack."

On July 13, 2007, the federal district court of Puerto Rico held that since 2003, ORIL's price scheme had been violating the Due Process Clause, the Equal Protection Clause, the dormant Commerce Clause, and the Takings Clause of the United States Constitution. *See Vaquería Tres Monjitas v. Fabré Laboy,* No. 04-1840 (D.P.R. July 13, 2007). It issued a preliminary injunction which provided in relevant part:

The Administrator [of ORIL] is ordered to adopt a temporary mechanism that will allow the processors to recover the new rate of return they are entitled to (whatever that may be) for the year 2003 (base cost year of the present [price] structure) and up to the day when they begin to recover said rate based on the new regulatory standards and corresponding order. *The Administrator may so act through regulatory accruals, special temporary rates of return or any other available mechanism of his choosing.* The period for this special recovery shall be reasonably determined by the Administrator. The Administrator will hold hearings for this purpose with the participation of plaintiffs, and all parties within the milk industry, within a period of thirty (30) days of this Opinion and Order. A decision of the Administrator shall follow promptly. *Id.* at 102 (emphasis added).

The panel depicts the regulatory accrual mechanism ORIL adopted pursuant to this injunction as an informal remedy that would not require any state action beyond the initial price order and would not be collected

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[5] Specifically, plaintiffs claimed that since 2003, ORIL had used outdated economic data and had unfairly favored dairy farmers and other entities at the expense of fresh milk processors when formulating the annual pricing schemes for the milk industry. Plaintiffs claimed they were therefore unable to obtain reasonable profits. They alleged violations of, inter alia, the Due Process Clause, the Equal Protection Clause, and the Takings Clause.

or retained by the Commonwealth. *See Vaquería Tres Monjitas,* 587 F.3d at 479. The facts do not support that characterization. ORIL promulgated the regulatory accrual mechanism through a formal regulation and administrative order subject to Puerto Rico's Uniform Administrative Procedure Act, P.R. Laws Ann. tit. 3, § 2121 *et seq*. Like a tax, the mechanism raises revenue through a method available only to sovereigns. It also entails extensive state involvement well beyond the promulgation of the initial price order.

The regulatory accrual mechanism works as follows. On April 17, 2008, after nine months and 375 docket entries' worth of further litigation over the terms of the injunction, ORIL issued a regulation and administrative order setting forth the details of the mechanism. The regulation created a special fund (called "the reserve for the eventual compensation for losses caused to the processing plants by the previous regulations") out of which plaintiffs' past losses were to be paid. ORIL did this by adding the regulatory accrual as one of the costs to be included in determining the new price of milk that consumers would pay in Puerto Rico. "This contribution for the abovementioned compensation," the regulation continued, "shall be retained and deposited in a special account in the Milk Industry Development Fund, which will keep and manage the special account in compliance with the orders it receives from the administrator of [ORIL]." [6]

In an accompanying administrative order, ORIL also set a new price structure for the consumer price of fresh milk in Puerto Rico.[7]

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[6] The Milk Industry Development Fund (Spanish acronym "FFIL") was established to promote the fresh milk industry. It is administered by an Administrative Board chaired by the Administrator of ORIL, and by law, "[a]ll monies in the Fund ... shall be acknowledged as depositories of funds of the Commonwealth of Puerto Rico, but they shall be kept in an account or accounts under the name of the Fund." P.R. Gen. Laws. Ann. tit. 5, § 1099(e). Thus, Puerto Rican law characterizes the funds in the account as funds of the Commonwealth of Puerto Rico.

[7] Specifically, the new price structure set the consumer price of fresh milk in Puerto Rico ($1.32) and divided the revenues per quart among retailers ($0.09), distributors ($0.02), fresh milk processors ($0.39), dairy farmers ($0.805), the new cost to ORIL of

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Originally, ORIL, pursuant to an agreement with plaintiffs, determined that 1.25 cents from every quart of milk sold to consumers would go into the special account for plaintiffs' compensation. A July 22, 2008 ORIL regulation increased that amount to 1.50 cents per quart. Under compulsion of the injunction, in August 2008, ORIL and plaintiffs also agreed that plaintiffs would be compensated out of the fund for their past damages from December 31, 2002 to December 31, 2007, but did not reach the issue of prospective compensation for 2008. These regulations and administrative orders were subject to the formal requirements of Puerto Rico's Uniform Administrative Procedure Act, including a notice and comment period.

II. Legal Analysis

When a state official is sued in his or her official capacity but the state is the true party in interest, the suit is barred under the Eleventh Amendment and the state cannot be subject to such a suit without its consent. *See Edelman v. Jordan,* 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law" is a classic example of what the Eleventh Amendment prohibits. *Papasan v. Allain,* 478 U.S. 265, 278, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). This is so irrespective of whether "the relief is expressly denominated as damages." *Id.* "[I]f the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else," the Eleventh Amendment prohibits it. *Id.*There can be no doubt that the injunction at issue makes the Commonwealth, through one of its administrative agencies, liable for retrospective monetary relief. By its terms, the injunction is directed against the Administrator of ORIL, an administrative agency within the Department of Agriculture that Puerto Rico has clearly structured as an arm of the state. *See Fresenius,* 322

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[7](...continued)
"future audits and regulatory activities" ($0.0025), and the special account contribution for regulatory accrual ($0.0125).

F.3d at 65. It is equally clear that the regulatory accrual compelled by the injunction is retrospective, not prospective.[8] Plaintiffs, the district court, and subsequent ORIL regulations implementing the injunction have all characterized the regulatory accrual as a way to allow plaintiffs to recover the *past* profits they say they lost between 2003 and the time of the injunction. It appears indistinguishable from "the award, as continuing income rather than as a lump sum, of an accrued monetary liability," which the Supreme Court has long characterized as retrospective monetary relief barred by the Eleventh Amendment. *Papasan,* 478 U.S. at 281, 106 S.Ct. 2932 (internal quotation marks and emphasis omitted); *Edelman,* 415 U.S. at 668, 94 S.Ct. 1347 (holding that payment of state funds as compensation to plaintiffs whose benefits were delayed by slow processing times was "indistinguishable in many aspects from an award of damages against the State"); *see also Whalen v. Mass. Trial Court,* 397 F.3d 19, 29-30 (1st Cir.2005) (holding that the restoration of service credit following past termination is impermissible retrospective compensation); *Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.,* 225 F.3d 1208, 1220-21 (11th Cir.2000) (holding that an injunction "to prescribe a set of standards upon which Defendants are to provide reimbursement for inadequate past and future payments" is barred).

The panel opinion nonetheless held that the Eleventh Amendment is

[8] The district court clearly erred when it characterized the relief as "prospective injunctive relief against the Defendants to avoid insolvency" as opposed to retrospective compensatory relief. *See Vaquería Tres Monjitas,* No. 04-1840, slip op. at 13-14 (D.P.R. Oct. 2, 2006) (order denying motions to dismiss). Plaintiffs say the regulatory accrual is really prospective because its purpose is to rebuild plaintiffs' capital base and no pricing structure, going forward, would be effective without this step. But that argument would open the floodgates to retrospective compensation in almost any situation. The panel opinion assumed this relief was retrospective and rested its holding on the theory that retroactive compensatory relief that does not come directly from the state treasury does not violate the Eleventh Amendment. *Vaquería Tres Monjitas,* 587 F.3d at 478.

not an issue because the "state treasury" is not involved.[9] That conclusion, to my mind, is doubtful. First, the conclusion assumes that if third parties-here, consumers-provide the funds the Commonwealth uses to compensate plaintiffs and the payments are not made directly out of the state treasury, the state's Eleventh Amendment interests are not involved. Second, the conclusion assumes that payments from an administrative fund created and maintained as public funds do not involve the state's fisc.

Plaintiffs' position misinterprets the holdings of *Parella v. Retirement Board of Rhode Island Employees' Retirement System,* 173 F.3d 46 (1st Cir.1999), and *Tenoco Oil Co., Inc. v. Department of Consumer Affairs,* 876 F.2d 1013 (1st Cir.1989). *Parella* did not hold that the Eleventh Amendment allows the recovery of just compensation for temporary takings despite its retrospective nature. It was instead concerned with the complications such a position could pose for courts if *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), were interpreted to require courts to reach Eleventh Amendment questions before other dispositive issues. 173 F.3d at 56-57. *Tenoco* mentioned *First English* only in passing and disposed of the case on the ground that permanent injunctions should not be imposed prior to final administrative actions. 876 F.2d at 1028-29.

In any event, *First English* did not squarely present an Eleventh Amendment question, since it involved a suit against a county, which cannot invoke Eleventh Amendment immunity. 482 U.S. at 308, 107 S.Ct. 2378. And in the analogous context of compensation for reverse condemnation claims, we have stated that the Eleventh Amendment bars federal courts from granting this relief. *See Citadel Corp. v. P.R. Highway Auth.,* 695 F.2d 31, 33 n. 4 (1st Cir.1982); *see also Seven Up Pete Venture v. Schweitzer,* 523 F.3d 948, 954-56 (9th Cir.2008)

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[9] Plaintiffs suggest in the alternative that *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), held, and our caselaw supports, the proposition that retroactive compensation for a Takings Clause claim is an exception to the Eleventh Amendment's usual bar on retrospective relief. The panel opinion rests instead on the ground that the regulatory accrual was an equitable remedy because there was no formal award of damages. *Vaquería Tres Monjitas,* 587 F.3d at 479-80.

(holding that the Eleventh Amendment bars retroactive compensation both under the Takings Clause and for reverse condemnation claims under the Due Process Clause).

Third, the panel opinion, in my view, most likely departs from precedent when it holds that the Eleventh Amendment is not involved when the Commonwealth is ordered to raise money from individuals through mechanisms other than a general tax that produces funds for the state treasury. This provides an easy mechanism for evasion of the Eleventh Amendment. A key purpose of the Eleventh Amendment is to protect the state's dignitary interests in how it chooses to impose surcharges, fees, and alternatives to taxation to provide funds for public purposes.

Whether an action in practice aims to recover money from a state, in violation of the Eleventh Amendment, is a functional question, and *Regents of the University of California v. Doe,* 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), expressly rejected the argument that Eleventh Amendment immunity turns upon "a formalistic question of ultimate financial liability." *Id.* at 431, 117 S.Ct. 900. Instead, "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Id.*

Thus, *Doe* held that the Eleventh Amendment barred a suit against the University of California, an arm of the state, that made the entity legally liable for compensatory relief even though the judgment would not, in practice, be paid by the state because of an indemnity arrangement.[10] *Id.* at 426, 117 S.Ct. 900. Perhaps *Doe* is no more than a variation on the usual collateral source rule, but I am doubtful it is so limited.

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[10] Another circuit, applying *Doe,* has rejected the claim that the Eleventh Amendment is not implicated so long as a judgment against a state does not require any new expenditures from the state treasury. "[T]he proper inquiry is not whether the state treasury would be liable in *this* case, but whether, hypothetically speaking, the state treasury would be subject to 'potential legal liability' *if* the [source in question] did not have the money to cover the judgment." *Ernst v. Rising,* 427 F.3d 351, 362 (6th Cir.2005) (en banc). The panel opinion puts our circuit in conflict with the Sixth Circuit.

The injunction orders the Administrator of ORIL to use the state's regulatory, revenue-raising powers to satisfy plaintiffs' demand for compensation for lost profits from 2003 to the time of the injunction, and ORIL adopted the regulatory accrual mechanism to comply with the injunction. The only reason this mechanism exists is to recover enough money so that plaintiffs get four years' worth of past lost profits. The mechanism is an option ORIL can use to satisfy the judgment only because the Commonwealth's powers over the milk industry in Puerto Rico are so extensive. The fact that the payments may not already have been made is irrelevant. And if this mechanism failed-if, for instance, consumers bought less fresh milk in response to the raised prices and the regulatory accrual failed to accumulate the significant sums needed to repay plaintiffs-there is no indication ORIL would not still be on the hook for plaintiffs' lost profits. The prospect of such liability may well be enough to make the Eleventh Amendment a shield. *See Doe,* 519 U.S. at 431, 117 S.Ct. 900; *see also Fed. Maritime Comm'n.,* 535 U.S. at 766-67, 122 S.Ct. 1864.

When a state raises revenues through the methods available to it as a sovereign-including taxation and regulatory orders-rather than by withdrawing existing funds in the state treasury, this surely does not remove the Eleventh Amendment's protections. Either way, the state fisc is affected because the state is being required "to use its own resources" to replace the original source of the plaintiffs' profits. *Papasan,* 478 U.S. at 281, 106 S.Ct. 2932. The regulatory accrual ORIL has adopted under compulsion by the district court essentially imposes a tax on Puerto Rican consumers: it increases the overall price of milk to consumers and channels 1.50 cents from every quart to compensate the plaintiffs for their lost profits. ORIL then sequesters this money in an account in the FFIL, not unlike the way tax revenues are collected.[11] The fact that the

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[11] Indeed, the regulatory accrual mechanism here functions similarly to the pricing scheme Massachusetts imposed to charge milk dealers additional money for the benefit of in-state dairy farmers in *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). Under that mechanism, Massachusetts, which at the time exercised considerable regulatory control over in-state milk prices, ordered every milk dealer operating in Massachusetts to make a monthly payment into the "Massachusetts

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special account in the FFIL was created to comply with the injunction and that the money in the account was never previously held by the state is irrelevant. "Where [the state] gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state." *Paschal v. Jackson,* 936 F.2d 940, 944 (7th Cir.1991) (internal quotation marks omitted).

Moreover, the injunction does force the Commonwealth to expend funds from its own public funds to pay plaintiffs' lost profits.[12] Under the regulatory accrual mechanism, the money collected from consumers goes into a special account in the FFIL that is controlled and administered by ORIL for eventual disbursal to plaintiffs. And all monies stored in the FFIL are, as a matter of Puerto Rican law, considered depositories of the Commonwealth. This is plainly relief that reaches the state fisc.

The fact that this is a special fund and not intermingled with the Commonwealth's general revenues does not remove Eleventh Amendment scrutiny. Reliance on this fact again elevates form over substantive reality. *Doe* certainly suggests that this kind of distinction is irrelevant. Even before *Doe,* the Supreme Court had long suggested that the definition of a state "treasury" includes segregated funds held in special accounts, not just the state's general revenue accounts. *See, e.g., Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 576, 66 S.Ct. 745, 90 L.Ed. 862 (1946); *Great N. Life Ins. Co. v. Read,* 322 U.S. 47, 52-53, 64 S.Ct. 873, 88 L.Ed. 1121 (1944); *see also Esparza v.*

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[11](...continued)
Dairy Equalization Fund," a special account, which was then distributed to Massachusetts producers every month. *Id.* at 190-91, 114 S.Ct. 2205. The Supreme Court described this pricing scheme as "effectively a tax." *Id.* at 194, 114 S.Ct. 2205.

[12] Defendants' Eleventh Amendment argument on appeal rested on the theory that the regulatory accrual effectively made ORIL, an arm of the state, liable for retroactive compensation. Under defendants' theory, these funds were by definition state funds, and the issue of whether the regulatory accrual implicates the state treasury is therefore before us. In any event, questions of Eleventh Amendment immunity can be raised by this court sua sponte, *see Parella,* 173 F.3d at 55.

Valdez, 862 F.2d 788, 794 (10th Cir.1988). This is so even if the source of the funds came from third parties like the federal government and not from an existing pool of state money. *See, e.g., Paschal,* 936 F.2d at 944. Practical considerations also favor this approach. Defining the state's "treasury" to mean money in a state's general revenues account and not elsewhere would turn the Eleventh Amendment into an exercise in forensic accounting. I admit that this case may be viewed as another example of a "spectrum" problem. What is involved is not a tax but an administrative surcharge. But the Court, understandably, has preferred harder, bright line rules.

The panel's legal analysis of the Eleventh Amendment issue also seems to me to ignore another state interest the Supreme Court has identified. The Court has held that a single-minded focus on whether relief comes directly from the state treasury or otherwise threatens states' financial welfare "reflects a fundamental misunderstanding of the purposes of sovereign immunity." *Fed. Maritime Comm'n,* 535 U.S. at 765, 122 S.Ct. 1864. The Eleventh Amendment "serves the important function of shielding state treasuries," but "the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns," and that broader concern must inform the analysis[13]. *Id.* (internal quotation marks omitted); *see also id.* at 760, 122 S.Ct. 1864.

My concern is not with some collection of vague interests which might be labeled "dignitary" interests. It is plain that the power to tax-and presumably analogous regulatory means of raising revenue-is

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[13] This is not to say that our inquiry must swing to a single-minded focus only on whether a given suit offends a state's dignitary interests. As the Supreme Court clarified in *Verizon Maryland, Inc. v. Public Service Commission of Maryland,* 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), whether a suit can proceed under *Ex Parte Young* turns on "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645, 122 S.Ct. 1753 (alteration in original) (internal quotation marks omitted). But as other circuits have concluded, the state's sovereign interests are still relevant to the analysis and should not be ignored. *See, e.g., Virginia v. Reinhard,* 568 F.3d 110, 119-21 (4th Cir.2009) (considering whether the state's "special sovereign interests" would be implicated in an *Ex Parte Young* action by a state administrative agency against state officials); *Union Elec. Co. v. Mo. Dep't of Conservation,* 366 F.3d 655, 658 (8th Cir.2004).

"central to state sovereignty." *See Dep't of Revenue v. ACF Indus., Inc.,* 510 U.S. 332, 345, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). Surely we must consider whether these interests are offended when a district court orders state officials to enact an elaborate regulatory scheme that imposes surcharges, special fees, or user fees in order to raise and pay out money in damages rather than simply withdrawing plaintiffs' retroactive compensation from the state treasury. If courts can evade Eleventh Amendment constraints by dictating to states that they find ways in which state officials can use the state's regulatory money-raising powers to satisfy a money judgment, the Eleventh Amendment's bar against retrospective monetary relief becomes a nullity.

My concerns are raised against the backdrop that the Court's refashioning of the interests at stake under the Eleventh Amendment has, in the wake of *Doe* and *Federal Maritime Commission,* reshaped the test for when an entity is an arm of the state. *See Fresenius,* 322 F.3d at 63, 67-68 (holding that the arm-of-the-state inquiry depends on a multi-factor test beginning with the way the state structures an entity and does not rely exclusively on whether damages against the entity would be paid from the state treasury); *see also Cooper v. Se. Penn. Transp. Auth.,* 548 F.3d 296, 301 (3d Cir.2008) ("In light of *Doe* and *FMC*, we held that we can no longer ascribe primary to the [state-treasury] factor in our sovereign immunity analysis.") (alteration in original) (internal quotation marks omitted). We must face up to the way these transformations in Eleventh Amendment doctrine also affect the underlying immunity question.

For these reasons, I respectfully dissent from the denial of en banc review.

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ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISIONS

RONALD WALKER, ALIDRA WALKER, AND TOP RAIL RANCH, INC.
A.Q. Docket No. 07-0131.
Decision and Order.
Filed January 13, 2010.

AQ. – Wasting disease – Compensation.

Lauren Axley and Darlene Bolinger, for the Administrator, APHIS.
Brenda L. Jackson, Canon City, CO, for Respondents.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint on June 14, 2007. The Administrator alleges that Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc. [hereinafter Respondents], violated the Animal Health Protection Act, as amended (7 U.S.C. §§ 8301-8321) [hereinafter the Animal Health Protection Act], and the Control of Chronic Wasting Disease regulations (9 C.F.R. pt. 55) [hereinafter the Regulations] by restocking their premises, in violation of 9 C.F.R. § 55.4. Respondents filed a timely answer on August 8, 2007.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Denver, Colorado, on May 14-15, 2008. Lauren Axley and Darlene Bolinger, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Brenda L. Jackson, Canon City, Colorado, represented Respondents. The Administrator called five witnesses and Respondents called three witnesses, including Ronald Walker. The parties filed a "Joint Stipulations of Fact" which was admitted as Joint Exhibit 1 (JX 1). The Chief ALJ admitted 36 exhibits at the behest of the Administrator (CX) and 6 exhibits at the behest of Respondents (RX).

On March 20, 2009, the Chief ALJ issued a decision in which he

found Respondents restocked their elk breeding premises with elk, in violation of an agreement with the Animal and Plant Health Inspection Service [hereinafter APHIS]. The Chief ALJ found Respondents' introduction of reindeer onto the elk breeding premises did not violate the agreement with APHIS, as the reindeer were not penned in an area of the elk breeding premises that was the subject of the agreement. The Chief ALJ assessed Respondents a $20,000 civil penalty for Respondents' violations. The Chief ALJ ordered that the $20,000 civil penalty be offset against the funds that APHIS withheld pending completion of the depopulation of Respondents' elk hunting herd.

On April 22, 2009, the Administrator appealed the Chief ALJ's decision challenging the holding that Respondents' introduction of reindeer onto the elk breeding premises did not violate Respondents' agreement with APHIS. The Administrator further challenged the Chief ALJ's decision to assess a $20,000 civil penalty rather than the $110,000 civil penalty recommended by the Administrator. For the reasons set forth in this Decision and Order, *infra*, I find Respondents' introduction of the reindeer onto Respondents' elk breeding premises violated Respondents' agreement with APHIS. I assess Respondents a total civil penalty of $80,000.

Statutory and Regulatory Background

The Animal Health Protection Act authorizes the Secretary of Agriculture to take actions for "the prevention, detection, control, and eradication of diseases and pests of animals." (7 U.S.C. § 8301(1).) The Animal Health Protection 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 (7 U.S.C. § 8301(1)(A)-(C)). The powers of the Secretary of Agriculture are broad and include the authority to seize, quarantine, treat, destroy, or dispose of animals affected with, or exposed to, livestock diseases (7 U.S.C. § 8306(a)). The Secretary of Agriculture is authorized to promulgate regulations as the Secretary of Agriculture determines necessary to carry out the Animal Health Protection Act (7 U.S.C. § 8315) and to seek civil and criminal penalties for violations of the Animal Health Protection Act

(7 U.S.C. § 8313).

In accordance with the Animal Health Protection Act, the Secretary of Agriculture promulgated 9 C.F.R. pt. 55—Control of Chronic Wasting Disease. The Regulations include a Chronic Wasting Disease Indemnification Program (9 C.F.R. §§ 55.2-.8) which provides for paying owners of cervids destroyed as part of a Chronic Wasting Disease program up to 95 percent of each cervid's value, with an upper limit of $3,000 per cervid (9 C.F.R. § 55.2). The Regulations also provide for cleaning and disinfection of premises after cervid removal has been accomplished (9 C.F.R. § 55.4) and for the creation of a herd plan whereby APHIS, the owner, and the state representative agree on a plan for eradicating Chronic Wasting Disease from a herd and preventing the future recurrence of Chronic Wasting Disease (9 C.F.R. §§ 55.1, .7(b)).

The Regulations specify that claims arising out of the destruction of cervids are only payable if the cervids have been appraised; the owners have signed the appraisal form indicating agreement with the appraisal amount; the owners agree to comply with a herd plan; and the owners agree they will not introduce cervids onto the premises until after the date specified in the herd plan (9 C.F.R. §§ 55.4, .7(a)-(b)). "Persons who violate this written agreement may be subject to civil and criminal penalties." (9 C.F.R. § 55.7(b)).

Facts

Ronald Walker and Alidra Walker own Top Rail Ranch, Inc. In 2004, Top Rail Ranch, Inc., consisted of a premises located in Penrose, Colorado, at which Respondents maintained an elk breeding herd and a premises in Canon City, Colorado, at which Respondents maintained an elk hunting herd. (JX 1 ¶¶ 1-2.) Respondents' breeding herd premises in Penrose, Colorado, is generally referred to as "E71," and Respondents' hunting herd premises in Canon City, Colorado, is generally referred to as "E85" (JX 1 ¶ 2).

Ronald 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. 557-59.)

Chronic Wasting Disease is a disease of livestock that belongs to the family of diseases known as transmissible spongiform encephalopathy (Tr. 274-75). Chronic Wasting Disease is a fatal, progressive, degenerative neurological disease and is transmissible from one animal to another through direct contact, as well as through environmental contamination (Tr. 288-89). Chronic Wasting Disease cannot be detected by testing a live animal. Chronic Wasting Disease 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 Chronic Wasting Disease. APHIS cooperates with the State of Colorado to implement this program. (JX 1 ¶ 4.) Once Chronic Wasting Disease is discovered in a herd, the common practice is to quarantine the herd and then depopulate the herd. Each euthanized animal is tested for Chronic Wasting Disease. (Tr. 303-10.)

Test results released in January 2005, taken from a sample collected by a USDA representative from a hunter-killed elk on the E85 premises, indicated that a 52-month-old elk bull tested positive for Chronic Wasting Disease (JX 1 ¶ 5). As a result of this positive sample and pursuant to its normal practices, the Colorado Department of Agriculture quarantined all elk on both the E71 premises and the E85 premises. Ronald Walker accepted the quarantine on February 2, 2005. The quarantine prohibited live elk from entering or leaving the E71 premises and the E85 premises. (JX 1 ¶ 6; CX 2; Tr. 27-28, 584-86.)

Several months later, APHIS and Respondents began discussions concerning depopulating the two herds (JX 1 ¶¶ 7-9; Tr. 31-36, 482-84, 588-91). Over a period of time, a plan was developed whereby the two herds would be depopulated and Respondents would be paid a percentage of the appraised value of the herds, as authorized by the Regulations. The "Depopulation Agreement & Preliminary Premises Plans" became effective after it was signed by Ronald Walker on August 22, 2005 (CX 5).

The breeding herd on the E71 premises, consisting of 234 elk, was appraised at $429,637.50 (JX 1 ¶ 11). The Depopulation Agreement & Preliminary Premises Plans provided for the appraised value to be paid after completion of the E71 herd depopulation. The parties further agreed that APHIS would withhold 25 percent of the payment for the

depopulation of the E71 herd until completion of the E85 herd depopulation. (CX 5 at 1-2.) APHIS allowed four specific elk in the E71 herd, referred to as "bottle babies,"[1] to avoid euthanasia as a negotiated exception to the usual practice of depopulating the entire herd prior to any indemnity payment (CX 5; JX 1 ¶ 13; Tr. 37, 40-43, 185-86, 483-85, 588-89). The Depopulation Agreement & Preliminary Premises Plans specifically exempted the four elk from depopulation and included a provision that, after each of the four bottle babies died, the bottle baby would be tested for Chronic Wasting Disease (CX 5).

The Depopulation Agreement & Preliminary Premises Plans referred to future "final premises plans" indicating these future plans would be "developed only after test results from samples collected from all depopulated and hunter killed animals are evaluated." (CX 5 at 2.) The Depopulation Agreement & Preliminary Premises Plans did not define the boundaries of the E71 premises. APHIS viewed the withholding of 25 percent of the payment for the depopulation of the E71 herd as leverage to ensure depopulation of the E85 herd. Previously, APHIS never allowed a bifurcated depopulation. (Tr. 83-84.)

By the time the depopulation of the E71 herd took place in September 2005, many of the elk had calved. Although no compensation was paid for these calves, a total of 65 calves were euthanized as part of the E71 herd depopulation. (Tr. 183-84.) Two of the elk euthanized as part of the E71 herd depopulation tested positive for Chronic Wasting Disease (JX 1 ¶ 15; Tr. 65).

When the depopulation of the E71 herd was completed, APHIS assumed that only the four bottle babies remained on the E71 premises (Tr. 56-59, 188-90). The bottle babies consisted of one bull and three cows (Tr. 184-85). APHIS was unaware that two of the bottle babies had calved, which resulted in six elk on the E71 premises after the depopulation, not just the four discussed in the Depopulation Agreement & Preliminary Premises Plans (Tr. 77, 110). Ronald Walker testified that the state personnel, particularly Dr. Cunningham, then Colorado State Veterinarian, knew of the two newborn elk (Tr. 601-03). Although Respondents did not notify APHIS about the birth of the two elk, Respondents followed state procedures, registering the newborn calves

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

with the Colorado Brand Board and tattooing them as required (Tr. 612, 628-29). Over the next few years, six additional calves were born as a result of mating within the bottle baby herd. The bottle baby bull, Howard, died a few months before the hearing (Tr. 610). At the time of the hearing, Respondents maintained 11 elk on the E71 premises (Tr. 628-29).

Respondents and APHIS negotiated an agreement in which the E71 herd depopulation would occur before the E85 herd depopulation (Tr. 39-41). Because every elk in the E85 herd came from the E71 herd and because living elk could not leave the E85 premises, Respondents and APHIS agreed that it would do no harm, in terms of the spread of Chronic Wasting Disease, if Respondents were allowed to conduct elk hunts on the E85 premises, provided that no new animals were introduced onto the E85 premises (Tr. 40). This agreement allowed Respondents to have two additional seasons of commercial hunts. These hunts would decrease APHIS' costs for the depopulation because there would be fewer elk to euthanize, resulting in lower indemnity payments. Furthermore, all hunter-killed elk would still be required to be tested for Chronic Wasting Disease. The Depopulation Agreement & Preliminary Premises Plans assumed the 25 percent remaining balance for the E71 herd indemnity would be paid by the end of 2006. The Depopulation Agreement & Preliminary Premises Plans anticipated that the depopulation of the E85 herd would be complete by that time. (CX 5.)

On September 20, 2005, Ronald Walker signed the "Final Premises Plan for Top Rail Ranch CO E-71, Penrose, CO" [hereinafter the E71 Final Premises Plan] and Dr. Roger Perkins, representing APHIS, signed the E71 Final Premises Plan the next day (CX 9; JX 1 ¶¶ 16-17). Although the state normally signs final premises plans and the E71 Final Premises Plan had a signature line reserved for this purpose, the Colorado State Veterinarian did not sign the E71 Final Premises Plan. The E71 Final Premises Plan refers to an attached diagram of the premises, but no such diagram was attached when the Chief ALJ admitted the exhibit into evidence. Dr. Perkins testified that the document admitted as CX 19 was the diagram referred to in the E71 Final Premises Plan. (Tr. 164-65.)

The E71 Final Premises Plan specifically states the entire E71 herd

had been depopulated "with the exception of 4 elk." (CX 9 at 1.) By signing the E71 Final Premises Plan, Ronald Walker was making a representation that he knew to be untrue. He admitted as much on his direct testimony, stating the only way to get his money was to sign the E71 Final Premises Plan, even though he knew there were 6, rather than 4, elk on the E71 premises (Tr. 636-37).

Events did not transpire as planned. For a variety of reasons, Respondents and APHIS had difficulty agreeing on aspects of a plan to depopulate the E85 herd. Respondents insisted on conditions which APHIS believed made implementing the plan difficult, if not impossible. These conditions included not allowing motor vehicles to operate off the trails, requiring all killed elk to be manually carried off the premises, and severely limiting the duration of the operation. (Tr. 87-120.) Unlike the E71 premises, where the elk were kept in a series of corrals, the E85 premises consisted of approximately 1,500 acres of rough terrain (Tr. 542-44).

APHIS eventually agreed to Respondents' condition that only hunters familiar with the E85 premises be employed to complete the depopulation of the E85 herd (Tr. 112-21). APHIS found the initial bids for the E85 herd depopulation too high (Tr. 120). Finally, late in the winter of 2007, APHIS hired, with Respondents' approval, Roger McQueen, an independent hunter, to complete the depopulation of the E85 herd (Tr. 131-33).

The E85 herd depopulation was scheduled to begin in mid-March 2007. Because conditions were good for hunting, Mr. McQueen began the depopulation 1 day early and killed seven elk in that 1 day (Tr. 137-38). The following day, APHIS directed that the depopulation of the E85 herd be suspended because APHIS discovered Respondents' violation of the agreements regarding the E71 premises, resulting from the procreative activities of the bottle babies and Respondents' introduction of reindeer onto the E71 premises (Tr. 133-34, 410-11, 632-33). APHIS reimbursed Respondents for the seven elk that Mr. McQueen killed (CX 37).

After suspension of the E85 herd depopulation, APHIS proposed to continue the depopulation of the E85 herd provided Respondents agree to depopulate all the elk on the E71 premises, including the four bottle babies (Tr. 141). APHIS sent Respondents this proposal in April 2007

(CX 40), but the Respondents rejected the proposal (CX 12). The record indicates that no further efforts to depopulate the E85 herd have been undertaken.

Ronald Walker admits purchasing seven reindeer, with the purpose of breeding them, subsequent to signing the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan (Tr. 642-45; JX 1 ¶¶ 25-26). Ronald Walker even exhibited the reindeer as part of a Christmas pageant in Florence, Colorado (Tr. 250). Reindeer, like elk, are cervids, but there has never been a reported case of Chronic Wasting Disease in a reindeer (Tr. 324-25, 399). The depopulation plan included a ban on keeping cervids on the E71 premises, but the parties disagree as to what constitutes the E71 premises and where Respondents kept the reindeer. Respondents did not dispute that they owned the reindeer, but rather contend the reindeer were kept out of the area that Respondents define as the E71 premises. (Tr. 643-45.) Respondents contend, with respect to the Depopulation Agreement & Preliminary Premises Plans, the E71 premises consisted of the fenced elk enclosure and the portions of Respondents' property that were not previously inhabited by elk were not covered by the conditions of the Depopulation Agreement & Preliminary Premises Plans. Ronald Walker knew cervids could not be brought onto a quarantined property and he testified the reindeer were never situated in any portion of the property that was quarantined (Tr. 643-45.) The Administrator contends the entire ranch property located in Penrose, Colorado, was the E71 premises.

Discussion

Respondents contend neither Alidra Walker nor Top Rail Ranch, Inc., are proper parties to this matter. Respondents contend because only Ronald Walker signed the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan and because there is no indication that Ronald Walker was acting on behalf of either Alidra Walker or Top Rail Ranch, Inc., he should be the only respondent in the instant proceeding. Respondents also contend Top Rail Ranch, Inc., had no ownership interest in the E71 herd and the Administrator only named

all three as respondents in the Complaint in order to increase the maximum civil penalty that could be assessed.

These contentions are belied by the Joint Stipulations of Fact (JX 1). The parties stipulated that Ronald Walker and Alidra Walker own and operate Top Rail Ranch, Inc., and that the ranch consists of an elk breeding herd (E71) as well as an elk hunting herd (E85) (JX 1 ¶¶ 1-2). The Joint Stipulations of Fact indicates that Ronald Walker's signature on the Depopulation Agreement & Preliminary Premises Plans was on behalf of both himself and Alidra Walker, which would likewise indicate that Ronald Walker was signing as the owner or authorized representative of both Alidra Walker and Top Rail Ranch, Inc. (JX 1 ¶ 12). The Depopulation Agreement & Preliminary Premises Plans purports to be "an agreement between Top Rail Elk Ranch owners Ron and Alidra Walker," APHIS, and the Colorado Department of Agriculture (CX 5 at 1). Thus, the evidence clearly supports a finding that Alidra Walker and Top Rail Ranch, Inc., are proper parties in this action, along with Ronald Walker.

Withholding 25 percent of the indemnity payment for the depopulation of the E71 herd, as an extra assurance that Respondents would allow the depopulation of the E85 herd, was not inconsistent with the Regulations. Unusual circumstances are present in this case, principally the sparing of the four bottle babies and Respondents' negotiation for a two-hunting-season extension of time before the depopulation of the E85 herd would occur, in order to allow Respondents to arrange the more profitable elk hunts during that time. Therefore, APHIS' negotiation of a quid pro quo was not unreasonable. While there is no language in the Regulations allowing the withholding of a portion of the indemnity payment, there is also no language in the Regulations that would allow excepting four elk from the depopulation, nor is there any language that would allow a two-hunting-season postponement of depopulation.

Under the Depopulation Agreement & Preliminary Premises Plans, the withheld 25 percent of the indemnity was to be paid on the completion of the E85 herd depopulation and no later than December 2006. APHIS suspended the depopulation of the E85 herd because of APHIS' investigation into whether Respondents violated the Depopulation Agreement & Preliminary Premises Plans and the E71

Final Premises Plan by restocking the elk (by allowing the bottle babies to breed and not reporting the information to APHIS) and by introducing reindeer onto the E71 premises.

The Depopulation Agreement & Preliminary Premises Plans contemplates that only the four identified bottle babies would be allowed to survive the E71 herd depopulation. Respondents' failure to notify APHIS that two of the bottle babies calved before the depopulation of the E71 herd and before the signing of the E71 Final Premises Plan, which represented that the four bottle babies were the only remaining elk on the E71 premises, constituted a deliberate misrepresentation of fact and was a violation of the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan.

Ronald Walker testified that the state veterinarian, Dr. Cunningham, saw the two calves and recommended that, during the depopulation of the E71 herd, the calves be locked in pen 7 with the bottle babies. Ronald Walker testified that the bottle babies and the calves were kept in clear view during the depopulation effort. (Tr. 601-05.) Other witnesses testified they did not see either the bottle babies or their two calves during the E71 herd depopulation (Tr. 188-89). Neither Ronald Walker nor Dr. Cunningham informed APHIS officials about the two calves born to the bottle babies, and APHIS officials did not know about the two calves at the time of the signing of the E71 Final Premises Plan. Ronald Walker did inform the Colorado Brand Board of the birth of the two calves, as well as the three additional calves born in the spring of 2006, however, although he never notified APHIS of the births (Tr. 612).

The addition of any elk, other than the four bottle babies, to the E71 premises constitutes restocking of the E71 premises, in violation of the E71 Final Premises Plan. The goal of the parties throughout the process was to reduce the elk population of the E71 premises to zero, allowing only the four bottle babies to remain quarantined for the remainder of their lives. As stated in the E71 Final Premises Plan, the parties further contemplated that no cervids, other than the four bottle babies, would be allowed on the E71 premises until the four bottle babies died. After the death of the bottle babies and based on the Chronic Wasting Disease test results on the bottle babies, a reassessment of Chronic Wasting Disease

risks on the property would be conducted before allowing restocking with cervids.

Respondents contend the failure of the E71 Final Premises Plan to address the issue of breeding indicates that no violation occurred. Respondents also contend APHIS was at fault for not developing "cooperative lines of communication" with Colorado so that APHIS would have known about the birth of calves which had been registered with the Colorado Brand Board. Neither contention is correct. Furthermore, the plain language of the E71 Final Premises Plan limited cervids on the E71 premises to the four bottle babies and prohibited additions to the E71 premises until after the four bottle baby elk died and were tested for Chronic Wasting Disease. I find difficult acceptance of Respondents' argument that they did not know that additions to the herd through breeding presented a problem for APHIS, in light of Ronald Walker's misrepresentation, when Ronald Walker signed the E71 Final Premises Plan, that only four elk remained on the E71 premises.

Ronald Walker also testified that the births were a surprise on two counts. First, the bull elk had a prolapsed sheath which should have made breeding difficult if not impossible (Tr. 609-10). After three more calves were born, Respondents 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. Respondents continued to report the births to the Colorado Brand Board, but never reported any information on the births to APHIS.

Even taking Respondents' word that the births were a surprise and that Respondents 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 the Depopulation Agreement & Preliminary Premises Plans nor the E71 Final Premises Plan addresses breeding and the only possible interpretation of the agreements is that only the four bottle babies were to be on the E71 premises with no additional cervids allowed on the E71 premises until the death of the bottle babies.

Respondents also contend the E71 Final Premises Plan was not a "herd plan" as required by the Regulations. However, APHIS amply demonstrated that the difference between the E71 Final Premises Plan

and a typical herd plan resulted from 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 E71 Final Premises Plan. Respondents' negotiation of these more lenient conditions does not render the E71 Final Premises Plan unenforceable.

Respondents' stocking of reindeer was a violation of the E71 Final Premises Plan. The E71 Final Premises Plan banned all cervids from the property unless "approved by the CO State Veterinarian and USDA Area Veterinarian in Charge." (CX 9 at 3.) It is undisputed that reindeer are cervids (9 C.F.R. § 55.1) and that Ronald Walker introduced reindeer onto the E71 premises (Tr. 642). Furthermore, Respondents do not claim and there is no evidence that the Colorado State Veterinarian or the USDA Area Veterinarian-in-Charge approved stocking reindeer on the E71 premises.

For the reasons discussed below, I find the prohibition in the E71 Final Premises Plan on reintroducing cervids onto the E71 premises without approval of the Colorado State Veterinarian and the USDA Area Veterinarian-in-Charge covers all contiguous Top Rail Ranch property in Penrose, Colorado.

APHIS argues the entire ranch in Penrose, Colorado, is covered by the E71 Final Premises Plan, while Respondents argue just the 12 pens and central alleyway with the appurtenant buildings and fixtures are subject to the E71 Final Premises Plan. My reading of the document is that most provisions are all encompassing applying to the entire Penrose, Colorado, ranch while certain provisions have specific limited application, e.g., the fencing requirements.

The controlling document is titled: "Final Premises Plan for Top Rail Ranch CO E-71, Penrose, CO" (CX 9 at 1). The first sentence of the document identifies the two components of the Top Rail Ranch: the breeding location near Penrose, Colorado, referred to as CO E71 and the hunting location 29 miles north and west of the Penrose, Colorado, location, referred to as CO E85. The E71 Final Premises Plan does not divide the Penrose, Colorado, location into two components, the area with the pens and the rest of the property in Penrose, Colorado. Therefore, all the property in Penrose, Colorado, is governed by the E71 Final Premises Plan. The statement "[t]his final premises plan pertains

only to the E71 facility" (CX 9 at 1) only indicates that the E71 Final Premises Plan does not apply to the E85 premises. Respondents' introduction of cervids, namely reindeer, onto the Top Rail Ranch, Penrose, Colorado, premises, without approval of the Colorado State Veterinarian and the USDA Area Veterinarian-in-Charge, violates the E71 Final Premises Plan and 9 C.F.R. § 55.4.

The restocking of elk via the pregnancies of the bottle babies are serious violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4. The evidence shows that a total of eight calves were born to the bottle baby herd during three breeding cycles shortly before and after the depopulation of the E71 herd. I find that each calf is a separate restocking of E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4. Respondents' introduction of seven reindeer onto the E71 premises constitutes seven violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4.

The Animal Health Protection Act sets forth the maximum civil penalty that the Secretary of Agriculture may assess and factors that the Secretary of Agriculture must consider when determining the amount of the civil penalty, as follows:

> **§ 8313. Penalties**
>
> . . . .
>
> **(b) Civil penalties**
>
> **(1) In general**
>
> Except as provided in section 8309(d) of this title, any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under this chapter may, after notice and opportunity for a hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—
>
> (A)(i) $50,000 in the case of any individual, except that the civil penalty may not exceed $1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain;

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

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

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

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider, with respect to the violator—

(A) the ability to pay;

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

(C) any history of prior violations;

(D) the degree of culpability; and

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

7 U.S.C. § 8313(b)(1)-(2). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalties that may be assessed under 7 U.S.C. § 8313(b)(1), as follows:

§ 3.91 Adjusted civil monetary penalties.

. . . .

(b) *Penalties*—. . . .

. . . .

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

. . . .

(vi) Civil penalty for any person [except as provided in

> 7 U.S.C. 8309(d)] that violates the Animal Health Protection Act (AHPA) or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided under the AHPA, codified at 7 U.S.C. 8313(b)(1), has a maximum of the greater of: $55,000 in the case of any individual, except that the civil penalty may not exceed $1,100 in the case of an initial violation of the AHPA by an individual moving regulated articles not for monetary gain, $275,000 in the case of any other person for each violation, and $550,000 for all violations adjudicated in a single proceeding; or twice the gross gain or gross loss for any violation or forgery, counterfeiting, or unauthorized use, alteration, defacing or destruction of a certificate, permit, or other document provided under the AHPA that results in the person's deriving pecuniary gain or causing pecuniary loss to another person.

7 C.F.R. § 3.91(b)(2)(vi).

I have analyzed the nature, circumstances, extent, and gravity of each violation as required by the Animal Health Protection Act (7 U.S.C. § 8313(b)(2)). I have also determined that Respondents have the ability to pay the civil penalty assessed in this Decision and Order and the civil penalty will not impact Respondents' ability to continue to do business. Respondents have no history of prior violations, but I do find Respondents culpable for the violations. Regarding the restocking of elk on the E71 premises via the pregnancies of the bottle babies, I find Respondents' violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4 serious. Therefore, I assess a civil penalty of $3,000 for each of the eight elk introduced onto the E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4. Regarding the introduction of reindeer onto the E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4, I find the circumstances under which Respondents moved the reindeer for a Christmas demonstration, after having introduced them onto the E71 premises, and then returning them to the E71 premises, had the potential to expose other cervids to Chronic Wasting Disease. I find this violation extremely troubling in that it demonstrates a disregard for the seriousness of the Chronic Wasting

Disease eradication program. Therefore, I assess a civil penalty of $8,000 for each of the seven reindeer Respondents introduced onto the E71 premises, in violation of the E71 Final Premises Plan and 9 C.F.R. § 55.4. Therefore, I assess Respondents a total civil penalty of $80,000.

Findings of Fact

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

2. The E71 premises consists of approximately 365 generally flat acres and includes 12 elk corrals as well as other property, including the residence of Ronald Walker and Alidra Walker.

3. The E85 premises consists of approximately 1,500 acres with significant ranges in elevation, thick woods, rocky outcroppings, and a few roads for access (Tr. 542-44). The E85 premises is enclosed by fencing. All elk in E85 are transported from the E71 premises and do not leave the E85 premises until they are hunted or otherwise killed.

4. After a hunt during the 2004 hunting season, the required testing was performed on the elk killed on the E85 premises. A 52-month-old elk bull tested positive for Chronic Wasting Disease. As a consequence of this test result, the Colorado Department of Agriculture issued an order quarantining all elk on the E71 premises and the E85 premises on January 31, 2005 (CX 2; Tr. 25-28).

5. Ronald 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. Ronald Walker, acting on behalf of Alidra Walker and Top Rail Ranch, Inc., signed a Depopulation Agreement & Preliminary Premises Plans for the E71 premises and the E85 premises on August 22, 2005 (CX 5). The Depopulation Agreement & Preliminary Premises Plans had been signed on August 1, 2005, by Dr. Cunningham on behalf of the State of Colorado and Dr. Perkins on behalf of APHIS. The

Depopulation Agreement & Preliminary Premises Plans states that the E71 herd would be depopulated first with indemnity to be paid based on a percentage of the herd's appraised value. Twenty-five percent of that indemnity was to be withheld pending the depopulation of the E85 herd and the signing of a final premises plan for the E85 premises. The Depopulation Agreement & Preliminary Premises Plans allows four specifically identified elk, referred to as "bottle babies," to be exempt from the depopulation. These four bottle baby elk would be kept "under permanent isolation and quarantine." (CX 5 at 1.) Restocking of the E71 herd would not occur until the four bottle babies had died and had been tested for Chronic Wasting Disease. The E85 herd would be hunted through the end of the 2006 hunting season, at which time the remaining elk would be appraised and depopulated, with depopulation of the E85 herd to be completed no later than December 31, 2006.

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

8. At the time of the E71 herd depopulation, two of the bottle babies had calves. Respondents did not inform APHIS of this fact at that time, although it appears that the state veterinarian, Dr. Cunningham, knew of the birth of the calves.

9. On September 20-21, 2005, Ronald Walker and APHIS signed the Final Premises Plan for the E71 premises. No one signed on behalf of the State of Colorado. In the E71 Final Premises Plan, Respondents specified that only the four bottle babies remained on the E71 premises and that each of the four bottle babies would be quarantined until its death. The E71 Final Premises Plan did not contain all the provisions normally associated with such plans because the E71 Final Premises 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). Ronald Walker signed the E71 Final Premises Plan even though it categorically stated that only the four bottle babies remained on the E71 premises, when he in fact knew that there were two calves on the E71 premises in addition to the bottle babies.

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

11. In subsequent years, the bottle baby cows calved again after being

impregnated by the bottle baby buck. Ronald Walker stated he did not believe the buck was capable of mating due to a prolapsed sheath. After the second series of births, Respondents separated the bull from the cows during the normal mating season. The cows became pregnant out-of-season and calved anyway. Respondents reported all the calves to the Colorado Brand Board, but did not inform APHIS.

12. Subsequent to the signing of the E71 Final Premises Plan and after difficult negotiations concerning a plan for the depopulation of the E85 herd, APHIS and Respondents reached an agreement in February 2007 (more than a month after the December 2006 deadline imposed by the E71 Final Premises Plan) regarding the depopulation of the E85 herd. Under this agreement, a hunter was hired to conduct the depopulation of the E85 herd, with indemnities to be paid for the killed elk.

13. The day after the hunter commenced the depopulation, which was 1 day earlier than he had told APHIS he would begin, APHIS directed him to stop depopulating the E85 herd. He had already killed seven elk, for which he was compensated and for which APHIS paid indemnity to Respondents. APHIS indicated to Respondents, and reiterated during the hearing, that the E85 herd depopulation was suspended because of Respondents' violations of the Depopulation Agreement & Preliminary Premises Plans and the E71 Final Premises Plan (Tr. 133-34).

14. In the spring of 2006, Respondents began purchasing reindeer, with the idea of establishing a reindeer breeding herd in 2006, when they purchased five reindeer cows from Tad Puckett. In the fall of 2006, Respondents purchased two breeding bull reindeer from Mr. Puckett. The reindeer were kept on the E71 premises, but were never kept in the elk pens. Reindeer are cervids, but there is no recorded instance of a reindeer with Chronic Wasting Disease.

15. Chronic Wasting Disease is a transmissible spongiform encepalothopy which is fatal to elk, deer, and moose. Generally, death from Chronic Wasting Disease takes 2 to 5 years from the time of exposure. Chronic Wasting Disease is transmissible from animal to animal, either through direct contact or through environmental contamination. Currently, the only way to test for Chronic Wasting Disease is by testing the brain stem tissue and tonsils of deceased

animals. No treatment or preventative vaccine exists for Chronic Wasting Disease. Depopulation of the contaminated herd is currently the best method to control Chronic Wasting Disease.

Conclusions of Law

1. Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc., are all proper parties to this action.

2. The E71 Final Premises Plan, signed by Ronald Walker on behalf of Respondents and Dr. Perkins on behalf of APHIS, is a legitimate agreement under the Regulations, and is binding on both Respondents and APHIS.

3. By failing to inform APHIS of the existence of two calves at the time the E71 Final Premises Plan was signed and by allowing the bottle babies to breed without notifying APHIS, Respondents violated the provisions of the E71 Final Premises Plan banning the restocking of cervids until after certain requirements were met and violated 9 C.F.R. § 55.4.

4. Respondents' introduction of reindeer onto the E71 premises violated the E71 Final Premises Plan restocking ban and 9 C.F.R. § 55.4, because the E71 Final Premises Plan prohibited the reintroduction of "cervids to this property" without "review[] and approv[al] by the CO State Veterinarian and USDA Area Veterinarian in Charge." (CX 9 at 3.)

5. Factoring in the severity of Respondents' violations, as well as the other factors required to be considered under the Animal Health Protection Act, I assess Respondents an $80,000 civil penalty for Respondents' violations of the E71 Final Premises Plan and 9 C.F.R. § 55.4.

The Administrator's Appeal Petition

The Administrator presented two issues in his appeal of the Chief ALJ's Decision:

> 1. Whether the Administrative Law Judge (ALJ) erred in finding that the Respondents did not violate the Final Premises Plan agreement and 9 C.F.R. § 55.4 by restocking their property

with reindeer prior to the date specified in the plan.

2. Whether the ALJ erred in reducing the civil penalty requested by Complainant and assessing a lesser civil penalty based upon his conclusion that "there was absolutely no legitimate basis for APHIS to discontinue the depopulation of E85."

Regarding the first issue, I conclude Respondents violated the E71 Final Premises Plan and 9 C.F.R. § 55.4 by restocking the E71 premises with reindeer. I discuss my reasoning in this Decision and Order, *supra*. I need not discuss this issue further in response to the Administrator's Appeal Petition.

Regarding the Administrator's appeal of the $20,000 civil penalty assessed by the Chief ALJ rather than the $110,000 civil penalty recommended by the Administrator, administrative law judges and the Judicial Officer have significant discretion when imposing a civil penalty under the Animal Health Protection Act. The United States Department of Agriculture's sanction policy provides that the administrative law judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

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

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991). However, I have repeatedly stated 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.[2]

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 8313(b)(2), and the remedial purposes of the Animal Health Protection Act, I conclude assessment of an $80,000 civil penalty is appropriate and necessary to ensure Respondents' compliance with the Animal Health Protection Act and the Regulations in the future, to deter others from violating the Animal Health Protection Act and the Regulations, and to fulfill the remedial purposes of the Animal Health Protection Act.

For the foregoing reasons, the following Order is issued.

ORDER

Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc., are assessed, jointly and severally, a civil penalty of $80,000. The civil penalty shall be paid by certified check or money order payable to the Treasurer of the United States and sent to:

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

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS, Accounts Receivable, within 60 days after service of this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 07-0131.

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[2]*In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009); *In re Amarillo Wildlife Refuge, Inc.,* 68 Agric. Dec. 89 (2009); *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).

RIGHT TO JUDICIAL REVIEW

The Order assessing Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc., a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.[3] Ronald Walker, Alidra Walker, and/or Top Rail Ranch, Inc., must seek judicial review within 60 days after entry of the Order.[4] The date of entry of the Order is January 13, 2010.

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GEORGE BAKER, d/b/a GEORGE BAKER STABLES.
A.Q. Docket No. 09-0027.
Decision and Order.
Filed February 23, 2010.

AQ –Transportation of slaughter horses.

Thomas Neil Bolick, Esquire, for APHIS.
Richard D. Gibbon, Esquire, for Respondent.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Preliminary Statement

Kevin Shea, then the Acting Administrator of the Animal and Plant Inspection Service (APHIS) commenced this action on November 17, 2008 by the filing of a Complaint against the Respondent alleging violations of the Commercial Transportation of Equines for Slaughter Act, 7 U.S.C. § 1901 note (the Act) and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*) and seeking civil penalties authorized by section 903(c) of the Act and 9 C.F.R. § 88.6.

The Respondent answered by the filing of a Response on January 5, 2009 indicating that he could find no records of him being a shipper of 32 horses on June 22, 2005 and accordingly denied any violation(s) on

[3]7 U.S.C. § 8313(b)(4)(A).

[4]28 U.S.C. § 2344.

that date and similarly had no records of the allegations on April 27, 2006 and demanded strict proof thereof.

An oral hearing was conducted on December 15, 2009 by three way audio-visual teleconference between the United States Department of Agriculture Courtroom in Washington, D.C., the United States Attorney's Office in Tulsa, Oklahoma and the United States Attorney's Office in Peoria, Illinois. The Administrator was represented by Thomas Neil Bolick, Esquire, Office of the General Counsel, United States Department of Agriculture. Mr. Baker was represented by Richard D. Gibbon, Esquire, Gibbon, Barron and Barron, PLLC of Tulsa, Oklahoma. Ten witnesses testified and 20 exhibits were admitted into evidence.[1]

Discussion

The Complaint filed by the Administrator alleges that on two instances Baker commercially transported horses as an "owner/shipper[2]" from Stroud, Oklahoma to Cavel International in DeKalb, Illinois for slaughter, the first being a load of 32 horses on June 22, 2005 and the second being a load of 35 horses shipped on April 26, 2006. During the first shipment of 32 horses in June of 2005, it was alleged that too many horses were loaded on the conveyance, aggressive horses were not segregated, and a mare having a pre-existing puncture wound suffered further injury during the trip causing her to die during the transportation. The alleged violation during the second shipment with 35 horses in April of 2006 involved three stallions that were not segregated to prevent them from coming into contact with the other horses.

The evidence introduced at the hearing amply established the fact

[1]Seven witnesses testified for the Administrator; three testified for the Respondent George Baker. References to the transcript of the proceedings will be Tr. and the page. The Complainants exhibits are indicated as CX and the Respondent's RX.

[2]7 U.S.C. ¶ 1901 Sec. 902 "(3) Person. - The term 'person' -"(A) means any individual, partnership, corporation, or cooperative association that regularly engages in the commercial transportation of equine for slaughter;. . . and in 9 C.F.R. ¶ 88 *Owner/shipper.* Any individual, partnership, corporation, or cooperative association that engages in the commercial transportation of more than 20 equines per year to slaughtering facilities,

that 32 horses in the June 2005 shipment from Stroud, Oklahoma to Cavel International in DeKalb, Illinois were shipped for slaughter, that the trailer containing the horses was overcrowded, aggressive animals were not segregated, and that a mare with a pre-existing puncture wound died during the shipment; however, the evidence introduced to establish George Baker as the "owner/shipper[3]" and thus responsible for violations under the Act however fell short of meeting the Administrator's burden of proof. Baker's position that he was neither the owner nor the shipper of the horses in 2005 is corroborated in part by the fact that in a case decided by United States Administrative Law Judge Jill S. Clifton the Secretary previously identified Charles Carter as being the owner/shipper and imposed liability upon him for the same shipment of horses.[4]

No evidence was introduced that Baker and Carter had joined together in a joint venture or in any type of partnership. Baker contended that he was only a buying agent for Carter in 2005 and that he was not tainted by any offenses committed by Carter.

Douglas Hoffman, an Animal Heath Technician formerly employed by APHIS Veterinary Services during 2005 and 2006 (now currently an employee of the Department of Homeland Security, Customs and Border Protection) testified that the VS Form 10-13 for the June 22, 2005 load of 32 horses listed Charles Carter as the owner shipper of the horses and

[3]Baker acknowledged purchasing horses for Carter as his agent, but testified that the equipment and driver used belonged to Carter and that he had no further involvement or control over the transportation of the horses once the horses were made available to the driver for loading at his facility in Stroud, Oklahoma.

[4]A Default Decision and Order was entered against Charles A. Carter on October 23, 2009 in *In re: Charles A. Carter, d/b/a C.C. Horses Transport; and Jeremy Pollitt, d/b/a Wildcat Trucking,* 68 Agric. Dec. 1104 (2009); AQ Docket No. 09-0024. Paragraph 45 of that decision involves the same shipment of 32 horses from Stroud, Oklahoma to Cavel International in DeKalb, Illinois. *Slip Opinion* at 20. Subparagraphs (b) and (c) of that decision identify the driver as being Carter's driver. *Id*. at 20-21. No appeal was made of that decision and it is now final. While it is possible for more than one individual to found to be culpable for a violation of the Act, the identification of the driver as being Carter's in the earlier case serves to corroborate the Respondent's claim that he had no control or authority over the driver and that the rig was not his. For reasons that are not clear, the position of the Secretary in the prior action was not disclosed at any time during the hearing.

that James Carpenter informed him that he drove for Charles Carter.[5] Tr. 16, 53-54, CX-1, 2, 3. Although he testified at the hearing that he "believed" the equipment used to transport the June 2005 shipment belonged to George Baker,[6] in retrospect through what must be regarded as a monumental oversight, his investigation lamentably failed to include pertinent ownership information concerning the tractor or trailer used to transport the horses. Moreover, none of the other documentation prepared by Hoffman mentioned Baker as having any control or other involvement other than as a point of origin for the horses.[7] Tr. 56.

Joseph W. Bauman, an Investigator with APHIS Investigative and Enforcement Services, testified that he had prepared an affidavit in connection with his involvement in the investigation and provided it to Doug Hoffman. Tr. 89, CX-5. His affidavit also fails to suggest any involvement by George Baker and he confirmed in this testimony under cross examination that his investigation did not include the development of information as to whose vehicle or trailer had been used in the transport of the horses for the shipment on June 22, 2005. Tr. 98-99.

Adina Baker testified that for the June 22, 2005 shipment of 32 horses Carter had the contract with Cavel, he determined the shipment date, provided the equipment and driver, and that his driver supervised the loading of the horses from inside the trailer, determining how many horses went into each part of the trailer. Tr. 232-235, 238. The driver

[5]Hoffman's testimony concerning his questioning of James Carpenter makes it clear that Carpenter took his orders from Carter and not from Baker. Hoffman testified "Being as that he drives for Mr. Carter, Mr. Carter had told his drivers not to sign any official documents from me so I didn't even attempt to take an affidavit from him, but I had requested that they fill out the basic information on the owner/shipper the driver form." Tr. 53.

[6]The testimony at trial casts doubt upon Hoffman's account of providing a binder to Baker concerning regulatory requirements as the testimony at the hearing indicated that Baker does not possess a Commercial Driver's License (CDL) which would be required for such transportation. Tr. 59, 256. Moreover, Baker denied ever traveling to DeKalb, Illinois which is where Hoffman is stationed. Tr. 256.

[7]Hoffman's affidavit and testimony incorrectly also indicated that he was at the Cavel facility on June 22, 2005 when the load arrived when in fact the evidence indicated that the load left Stroud, Oklahoma on June 22, 2005 and arrived in DeKalb, Illinois on June 23, 2005. Tr. 21, CX-2, 4-6. Only when specifically asked about the date in relation to the amount of time required for the trip did he correct the date. Tr. 78.

operated on instructions from Carter, a fact corroborated by the testimony of Hoffman, and the Bakers had no means of contacting the driver. Tr. 53, 238.

By way of contrast, the same degree of control by Carter was not exercised in the case of the April 24, 2006 shipment as that load of 35 horses was driven from the Baker facility in Stroud, Oklahoma to Cavel International in DeKalb, Illinois by Baker's step son Kory Pierson who was working for Baker at the time. While Douglas Hoffman testified that he observed that there were three stallions in the load, contrary to his usual thoroughness, he did not take any photographs of the animals.[8] Tr. 34-35. His testimony was corroborated however by Cavel's records reflecting the gender of the horses. CX-14. Given the explicitness of the regulatory requirements set forth in 9 C.F.R.§88.4(a)(4)(ii) and the number of horses in the load, although no injuries were sustained by the horses during the transport (Tr. 247), it is clear that a violation did occur on that occasion and that it is attributable to the Respondent George Baker.

Based upon the entire record of all evidence presented, including the testimony of the witnesses and the exhibits introduced during the hearing, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Respondent George Baker is an individual who operates a tack and horse receiving business which includes the buying and selling horses under the name of George Baker Stables. He is a resident of Stroud, Oklahoma.
2. Adina Agnew (Toots) Baker is George Baker's wife and assists him in the operation of his business. She completed the VS Form 10-13 for the June 22, 2005 shipment of 32 horses and signed the form as the agent of Charles Carter. Tr. 231, 237, CX-8.

[8]Hoffman was generally regarded as a thorough investigator according to Randy Beasley, a former Cavel employee who in his affidavit provided an encomium indicating that every time Hoffman issued any type of violation he would fill out the paperwork and take multiple photos of the said violation… RX-2.

3. Kory Pierson is George Baker's step son; the Bakers provide him a place to live and the facilities to keep his horses. He works for his step father driving trucks and handling horses, as well as buying and selling horses and tack for himself. CX-16.
4. George Baker acts as an agent of Charles A. Carter on numerous occasions to purchase horses for Carter. On June 22, 2005, he delivered 32 head of horses purchased for Carter to Carter's driver, James Carpenter at his place of business in Stroud, Oklahoma. The load of 32 horses included a mare with a pre-existing puncture wound. Tr. 232-235, 237.
5. Acting on instructions from Carter and using Carter's equipment, Carter's driver James Carpenter supervised the loading of 32 horses at Baker's facility in Stroud, Oklahoma and their placement in the trailer on June 22, 2005 and transported the horses to Cavel International in DeKalb, Illinois for slaughter. Tr. 232-235.
6. During the course of their transportation, the horses were crowded in the trailer transporting them, aggressive animals were not segregated and the mare with the pre-existing puncture wound died as a result of injuries sustained during the transport. CX-2.
7. As previously found in *In re: Charles A. Carter, d/b/a C.C. Horses Transport; and Jeremy Pollitt, d/b/a Wildcat Trucking,* 68 Agric. Dec. 1104 (2009); AQ Docket No. 09-0024, Charles A. Carter (and not George Baker) was the owner/shipper of the horses for the load of 32 horses shipped on June 22, 2005 to Cavel International in DeKalb, Illinois for slaughter.
8. On April 27, 2006, Kory Pierson, working as his step father's employee, transported a load of 35 horses purchased for Charles Carter from the Baker facility in Stroud, Oklahoma to Cavel International in DeKalb, Illinois for slaughter. Tr. 246-247, 264, 267, CX-16.
9. Although there were no reported injuries to the horses transported, the load of 35 horses shipped on April 27, 2006 in Baker's equipment by Pierson from Stroud, Oklahoma to Cavel International in DeKalb, Illinois included three stallions that were not segregated from the other horses as required by 9 C.F.R.§88.4(a)(4)(ii). Tr. 34-35, CX-14.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. George Baker as the individual responsible for shipment of the horses in equipment owned by him and driven by his employee failed to segregate the three stallions from the other horses during the shipment of 35 horses from the Baker facility in Stroud, Oklahoma to Cavel International in DeKalb, Illinois on April 27, 2006, in violation of 9 C.F.R. §88.4(a)(4)(ii).

Order

1. The Respondent George Baker is assessed a civil penalty of $1,200 for the violation of 9 C.F.R. §88.4(a)(4)(ii). Payment of the civil penalty shall be made to the **Treasurer of the United States** and be paid within 30 days from the effective date of this Order by certified check or money order sent to:

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

The certified check or money order should include the docket number of this proceeding.

2. This Order shall become final and effective thirty (30) days after date of service of this Order on the Respondent unless appealed to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

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

Done at Washington, D.C.

ANIMAL WELFARE ACT

COURT DECISION

ZANONIA WHITE, et al. v. USDA.
No. 09-3158.
Filed April 9, 2010.

[Cite as: 601 F.3d 545].

United States Court of Appeals,
Sixth Circuit.

AWA – Economic injuries, prospective, not unique to act – Chilling effect – Game foul, display of – First (association), ninth, tenth, eleventh amendments.

Gamefowl sellers and breeders showing of gamefowl, brought pre-enforcement challenge to anti-animal-fighting provisions of the Animal Welfare Act, seeking declaration that the provisions were unconstitutional and void in their entirety insofar as they applied to gamefowl and an injunction prohibiting enforcement of those provisions. No animal fighting was actually involved. The U.S. District Court dismissed the suit for lack of standing. Plaintiffs appealed. The petitioner's standing was based upon a string of possible events which were speculative.

The Court of Appeals, Cole, Circuit Judge, held that:

(1) alleged economic injuries were not traceable only to provisions of Act;
(2) alleged risk of prosecution and resulting chill was too speculative to demonstrate injury in fact;
(3) alleged injuries did not implicate constitutional rights of travel, association, due process, and freedom from bills of attainder; and
(4) no personal injury was suffered as a result of any federalism violations.

Affirmed.

Before: KENNEDY, COLE, and GRIFFIN, Circuit Judges.

OPINION

COLE, Circuit Judge.Plaintiffs-Appellants appeal the district court's dismissal of their pre-enforcement challenge to the anti-animal-fighting provisions of the Animal Welfare Act, naming as defendants the United States, the Secretary and Department of Agriculture, the Attorney General and Department of Justice, and the Postmaster General and the United States Postal Service. The plaintiffs-appellants allege that these provisions are unconstitutional insofar as they constitute a bill of attainder; violate the principles of federalism contained in, inter alia, the Ninth, Tenth, and Eleventh Amendments to the United States Constitution; and unduly impinge on the plaintiffs-appellants' First Amendment right of association, constitutional right to travel, and Fifth Amendment right to due process for deprivations of property and liberty. The district court dismissed the lawsuit for lack of Article III standing, a decision that we now **AFFIRM.**

I. BACKGROUND

A. Statutory background Before the district court, the plaintiffs-appellants ("the plaintiffs") sought a declaratory judgment that all provisions of the Animal Welfare Act ("AWA"), 7 U.S.C. §§ 2131-56, are "unconstitutional and void in their entirety" insofar "as they apply to gamefowl or activities and products relating to gamefowl," and an injunction prohibiting enforcement of these provisions. The targeted provisions of the AWA are contained in § 2156, which places restrictions on cockfighting and other "animal fighting ventures," defined as "any event, in or affecting interstate or foreign commerce, that involves a fight conducted or to be conducted between at least 3 animals for purposes of sport, wagering, or entertainment." 7 U.S.C. § 2156(g)(1). In February 2008, at the time the plaintiffs filed their complaint,

§ 2156 prohibited:

- knowingly sponsoring or exhibiting animals in an animal fighting venture if any of the animals was moved in interstate or foreign commerce, *id.* § 2156(a)(1), except for persons (1) sponsoring or exhibiting birds in a state where fighting ventures involving live birds are not illegal, (2) who had not knowingly bought, sold, delivered, transported, or received the birds in interstate or foreign commerce for the purpose of participating in the fighting venture, *id.* § 2156(a)(2);
- knowingly selling, buying, transporting, delivering, or receiving any animal for the purpose of having the animal participate in an animal fighting venture, *id.* § 2156(b);
- knowingly using the United States Postal Service or any instrumentality of interstate commerce for commercial speech for promoting, or in any other manner furthering, an animal fighting venture in the United States, *id.* § 2156(c), unless the promoted activity is one that involves live birds and takes place in a state where bird fighting is legal, *id.* § 2156(d); and
- knowingly selling, buying, transporting, or delivering in interstate or foreign commerce a knife, gaff, or other sharp instrument attached or intended to be attached to the leg of a bird for use in an animal fighting venture, *id.* § 2156(e).

Originally, § 2156 contained a broader exception for live birds: its prohibitions applied to fighting ventures involving birds "only if the fight is to take place in a State where it would be in violation of the laws thereof." *See* Animal Welfare Act Amendments of 1976, Pub.L. No. 94-279, 90 Stat. 417 (1976) (adding § 2156 to the AWA). In 2002, Congress limited this exception considerably by eliminating its applicability to subsection (b) (which covers the knowing sale, purchase, transport, delivery, and receipt of animals for fighting purposes) and amending subsection (a) (which covers the knowing sponsorship and exhibition of animals for fighting purposes) to the wording that existed at the time of the plaintiffs' complaint. *See* Farm Security and Rural Investment Act of 2002, Pub.L. No. 107-171, 116 Stat. 134, 491-92 (2002). In 2007, Congress added subsection (d), covering knives, gaffes

and other sharp instruments intended for bird-fighting purposes. Animal Fighting Prohibition Enforcement Act, Pub.L. No. 110-22, 121 Stat. 88 (2007). [1]

In sum, at the time the plaintiffs filed their complaint, § 2156 restricted (and continues to restrict) various activities associated with animal fighting that involve interstate travel and commerce, but did not (and does not) itself prohibit animal fighting, including cockfighting. All fifty states have legislation prohibiting cockfighting, however, although the defendants concede that Louisiana's ban had not yet taken effect at the time the plaintiffs filed their complaint and that cockfighting remains legal in some U.S. territories and the Commonwealth of Puerto Rico.[2]

B. Plaintiffs' alleged injuries

In support of their claims for declaratory and injunctive relief, the plaintiffs allege that the AWA has caused them various individual and collective injuries. We accept the factual basis of these injuries as true because the plaintiffs' suit was dismissed at the pleading stage. *See Fednav, Ltd. v. Chester,* 547 F.3d 607, 614 (6th Cir.2008). Zanonia White, a resident of Weimar, Texas, who supplements her retirement income by selling chickens, alleges that she no longer fights birds and sells chickens only for breeding and show purposes. She does not sell birds to any person she believes will use them for fighting purposes and requires all customers to sign a form certifying the same. Nonetheless, she is contemplating ceasing her breeding business because she fears arrest under the AWA and consequent economic damages. She claims to know of other law-abiding breeders who have been harassed by law enforcement officials regarding their breeding activities.

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[1] Congress further amended § 2156 in June 2008, *see* Food, Conservation, and Energy Act of 2008, Pub.L. No. 110-246, 122 Stat. 2223 (2008), after the plaintiffs filed their complaint. The plaintiffs do not challenge the 2008 amendments.

[2] For the purposes of § 2156, "State" is defined as "any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States." 7 U.S.C. § 2156(g)(3). Thus, the AWA's prohibitions on activities involving interstate travel and commerce extend to Puerto Rico and American territories and possessions.

Ben J. Taylor, a resident of Newport, Tennessee, raises and sells gamefowl for show and breeding purposes, but no longer for fighting purposes. He claims that the AWA has significantly reduced the market for his birds, both because it has restricted his sales to non-fighting purposes and because customers who might otherwise buy his birds for show or breeding purposes are loathe to transport birds across state lines for fear of wrongful prosecution under § 2156. He, too, is reluctant to ship his birds across state lines for fear of wrongful prosecution.

Teresa Doolittle, also a resident of Newport, has operated a feed store there for over a decade. While the gamefowl industry originally provided approximately sixty percent of the store's business, the AWA allegedly has led that figure to decline to about twenty percent (representing a $30,000 to $60,000 loss in gross revenue), and Doolittle estimates that the figure will drop further to about fifteen percent. Following amendments to the AWA in 2007, Doolittle ceased to ship birds even for lawful purposes because of the risk of wrongful prosecution.

Anthony Seville is president of the American Game Fowl Society, a nonprofit organization that promotes the showing of gamefowl and that is affiliated with the American Poultry Association. He claims that the AWA has adversely affected his ability to work as a gamefowl judge and promote gamefowl shows because potential exhibitors are reluctant to participate due to the legal risks associated with transporting birds, including that of wrongful prosecution.[3]

Milton Brooks is a Georgia resident who has been collecting rare gamefowl stock for show and breeding purposes for the past ten years. He claims that, as a result of the AWA, he no longer can transport or sell birds across state lines for fighting purposes, even to those (unspecified) states where cockfighting remains legal. Moreover, the AWA has reduced his ability to sell birds for non-fighting purposes because it has chilled the purchase and transport of breeding and show birds.

In addition to these individual injuries, the plaintiffs argue that they

[3] The complaint alleges that, by the same token, the AWA also has adversely affected the organizational interests of the American Game Fowl Society and its members by chilling the transportation of birds for show across state lines. Neither the American Game Fowl Society nor its other members, however, is party to this lawsuit.

collectively have suffered and will continue to suffer violations of various constitutional rights because of the AWA. First, the plaintiffs argue that the AWA creates an "unconstitutional impairment of plaintiffs' Fifth Amendment liberty interests in their right to travel," by prohibiting them "from taking the property they own from a place where they have the right to own, possess, and enjoy it to another place where they have the right to own, possess, and enjoy it," and chilling the right to travel with chickens intended for non-fighting purposes. Second, the AWA allegedly impinges the plaintiffs' First Amendment association rights by making it impossible for the plaintiffs to travel to the events at which they ordinarily would associate with like-minded people. Third, the plaintiffs argue that the AWA inflicts punishment on them and other members of the gamefowl community without a judicial trial and therefore is a bill of attainder. Finally, the plaintiffs argue that the AWA violates principles of federalism embodied, inter alia, in the Ninth, Tenth, and Eleventh Amendments to the United States Constitution by impermissibly favoring the domestic policies of those states that have enacted cockfighting bans over those of states that have not.

C. Procedural history

On the basis of these alleged injuries, the plaintiffs filed suit on February 7, 2008. On October 28, the defendants filed a motion to dismiss the complaint for lack of standing under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6). The plaintiffs filed a response on December 9. On January 26, 2009, the district court granted the defendants' motion to dismiss for lack of standing, noting that, to be conferred standing, the plaintiffs had the burden of demonstrating that they had (1) personally suffered an "injury in fact" that was actual or imminent and not conjectural or hypothetical; (2) that the injury was "fairly traceable" to the challenged action of the defendant (i.e., the enactment and enforcement of § 2156); and (3) that a favorable decision likely would redress the injury. *White v. United States,* No. 2:08-cv-118, 2009 WL 173509, at *2 (S.D.Ohio Jan.26, 2009) (op. & order) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).Rather than address

individually the plaintiffs' various alleged economic and constitutional injuries, the court consolidated the injuries into two basic "premises": first, that the plaintiffs feared false prosecution under § 2156, and second, that they had suffered economic injuries because of the AWA. *Id.* at *3. On the first premise, the court found that the plaintiffs' fear of false prosecution did not constitute an "injury in fact" sufficient to confer constitutional standing. In the court's words, because the " '[p]ossibility of future harm [is] neither actual nor imminent, but [is] conjectural at best,' " the plaintiffs' potential injury due to false prosecution " '[is] not within the purview of disputes that the federal courts are permitted to adjudicate.' " *Id.* at *4 (quoting *Hyman v. City of Louisville,* 53 Fed.Appx. 740, 744 (6th Cir.2002)). On the second premise, the court reasoned that, because cockfighting is now illegal in all fifty states and in the District of Columbia, there would be no legal domestic market for cockfighting even if § 2156 were declared unconstitutional. Thus, any economic injuries the plaintiffs had suffered were not traceable to the AWA nor redressable by the declaratory or injunctive relief sought, as required under the second and third prongs of the test for Article III standing. *Id.* at *4-*5.

The plaintiffs timely appealed the district court's decision that they lack constitutional standing to bring their claims. We have jurisdiction over the final decision of the district court under 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

The plaintiffs argue that the district court erred in dismissing their lawsuit for lack of constitutional standing. We review the district court's decision de novo. *Stalley v. Methodist Healthcare,* 517 F.3d 911, 916 (6th Cir.2008) (citing *Prime Media, Inc. v. City of Brentwood,* 485 F.3d 343, 348 (6th Cir.2007)); *see also Raines v. Byrd,* 521 U.S. 811, 820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."). Constitutional standing under Article III has three elements. *Fednav,* 547 F.3d at 614. " 'First, the plaintiff must have suffered an 'injury in

fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' " *Id.* (quoting *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130). Second, the injury must be " 'fairly traceable to the challenged action of the defendant.' " *Id.* (quoting *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130). Third, it must be likely that the injury will be " 'redressed by a favorable decision.' " *Id.* (quoting *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130). Each of these elements " 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive states of the litigation.' " *Id.* (quoting *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130). As stated above, because the plaintiffs' suit was dismissed at the pleading stage, we " 'must accept as true all material [factual] allegations of the complaint.' " *Id.* (quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). We also must construe the complaint liberally in favor of the complaining party. *See United States v. Salti,* 579 F.3d 656, 667 n. 11 (6th Cir.2009) (citing *Warth,* 422 U.S. at 501, 95 S.Ct. 2197). General factual allegations of injury may suffice to demonstrate standing, "for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130 (internal quotation marks omitted). However, "standing cannot be inferred ... from averments in the pleadings, but rather must affirmatively appear in the record," *Spencer v. Kemna,* 523 U.S. 1, 10-11, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), nor will "naked assertion[s] devoid of further factual enhancement" suffice, *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). Rather, the complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted).

Rather than examine each of the various injuries alleged by the plaintiffs to determine which, if any, satisfy the test for constitutional standing, we can distill the claimed injuries into four categories: first, the plaintiffs' economic injuries caused by the AWA; second, the plaintiffs' fear of false prosecution under the AWA and resulting "chill" on the plaintiffs' conduct; third, the AWA's violation of plaintiffs'

constitutional rights; and fourth, the AWA's violation of the principles of federalism contained in the Ninth, Tenth, and Eleventh Amendments. None of these alleged injuries suffices to confer standing on the plaintiffs.

III. DISCUSSION

A. Economic injuries

The plaintiffs argue that the district court was compelled to accept as true their allegations that there are states and territories where cockfighting remains legal and note that even the defendants conceded that cockfighting is allowed in Puerto Rico and some American territories. By consequence, according to the plaintiffs, the district court erred in finding that the economic injuries they have suffered and continue to suffer cannot be traced to § 2156's prohibition on activities involving interstate and foreign travel and commerce for the purposes of cockfighting. Rather, they argue, their injuries may be fairly traced to the AWA, and a declaration that § 2156 is unconstitutional and an order enjoining its enforcement would redress these injuries. In their words, "if the court finds the statutory provisions to be unconstitutional ... persons who have stopped the activities prohibited by the statute would resume them, and the ... injuries sustained by appellants, including but not limited to economic losses ... would be limited or avoided in the future." Contra the plaintiffs' argument, the district court was not compelled to accept their legal allegations as true. *See Iqbal,* 129 S.Ct. at 1949 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Neither are we. Cockfighting is banned to a greater or lesser degree in all fifty states and the District of Columbia. Thus, while economic injuries may constitute an injury-in-fact for the purposes of Article III standing, *see Lujan,* 504 U.S. at 559-61, 112 S.Ct. 2130; *see also Lambert v. Hartman,* 517 F.3d 433, 437 (6th Cir.2008) (noting that "actual financial injuries" may satisfy the injury-in-fact requirement), the plaintiffs' alleged economic injuries due to restrictions on cockfighting are not traceable only to the AWA. *Cf. San Diego County Gun Rights v. Reno,* 98 F.3d 1121, 1130 (9th Cir.1996) (holding that

state law banning activities similar to those prohibited by challenged federal law undercut traceability). Nor would these injuries be redressed by the relief plaintiffs seek, since the states' prohibitions on cockfighting would remain in place notwithstanding any action we might take in regard to the AWA.

While the defendants concede that cockfighting remains legal in Puerto Rico and some territories of the United States, this concession does not aid the plaintiffs. The complaint does not allege that the plaintiffs have ever derived any income from or engaged in any trade with individuals in Puerto Rico or U.S. territories. Nor does it claim that the plaintiffs have any intent to do so in future. Absent any allegation that the plaintiffs have lost or will lose income because of the AWA's restrictions on interstate commerce with these locales, the bald assertion that plaintiffs have suffered economic injury due to the AWA is not sufficient to confer standing based on the continued legality of cockfighting there. *See Bishop v. Lucent Techs., Inc.,* 520 F.3d 516, 522 (6th Cir.2008) ("The court should not assume facts that could and should have been pled, but were not."); *cf. Iqbal,* 129 S.Ct. at 1949 (complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face").[4]

B. Fear of false prosecution and resulting "chill" on plaintiffs' conduct

The risk of false prosecution under the AWA also is too speculative to confer standing on the plaintiffs. In reaching the same conclusion, the district court emphasized that none of the plaintiffs alleged any intention to engage in conduct prohibited by the AWA. *White,* 2009 WL 173509, at *3. This emphasis is misplaced. Whether or not the plaintiffs alleged

[4] In February 2008, when the plaintiffs filed their complaint, Louisiana's ban on cockfighting had not yet gone into effect. *See* La.Rev.Stat. Ann. § 14:102.23 (2008); *Cleveland Branch, NAACP v. City of Pharma,* 263 F.3d 513, 524 (6th Cir.2001) ("The Supreme Court has consistently held that 'jurisdiction is tested by the facts as they existed when the action [was] brought ....' ") (quoting *Smith v. Sperling,* 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957)). The plaintiffs have not alleged any present or future economic loss due to foregone revenues from Louisiana, and the state's now effective ban would render moot any such claim.

an intention to engage in prohibited conduct is not relevant to their allegations that they risk false prosecution under the AWA even if they engage only in lawful conduct. This issue aside, however, the district court was correct to conclude that the risk of false prosecution to the plaintiffs is too speculative to confer standing. " 'A threatened injury must be certainly impending to constitute injury in fact.' " *Rosen v. Tenn. Comm'r of Fin. & Admin.,* 288 F.3d 918, 929 (6th Cir.2002) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)); *accord City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). The plaintiffs' allegations of potential false prosecution amount to a claim that, if they transport or sell chickens across state lines for non-fighting purposes and if they are stopped by law enforcement authorities, the authorities may misinterpret the plaintiffs' intent and may wrongly prosecute them. This claim accordingly bears some similarity to the allegations presented in *O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), which the Supreme Court found insufficient for standing. In *O'Shea,* the plaintiffs sought injunctive relief against two judges who allegedly were engaged in "a continuing pattern and practice" of discriminatory and unconstitutional bond-setting, sentencing, and mandating of fee payments. *Id.* at 491-92, 94 S.Ct. 669. The Court found that these allegations amounted to a claim "that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before [the judges], they will be subjected to the discriminatory practices that [the judges] are alleged to have followed." *Id.* at 497, 94 S.Ct. 669. As in *O'Shea,* the chain of events necessary for the plaintiffs in this case to suffer false prosecution veers "into the area of speculation and conjecture." *Id.* In the district court's words, the "[p]laintiffs' pleading as to the scenario of events that must unfold to injure them-their allegations that they *might* incur injury in the future *if* the law is not properly followed and *if* their intentions are misconstrued-is simply too ... highly conjectural" to present a threat of immediate injury, as the allegations "rest[ ] on a string of actions the occurrence of which is merely speculative." *White,* 2009 WL 173509, at *4. While wrongful prosecution may be more likely here than in *O'Shea* in light of the plaintiffs' claim that law enforcement officials

mistakenly believe, due to misinformation provided by entities like the Humane Society, that birds intended for fighting are distinguishable from birds that are not, the risk remains too remote to confer standing.[5]

Nor does the "chill" on the plaintiffs' right of travel, right of association, and "right to be free of bills of attainder," which the plaintiffs claim results from their fear of false prosecution, suffice for standing. Our jurisprudence assumes that only the chilling of First Amendment rights may confer standing. Moreover, where a plaintiff seeks injunctive or declaratory relief to remedy a First Amendment violation, a subjective fear of chilling will not suffice for standing absent a real and immediate threat of future harm. *See Hange v. City of Mansfield,* 257 Fed.Appx. 887, 891 (6th Cir.2007) ("[T]o seek an injunction ... the mere subjective fear that a plaintiff will be subjected ... to an allegedly illegal action is not sufficient to confer standing.") (citing *Lyons,* 461 U.S. at 107 n. 8, 103 S.Ct. 1660 ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.")); *see also Fieger v. Mich. Supreme Court,* 553 F.3d 955, 962 (6th Cir.2009) (" '[T]he Supreme Court is emphatic: 'Allegations of a subjective 'chill' are not an adequate substitute for a claim of *specific present objective* harm or a threat of *specific future harm*.' ") (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972)). As argued above, the risk of false prosecution the plaintiffs face in this case is too speculative to confer standing. Their resulting decision to curtail their activities based on their subjective fear of prosecution-the alleged "chill" on their constitutional rights-does not affect this analysis. As we stated in *Morrison v. Board of Education,* 521 F.3d 602 (6th Cir.2008), "subjective apprehension and a personal (self-imposed) unwillingness" to engage in First Amendment conduct, "without more," "fail to

[5] The complaint included as defendants "Does 1-50[who] include other persons or entities who, like defendant [Humane Society of the United States] have been acting on behalf or in concert with the named defendants ... in carrying out or assisting law enforcement and government officials," and sought to enjoin any defendant from providing to law enforcement officials or other organizations "false or misleading information pertaining to characteristics of chickens." The plaintiffs' brief before this Court does not mention these defendants nor this prayer for relief.

substantiate an injury-in-fact for standing purposes." *Id.* at 610 (citing *ACLU v. NSA,* 493 F.3d 644, 662 (6th Cir.2007)). While the plaintiffs argue that law enforcement officials' mistaken belief regarding the distinctive characteristics of fighting birds helps transform their subjective apprehension of prosecution into a fear of imminent injury sufficient to confer standing, the risk of wrongful prosecution remains overly speculative, even in light of this allegation.

C. Violations of plaintiffs' constitutional rights

The plaintiffs' brief focuses on the chill to plaintiffs' constitutional rights based on the fear of false prosecution. However, the plaintiffs' complaint also appears to allege constitutional violations based on § 2156's ban on interstate sales and transportation of chickens actually intended for fighting purposes, since some of the plaintiffs allegedly would sell and / or transport chickens for fighting purposes but for the AWA's restrictions. By prohibiting the sale and transportation of chickens for fighting purposes, the AWA violates (or so the complaint argues) the plaintiffs' rights of travel and association, their "rights to due process in the deprivation of their rights to property and liberty," and their "right to be free from bills of attainder."The plaintiffs argue that they need not allege an intention to violate the AWA in order to have standing based on these alleged violations of their constitutional rights. We indeed have held that "[a] plaintiff can meet the standing requirements when suit is brought under the Declaratory Judgment Act by establishing 'actual present harm or a significant possibility of future harm,' *People's Rights Org. v. City of Columbus,* 152 F.3d 522, 527 (6th Cir.1998), 'even though the injury-in-fact has not yet been completed.' *Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 280 (6th Cir.1997)." *Hyman,* 53 Fed.Appx. at 743. In other words, the plaintiffs are correct that they need not actually violate the AWA in order to have standing. However, they still must demonstrate an injury-in-fact to a legally protected interest that is actual or imminent and that satisfies the other prongs of the constitutional standing test.

The purported constitutional violations the plaintiffs allege do not satisfy this standard. Even if the plaintiffs' allegations that they would

sell chickens for fighting purposes but for § 2156 are sufficient to demonstrate a significant possibility of future harm, none of the purported "constitutional" injuries actually implicates the Constitution. *Cf. Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (injury-in-fact must implicate legally protected interest). The plaintiffs' arguments to the contrary are near frivolous. The plaintiffs offer no support for their argument that the right to travel "includes within it the right ... to bring with them their property ... in this case birds and paraphernalia including ... 'sharp implements.' " Nor do they provide any support for the argument that their rights to association are violated because the AWA "mak[es] it impossible to travel to the events at which [the plaintiffs] would ordinarily associate with like-minded people" since "[t]he very property which Congress wants plaintiffs to leave at home is the very reason the plaintiffs associate with other[s] in the gamefowl community." In fact, § 2156 neither prohibits travel nor prevents individuals from associating for the purposes of animal fighting in locations where animal fighting remains legal. Nor does it deprive the plaintiffs of property or liberty without due process. If the plaintiffs violate the AWA and are arrested for doing so, there is no reason to think they will not receive the procedural protections of the federal criminal justice system. By the same token, because the AWA does not impose any penalties without a judicial trial, it is not a bill of attainder. *Cf. United States v. Brown,* 381 U.S. 437, 448-49, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965) (describing features of bills of attainder). Because none of these alleged injuries actually implicates the Constitution, none is sufficient to confer standing.

D. Federalism violation

Finally, the plaintiffs argue that the anti-animal-fighting provisions of the AWA violate the principles of federalism contained in the Ninth, Tenth, and Eleventh Amendments by favoring the policies of those states that ban cockfighting in a manner that imposes burdens on those states that have not enacted such bans. Even assuming the plaintiffs are correct that a constitutional violation has occurred, they do not have standing to challenge it. A party invoking the court's jurisdiction must

show that he has "personally suffered" some actual or threatened injury. *Lujan,* 504 U.S. at 563, 112 S.Ct. 2130; *see also Warth,* 422 U.S. at 499, 95 S.Ct. 2197 ("The Art. III judicial power exists only to redress or otherwise protect against injury to the complaining party.... A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury ....") (internal quotation marks omitted). Any injury here is to the impacted states, and perhaps to their citizens or the citizens of the United States in general. Thus, the plaintiffs cannot be said to have "personally suffered" the alleged federalism violation in a manner that would confer standing. *Cf. Greater Cincinnati Coal. for the Homeless v. City of Cincinnati,* 56 F.3d 710, 716 (6th Cir.1995) (standing cannot be conferred based upon "a mere interest in a problem") (citing *Sierra Club v. Morton,* 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)).

IV. CONCLUSION

For the reasons described above, we **AFFIRM** the decision of the district court.C.A.6 (Ohio),2010.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

GREAT CATS OF INDIANA, INC., LAUROB, LLC AND ROBERT B. CRAIG AND LAURA PROPER, d/b/a GREAT CATS OF INDIANA.
AWA Docket No. 07-0183.
Decision and Order.
Filed January 4, 2010.

AWA – Zoo.

Colleen Carroll, for the Administrator, APHIS.
Robert B. Craig, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*.)(the "Act"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, and subsequently amended, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq*.). This initial decision and order is entered pursuant to section 1.141(e) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.141(e)).

The Administrator of the Animal and Plant Health Inspection Service ("APHIS") initiated this case in furtherance of USDA's statutory mandate under the Act to ensure that animals transported, sold or used for exhibition are treated humanely and carefully.[1] In its amended complaint, APHIS seeks penalties against respondents for violating the Act and the regulations and standards promulgated thereunder, 9 C.F.R. § 2.1 *et seq*. (the "Regulations" and "Standards"). The respondents filed

[1]The Animal Welfare Act, 7 U.S.C. § 2131 *et seq*. (the "Act"), was originally passed by Congress specifically to address the public's interest in preventing the theft of pets and in ensuring that animals used in research were treated humanely. The Act was amended to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals used for exhibition purposes or as pets

an answer denying material allegations of the complaint.

The hearing of this matter was scheduled to commence on January 4, 2010, by notice filed April 29, 2009, following a teleconference held by me on that date. Respondents were represented by respondent Robert B. Craig. On December 15, 2009, I filed a Hearing Room Designation stating that the hearing would be held in Lafayette, Indiana, and identifying the building, address, and courtroom. The Hearing Clerk sent a copy of that notice to respondents on December 16, 2009. Respondents were duly notified of the time, place and location of the scheduled hearing.

On January 4, 2010, I presided over an oral hearing in this matter in Lafayette, Indiana. Complainant was represented by Colleen Carroll, Office of the General Counsel, U.S. Department of Agriculture. Respondents failed to appear at the hearing without good cause. Pursuant to the Rules of Practice, respondents are deemed to have waived the right to an oral hearing and to have admitted all of the material allegations of fact contained in the amended complaint. 7 C.F.R. §1.141(e). Complainant elected to follow the procedure set forth in section 1.139 of the Rules of Practice. Therefore, I issue this initial decision and order on January 4, 2010.

FINDINGS OF FACT

1. Respondent Great Cats of Indiana, Inc. ("GCI"), is an Indiana corporation (number 2001112600247, incorporated November 21, 2001) whose address is 10471 East Highway 24, Idaville, Indiana 47950, and whose agent for service of process is respondent Robert B. Craig. At all times mentioned herein, respondent GCI operated as an exhibitor as that term is defined in the Act. Respondent GCI has never held an Animal Welfare Act license.

2. Respondent Laurob, LLC ("Laurob") is an Indiana limited liability company (number 2003021700011, formed on January 30, 2003) whose address is 10471 East Highway 24, Idaville, Indiana 47950, and whose agent for service of process is respondent Robert B. Craig. Beginning in January 2003, respondent Laurob operated as an exhibitor as that term is defined in the Act, and since February 24, 2004,

has held Animal Welfare Act license 32-C-0186, issued to "LAUROB, LLC, DBA: GREAT CATS OF INDIANA." In its initial license application submitted in July 2003, Laurob identified itself as a limited liability company doing business as "Great Cats of Indiana." Its 2005 through 2008 license renewal forms represent that it is a corporation. In its application, Laurob identified the nature of its business as both a "zoo" and a "broker."

3. Respondent Robert B. Craig is an individual whose mailing address is 10471 East Highway 24, Idaville, Indiana 47950. Complainant is informed and believes and on that basis alleges that respondent Craig is a director and officer of respondent GCI and a manager of respondent Laurob, and since approximately November 2001 has operated as an exhibitor using the names "Great Cats of Indiana" and Cougar Valley Farms, Inc.

4. Respondent Laura Proper is an individual whose mailing address is 10471 East Highway 24, Idaville, Indiana 47950. Complainant is informed and believes and on that basis alleges that respondent Proper is a director and officer of respondent GCI and a manager of respondent Laurob, and since approximately November 2001 has operated as an exhibitor using the names "Great Cats of Indiana" and Cougar Valley Farms, Inc.

5. Respondents Craig and Proper were the principals of Cougar Valley Farms, Inc., an Indiana corporation that validly held Animal Welfare Act license 32-B-0136, from its incorporation until its dissolution by the Indiana Secretary of State on December 8, 2001. Although a defunct corporation is not a "person," as defined in the Act and the Regulations, and therefore cannot legitimately hold a license, for almost two years, between December 8, 2001, through September 19, 2003, respondents Craig and Proper continued to operate as dealers under the name "Cougar Valley Farms, Inc.," and to use (and renew) the license that APHIS had issued to Cougar Valley Farms, Inc., as their own for their own purposes.

6. Respondents operate a moderately-large business, and have regularly had custody and control of approximately 30 to 50 animals, including canids, felids and bears. The gravity of the violations in this

case is great. They include repeated instances in which respondents exhibited animals without adhering to the handling Regulations, failed to provide minimally-adequate veterinary care to animals that were suffering, and failed to provide minimally-adequate housing and husbandry to animals. Respondents have not shown good faith. They have continually failed to comply with the Regulations and Standards, after having been repeatedly advised of deficiencies, and on August 30, 2004, APHIS issued a notice of warning to respondent Laurob. Respondents Craig and Proper operated for two years ostensibly using a dealer's license issued to a defunct corporation (Cougar Valley Farms, Inc.). On November 1, 2006, respondent Craig misrepresented to inspectors that on October 25-26, 2006, he sought veterinary care from two veterinarians for a jaguar in distress, when both veterinarians confirmed to APHIS that respondent Craig had never so communicated with them.

7. Since approximately November 21, 2001, respondent GCI has continually operated as a dealer and an exhibitor, as those terms are defined in the Act and the Regulations (7 U.S.C. § 2132(h), 9 C.F.R. § 1.1), and specifically operated a "zoo," as defined in the Regulations (9 C.F.R. § 1.1), at its business location at 10471 East Highway 24, Idaville, Indiana 47950, without having a valid license under the Act, in willful violation of the Regulations. 9 C.F.R. § 2.1(a). Since approximately December 8, 2001, and continuing through March 16, 2004, respondents Craig and Proper continued to do business as dealers and exhibitors using the name of a defunct corporation, Cougar Valley Farms, Inc., whose AWA dealer license (32-B-0132) had, by regulation, expired upon the dissolution of Cougar Valley Farms, Inc. Complainant is informed and believes and on that basis alleges that beginning in approximately 2002, respondents Craig and Proper sought to substitute GCI as the holder of license number 32-B-0132.

8. On January 16, 2008, respondents GCI, Laurob, Craig and Proper failed to allow APHIS officials to enter their place of business, during normal business hours, to conduct an inspection of respondents' facility, animals and records.

9. On September 19, 2003, respondents Craig and Proper failed to employ an attending veterinarian under formal arrangements, as

required, and specifically, failed to employ either a full-time attending veterinarian, or a part-time veterinarian under formal arrangements that include a written program of veterinary care and regularly-scheduled visits to the premises.

10.On August 26, September 6, September 15 and September 26, 2005, and July 12, October 25-26, and November 1, 2006, respondents GCI, Laurob, Craig and Proper failed to employ an attending veterinarian under formal arrangements, as required, and specifically, failed to employ either a full-time attending veterinarian, or a part-time veterinarian under formal arrangements that include a written program of veterinary care and regularly-scheduled visits to the premises.

11.On September 15 and September 26, 2005, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) two emaciated juvenile tigers with brittle coats, (ii) a cougar (Buddy Boy) with unhealed wounds on his right front paw that occurred months before, and (iii) wolves in poor condition with bloody diarrhea.

12.On November 30, 2005, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) three bears with loose stools, (ii) three juvenile tigers, (iii) wolves, and (iv) a cougar (Buddy Boy) with unhealed wounds on his right front paw from an amputation that occurred months before, or to following the bandaging and surgical debridement prescription.

13.On November 30, 2005, and February 28, July 12 and November 1,2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services, and housed juvenile tigers in enclosures that were too small for them, and would not accommodate their rapid growth.

14.On February 28 and July 12, 2006, respondents GCI, Laurob,

Craig and Proper failed to employ an attending veterinarian who had appropriate authority to ensure the provision of veterinary care to animals, as required, and specifically, respondents failed to adhere to the veterinary medical instructions of their attending veterinarian, failed to follow recommended veterinary programs and treatments, and in fact, have elected to disregard their veterinarian's advice, and instead to make their own veterinary medical decisions regarding the veterinary care for the animals in their custody.

15. On February 28, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) animals recommended for worming with fenbendazole, (ii) animals needing testing for heartworm (*dirofilaria immitis*) and hookworm (*ancylostoma*), (iii) a lion (Mufasa) with a dental abscess, (iv) a cougar (Buddy Boy) with unhealed wounds on his right front paw from an amputation that occurred months before, and (v) animals in need of fecal exams for the treatment of parasites.

16. On July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) with a dental abscess, (ii) thin cougars, (iii) a cougar (Buddy Boy) whose wounds were treated not by a veterinarian but by respondent Craig, and (iv) animals in need of fecal exams for the treatment of parasites.

17. On or about October 25-26, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to obtain any veterinary medical treatment for a jaguar that stopped eating, became aggressive, then lethargic, and died on October 26, 2006, without having been seen by a veterinarian.

18. On November 1, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services

and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) with a dental abscess, (ii) thin cougars, (iii) three thin tigers, and (iv) animals in need of fecal exams for the treatment of parasites.

19. Between January 28, 2007, through February 4, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) one tiger, one lion, one jaguar, and four cougars, all of whom died without having been seen by a veterinarian, despite their suffering from vomiting and diarrhea.

20. On March 13, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a leopard with an open wound on its left rear, (ii) a cougar (Raja) with half of a tail, and a bloody open wound on the end, (iii) an emaciated adult lion (Cofu), and (iv) a lion (Mufasa) with a dental abscess and an open wound with hair loss on his left rear hock.

21. On April 17, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a tiger (Cooper) whose tail was docked, and its sutures removed leaving an open wound and exposed bone, (ii) an emaciated adult lion (Cofu), and (iii) a lion (Mufasa) with a dental abscess.

22. Between May 30, 2007, through August 29, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) with an untreated dental abscess.

23. On June 9, 2008, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to a cougar (Buddy Boy) with a raw, open sore on his right from paw (which paw had been the subject of an amputation that occurred years earlier), and instead, respondent Craig elected not to communicate with his attending veterinarian or to obtain veterinary care from a veterinarian, but instead simply to treat the animal himself.

24. On September 17, 2008, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to prevent disease, and failed to provide adequate veterinary medical treatment to canids, who did not receive any heartworm preventive. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

25. On or about March 10, 2009, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) who, having had his abscess treated (by extracting his lower left canine) (*see* ¶¶ 15-16, 18, 20-22 above), evidenced a draining tract on the bottom of his mandible; and (ii) a large felid (Samson) has a watery drainage from both eyes and crusty material around his nose.

26. On June 14, 2004, APHIS inspectors determined that on June 14, 2003, respondents GCI, Laurob, Craig and Proper failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, respondents exhibited a bear (Trouble) without sufficient distance and/or barriers to prevent the public from approaching and having direct contact with the bear, and a customer on a tour of the facility put her hand into the bear's cage, whereupon the bear bit off part of the customer's left index finger.

27. On January 27, April 5, approximately July, August 26, September 15, September 26, and November 30, 2005, and February 28, July 12,and November 1, 2006, and March 13, July 17, and August 29, 2007, respondents GCI, Laurob, Craig and Proper failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public.

28. On August 29 and September 7, 2007, respondents GCI, Laurob, Craig and Proper exposed a young (five to six-week-old), immature, unvaccinated tiger to excessive public handling, and exhibited the tiger for periods of time and in a manner that would be detrimental to its health and well-being, and specifically, allowed the tiger to roam around respondents' gift store, making it available to customers.

29. Respondents failed to meet the minimum facilities and operating standards for dogs, and specifically, on March 9, 2004, respondents failed to house wolf-hybrids in enclosures that were
in good repair and structurally sound.

30. Respondents failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. On September 10, 2002, respondents Craig and Proper failed to ensure that housing facilities were structurally sound and maintained in good repair, specifically the shelter box for two black bears, the housing enclosure for three lions, and the female tiger enclosure.

b. On September 10 and December 3, 2002, respondents Craig and Proper failed to provide for the removal and disposal of food and animal waste in animal enclosures.

c. On September 10, 2002, respondents Craig and Proper failed to maintain their perimeter fence structurally sound and in good repair, and specifically, there was no perimeter fence around the enclosure for four juvenile lions.

d. On September 10, 2002, respondents Craig and Proper failed

to provide two black bears with adequate shelter from inclement weather.

e. On September 10, 2002, respondents Craig and Proper failed to keep water receptacles for animals clean and sanitary.

f. On September 10, 2002, respondents Craig and Proper failed to keep the premises clean and in good repair, and specifically, APHIS inspectors observed excessive weed growth, trash and accumulated debris.

g. On December 3, 2002, respondents Craig and Proper failed to keep the premises clean and in good repair, and specifically, APHIS inspectors observed trash and accumulated debris.

h. On July 29, 2003, respondents Craig and Proper failed to ensure that housing facilities were structurally sound and maintained in good repair, specifically the housing enclosure for a male lion (Chucky).

i. On July 29, 2003, respondents Craig and Proper failed to provide for the removal and disposal of food and animal waste, bedding and trash in lion and tiger enclosures.

j. On July 29, 2003, respondents Craig and Proper failed to establish and maintain an effective program for pest control, and APHIS inspectors observed excessive maggots on the ground of the pathway outside the lion and tiger enclosures.

k. On September 19, 2003, respondents Craig and Proper failed to remove excreta from primary enclosures for bears as often as necessary.

l. On March 9 and June 14, 2004, April 5, August 26, September 6, September 26 and November 30, 2005, February 28, July 12 and November 1, 2006, March 13, April 17, May 30, July 17, August 29, and September 24, 2007, and March 3, 2008, respondents GCI, Laurob, Craig and Proper failed to keep water receptacles for animals functional, available, clean and sanitary, and to provide animals with clean, potable water as often as necessary for their health and well-being.

m. On March 9 and June 14, 2004, April 5, September 15 and September 26, 2005, July 12 and November 1, 2006, March 13, April 17, July 17, and August 29, 2007, March 3 and November 17, 2008,

and March 10, 2009, respondents GCI, Laurob, Craig and Proper failed to ensure that housing facilities were structurally sound and maintained in good repair.

n. On January 27, April 5, August 26 and September 15, 2005, and July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to have ample lighting in animal enclosures.

o. On January 27, August 26, September 6, September 15, September 26, and November 30, 2005, February 28, July 12 and November 1, 2006, and March 13, April 17 May 30, July 17, August 29, and September 24, 2007, respondents GCI, Laurob, Craig and Proper failed to remove excreta and other waste from primary enclosures for all animals as often as necessary.

p. On April 5, August 26, September 15 and September 26, 2005, and February 28, July 12 and November 1, 2006, and September 24, 2007, respondents GCI, Laurob, Craig and Proper [failed to] provide for the removal and disposal of food and animal waste, bedding and trash.

q. On August 26, September 15, September 26, and November 30, 2005, February 28, July 12 and November 1, 2006, and March 13, 2007, respondents GCI, Laurob, Craig and Proper failed to store supplies of food in facilities that adequately protect them against deterioration, molding and contamination.

r. On August 26, September 26 and November 30, 2005, July 12 and November 1, 2006, March 13, May 30, July 17, and August 29, 2007, June 9, September 17, and November 17, 2008, and March 10, 2009, respondents GCI, Laurob, Craig and Proper failed to provide a suitable method to eliminate excess water from animal enclosures.

s. On August 26, 2005, and March 13, May 30, July 17, August 29, and September 24, 2007, respondents GCI, Laurob, Craig and Proper failed to provide adequate wholesome, palatable and uncontaminated food to animals.

t. On August 26, September 15 and September 26, 2005, and February 28, and July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to keep the premises clean and in good repair, and specifically, APHIS inspectors observed trash and accumulated

debris.

u. On September 15, 2005, respondents GCI, Laurob, Craig and Proper failed to establish and maintain an effective program for pest control, and APHIS inspectors observed numerous rat holes.

v. On September 26 and November 30, 2005, February 28, July 12, November 1 and December 7, 2006, and March 3 and November 17, 2008, respondents GCI, Laurob, Craig and Proper failed to provide animals with adequate shelter from inclement weather.

w. On November 30, 2005, and February 28, July 12 and November 1, 2006, and July 17, and August 29, 2007, respondents GCI, Laurob, Craig and Proper failed to maintain their perimeter fence functional, and in structurally sound condition.

x. On November 30, 2005, and February 28, July 12 and November 1, 2006, respondents GCI, Laurob, Craig and Proper failed to provide animals with adequate space in which to make social and postural adjustments.

y. From September 10, 2002, through March 3, 2008, respondents Craig and Proper failed to employ a sufficient number of adequately-trained personnel to maintain an acceptable level of husbandry, and from January 5, 2004, through March 3, 2008, respondents GCI and Laurob failed to employ a sufficient number of adequately-trained personnel to maintain an acceptable level of husbandry.

z. On May 30, 2007, respondents GCI, Laurob, Craig and Proper failed to provide eight tigers with adequate shelter from sunlight.

aa. On July 17, 2009, respondents GCI, Laurob, Craig and Proper failed to keep the premises in good repair, and specifically, APHIS inspectors observed an exposed (open) electrical box on the enclosure housing the tiger and cougar.

bb. On or about September 7, 2007, respondents GCI, Laurob, Craig and Proper transported a young tiger in a primary enclosure that did not conform to the Standards, and specifically respondents transported the tiger to and from staff members' homes in an open-topped bin that does not contain the animal.

CONCLUSIONS OF LAW

1. Since approximately November 21, 2001, respondent GCI has continually operated as a dealer and an exhibitor, as those terms are defined in the Act and the Regulations (7 U.S.C. § 2132(h), 9 C.F.R. § 1.1), and specifically operated a "zoo," as defined in the Regulations (9 C.F.R. § 1.1), at its business location at 10471 East Highway 24, Idaville, Indiana 47950, without having a valid license under the Act, in willful violation of the Regulations. 9 C.F.R. § 2.1(a). Since approximately December 8, 2001,and continuing through March 16, 2004, respondents Craig and Proper continued to do business as dealers and exhibitors using the name of a defunct corporation, Cougar Valley Farms, Inc., whose AWA dealer license (32-B-0132) had, by regulation, expired upon the dissolution of Cougar Valley Farms, Inc. Complainant is informed and believes and on that basis alleges that beginning in approximately 2002, respondents Craig and Proper sought to substitute GCI as the holder of license number 32-B-0132.

2. On January 16, 2008, respondents GCI, Laurob, Craig and Proper failed to allow APHIS officials to enter their place of business, during normal business hours, to conduct an inspection of respondents' facility, animals and records, in willful violation of section 2.126of the Regulations. 9 C.F.R. § 2.126(a)(1).

3. On September 19, 2003, respondents Craig and Proper failed to employ an attending veterinarian under formal arrangements, as required, and specifically, failed to employ either a full-time attending veterinarian, or a part-time veterinarian under formal arrangements that include a written program of veterinary care and regularly-scheduled visits to the premises, in willful violation of the Regulations. 9 C.F.R. § 2.40(a)(1).

4. On August 26, September 6, September 15 and September 26, 2005, and July 12, October 25-26, and November 1, 2006, respondents GCI, Laurob, Craig and Proper failed to employ an attending veterinarian under formal arrangements, as required, and specifically, failed to employ either a full-time attending veterinarian, or a part-time veterinarian under formal arrangements that include a written program

of veterinary care and regularly-scheduled visits to the premises, in willful violation of the Regulations. 9 C.F.R. § 2.40(a)(1).

5. On September 15 and September 26, 2005, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) two emaciated juvenile tigers with brittle coats, (ii) a cougar (Buddy Boy) with unhealed wounds on his right front paw that occurred months before, and (iii) wolves in poor condition with bloody diarrhea, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

6. On November 30, 2005, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) three bears with loose stools, (ii) three juvenile tigers, (iii) wolves, and (iv) a cougar (Buddy Boy) with unhealed wounds on his right front paw from an amputation that occurred months before, or to following the bandaging and surgical debridement prescription, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

7. On November 30, 2005, and February 28, July 12 and November 1, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services, and housed juvenile tigers in enclosures that were too small for them, and would not accommodate their rapid growth, in willful violation of the Regulations. 9 C.F.R. § 2.40(b)(1).

8. On February 28 and July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to employ an attending veterinarian who had appropriate authority to ensure the provision of veterinary care to animals, as required, and specifically, respondents failed to adhere to the veterinary medical instructions of their attending veterinarian, failed to follow recommended veterinary programs and treatments, and in fact, have elected to disregard their veterinarian's advice, and instead to make

their own veterinary medical decisions regarding the veterinary care for the animals in their custody, in willful violation of the Regulations. 9 C.F.R. § 2.40(a)(2).

9. On February 28, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) animals recommended for worming with fenbendazole, (ii) animals needing testing for heartworm (*dirofilaria immitis*) and hookworm (*ancylostoma*), (iii) a lion (Mufasa) with a dental abscess, (iv) a cougar (Buddy Boy) with unhealed wounds on his right front paw from an amputation that occurred months before, and (v) animals in need of fecal exams for the treatment of parasites, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

10.On July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) with a dental abscess, (ii) thin cougars, (iii) a cougar (Buddy Boy) whose wounds were treated not by a veterinarian but by respondent Craig, and (iv) animals in need of fecal exams for the treatment of parasites, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

11.On or about October 25-26, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to obtain any veterinary medical treatment for a jaguar that stopped eating, became aggressive, then lethargic, and died on October 26, 2006, without having been seen by a veterinarian, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

12.On November 1, 2006, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary

care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) with a dental abscess, (ii) thin cougars, (iii) three thin tigers, and (iv) animals in need of fecal exams for the treatment of parasites, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

13. Between January 28, 2007, through February 4, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) one tiger, one lion, one jaguar, and four cougars, all of whom died without having been seen by a veterinarian, despite their suffering from vomiting and diarrhea, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

14. On March 13, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a leopard with an open wound on its left rear, (ii) a cougar (Raja) with half of a tail, and a bloody open wound on the end, (iii) an emaciated adult lion (Cofu), and (iv) a lion (Mufasa) with a dental abscess and an open wound with hair loss on his left rear hock, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

15. On April 17, 2007, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a tiger (Cooper) whose tail was docked, and its sutures removed leaving an open wound and exposed bone, (ii) an emaciated adult lion (Cofu), and (iii) a lion (Mufasa) with a dental abscess, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

16. Between May 30, 2007, through August 29, 2007, respondents

GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) with an untreated dental abscess, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

17. On June 9, 2008, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to a cougar (Buddy Boy) with a raw, open sore on his right from paw (which paw had been the subject of an amputation that occurred years earlier), and instead, respondent Craig elected not to communicate with his attending veterinarian or to obtain veterinary care from a veterinarian, but instead simply to treat the animal himself, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

18. On September 17, 2008, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to prevent disease, and failed to provide adequate veterinary medical treatment to canids, who did not receive any heartworm preventive. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

19. On or about March 10, 2009, respondents GCI, Laurob, Craig and Proper failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate equipment and services and the use of appropriate methods to treat injuries, and failed to provide adequate veterinary medical treatment to (i) a lion (Mufasa) who, having had his abscess treated (by extracting his lower left canine) (*see* ¶¶ 15-16, 18, 20-22 above), evidenced a draining tract on the bottom of his mandible; and (ii) a large felid (Samson) has a watery drainage from both eyes and crusty material around his nose, in willful violation of the Regulations. 9 C.F.R. §§ 2.40(a), 2.40(b)(1), 2.40(b)(2).

20. On June 14, 2004, APHIS inspectors determined that on June 14, 2003, respondents GCI, Laurob, Craig and Proper failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically, respondents exhibited a bear (Trouble) without sufficient distance and/or barriers to prevent the public from approaching and having direct contact with the bear, and a customer on a tour of the facility put her hand into the bear's cage, whereupon the bear bit off part of the customer's left index finger, in willful violation of the Regulations. 9 C.F.R. § 2.131(b)(1)[renumbered as 9 C.F.R. § 2.131(c)(1), effective July 14, 2004].

21. On January 27, April 5, approximately July, August 26, September 15, September 26, and November 30, 2005, and February 28, July 12,and November 1, 2006, and March 13, July 17, and August 29, 2007, respondents GCI, Laurob, Craig and Proper failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of the Regulations. 9 C.F.R. § 2.131(c)(1).

22. On August 29 and September 7, 2007, respondents GCI, Laurob, Craig and Proper exposed a young (five to six-week-old), immature, unvaccinated tiger to excessive public handling, and exhibited the tiger for periods of time and in a manner that would be detrimental to its health and well-being, and specifically, allowed the tiger to roam around respondents' gift store, making it available to customers, in willful violation of section 2.131(c)(3) and 2.131(d)(1) of the Regulations. 9 C.F.R. §§ 2.131(c)(3), 2.131(d)(1).

23. Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for dogs, and specifically, on March 9, 2004, respondents failed to house wolf-hybrids in enclosures that were in good repair and structurally sound. 9 C.F.R. §§ 3.1(a), 3.4(c).

24. Respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for

animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. On September 10, 2002, respondents Craig and Proper failed to ensure that housing facilities were structurally sound and maintained in good repair, specifically the shelter box for two black bears, the housing enclosure for three lions, and the female tiger enclosure. 9 C.F.R. § 3.125(a).

b. On September 10 and December 3, 2002, respondents Craig and Proper failed to provide for the removal and disposal of food and animal waste in animal enclosures. 9 C.F.R. § 3.125(d).

c. On September 10, 2002, respondents Craig and Proper failed to maintain their perimeter fence structurally sound and in good repair, and specifically, there was no perimeter fence around the enclosure for four juvenile lions. 9 C.F.R. § 3.127(d).

d. On September 10, 2002, respondents Craig and Proper failed to provide two black bears with adequate shelter from inclement weather. 9 C.F.R. § 3.127(b).

e. On September 10, 2002, respondents Craig and Proper failed to keep water receptacles for animals clean and sanitary. 9 C.F.R. § 3.130.

f. On September 10, 2002, respondents Craig and Proper failed to keep the premises clean and in good repair, and specifically, APHIS inspectors observed excessive weed growth, trash and accumulated debris. 9 C.F.R. § 3.131(c).

g. On December 3, 2002, respondents Craig and Proper failed to keep the premises clean and in good repair, and specifically, APHIS inspectors observed trash and accumulated debris. 9 C.F.R. § 3.131(c).

h. On July 29, 2003, respondents Craig and Proper failed to ensure that housing facilities were structurally sound and maintained in good repair, specifically the housing enclosure for a male lion (Chucky). 9 C.F.R. § 3.125(a).

i. On July 29, 2003, respondents Craig and Proper failed to provide for the removal and disposal of food and animal waste, bedding and trash in lion and tiger enclosures. 9 C.F.R. § 3.125(d).

j. On July 29, 2003, respondents Craig and Proper failed to establish and maintain an effective program for pest control, and APHIS inspectors observed excessive maggots on the ground of the pathway outside the lion and tiger enclosures. 9 C.F.R. § 3.131(d).

k. On September 19, 2003, respondents Craig and Proper failed to remove excreta from primary enclosures for bears as often as necessary. 9 C.F.R. § 3.131(a).

l. On March 9 and June 14, 2004, April 5, August 26, September 6, September 26 and November 30, 2005, February 28, July 12 and November 1, 2006, March 13, April 17, May 30, July 17, August 29, and September 24, 2007, and March 3, 2008, respondents GCI, Laurob, Craig and Proper failed to keep water receptacles for animals functional, available, clean and sanitary, and to provide animals with clean, potable water as often as necessary for their health and well-being. 9 C.F.R. § 3.130.

m. On March 9 and June 14, 2004, April 5, September 15 and September 26, 2005, July 12 and November 1, 2006, March 13, April 17, July 17, and August 29, 2007, March 3 and November 17, 2008, and March 10, 2009, respondents GCI, Laurob, Craig and Proper failed to ensure that housing facilities were structurally sound and maintained in good repair. 9 C.F.R. § 3.125(a).

n. On January 27, April 5, August 26 and September 15, 2005, and July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to have ample lighting in animal enclosures. 9 C.F.R. § 3.126(c).

o. On January 27, August 26, September 6, September 15, September 26, and November 30, 2005, February 28, July 12 and November 1, 2006, and March 13, April 17 May 30, July 17, August 29, and September 24, 2007, respondents GCI, Laurob, Craig and Proper failed to remove excreta and other waste from primary enclosures for all animals as often as necessary. 9 C.F.R. § 3.131(a).

p. On April 5, August 26, September 15 and September 26, 2005, and February 28, July 12 and November 1, 2006, and September 24, 2007, respondents GCI, Laurob, Craig and Proper [failed to] provide for the removal and disposal of food and animal waste, bedding and trash. 9 C.F.R. § 3.125(d).

q. On August 26, September 15, September 26, and November

30, 2005, February 28, July 12 and November 1, 2006, and March 13, 2007, respondents GCI, Laurob, Craig and Proper failed to store supplies of food in facilities that adequately protect them against deterioration, molding and contamination. 9 C.F.R. § 3.125(c).

r. On August 26, September 26 and November 30, 2005, July 12 and November 1, 2006, March 13, May 30, July 17, and August 29, 2007, June 9, September 17, and November 17, 2008, and March 10, 2009, respondents GCI, Laurob, Craig and Proper failed to provide a suitable method to eliminate excess water from animal enclosures. 9 C.F.R. § 3.127(c).

s. On August 26, 2005, and March 13, May 30, July 17, August 29, and September 24, 2007, respondents GCI, Laurob, Craig and Proper failed to provide adequate wholesome, palatable and uncontaminated food to animals. 9 C.F.R. § 3.129.

t. On August 26, September 15 and September 26, 2005, and February 28, and July 12, 2006, respondents GCI, Laurob, Craig and Proper failed to keep the premises clean and in good repair, and specifically, APHIS inspectors observed trash and accumulated debris. 9 C.F.R. § 3.131(c).

u. On September 15, 2005, respondents GCI, Laurob, Craig and Proper failed to establish and maintain an effective program for pest control, and APHIS inspectors observed numerous rat holes. 9 C.F.R. § 3.131(d).

v. On September 26 and November 30, 2005, February 28, July 12, November 1 and December 7, 2006, and March 3 and November 17, 2008, respondents GCI, Laurob, Craig and Proper failed to provide animals with adequate shelter from inclement weather. 9 C.F.R. § 3.127(b).

w. On November 30, 2005, and February 28, July 12 and November 1, 2006, and July 17, and August 29, 2007, respondents GCI, Laurob, Craig and Proper failed to maintain their perimeter fence functional, and in structurally sound condition. 9 C.F.R. § 3.127(d).

x. On November 30, 2005, and February 28, July 12 and November 1, 2006, respondents GCI, Laurob, Craig and Proper

failed to provide animals with adequate space in which to make social and postural adjustments. 9 C.F.R. § 3.128.

y. From September 10, 2002, through March 3, 2008, respondents Craig and Proper failed to employ a sufficient number of adequately-trained personnel to maintain an acceptable level of husbandry, and from January 5, 2004, through March 3, 2008, respondents GCI and Laurob failed to employ a sufficient number of adequately-trained personnel to maintain an acceptable level of husbandry. 9 C.F.R. § 3.132.

z. On May 30, 2007, respondents GCI, Laurob, Craig and Proper failed to provide eight tigers with adequate shelter from sunlight. 9 C.F.R. § 3.128.

aa. On July 17, 2009, respondents GCI, Laurob, Craig and Proper failed to keep the premises in good repair, and specifically, APHIS inspectors observed an exposed (open) electrical box on the enclosure housing the tiger and cougar. 9 C.F.R. § 3.131(c).

bb.On or about September 7, 2007, respondents GCI, Laurob, Craig and Proper transported a young tiger in a primary enclosure that did not conform to the Standards, and specifically respondents transported the tiger to and from staff members' homes in an open-topped bin that does not contain the animal. 9 C.F.R. § 3.137(a).

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder.

2. Animal Welfare Act license 32-C-0186 and Animal Welfare Act license 32-B-0136 are hereby revoked.

The provisions of this order shall become effective immediately. Copies of this decision shall be served upon the parties.

_____

JAMIE MICHELLE PALAZZO d/b/a GREAT CAT ADVENTURES; AND JAMES LEE RIGGS.
AWA Docket No. 07-0207.
Decision and Order.
Filed January 5, 2010.

AWA. – Interfering with APHIS inspectors – Exhibiting.

Colleen A. Carroll, for APHIS.
Respondents, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Preliminary Statement

On September 28, 2007, Kevin Shea, then the Acting Administrator, Animal and Plant Health Inspection Service (APHIS), initiated this disciplinary proceeding against the Respondent Jamie Michelle Palazzo (Palazzo), an individual doing business as Great Cat Adventures[1] by filing a Complaint alleging willful violations of the Animal Welfare Act, as amended (the "Act" or "AWA") (7 U.S.C. §2131, *et seq*.) and the Regulations issued pursuant thereto (the "Regulations") (9 C.F.R. §1.1, *et seq*.).

The Respondent filed her Answer with a Cover Letter[2] on October 22, 2007. No further action was taken to advance the case until April 23, 2008 when the Hearing Clerk sent out a "No Activity Letter." In

[1]The original Complaint named only Jamie Michelle Palazzo; the respondent James Lee Riggs was later added in the Amended Complaint. Docket Entries 1 and 11.

[2]Although the Docket Entry indicates both an Answer and a Cover Letter were filed, when review of this case was commenced, only the cover letter was found in the record which indicated that three copies of the Answer were being filed. Docket Entry 4. In the Complainant's Response to Motions for Summary Judgment and to Debar Complainant's Counsel, Ms. Carroll made reference to the 17 page Answer to the Complaint. Docket Entry 8 at page 4. A copy of the Answer and the attachments was included in the Exhibits identified by the Respondents RX 75 but was not admitted during the hearing, but has been added to the record.

response to the "No Activity Letter," the Respondent filed a pleading styled as a "Complaint"[3] in which she sought a summary judgment and removal of Colleen A. Carroll as the Counsel for the Complainant.[4] Docket Entry 7. The Complainant responded to the Motions and on September 23, 2008, the Complainant filed an Amended Complaint which added James Lee Riggs[5] (Riggs) as a named Respondent. The Respondents filed their Answer to the Amended Complaint on October 21, 2008.

The oral hearing of this action was commenced in Fort Worth, Texas on Monday, August 24, 2009 and concluded on Thursday, August 27, 2009. Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture represented the Complainant. Neither Respondent was represented by counsel; however, Riggs served as the Respondents' representative, cross examining the Complainant's witnesses and questioning Ms. Palazzo during direct examination. A total of 27 witnesses testified (26 for the Complainant and Jamie Michelle Palazzo for the Respondents). 204 exhibits were introduced.[6]

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[3]The practice of titling their pleadings as "Complaint" was followed repeatedly throughout the case by the Respondents.

[4]The Respondents' pleading concluded with the question: "Doesn't the "appearance of impropriety" far outweigh the loss of one "rouge [sic] attorney" working one case? Docket Entry 7 at page 3 of Complaint.

[5]James Lee Riggs was previously involved in two prior disciplinary proceedings. Although not named as a Respondent in the initial case in which the Consent Decision was entered (AWA Docket No. 98-34), Riggs was married to Heidi Berry Riggs (now Heidi Berry) at that the time that the first action was brought against her and Bridgeport Nature Center, Inc. and was engaged in the entity's touring operation that was the focus of the disciplinary action. Riggs was a named Respondent in a second action, *In re: Heidi Berry Riggs, Bridgeport Nature Center, Inc., and James Lee Riggs, d/b/a Great Cats of the World,* 65 Agric. Dec. 1039 (2006); *Remanded,* 67 Agric. Dec. 384 (2008). Riggs' application for an Animal Welfare Act license in his own name was denied; however, that the appeal of that denial was deferred and not addressed in the 2006 decision.

[6]The Complainant called 26 witnesses; Jamie Michelle Palazzo was the only witness for the Respondents. The Complainant introduced 160 exhibits (CX 1-11,13, 14, 14A,

(continued...)

Both parties have submitted briefs and this matter now stands ready for disposition.

Discussion

Palazzo and Riggs are alleged to have willfully violated the Act and the Regulations on multiple occasions between August of 2006 and August of 2008. The 26 violations alleged in the Amended Complaint run the gamut of seriousness ranging from (a) interference with, threatening, verbally abusing, or harassing APHIS inspectors on two occasions, (b) the use of abuse in training on two occasions, (c) the failure to handle tigers in an appropriate manner on multiple occasions, (d) the failure to have adequate barriers when exhibiting tigers on multiple occasions, (e) the failure to provide adequate veterinary care, (f) the refusal to grant access to inspectors, to (h) simple record keeping violations. At the conclusion of the third day of the hearing, the Complainant moved to withdraw seven of the alleged violations, including some of the more serious violations (both instances of interference with, threatening, verbally abusing or harassing APHIS inspectors, one of the training abuse allegations, and one of the allegations concerning providing adequate veterinary care to their animals, two allegations of careful handling and one of insufficient distance and/or barrier).[7] Tr. 905-909.

Although a number of other alleged violations were included in the

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[6](...continued)
14B, 15-30, 32-39, 40A, 40B, 42-82, 84-115, 117-139, 142-147, 152-165, 167,169-171) and the Respondents introduced 44 (RX 4-8, 10-17, 31, 32, 34, 39 (same as CX 40B), 41-47, 50-54, 64, 72, 74, 77-82).

[7]Complainant moved and was granted leave to withdraw the violations alleged in paragraph 6 (interference with an APHIS inspector on two occasions in violation of 9 C.F.R. §2.4 of the Regulations); paragraph 7 (failure to provide adequate veterinary care in violation of 9 C.F.R. §2.40(a), 2.40(a)(2) and 2.40(b)(2)); paragraph 10g & h (failure to handle tigers as carefully as possible in violation of 9 C.F.R. §2.131(b)(1)); one of two dates in paragraph 11 (use of abuse in training in violation of 9 C.F.R. §2.131(b)(2)(i)); and one date of the six alleged in paragraph 12 (failure to have sufficient barriers in violation of 9 C.F.R. §2.131(c)(1).

Amended Complaint, the primary focus of this disciplinary action centers around safety concerns about the manner in which Palazzo and Riggs exhibited their cats, particularly during the sessions in which photographs with taken of the public with the cats for a fee. For their part, the Respondents eschew any wrong doing, claiming (1) that their conduct was well within the parameters set forth by USDA for such photograph opportunities in a Consent Decision entered into by Secretary and Riggs' ex-wife, Heidi Berry Riggs (now Heidi Berry) and Bridgeport Nature Center, Inc., an entity then operated by the ex-wife and (2) that the Consent Decision (despite the restrictive and limiting language contained in the document itself) had created a very clear and specific bright line standard allowing exhibition of tigers that were less than six months of age and less than seventy-five pounds in weight which in the name of fairness should now be extended to all exhibitors.[8]

Despite the initially beguiling appeal of a position which is cloaked in and invokes both fairness and equal treatment of similarly situated parties, Palazzo's and Riggs' argument minimizes or overlooks a number of significant factors. First, the language of the Consent Decision was restrictive, limiting its application to the named parties, i.e. Heidi Berry Riggs and Bridgeport Nature Center, Inc.[9] Second, although Respondent Palazzo purchased certain of the equipment and items that may have previously been owned by Heidi Berry Riggs and or Bridgeport Nature Center, Inc., no evidence was ever introduced that Ms. Palazzo acquired any interest in Bridgeport Nature Center, Inc. and it is clear from the documents transferring ownership of the equipment to her that her purchase of the equipment fell far short of placing her in

[8]*In re: Heidi Berry Riggs and Bridgeport Nature Center, Inc.*, (unpublished Consent Decision) AWA Docket No. 98-34, (August 19, 1998).

[9]The first paragraph of the Order contained in the Consent Decision which provided a cease and desist provision did include agents, employees, and successors and assigns; however, the subsequent provisions omitted that language and were intended to be limited to the Respondents in that case, *i.e.* Heidi Berry Riggs and Bridgeport Nature Center, Inc. *See,* Affidavit of Frank Martin, RX 50. Even where the subsequent provisions made applicable to employees, it would appear that status would apply only so long as an individual was employed by that employer, absent an application similar to Marine tradition (Once a "Marine," always a "Marine").

the shoes of a successor in interest of either Ms. Berry or the corporation.[10] Last, and possibly most importantly, even assuming *pro arguendo* that the Consent Decision may have represented USDA policy at one time in that case, it is now manifestly clear that USDA has changed its position, finding there to be "an inherent danger present for both the viewing public and the exhibited animal(s) where there is any chance that the public could come into direct contact with juvenile or adult big cats"… and finding that …"For regulatory purposes, APHIS generally considers big cats to become juveniles when they reach 12 weeks of age." [11]CX 20.

The Supreme Court recently made it abundantly clear that enforcement policy can be changed from time to time. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, (April 28, 2009). The Administrative Procedures Act, 5 U.S.C. §551 *et seq*., sets forth the full extent of judicial authority to review executive agency action for procedural correctness and allows the setting aside of agency action

[10]Ms. Palazzo consistently maintained that the provisions of the Consent Decision applied to her. CX 19, 146, 168. In a letter of July 17, 2007 to the USDA Inspector General, she wrote: "And, since I worked for them. [referring to Heidi and Jay Riggs, Bridgeport Nature Center in a prior paragraph] And, bought all their equipment and continued with my own license, this clearly applies to me as well." Exhibit 15 to the Answer to the Original Complaint. The 6 month and 75 pound standard was also repeatedly referenced in other correspondence. CX 24, 40A, RX 32. While the equipment that Palazzo purchased may have at one time been owned by either Heidi Berry Riggs or Bridgeport Nature Center, Inc., the Bill of Sale(s) for the equipment were executed by James Lee Riggs as the seller. RX 45-46. After establishing a new §501(c)(3) entity named Center for Animal Research and Education (CARE), Bridgeport Nature Center, Inc. allowed its Animal Welfare Act license to lapse. Tr. 430-431. Ms. Berry testified that she and CARE requested that Palazzo and Riggs remove references to Bridgeport from Great Cat Adventures promotional material on the internet and that neither she nor Bridgeport transferred any equipment or other property to Palazzo. CX 170, 171, Tr. 428-430, 435.

[11]According to Dr. Gibbens' testimony, the policy precluding direct public contact with juvenile tigers was in effect in 2004 (CX 2), was placed on Department website in 2005 (RX 58) long before either Dr. Kay Carter-Corker's August 8, 2007 letter (CX 20) or the 12 week definition that contained in the letter from Mary E. Moore, DVM, USDA, Animal Care-Eastern Region dated April 14, 2006 (RX 37). Tr. 701-702.

which is "arbitrary" or "capricious." 5 U.S.C. §706(2)(A). In exercising what the Court has termed its "narrow" standard of review, the Court requires agencies to examine relevant data and articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983). While an agency may be required to demonstrate there are good reasons for a new policy, it need not demonstrate that "the reasons for the new policy are *better* than the old; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." (Emphasis in original) Slip Op. at 11. In this case, it is evident that first, the Secretary has been delegated authority under 7 U.S.C. §2151 "to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter;" second, that the inherent risk to the public from direct contact with juvenile and adult big cats amply justifies the imposition of appropriate safeguards; and last, the policy revision reflects the "belief" of the agency that the revised standard is "better" designed to protect the public.

Both Riggs and Ms. Palazzo are experienced animal handlers, with extensive experience working with big cats on a daily basis. Riggs has well over 20 years of experience[12] and in the 2006 *Bridgeport* decision, Riggs was acknowledged by both Dr. Bellin and Mr. Swartz to be an expert in handling exotic cats. 65 Agric. Dec. 1039, 1055. Ms. Palazzo's experience is not as lengthy, having started with part-time work in 1998 for Bridgeport Nature Center, Inc., advancing to full time employment in 1999 and remaining employed by Bridgeport until October of 2004.[13] Tr. 943, 948-949. While at Bridgeport, she was trained both by Bridgeport staff as well as by outside consultants hired by Bridgeport to put on training and educational programs. Tr. 943-947. The Animal Welfare Act license is issued in Jamie Palazzo's name and she purchased most if not all of the vehicles, trailers, sound system, cameras,

[12]CX 142.

[13]In October of 2004, Ms. Palazzo applied for an Animal Welfare Act License in her own name. CX 1.

computers, tents, portable fencing and other equipment used for the road tours from Riggs. CX 1, 3-7, RX 45-47. Although Ms. Palazzo took pains to distance herself from Riggs with USDA during the license application and renewal process,[14] it is clear that in addition to being the father of her children, Riggs travels with Ms. Palazzo for the road exhibitions, he participates in the operation of the business on a daily basis,[15] and that he advises and continues to exert significant influence over her, much of it to her ultimate detriment.

The record does reflect that Ms. Palazzo did make repeated requests[16] to Dr. Robert Gibbens to either homolgate the *Bridgeport* standards or to articulate exactly what would be allowed under the Regulations which

[14]Tr. 700, 703-704, 1028, 1033-1034, RX 31. Riggs' name was added as an authorized person in April of 2005 for a brief period and then was removed in January of the following year. CX 142.

[15]Riggs appears in one of the photographs in CX 13 and is featured prominently in many of the photographs in CX 22. Animal Care Inspector Radel testified that she understood him to be a very integral part of the operation. Tr. 236. Ms. Palazzo has referred to Jay (Riggs) as "my husband for all intensive purposes. He lives here and works for and with me. He consults me, as do our Vet and Lawyer." CX 24.

[16]In her testimony, Ms. Palazzo indicated that she wanted "clarification of some of the gray areas in the regulations, and I hoped to maybe come up with a magical age or weight limit to try to make sure that everybody is under the same understanding." Tr. 1039-1040. *See:* In her letter of August 29, 2005 to Dr. Gibbens, Ms. Palazzo responded to an undated Dear Applicant letter (CX 2) which then defined a juvenile cat as over three months and asked for a hearing… if you feel I am not in compliance…CX 7. In her letter of July 17, 2007, she noted that there had been no response to her August 29, 2005 letter. CX 19. The July 2007 letter was answered by Dr. Kay Carter Corker and the 12 week standard was reaffirmed. CX 20. In a later letter dated August 16, 2007, she proposed a schedule using the six month standard, but indicating that she wanted to follow the Regulations. CX 24. This letter was also responded to and Palazzo was again informed of the 12 week standard. CX 29. Ms. Palazzo again wrote on October 12, 2007, reaffirming her intention to use a 6 month standard, but again asking for a meeting "so I can operate in compliance." CX 40A. Although her letter was answered, no meeting was arranged and she was advised that she would continue to be cited without reference to any standard. The answer to her August of 2008 request for an exact age and weight standard was also denied (without referencing the 12 week standard). CX 145.

lamentably were initially unanswered; however, it is abundantly clear from the evidence that beginning in April of 2006 and continuing throughout 2007, Ms. Palazzo and Riggs were repeatedly notified that big cats were considered to be "juveniles" upon reaching 12 weeks of age and that after reaching that age, the cats were no longer considered suitable for direct public contact.[17] While it appears that Ms. Palazzo's obdurate and implacable unwillingness to accept a standard of tigers becoming juveniles upon attaining 12 weeks of age is based upon contrary but erroneous advice advanced by Riggs, it is also clear that such reliance will not now shelter her from disciplinary action being taken against her as the Judicial Officer has held that reliance upon erroneous advice is misplaced. *In re: Arab Stockyard, Inc.,* 37 Agric. Dec. 293, 306 (1978); *aff'd sub nom. Arab Stockyard v. United States,* 582 F.2d 39 (5th Cir. 1978). As the ability to hold an Animal Welfare Act license is clearly a privilege and not a right, it behooves those wishing to avail themselves of that privilege to comply with the corresponding regulatory requirements that accompany the license. While authority to perform acts in a licensee's name can be delegated, the responsibilities that accompany the license cannot.

The evidence concerning the 19 alleged violations which remain is summarized as follows:

1. August 9, 2006: Failure to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort and use of physical abuse to train, work, or handle animals. (9 C.F.R. §2.131(b)(1) and §2.131(b)(2)(i)). On August 9, 2006 at the Boone County Fairgrounds in Belvedere, Illinois, Jamie Palazzo was observed by Chad Moore, an Animal Care Inspector, spraying a tiger with a water hose to encourage it to enter an enclosure. Moore completed an Inspection Report citing Ms. Palazzo with a violation of Section 2.131(b)(1) (9 C.F.R. §2.131(b)(1)) a violation of failing to handle animals in manner so as to avoid trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort. CX 8. Ms. Palazzo appealed the violation report, admitting that she had sprayed the

[17]RX 37.

tiger, but claimed the spraying was an incidental spray which "may have startled" the animal, but denying that it would have been traumatic. CX 9. Although Ms. Palazzo (in her letter to Dr. Gibbens [CX 9]), Nancy Brown, and Joe Schreibvogel all expressed the opinion that cats enjoy water and playing in water (Tr. 722, 869-870), given evidence of a similar prior violation by Ms. Palazzo[18], while I do not find that the incident involved the more serious violation of the use of physical abuse to the animal, I will find a violation of Section 2.131(b)(1).

2. October 2006 to November 2007: Failure to keep, make and maintain records that fully and correctly disclosed required information. (9 C.F.R. §2.75(b)). Wayne Edwards testified that he was involved with Great Cat Adventures between 2005 until October of 2008, starting initially as a volunteer in 2005 and in 2007 taking on the greater role of booking of their schedule and sending out material to the various fairs. Tr. 182. In March of 2008, while still associated with Riggs and Ms. Palazzo, he went to work at the Oklahoma Wildlife Preserve, a 110 acre facility located in Atoka, Oklahoma, a corporation owned or controlled by Riggs and Ms. Palazzo that also applied for an Animal Welfare Act license, with Edwards as listed as the president.[19] Edwards testified that all of the cats owned by Great Cat Adventures were always older than the birth dates recorded for them by the Respondents so that they could be used with the public longer.[20] Tr. 191-192, 199-201. He also testified that on occasion although the means of acquisition of animals on APHIS Forms 7020

[18] The prior incident was treated only as a violation of Section 2.131(b)(1) and as not physical abuse under 2.131(b)(2)(i). RX 51.

[19] The appeal of the license denial was dismissed on March 11, 2009 when Edwards failed to appear at the oral hearing. *In re Wayne Edwards, d/b/a Oklahoma Wildlife Preserve, Inc.,* AWA Docket No. D-08-0149.

[20]Joseph Schreibvogel's and Michelle Higdon's affidavits indicate that Riggs asked Michelle Higdon, Schreibvogel's office manager at the time to alter the birth date of a cat. CX 158, 167. On cross examination, Schreibvogel indicated that he did not witness the incident, but it had been reported to him while he was on the road. Tr. 840.

were marked as being "Donations," in fact, he had handed the transferor an envelope with $1,000 in it. CX 136, 137, Tr. 211-212. While Edwards acknowledged leaving Great Cat Adventures on less than good terms, his testimony was considered generally credible and it is buttressed by more than the more than ample documentary evidence of far too many unexplained inconsistencies in the maintenance of the records which fully warrant an inference of multiple willful violations. *E.g.* CX 22@ 30-31, 32-33, 35-36, 37-38, 39-40, 48-49, 50-51.

3. March 7, 2007: Failure to provide access to facilities, records and animals. (9 C.F.R. §2.126(a)). Animal Care Inspector (ACI) Thomasina Barney testified that on March 7, 2007, she attempted to inspect Ms. Palazzo's Amarillo facility at 10:40 AM; however, there was no facility representative on the premises to allow access. Tr. 439-440, CX 10. Inspector Barney indicated that she had been told "if there is no one there and you can't contact anybody to go ahead and write an attempted inspection with the date and time that you were there." Tr. 439. Although the Regulations are clear that APHIS was authorized to inspect the Amarillo facility on March 7, 2007 during normal business hours, the evidence also reflected that APHIS had previously been notified that the principals of the business would be on the road in Gonzales, Louisiana on March 8 through 11, 2007 and that given the distance from the Amarillo location, that they likely would be en route. Tr. 448-449, 953-954, RX 77. Further it appears that although Inspector Barney (who acknowledged seeing the January 26, 2007 itinerary) called the cell phone of Paula Reams, the local employee who could have provided access, she failed to leave a voice message as to the reason for the call, but merely left a business card at the facility. Tr. 448-451. As her folder did not include Ms. Palazzo's cell phone number, she did not call Ms. Palazzo or leave a message with her so that she could contact her employee to come in and provide access. Tr. 450-451. Given the circumstances and APHIS's demonstrated ability to contact Ms. Palazzo on the road on multiple other occasions, while a technical violation may arguably have occurred at the Amarillo location, the evidence falls short of constituting a willful violation warranting

sanction.[21]

4. March 2007: Failure to have a veterinarian provide adequate veterinary care to two felids having ringworm. (9 C.F.R. §2.40(a), 240(a)(2) and 240(b)(2)). The affidavit of Joseph Schreibvogel indicated that in March of 2007 when the Respondents returned two animals that had been on loan, a baby mountain lion and a baby lion, they had ringworm and that he had them treated by his veterinarian. [22] CX 117. Although the violation alleged in the Amended Complaint was to have occurred in March of 2007, his testimony at the hearing concerned animals returned to GW Exotic Animal Park in November of 2007. He indicated that the animal(s) had been on treatment, but that his veterinarian placed the animal on a different protocol. Tr. 829. Earlier testimony from Wayne Edwards indicated that the animals often contracted ringworm, but that if an animal needed veterinary care, they got it. Tr. 198-199. Schreibvogel also testified that he felt that Palazzo genuinely cared for the animals in her care. Tr. 855. The record also contains a number of Certificates of Veterinary Inspection covering the month of March of 2007 indicating that the animals had been inspected by a veterinarian and were exhibiting no signs or symptoms of infectious, contagious or communicable diseases. CX 97-100. Accordingly, I find insufficient evidence of a violation of failing to provide adequate veterinary care.

5.-7. April 20-22, 2007: Failure to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort_and failure to handle animals during public exhibition so there was a minimal risk to the animals and

[21]Despite testimony of what could be interpreted as inadequate efforts to contact or to allow adequate time for a responsible person to come in to provide the required access at a time when the operation was not open for business with the general public, the Complainant chose to continue to include it as an alleged violation. Tr. 907. No evidence was introduced concerning any requirement that licensees operating at more than one location be staffed during normal business hours at all locations.

[22]Schreibvogel indicated that he was on the road when the animals were returned. Tr. 840.

> to the public, with sufficient distance and/or barriers. (9 C.F.R. §2.131(b)(1) and §2.131(c)(1)). In this and several of the succeeding alleged violations, Ms. Palazzo and Riggs are alleged in separate paragraphs of the Amended Complaint with having violated both Sections 2.131(b)(1) and 2.131(c)(1). In enacting the Animal Welfare Act, Congress found that regulation was necessary "to insure that animals intended for use….for exhibition purposes…are provided humane care and treatment. Congressional statement of policy. 7 U.S.C. §2131. Section 2.131(b)(1) was promulgated with that intent clearly in mind as it requires "Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." 9 C.F.R. §2.131(b)(1). The barrier requirements found in Section 2.131(c)(1) are less clearly directly related to provisions of humane care and treatment, but nonetheless have been found supportable because in the event of injury to the general public, it might become necessary to euthanize the animal that caused the injury.

Although Ms. Palazzo and Riggs are alleged to have violated both the expeditious and careful handling and barrier and distance provisions of the Regulations at the Kidfest event in Ridgeland, Mississippi from April 20 to 22, 2007, the testimony elicited by the Complainant was focused upon the walking of the cats on leashes and the absence of what was considered adequate barriers or distance between the cats and the public, rather than any stress or discomfort suffered by the cats from a lack of humane treatment. Although Robert McFarland expressed some fears over safety concerns and indicated that Great Cat Adventures would not be asked to return to the event, his testimony indicated that the leopard he observed during the VIP educational presentation on April 20, 2006 was on a leash held by Ms. Palazzo within an area separated from the public by barriers or a fence.[23] Tr. 83-88, 94-98. No

[23]There was no evidence of any public contact or photographs being taken during the VIP event. In his affidavit, McFarland's indicated that the public was separated from the podium or stand by an aluminum picket type of fence, with an estimated five feet

(continued...)

USDA employee observed the incident and Denver Osborne, a competitor and the only other witness to an earlier incident, did not testify and his affidavit allowed neither confrontation or cross examination by the Respondents. CX 152. Significantly, no report of violation was prepared by either Veterinary Medical Officer (VMO) Tami Howard or by Richard Rummel on behalf of the Mississippi Department of Wildlife, Fisheries and Parks. CX 11, 14, 14A, 14B. Accordingly, I will find the evidence insufficient to support a willful violation of either the handling or the barrier provisions on the date of the alleged infraction.

8. July 17, 2007: Failure to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort and failure to handle animals during public exhibition so there was a minimal risk to the animals and to the public, with sufficient distance and/or barriers. (9 C.F.R. §2.131(b)(1) and §2.131(c)(1)). VMO Kurt Hammel was present in Fowlerville, Mississippi on July 16 and 17, 2006[24] and testified that he observed the Respondents exhibiting tigers which he considered too large for direct public contact. Tr. 153-180. Although VMO Hammel observed one of the larger tigers in the photograph area, he did not witness any photographs being taken with the tiger. Tr. 177. CX 17. He did take three photographs, two of which were relied on as being evidence of direct public contact reflecting a blonde female with glasses who had come from the audience area feeding a juvenile tiger, who was later identified as Heidi Nelson, an employee of Great

[23](...continued)
between the podium or stand and the fence. CX 152. Regrettably, no diagram was made by the investigators setting forth the distance with any precision.

[24]VMO Hammel's letter to Dr. Kirsten dated July 26, 2007 indicates that he had been informed by Dr. Jones of the Western Regional Office that Jay Riggs might be exhibiting without a license and that he should conduct an inspection to see who was holding the license. CX 17.

Cat Adventures.[25] CX 16 (2 and 3 of 3), Tr. 164, 989. Ms. Palazzo denied allowing any person from the public to come into contact with a tiger identified as too large for the public and testified that they have "been putting plants in the audience that work for us for years….It adds to the entertainment…" Tr. 989-990. On cross examination, Hammel conceded that if Nelson was an employee, it would not be a violation for her to sit there with the tiger. Tr. 164. Given the lack of direct observation of "public" contact by anyone other than an individual identified (without contradiction) as an employee, I conclude that there is insufficient evidence to support a violation of either provision of the Regulations relating to "public" exhibition on the alleged date.

9. August 16, 2007: Failure to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort and failure to handle animals during public exhibition so there was a minimal risk to the animals and to the public, with sufficient distance and/or barriers. (9 C.F.R. §2.131(b)(1) and §2.131(c)(1)). Melissa Kay Radel, an Animal Care Inspector with APHIS, testified that she and Veterinary Medical Officer Debra Sime were present at the Steele County Fair in Owatonna, Minnesota and observed the Respondents' exhibit on August 16, 2007. Tr. 221-222. Radel identified a number of photographs she took during the inspection, including two which clearly show a juvenile tiger being carried by Ms. Palazzo through a public area without a barrier between the cat and the public. CX 22 (21 and 22 of 57). Other photos show audience members feeding juvenile tigers that were considered too large and too old for direct public contact. CX 20, 22 (10-18 of 57). The inspectors' examination of the records found a number of discrepancies in the records further documenting the record keeping violation discussed previously. The documents examined indicated the youngest tiger to be approximately 8 weeks old and the cubs that were represented to be 14 weeks old on the health certificate were in fact 24 weeks old. CX

[25]In his cross examination of VMO Hammel, Mr. Riggs suggested that Ms. Nelson appeared in an earlier photograph. CX 13 (2 of 3). In her testimony, Ms. Palazzo identified the individual in CX 16 as Heidi Nelson, an employee at the time. Tr. 989.

28. Although I find no evidence of the exhibition causing trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort to the animals, I do find that more than ample evidence was introduced that there was more than minimal risk in the handling of the animals without sufficient distance and/or barriers being present between the animals and the general public establishing the barrier violation.

10. September 7, 2007: Failure to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort and failure to handle animals during public exhibition so there was a minimal risk to the animals and to the public, with sufficient distance and/or barriers. (9 C.F.R. §2.131(b)(1) and §2.131(c)(1)). Veterinary Medical Officer Susan Kingston testified that she and Ken Kirsten, another Veterinary Medical Officer were present at the Shoppes at College Hill in Bloomington, Illinois at the direction of the Regional Office on September 7, 2007 for the purpose of checking the Respondents' exhibit. Tr. 290-292. She was accompanied by VMO Kirsten as her supervisor was concerned that it could be a potentially hostile situation, or a volatile situation. Tr. 291. When they arrived, they were too early for the performance, but saw that some pictures were being taken. They waited, looked at the exhibits of the animals displayed there, later watching the educational program and the subsequent picture taking session. *Id.* During the photograph sessions, they observed and VMO Kingston photographed a number of instances in which juvenile tigers were being photographed with the general public, including small children, having direct contact with the animals. Tr. 291-293, CX 32. The photographs clearly indicate the general public with the juvenile tigers in several of the photographs actually touching the tigers without the presence of any barriers. Again, although I do not find any evidence of the exhibition causing trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort to the animals, I do find that more than ample evidence was introduced that there was more than minimal risk in the handling of the animals without sufficient

distance and/or barriers being present between the animals and the general public in violation of the barrier provision.

11. October 5, 2007: Failure to handle tigers as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort and failure to handle animals during public exhibition so there was a minimal risk to the animals and to the public, with sufficient distance and/or barriers. (9 C.F.R. §2.131(b)(1) and §2.131(c)(1)). On October 5, 2007, ACIs Cathy Niebruegge and Karl Thornton were present at the Tulsa State Fair in Tulsa, Oklahoma and observed the Great Cat Adventures exhibit. While there the two ACIs observed and Karl Thornton photographed Palazzo exhibiting a juvenile tiger that had been brought from its primary enclosure to a platform located in the exhibit area where the individual general public was being photographed in close proximity to the tiger. Tr. 373-380, CX 37. The photographs corroborate the information contained on the Inspection Report and reflect Ms. Palazzo holding the tiger with a leash and feeding it a bottle with the members of the general public being photographed only 3-5 feet away without any barrier being present between them. CX 39. Noting that the Inspection Report cited Palazzo only for a barrier violation, in absence of any evidence of stress to the animal, I will find only the violation of the barrier provision.

The Amended Complaint asked for revocation of Ms. Palazzo's license. No testimony was proffered at the hearing concerning the proposed penalty as it was the Complainant's intention to include such information in the brief. Tr. 1075. In the Sanctions portion of the Complainant's Post Hearing Brief, the Complainant asserts that Respondent Jamie Palazzo's should not remain licensed as an animal exhibitor and her license should be revoked. The Complainant also seeks a $35,750.00 civil penalty from Respondent James Lee Riggs. In seeking revocation of Ms. Palazzo's license, the Complainant argues that "Palazzo has rejected the Secretary's interpretation of the handling Regulations" and "respondents have repeatedly fulfilled their pledge not to comply with the regulations." Complainant's Brief at 33. Notwithstanding the fact that Ms. Palazzo as the license holder is ultimately responsible for complying with the Secretary's Regulations,

I find her undue and erroneous reliance upon James Lee Riggs less culpable than that of Riggs who now has a documented history of both flaunting the Secretary's Regulations and for attempting to shield himself from responsibility by corporate artifice, manipulation of others and by working under the licenses of others. Accordingly, given her responsibilities as a parent, I find that the remedial purpose of the Regulations will be served by a lengthy period of suspension of Ms. Palazzo's license and does not require a revocation which would involve permanent disqualification of her as a licensee.

Based upon all of the evidence in this action, including the testimony of the witnesses and exhibits admitted during the hearing, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Jamie Michelle Palazzo is an individual residing in Haltom City, Texas. She is licensed under the Animal Welfare Act as a Class C Exhibitor, holding License No. 74-C-0627 and does business as Great Cat Adventures.
2. James Lee Riggs is an individual residing in Haltom City, Texas. During 2006 and 2007, he traveled with Great Cat Adventures and operated an "exhibitor," acting for or employed by Jamie Palazzo.
3. Ms. Palazzo operates a moderate sized business, exhibiting wild and exotic animals, including Bengal, Royal White Bengal, and Siberian tigers, cougars, and leopards for profit.[26] Described in promotional literature as a wildlife refuge dedicated to the care of big cats, in order to fund the refuge, the enterprise spends much of the year on the road touring the nation giving educational shows and providing opportunities for the general public to be photographed with the animals. CX-156.
4. Although Ms. Palazzo previously was an employee of Bridgeport

[26]The promotional literature indicates that the business has more than 35 big cats and feeds 3,000 pounds of meat per week. CX-156. The 2007 records of Bridgeport Animal Hospital, LLC listed 39 animals. CX-106.

Nature Center, Inc. and purchased equipment from Respondent Riggs which likely was used by Bridgeport Nature Center, Inc.'s road operation while giving educational shows and providing opportunities for the general public to be photographed with the animals, there is no evidence that she ever purchased any interest in Bridgeport Nature Center, Inc., or in any other way became a "successor in interest" to Bridgeport Nature Center, Inc.

5. AHIS at least since 2004 has consistently maintained that there is an inherent danger for both the viewing public and the exhibited animal(s) where there is any chance that the general public could come into direct contact with juvenile or adult big cats, including lions, tigers, jaguars, leopards and cougars, and considering big cats to become juveniles when they reach 12 weeks of age.
6. On August 9, 2006 at the Boone County Fairgrounds in Belvedere, Illinois, Ms. Palazzo was observed using a stream of water from a hose to encourage a tiger to enter its enclosure which may have "startled" the animal causing it unnecessary behavioral stress.
7. From October of 2006 to November of 2007, the Respondents failed to keep records that fully and correctly disclosed required information. The records on multiple occasions reflected numerous inconsistent entries as to birth dates of the animals with the inference that the Respondents' intent was that the animals might continue to be exhibited for a longer periods of time and also reflected inaccurate information as to the means of acquisition of certain of the animals.
8. On August 16, 2007 at the Steele County Fair in Owatonna, Minnesota, Ms. Palazzo was observed carrying a juvenile tiger through a public area without a barrier between the cat and the general public and the Respondents allowed audience members to feed juvenile tigers that were too large and too old for direct public contact without a sufficient barrier between the cat and the general public.
9. On September 7, 2007 at the Shoppes at College Hill in Bloomington, Illinois, the Respondents allowed juvenile tigers to be photographed with the general public, including small

children, having direct contact with the animals without barriers being present.

10. On October 5, 2007 at the Tulsa State Fair in Tulsa, Oklahoma, Respondents allowed juvenile tigers to be photographed with the general public, including small children, without sufficient barriers being present.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Between October of 2006 and November of 2007, Respondents failed to keep, make and maintain records or forms that fully and correctly disclosed the required information regarding animals owned, held, leased, or otherwise in their possession or control, or transported, sold, euthanized, or otherwise disposed of, and in many instances, Respondents' records contained incorrect or conflicting dates of birth, incorrect, conflicting, or missing acquisition and disposition dates, and incorrect, conflicting or missing identification of animal custody or ownership, in willful violation of 9 C.F.R. §2.75(b).
3. The Respondent Jamie Palazzo failed to handle a tiger as carefully as possible in a manner that did not cause behavioral stress, physical harm, or unnecessary discomfort in willful violation of 9 C.F.R. §2.131(b)(1) on August 9, 2006 (Boone County Fairgrounds, Belvedere, Illinois)
4. The Respondents failed to handle animals during public exhibition in such a manner as to allow only minimal risk to the animals and to the public with sufficient distance and or barriers between the animals and the general viewing public so as to assure the safety of the animals and the general public in willful violation of 9 C.F.R. §2.131(c)(1) on the following dates:
   a. August 16, 2007 (Steele County Fair, Owatonna, Minnesota)
   b. September 7, 2007 (Shoppes at College Hill, Bloomington, Illinois)
   c. October 5, 2007 (Oklahoma State Fair, Tulsa, Oklahoma)

Order

1. The Respondents, their agents, employees, successors and assigns, directly or indirectly through any corporate or other device are **ORDERED** to cease and desist from further violations of the Act and the Regulations.
2. Animal Welfare Act License No. 74-C-0627 issued to Jamie Palazzo, doing business as Great Cat Adventures, as a Class C Exhibitor is hereby **SUSPENDED** for a period of three years.
3. The Respondent James Lee Riggs is assessed a civil penalty in the amount of $10,000.00. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

   Colleen A. Carroll, Esquire
   United States Department of Agriculture
   Office of the General Counsel
   1400 Independence Avenue SW
   South Building
   Washington, D.C. 20250-1417

4. This Decision and 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.

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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LION'S GATE CENTER, LLC.
AWA Docket No. D-09-0069.
Decision and Order.
Filed January 5, 2010.

AWA – Unfit for license.

Colleen A. Carroll, for APHIS.
Jennifer Reba Edwards, Wheat Ridge, CO, for Petitioner.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This action was brought by Lion's Gate Center, LLC., a Colorado Limited Liability Company, (Lion's Gate) seeking review of and requesting a hearing concerning the Administrator's determination that the corporation was unfit to be licensed under the Animal Welfare Act. 7 U.S.C. §2131, *et seq*. The Administrator filed a Response to the Request for Hearing, agreeing to have the matter set for hearing. An Order was entered on May 6, 2009 directing the filing of exhibit and witness lists and exchange of the exhibits between the parties on May 6, 2009 and on September 23, 2009, the matter was set for oral hearing to commence in Denver, Colorado on January 26, 2009.

This matter is now before the Administrative Law Judge upon the Motion of the Respondent filed on November 24, 2009 seeking Summary Judgment affirming the denial of an application for an Animal Welfare Act License to the Petitioner corporation. The Petitioner has filed a Response to the Motion and the matter is ready for disposition at this time.

In moving for Summary Judgment, the Respondent relies upon Section 2.10(b) and 2.11 of the Regulations. Section 2.10(b) provides:

> Any person whose license has been revoked shall not be licensed in his name or her own name or in any other manner; nor will any partnership, firm, corporation, or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed. 9 C.F.R. §2.10(b).

Section 2.11 provides:

> A license will not be issued to any applicant…(3) has had a license revoked or whose license is suspended as set forth in §2.10; 9 C.F.R. §2.11.

In the letter dated February 18, 2009, the Administrator indicated his

reasons to believe Lion's Gate Center, LLC. unfit as an applicant. Specifically, because of the corporation's involvement with a disqualified entity, issuance of a license to Lion's Gate was considered contrary to the purposes of the Act and would operate so as to circumvent the order of revocation issued by the Secretary of Agriculture against the disqualified entity, Prairie Wind Animal Refuge (Prairie Wind).

Findings of Fact

The following facts do not appear to be in dispute:

1. On July 31, 2001, Administrative Law Judge Jill S. Clifton entered a Consent Decision in *In re Michael Jurich, an individual; and Prairie Wind Animal Refuge, a Colorado corporation,* AWA Docket 01-0029. That decision resolved the pending administrative proceeding and included a civil penalty, a cease and desist order and liquidated penalties including license revocation and an additional civil penalty should there be further violations of the Regulations during a specified probationary period. Complainant's Motion for Summary Judgment (CMSJ) RX 1.
2. Lion's Gate Center, LLC. was formed by Peter Winney on or about May 31, 2002.
3. By letter dated February 11, 2003, the Animal and Plant Health Inspection Service (APHIS) advised Jurich and Prairie Wind that APHIS had documented a failure to comply with the Regulations during the probationary period, enclosed documentary evidence of the violations and assessed the penalty set forth in the Decision and revoked License No 84-C-0052. CMSJ, RX 2.
4. Jurich and Prairie Wind filed suit seeking review of the APHIS action in the United States District Court for the District of Colorado, *Jurich, et al. v. U.S. Dep't of Agriculture,* 1:03-cv-00793-EWN-OES. CMSJ, RX 3a. On or about August 27, 2003, the case was settled, with Jurich and Prairie Wind acknowledging revocation of the exhibitor's license. CMSJ, RX 3c.

5. On or about May 11, 2005, Peter Winney applied for an exhibitor's license, identifying himself as an individual doing business as "Lion's Gate." The application listed Dr. Joan Laub and himself as "owners of the business." The application was subsequently withdrawn. CMSJ, RX 4.
6. By deed dated December 21, 2007, Joan Laub took title to the real estate located at 22111 County Road 150, Agate, Colorado on which Prairie Wind was and is currently located. CMSJ, RX 6, pp. 15-16.
7. Prairie Wind holds Colorado Division of Wildlife License No. 08CP270. Both Dr. Laub and Winney are officers of Prairie Wind.
8. On July 7, 2008, Prairie Wind applied for an Animal Welfare Act license as an exhibitor, identifying Dr. Laub as the corporation's President and Executive Director, and Winney as its Vice President and Director. CMSJ, RX 5, p 1.
9. On August 12, 2008, APHIS denied the application and returned the application fee, stating that APHIS was unable to issue a license to Prairie Wind due to its previous license revocation. CMSJ, RX 5, pp. 2-3.
10. On October 31, 2008, Peter Winney submitted Lion's Gate Center, LLC.'s application for an Animal Welfare Act license as an exhibitor. Included in the attachments to the application was a "License Agreement" between Lion's gate and Prairie Wind, stating that Prairie Wind and Dr. Laub own the property, facility, and animals intended to be exhibited by the applicant Lion's Gate. The stated purpose of the agreement was to facilitate exhibition of the animals owned by Prairie Wind and Laub at Prairie Wind's facility. In turn, Lion's Gate would be allowed to employ the wildlife sanctuary license issued by the Colorado Division of Wildlife and Lion's Gate would obtain an Animal Welfare Act license in its name. CMSJ, RX 6, PX 4.
11. On February 18, 2009, APHIS denied Lion's Gate's application on the grounds that it was unfit to be licensed and "that issuance of a license to Lion's Gate would be contrary to the purposes of the Act, and would operate so as to circumvent an oder of

revocation issued by the Secretary of Agriculture as to Prairie Wind Animal Refuge." PX 14.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. The Administrator's determination that Lion's Gate was unfit for issuance of a license and the denial of the application on the basis of Sections 2.10(b) and 2.11 of the Regulations (9 C.F.R. §§ 2.10(b) and 2.11) was in accordance with law and the Regulations as the application sought approval of a joint venture with a corporate entity whose license had been revoked by the Secretary.
3. The divestiture of ownership and subsequent death of Michael Jurich do not act to remove the permanent disqualification from licensure of a corporate entity whose existence is perpetual.

Order

1. The Motion of the Administrator for Summary Judgment is **GRANTED** and the determination of unfitness and denial of the license application of Lion's Gate Center, LLC. is **AFFIRMED.**
2. Lion's Gate Center, LLC. is disqualified for a period of one year from obtaining, holding, or using an Animal Welfare Act license directly or indirectly through any corporate or other device or person.
3. This Decision and Order shall become final without further proceedings 35 days from 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 will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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PINE LAKE ENTERPRISES, INC.
AWA Docket No. D-10-0014.
Decision and Order.
Filed February 4, 2010.

AWA. – Circumvention of licensing process.

Babak Rastgoufard, Esquire, for Respondent.
Zenas Baer & Associates, for Petitioner.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This action was initiated on October 16, 2009 by the Petitioner by the filing of a Demand for a Fitness Hearing with regard to the denial of an Animal Welfare Act license by Elizabeth Goldentyer, DVM, Director of the Eastern Region, United States Department of Agriculture (USDA) Animal and Plant Inspection Service (APHIS) Animal Care. The Respondent, through counsel filed a Response to the Request for Hearing indicating that Summary Judgment would be appropriate means of resolving the issues.

On December 17, 2009, Administrative Law Judge Jill S. Clifton conducted a teleconference with the parties and scheduled an oral hearing in the case to commence on March 31, 2010 in Fargo, North Dakota. In the same Order, Judge Clifton directed that any Motion for Summary Judgment by the Respondent should be filed on or before January 11, 2010 and that the Petitioner should file a Response by February 1, 2010. The Motion for Summary Judgment was filed on January 11, 2010 and the Petitioner's Response was filed on February 1, 2010.

As I find that there is no issue of material fact in dispute, I will grant the Administrator's Motion for Summary Judgment and on the record before me will affirm the denial of the Petitioner's application for an Animal Welfare Act license as set forth in the Order which is a part of this Decision.

Discussion

The Animal Welfare Act (the Act or AWA) provides that the

Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe (7 U.S.C. §2133).[1] The power to require and to issue licenses under the Act includes the power to disqualify a person from being licensed. *In re:Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. 77 (2009); *In re: Loreon Vigne,* 67 Agric. Dec. 1060 (2008); *In re: Mary Bradshaw,* 50 Agric. Dec. 499, 507 (1991). In this action, the Administrator of the Animal and Plant Health Inspection Service (APHIS) believed that the application for a license was an attempt to circumvent the then impending termination of Kathy Bauck's AWA license No. 41-B-0159,[2] and the resulting disqualification period and on that basis determined that the Petitioner was unfit to be licensed as a dealer under the Act. In reaching its conclusion, APHIS looked at the timing of the application, the affiliation of the applicant corporation with Puppy's on Wheels and Kathy Bauck, the information contained in the application, the existing ownership interests at the address set forth in the application which was the same as that of Kathy Bauck's business, and the fact that Pine Lake Enterprise Inc. did not appear to be authorized to do business in Minnesota, among other things. Docket Entry 1, Goldentyer denial letter dated September 28, 2009 attached to Demand for Fitness Hearing. Exhibit 1A, Motion for Summary Judgment.[3] Since the institution of this action, additional reasons upon which a denial might be based have come to light and have been included in the documentation submitted in support of the Motion for Summary Judgment filed by the Administrator.

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[1]". . . Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies . . "

[2]On September 29, 2009, I granted the Administrator's Motion for Summary Judgment in AWA Docket No. D-09-0139, terminated Kathy Bauck's AWA license and disqualified her for a period of two years from being relicensed. That decision was affirmed by the Judicial Officer on December 2, 2009, *In re: Kathy Bauck, an individual, d/b/a Puppy's on Wheels, a/k/a "Puppies on Wheels" and "Pick of the Litter"* 68 Agric. Dec.793 (2009) and the case is now currently pending before the United States Court of Appeals for the Eighth Circuit.

[3]References to the Motion for Summary Judgment and the Exhibits will hereafter be cited as Ex. SJM.

The exhibits submitted by the Administrator in support of the Motion for Summary Judgment clearly document the relationship between the applicant Pine Lake Enterprise Inc. as a successor entity of Pick of the Litter, Puppies on Wheels, Puppy's on Wheels at the same address as that of Kathy Bauck and the entities named against whose operation(s) the disciplinary action was taken. Although the AWA License No. 41-B-0159 was issued to Kathy Bauck, filings with the Minnesota Secretary of State from 1994 indicate that both Kathy Bauck and her husband Allan Bauck intended to or had conducted business under the assumed name of Pick of the Litter. Ex. 2, SJM. Pick of the Litter, Inc. was incorporated on March 4, 2003, with Allan and Kathy Bauck both as directors. Ex 3, SJM. Pick of the Litter, Inc. amended its articles of incorporation to change its name to Puppies on Wheels on August 22, 2008 and five days later filed an additional amendment to change the name to Puppy's on Wheels. Ex. 5,6, SJM. On October 9, 2009, a date a month after initiating the application for an AWA License in the name of Pine Lake Enterprise Inc.,[4] a further amendment to the articles of incorporation was filed with the Minnesota Secretary of State's Office changing the name of Puppy's on Wheels to Pine Lake Enterprises Inc. Ex. 1A, 7, SJM.

Even were Pine Lake Enterprises Inc. not a successor in interest to an entity against whom disciplinary action was brought, the record also reflects that Allan Bauck has engaged in regulated activities for which an AWA license is required without having first obtained that license by selling hundreds of dogs for resale as pets or for breeding purposes in his name. Ex. 8, H-M, SJM. While it is possible for Allan Bauck to take the position that the sales were legitimately made under Kathy Bauck's license; however, such a position would be an implicit acknowledgment that Allan Bauck was operating as an agent, employee or alter-ego of Kathy Bauck and that the application by him was an attempt to circumvent any disqualification affecting her or the entities that she operated.

Section 2.11 of the Regulations (9 C.F.R. §2.11) authorizes denial of a license for a variety of reasons, including:

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[4]This delay provided the basis by APHIS to conclude that Pine Lake was not qualified to do business in Minnesota.

(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 issuance of a license would be contrary to the purposes of the Act.

Section 2.12 (9 C.F.R. §2.12) provides:

A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to §2.11 after a hearing in accordance with the applicable rules of practice.

The Petitioner suggests that the only basis for the denial of an AWA license to the Petitioner is that Allan Bauck is the spouse of Kathy Bauck and that such a rationale harkens back to the misogynous laws prevalent during the infancy of the United States. It also questions the appropriateness of a motion for summary judgment and insists that at a minimum it is entitled to a fitness hearing to determine its ability to carry out the provisions of the Act. The Petitioner's argument, while ostensibly logical, is without merit as despite what is suggested as being the clear mandate of the regulation, the Judicial Officer, speaking for the Secretary, has repeatedly held motions for summary judgment appropriate in cases involving the termination and denial of Animal Welfare Act licenses. *In re: Amarillo Wildlife Refuge, Inc., supra; In re Loreon Vigne, supra, In re: Mark Levinson,* 65 Agric. Dec. 1026, 1028 (2006). The Judicial Officer has also held that hearings are unnecessary and futile when there is no factual dispute of substance. *In re: Animals of Montana,* 68 Agric. Dec. 92 (2009), 2009 WL 624354 at *7 citing *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F. 2d 601, 607 (D.C. Cir. 1987).

Accordingly, based upon the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Respondent Pine Lake Enterprises Inc. is a Minnesota corporation with a mailing address in New York Mills, Minnesota.

2. The corporation previously did business under the names of "Puppy's on Wheels" and "Pick of the Litter" or "Pick of the Litter Kennels," all names also used by Kathy Bauck, an individual against whom disciplinary action was brought in AWA Docket No. D-09-0139 for being found guilty pursuant to her *Alford* plea by the Otter Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, of one misdemeanor count of practicing veterinary medicine without a license in *State of Minnesota v. Kathy Jo Bauck,* 56-CR-08-1131 on May 19, 2008. Kathy Bauck was also found guilty by a jury verdict in the Otter Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, of four misdemeanor counts pertaining to animal cruelty and torture in the case of State of Minnesota v. *Kathy Jo Bauck*, 56-R-08-2271 on or about March 29, 2009. On or about May 1, 2009, the Respondent was sentenced in 56-CR-08-2271 to be confined in the county jail for a period of 90 days (with 70 days suspended for a period of one year with specified conditions), to pay a fine of $1,000 (of which $500 was suspended), to be placed on formal supervised probation, to complete 80 hours of community service, and to allow inspections of her property as long as she was continuing to work with animals. On the same date, three of the four counts were vacated, leaving only Count 5 which involved torture of a Mastiff between the dates of May 14 and 24, 2008. *In re: Kathy Bauck, et al.,* 68 Agric. Dec. 793 (2009).

3. Pine Lake Enterprises Inc. is a successor in interest to entities operated by Kathy Bauck in the above cited disciplinary action, has the same address, and at the time of application was not authorized to do business in the state of Minnesota.

4. Allan Bauck is the spouse of Kathy Bauck and previously worked as an officer, agent, employee, or co-owner of the business operated by

Kathy Bauck.

5. Allan Bauck either sold numerous dogs for resale use as pets or breeding purposes on behalf of Kathy Bauck or engaged in the unlicensed sale of the animals without being properly licensed under the AWA as a dealer.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Issuance of an AWA license to Pine Lake Enterprises Inc., a successor in interest to entities previously found to be unfit to hold an Animal Welfare Act license by the Secretary would be contrary to the purposes of the Act. 9 C.F.R. §2.11(a)(6).

3. Denial of the AWA license would be appropriate to anyone who had engaged in the unlicensed sale of dogs for resale as pets or breeding purposes in violation of Federal regulations pertaining to the transportation, ownership, neglect, or welfare of animals. 9 C.F.R. §2.11(a)(6).

Order

1. The denial of the application of Pine Lake Enterprises Inc. is **AFFIRMED**.

2. This Decision and Order shall become 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 will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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SUSAN BIERY SEROGJAN.
AWA Docket No. 07-0119.
Decision and Order.
Filed March 18, 2010.

AWA. – Adequate veterinarian care, failure to provide.

Colleen A. Carroll, for the Administrator, APHIS.
Steven R. Meeks, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.

Decision Summary

1. I decide that Akela the wolf, in captivity at Wolf Haven International, needed euthanasia to end his suffering as he was dying in 2005 at the age of 15 years. I decide that Susan Biery Sergojan, the Respondent ("Respondent Sergojan" or "Respondent"), who was Wolf Haven's Executive Director at that time, failed to provide adequate care to Akela; in so failing, Respondent Sergojan violated provisions of the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq.* (frequently herein the "AWA" or the "Act") and Regulations issued thereunder, specifically 9 C.F.R. § 2.40(a), 9 C.F.R. § 2.40(a)(2), 9 C.F.R. § 2.40(b)(1), 9 C.F.R. § 2.131(b)(1), and 9 C.F.R. § 2.131(e). I decide further that the appropriate remedy for Respondent Sergojan's violations includes civil penalties totaling $10,000.

Introduction

2. Certainly there can be disagreement as to when euthanasia, especially for an animal dying of natural causes at an advanced age, is necessary; but Respondent Sergojan missed critical information by choosing to shut out the treating veterinarian from her decision-making process. Akela the wolf was dignified and majestic while dying, even though emaciated and weak; even though shivering on damp, cold ground (during January 5 through 10, 2005, the evening temperatures were as low as 19 degrees

Fahrenheit.[1]); even though his internal organs had been shutting down, causing pain; even though he had not eaten for three weeks; even though he was suffering. Akela's brave front masked his pain and suffering; nevertheless, Akela's pain and suffering would have been apparent to Respondent Sergojan had she consulted with the treating veterinarian; even had she been more attuned to the observations and concerns voiced at the time by Wolf Haven's animal curator and other support staff, including volunteers. Had Respondent Sergojan just not injected herself into the decision-making process, by overruling the animal curator, by overruling the treating veterinarian, and by involving Wolf Haven's Board while failing to obtain and provide for the Board information from the treating veterinarian, Akela would have been spared the additional pain and suffering when euthanasia was overdue. USDA veterinarian Randall Ridenour, D.V.M., testified that he had not seen other animals during the course of his career that he believed were in greater need of euthanasia than Akela. This included Akela's condition as shown in the first videotaped evidence (taken January 5, 2005). Tr. 1308-09, 1310-13. CX 10. Respondent Sergojan's Animal Welfare Act violations began January 5, 2005, and persisted into January 10, 2005, when Dr. Ridenour and another USDA Veterinarian, Dr. Ruth Hanscom, arrived at Wolf Haven to investigate Akela's reported suffering. Akela's treating veterinarian met them there; Wolf Haven's curator met them there. The decision among the four of them was unanimous that Akela required immediate euthanasia, indeed had required euthanasia for some time; and the treating veterinarian humanely euthanized Akela, there in his home at Wolf Haven.

3. Akela was a wolf in captivity. A wolf dying in captivity cannot be treated in similar fashion to what would happen if he were in the wild. To "let nature take its course" when the wolf has been removed from his "natural" environment, can be inhumane and was, here.

4. Only by listening to the veterinarians did I understand Akela's pain and suffering.

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[1]Tr. 113-14:6, CX 5 (weather reports from The Olympian "from forecasts and data supplied by the National Weather Service, Accu-Weather, Inc. and The Associated Press," showing lows of 19 degrees (January 5), 23 degrees (January 6), 37 degrees (January 7), 32 degrees (January 8), and 33 degrees (January 9)).

Parties and Counsel

5. The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Complainant"), is represented by Colleen A. Carroll, Esq., United States Department of Agriculture, Office of the General Counsel, Marketing Division, South Building Room 2343 Stop 1417, 1400 Independence Avenue, S.W., Washington, D.C. 20250-1417.
6. Susan Biery Sergojan is represented by Steven R. Meeks, Esq., 1235 Fourth Avenue, Suite 204, Olympia, Washington 98506.

Procedural History

7. The Complaint, filed on May 23, 2007, named three respondents: (1) Wolf Haven International, a Washington corporation ("Wolf Haven"); (2) Susan Biery Sergojan, an individual; and (3) Michael Peters, an individual.
8. Respondent Wolf Haven settled the case through a Consent Decision filed April 7, 2008. (*See http://www.da.usda.gov/oaljdecisions/aljcondecisions-archived_2008.htm* .) Wolf Haven is a licensed exhibitor under the Animal Welfare Act and the Regulations; Wolf Haven was the employer of Respondent Sergojan.
9. Respondent Michael Peters settled the case through a Consent Decision filed April 10, 2008. (*See http://www.da.usda.gov/oaljdecisions/aljcondecisions-archived_2008.htm* .) Michael Peters was the President of Wolf Haven and a member of Wolf Haven's Board of Directors.
10. Respondent Sergojan's case was heard April 15-18, 2008, in Olympia, Washington, before me, Jill S. Clifton, U.S. Administrative Law Judge. Witnesses testified and exhibits were admitted into evidence. The transcript, in four volumes, is referred to as "Tr." Identification of the exhibits admitted into evidence and those rejected, and identification of the transcript, were included in a filing May 16, 2008, an excerpt of which is included as Appendix A to this Decision.
11. APHIS's proposed transcript corrections were filed February 4, 2009.

Respondent Sergojan filed no proposed transcript corrections. The transcript was excellently prepared; I thank Neal R. Gross and Co., Inc., Court Reporters, and specifically Pamela Hollinger, who had to move with us and set up equipment quickly more than a few times and whose work was impeccable. My Order regarding transcript corrections will be filed separately.

12. APHIS called ten witnesses. Volume I: (1) Kirk B. Miller, Tr. 62-67; (2) Michael K. McCann, Tr. 68-202; (3) Brenda Thornhill, Tr. 203-293; (4) Michelle Murphy, formerly known as Michelle Margolis, Tr. 294-379; Volume II: (5) William Waddell, Tr. 446-553; (6) Jerry William Brown, D.V.M., Tr. 556-690; (7) Shawndra Lynette Michell, Tr. 692-763; Volume III: (8) Wendy Spencer-Armestar, Tr. 807-1103; (9) Michele Beal-Erwin, Tr. 1104-1141; and Volume IV: (10) Randall Carl Ridenour, D.V.M., Tr. 1190-1279, Tr. 1291-1387.

13. Respondent Sergojan called two witnesses: Volume IV: (1) Trudy Cadman, Tr. 1279-1291; and (2) Susan Biery Sergojan, Tr. 1390-1540.

14. APHIS's exhibits are designated by "CX" or "Govt X". APHIS submitted the exhibits shown on Appendix A enclosed. Respondent Sergojan submitted no exhibits.

15. APHIS's Brief was timely filed on February 19, 2009. Respondent Sergojan filed no Brief; thus the record was closed and forwarded to me for Decision.

Discussion

16. The videotape in evidence of some moments of Akela's last days (CX 10) shows a knowledgeable viewer how bad Akela's condition had become. Akela's brave front obscured, to someone not knowledgeable, the extent of the pain and suffering Akela was enduring. I benefitted greatly from observations by Dr. Ridenour, who not only saw and palpated Akela on his last day, January 10, 2005,[2] but who also watched the videotaped segments (January 5, January 8 and January 10, 2005) and testified about what he saw there, and about what he knew from

[2]Dr. Hanscom and Dr. Ridenour went into Akela's enclosure, accompanied by the treating veterinarian and the animal curator, to get a closer look at Akela and actually palpate Akela, on January 10, 2005. Tr. 1244-49.

Akela's treating veterinarian's treatment notes and laboratory results. 17.Dr. Ridenour testified that in his opinion Akela was not handled in a manner that would not cause him unnecessary discomfort. Tr. 1292-94.

Ms. Carroll: Dr. Ridenour, do you have an opinion whether Akela during the period January 5 through 10, 2005 was handled in a manner that would not cause him unnecessary discomfort? . . . .

Dr. Ridenour: Yes. I do have an opinion.

Ms. Carroll: And what is that opinion?

Dr. Ridenour: That he was not properly handled.

Ms. Carroll: And what is the basis for that opinion?

Dr. Ridenour:Well, that because he was suffering and should have been euthanized, he was just kind of left to lay out there in those cold conditions, in a body condition that was not conducive to protecting himself from the effects of those environmental conditions but also just his continuing body -- the pain and distress associated with his continuing physical decline.

Ms. Carroll: And do you have an opinion as to whether - - let me ask you - - do you have an opinion whether Akela's well-being was threatened or affected in a detrimental way by his being housed outdoors in the climatic conditions that were present in January 5 through 10, 2005?

Dr. Ridenour: Yes, I do.

Ms. Carroll: What is that opinion?

Dr. Ridenour: That he was negatively affected by being housed outdoors in thoseconditions.

Ms. Carroll: What is that based on?

Dr. Ridenour: Given his health status and serious decline in the overall health and failing condition. It is - - it was not appropriate that he continue to live out there like that.

Ms. Carroll: Would euthanasia, had it been performed earlier than January 10, 2005, have been a measure in your mind that would have alleviated the impact of those climatic conditions on his well-being? Dr. Ridenour: Absolutely it would have. Yes.

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

Dr. Ridenour: Once the euthanasia is performed, then the animal is no longer suffering. That terminates the suffering. That's why the veterinary profession has that option available as part of a treatment plan, is that when it's deemed necessary, that is the appropriate way to stop the suffering of an animal.

Tr. 1292-94.

18. Dr. Ridenour described what he had gleaned from Akela's laboratory results from November 18, 2004. Tr. 1224-26.

Dr. Ridenour: Those two pages, those serum chemistries indicate to me that Akela was clearly in renal failure, probably also experiencing liver failure, and a good possibility, looking at the entire package of Akela, that the pancreas was failing as well.

Judge Clifton: Thank you.

Ms. Carroll: Is that a painful process?

Dr. Ridenour: Yes. Yeah.

Ms. Carroll: Why do you say so?

Dr. Ridenour: Because with organ failure like that, significant organ failure - - and we're talking kidney, liver, and pancreas, in my opinion, there's also a great deal of inflammation that occurs, especially in the abdominal cavity where those three organs are located. As the - - as organs in the abdominal cavity become inflamed or deteriorate, degenerate, the inflammatory process releases chemicals that cause a lot of pain in the abdominal lining.

The other component that goes along with pain associated with this type of syndrome is as the BUN elevates, that circulating - - those circulating urine toxins that are not being eliminated by the kidneys properly accumulate in a lot of other tissues, including joint tissues, so there's a good chance that the joints would become very painful as well.

Elevated BUN and toxic products associated with liver failure as well can cause a lot of central nervous system deterioration and discomfort in the central nervous system. Tr. 1224-26.

19. Dr. Ridenour described what he saw on the videotape (CX 10). Tr.

1228-41.

Ms. Carroll: I'd ask to have the video that is Complainant's Exhibit 10 played for Dr. Ridenour and, again, I want to ask him to comment on what he sees.

Before we play this video, could I ask a question?

Judge Clifton: You may.

Ms. Carroll: Dr. Ridenour, were you present in the room earlier in the hearing when we watched the video previously?

Dr. Ridenour: Yes.

Ms. Carroll: And would you - -

Dr. Ridenour: Twice.

Ms. Carroll: - - did you make observations at that time?

Dr. Ridenour: Yes, I did.

Ms. Carroll: Okay. Do - - are you prepared to present observations again?

Dr. Ridenour: Sure.

* * *

Dr. Ridenour: This is just a shot from a distance, and basically all you - - all I see here is that the animal is in sternal recumbency. His head is actually lower than I would expect for an animal resting - - a healthy animal resting normally in sternal recumbency, indicating to me that he is uncomfortable.

Just a closer-up shot. Again, he's in sternal recumbency for the most part. His hindquarters are kind of in lateral recumbency. His head again is lowered and extended forward, and that - - I'll point out why that's significant father down on the videotape.

There's a good shot of his pen mate, Aurora, and you can notice the difference in her facial features, her attitude in general, and her hair coat especially.

Ms. Carroll: What are the differences that you see?

Dr. Ridenour: Akela's look is very depressed look. He's not -- not -- he's not bright-eyed as you would expect a normal animal to be. His hair coat is significantly rougher and more unkempt. This is a good shot. You can look at the tail there and his hindquarters behind his shoulder cape. His hair just is not a normal, well-groomed and

naturally cared-for hair coat that I would expect in any dog, including a wolf like this. It's an unkempt hair coat, the clumping of the hairs like that. He's just not -- he's just not healthy and that's reflected in his -- this also shows actually his head again lowered and his neck extended and that is a reflection of the fact that he was having some discomfort in breathing.

Ms. Carroll: And when you say "unkempt," what would a normal canid do with respect to his or her coat?

Dr. Ridenour: Well, there's lots of licking and scratching and rubbing against things, rolling on the ground, just anything they can do to kind of move their hair around and keep it well-groomed and fluffed up, especially in the wintertime when they need that fluffing in order to maintain dead air space against their skin for warmth.

This shows a closeup of his face. His muscle is definitely thin. Notice also that when he blinks his eyes, his eyes are sunken, there is an ocular discharge. When he blinks his eyes, he's only moving this very medial dorsal part of his upper eyelid so his whole eyelid isn't functioning properly That's a reflection of the severe muscle atrophy in the muscles of his face and skull.

And you can see -- there -- right there, I don't know if you saw it, but it was a very slight twitching of his head. That in my opinion is probably more a result of the fact that he's trying to hold his head up above his forelimbs and he's just -- his neck and shoulder muscles are just so weak that he can't really hold his head up well.

Right there, you can see he's trying to arch his eye and just the -- the dorsal part of the eyelid by the medial canthus is all he can actually move.

Notice here how he's got his ears back. They're not up and alert. He is clearly distressed by the fact that the videographer is so close to him and actually touched him then. It's a very distressful facial and head posture.

This is a really good shot of his flanks behind his shoulder cage and you can see that he's extremely thin in the flanks. Another shot from the side, basically showing most of what we saw a few seconds ago. A little more indication of some labored breathing there.

Notice also in the -- the side of his thigh that we're looking at,

that's -- you can almost see a bony prominence rather than just a nice rounded fleshy leg. Severely emaciated musculature in his hind legs there.

And, again, you can kind of see the blinking. And, again, he's got his head extended forward trying to ease passage of air into his lungs.

Also, it's hard to describe without having some experience, but the way he wasn't at that point looking at the camera is significant. He is distressed by the fact that somebody is so close to him and he can't get away.

This is a similar posture here. He's not looking directly at the camera because he doesn't want to. He is just -- he's distressed by the fact that the videographer is so close to him. This is not normal behavior for a wolf.

There, you see the arching of the eyebrow, and it was just that one part of the upper lid.

Ms. Carroll: You mean the part closest to the center of the face?

Dr. Ridenour: Yes, the -- yes. You can also see that there is slight head bobbing. Again, in my opinion, that's more a reflection of his weakness. There it is again, the bobbing of the head.

You can also see on that thigh, on his left thigh, there's almost like a gray line, a shadowing effect. That is because the musculature is so emaciated that the skin is actually dipping down behind the thigh bone.

Ms. Carroll: You mean a little bit to the right of the actual separation of the thigh or where the thigh is in front of the rest of the body?

Dr. Ridenour: Yes. Yes, kind of in the middle of his thigh area there.

Here he's laying on his left side in lateral recumbency. Again, his head is fully extended, trying to ease his breathing. You can see labored breathing in the part that is happening there. He's also at a very abnormal posture with his legs. His front legs are -- are not only extended to the side because of his lateral recumbency, but they're crossed and pulled back a little bit. His rear legs are -- which is completely abnormal in that they're again extended and crossed and pulled forward a little bit, almost like he's tucking -- trying to tuck his forelegs together as he hunches his abdomen.

And you notice there, there was a bit of a -- a little bit of a

withdrawal of the -- almost a spasming of the musculature there. There, there it is again. And that's all a reflection of pain. He is in extreme discomfort there.

Here he's in actually a little better position. He's up again in sternal recumbency. He's got his head held a little bit higher.

Ms. Carroll: And this is in the second portion?

Dr. Ridenour: Yes. I'm sorry. The second -- there was a gap there and then this is the second portion of the video. Still clearly a sick, weak, unhealthy animal but holding his -- there's a much better picture of his thigh and a shadowing in the middle part of the thigh where the thigh bones are to the front and then the skin dips down because there's no musculature behind the thigh bones. You can also see that eyelid pulling up above the medial canthus of the eye.

And you can see his head -- the hair on his head, the guard hairs are spaced apart rather than being very tightly close together and not a normal or healthy looking hair coat at all.

This also shows that -- you notice his forearms. His forearms are significantly larger in diameter, the musculature, than his back leg is, the thigh is, okay?

And --

Ms. Carroll: Why is that?

Dr. Ridenour: The reason for that is because four-legged animals -- normal four-legged animals, unlike a walking horse -- sorry -- a normal four-legged animal carries the vast majority of his body weight on the front limbs, so those tend to be the strongest muscles and likely be the last muscles to atrophy severely.

Here again he's averting his gaze and holding his ears back, again just -- he's just very bothered by the fact that he is threatened by the close proximity of the videographer and the fact that he just -- he physically cannot get away. He's too weak to get up and move.

Ms. Carroll: There's been some observation that his tail is fluffy. Do you agree?

Dr. Ridenour: Well, not in what I would consider a -- "fluffy" to me implies a positive attribute or a healthy type of a look to the tail, and I disagree with that. He's got long guard hairs in his tail, but he wouldn't have the normal fluffiness of a tail with a good healthy

winter undercoat, of the underfur. He certainly does not have the bright-eyed, bushy-tailed look that that term comes from. He -- he is not bright-eyed and bushy-tailed at all.

This is just continuing the segment of his facial attitude and averting his gaze from the videographer as best he can, as well as this shows significantly the ocular discharge. There's a slight hint right there if you look closely at the black line of his mouth, he's actually opened his mouth a little more than what we saw in some previous -- earlier in the video and that -- and this is a little more noticeable here.

Ms. Carroll: And now we're in the third section?

Dr. Ridenour: The third section -- I'm sorry. He's in lateral recumbency. He's lifted his head to look at the videographer. Now he's probably gonna aver[t] his gaze. Notice there that his mouth is slightly open and there again. That's an attempt on his part, in addition to having his head extended as much as he can, to try and enhance air passage and -- air passage into his lungs because he's having difficulty breathing. And there's his -- you can see his chest rising and falling as he's in labored breathing.

And, again, another -- just another view of that just kind of generally unkempt hair coat.

His face looking straight on is actually thinner than I would expect it to be. He just -- he looks very frail. A good closeup of his eyes, very sunken, inflamed, significant amounts of ocular discharge. Another -- that staining of the ocular discharge down the side of his muzzle is another clear indication that he can't normally groom himself.

Ms. Carroll: Would there be normally licking and --

Dr. Ridenour: Yes. And rubbing himself with his forepaws. You can see the look there. He -- that countenance that he has, he is -- he's very distressed by the proximity of the videographer. He just cannot maintain that -- that comfortable flight distance that was referred to in earlier testimony, very distressful for an animal like that to not be able to do that.

Ms. Carroll: So are you speaking that there's psychological issues that are involved then in the condition of Akela?

Dr. Ridenour: Oh, absolutely. He was not only suffering physically.

> He was suffering psychologically as well. Very -- it's very distressful for an animal to not be able to maintain their normal behaviors, including the ability to get away from a potential threat.

(end of videotape playing)
Tr.1228-41.

20. Respondent Sergojan apparently decided, without input from the treating veterinarian, that Akela was not suffering and should be allowed to die "naturally". In contrast, the attending veterinarian and the animal curator had decided jointly that euthanasia was necessary, and they agreed that euthanasia would occur January 5, 2005. Respondent Sergojan's overruling of the joint decision of the attending veterinarian and the animal curator (that euthanasia was necessary) contravened the established program of veterinary care.

21. I am persuaded that during January 5, 2005 through January 10, 2005, Akela, while he was dying, experienced distress, discomfort, pain, and suffering that were unnecessary. Euthanasia as scheduled on January 5, 2005 would have put an end to Akela's distress, discomfort, pain, and suffering, but Respondent Sergogan forbade the treating veterinarian to perform the euthanasia, not only on January 5, 2005, but also when euthanasia had again been scheduled by the treating veterinarian with the animal curator, for January 7, 2005.

Findings of Fact

22. Respondent Susan Biery Sergojan is an individual whose business mailing address is Law Offices of Sergojan & Sergojan, Post Office Box 11578, Olympia, Washington 98508-1578. Respondent Sergojan was Executive Director of respondent Wolf Haven International ("Wolf Haven"), from April 12, 2004, to February 9, 2005. In that capacity Respondent Sergojan was acting for and employed by Wolf Haven, pursuant to section 2139 of the Act (7 U.S.C. § 2139).

23. In 2005, Dr. Jerry W. Brown, Yelm Veterinary Hospital, was the treating veterinarian and had been Wolf Haven's attending veterinarian for over 20 years. CX 2.

24. Wendy Spencer-Armestar began volunteering at Wolf Haven in June 1998, and became Acting Curator of Wolf Haven in June 2003. CX 9 at 1.

25. It had historically been the practice at Wolf Haven that the decision to euthanize an animal was made by the attending veterinarian and the curator.[3]

26. In late 2004, Akela was a 15-year-old captive male gray wolf housed at Wolf Haven,[4] and was in declining health. On November 18, 2004, Dr. Brown drew blood from Akela, and had diagnostic tests performed, the results of which indicated elevated renal values.[5] Dr. Brown diagnosed kidney failure. On December 6, 2004, Dr. Brown prescribed a trial program of Lasix,[6] and noted that Akela was "[c]oughing at night and at activity," and was possibly suffering from congestive heart failure. CX 3 at 3.

27. On December 23, 2004, Dr. Brown examined Akela at Wolf Haven. In his declaration made on February 22, 2005, Dr. Brown stated:

> I noted purulent ocular and nasal debris, deep respiration with some abdominal breathing, rapid but normal heart sounds and rhythm, and some coughing when he was moving around. It was reported that the wolf had been increasingly listless and anorectic. My tentative diagnosis was a pulmonary problem, infection, or cancer. A CBC

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[3] CX 2 at 1.

> Q And -- but generally speaking, was it the case that it was the course of treatment or action to be taken was a decision made between you and Dr. Brown?
>
> A It was a decision that was made between the two of us. I just let other people know what was happening. Tr. 813.

[4] CX 3, CX 4 at 1.

[5] CX 2 at 1 ("On November 18, 2004, an adult male wolf names Akela, 15+ years of age, which had been reported by Wolf Haven staff as lethargic and exhibiting abnormal behavior, had blood drawn for testing. The results showed significantly elevated renal values (BUN - 84 mg/dl and Creatinine - 3.7 mg/dl."); CX 3.

[6] CX 2 at 1 ("On December 6, 2004, treatment of the animal with Lasix was initiated due to excessive coughing.").

was done, and he was treated with antibiotics and cortisone.[7]

28. On December 29, 2004, in response to a report from Ms. Spencer-Armestar that there was "no change from injection" and Akela "continues to lie around, anorectic. Drinking some," Dr. Brown noted: "I am concerned about previous BUN - creat. Levels. Euth may be close."[8]

29. Dr. Brown and Ms. Spencer-Armestar communicated regarding Akela's condition. Ultimately, Ms. Spenser-Armestar made an appointment for Dr. Brown to euthanize Akela on January 5, 2005. CX 2 at 3.

30. Dr. Brown wrote in his treatment notes: "On January 5, 2005, after back and forth communications with Wendy, she called me out to euthanize Akela. He had reportedly been down for two days, but was now up and slowly moving around the compound, still anorectic. Costly intensive care at the clinic appeared to be the only alternative, and I felt this would only prolong the inevitable." CX 2. *See also* CX 3, Tr. 561-578.

31. Ms. Spenser-Armestar advised Respondent Sergojan of the euthanasia appointment. Tr. 1440-43.

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[7] CX 3 at 2. Dr. Brown noted:

"Exam: Purulent ocular/nasal debris
Deep resp. w/some abdominal breathing
Heart: Rapid but normal heart sounds. Rhythm OK
Abdominal palpation: ___
Coughing noted when wolf moving around. Lately has been more listless and anorectic.
Tent. Dx: Pulmonary problem infection or cancer
Plan: 1. Idex CBC
2. Baytril 170 mg
3. Dexasone 5ml
4. PenG 5 ml"

[8] CX 3 at 2; CX 2 at 1 ("On December 29, 2004, I spoke with Wendy, the acting Curator, and Erin from Wolf Haven, and they reported no improvement from the injection on December 23. They said Akela was drinking some water, but he was continuing to lie around and was anorectic. I was concerned about the previous BUN and Creatinine levels, indicating he problem was renal in nature, and I concluded that euthanasia might be close."); *see* Tr. 1217-18.

32. Ms. Spenser-Armestar took videotape footage of Akela on January 5, January 8 and January 10, 2005. CX 10.
33. Ms. Spenser-Armestar stated in her Affidavit that on January 5, 2005, "Akela had not eaten in three weeks, and he was extremely emaciated." CX 9 at 2, Tr. 891.
34. Dr. Brown arrived on January 5, 2005, to perform the scheduled euthanasia. Respondent Sergojan advised Dr. Brown that the euthanasia would not take place.
35. Ms. Spenser-Armestar and Dr. Brown rescheduled the euthanasia for January 7, 2005. Respondent Sergojan canceled the euthanasia.
36. In response to a public complaint, two USDA veterinarians, Drs. Ruth Hanscom and Randy Ridenour,[9] inspected Akela and records relating to Akela's care on January 10, 2005. Drs. Hanscom and Ridenour found that Akela was suffering as a result of the failure of respondents Wolf Haven and Sergojan to provide needed veterinary care to him. Drs. Hanscom and Ridenour notified Wolf Haven's curator that the Secretary would confiscate Akela unless he was provided with adequate care, in the form of euthanasia, immediately. Tr. 1201-03, 1208-09, 1215-17, 1244-49, 1258-59, CX 13, Tr. 1295-98, CX 12, Tr. 1299-1301, CX 14, Tr. 1301-05.
37. Akela, when examined on January 10, 2005, was so emaciated that, according to Dr. Ridenour, he had virtually no musculature left at all and hardly any underfur. Akela did not have enough protein to produce a hair coat (not only was he not eating, his digestive organs were failing); and he could not effectively maintain body temperature, not only because he did not have a good undercoat of fur, but also because his metabolism was failing. His body was consuming itself. Tr. 1249-53.
38. With Ms. Spenser-Armestar's concurrence, Dr. Brown euthanized Akela on January 10, 2005.
39. Respondent Sergojan does not have a history of violations. Respondent Sergojan does not have a sizable business.
40. Respondent Sergojan did not intend to harm Akela; she loved Akela;

[9] Dr. Ridenour was assigned to inspect respondent Wolf Haven's facilities and animals for thirteen years. Tr. 1196. Dr. Ridenour identified his educational and professional background, and specifically described his experience with wolves, and the resources he draws on in connection with wolves and wolf behavior. Tr. 1191-98.

nevertheless, the gravity of Respondent Sergojan's violations is great, in that, among other things, Respondent Sergojan failed to ensure, impeded or prevented the provision of veterinary care to a dying wolf, Akela, thereby prolonging his suffering.

41.Respondent Sergojan's violations go directly to the heart of the Animal Welfare Act, the purpose of which, among other things, is to ensure the humane treatment of animals used for exhibition. Respondent Sergojan's actions, in consigning a dying, weakened animal to remain outdoors in freezing temperatures for five days rather than to permit the attending veterinarian to perform euthanasia, were contrary to the Regulations and, as Dr. Ridenour observed, inhumane. Tr. 1257.

42.I do not find any lack of good faith on Respondent Sergojan's part. I do find that, for some reason other than a lack of good faith, Respondent Sergojan avoided providing Akela with the euthanasia he needed; Respondent Sergojan avoided discussing Akela's condition with the treating veterinarian; Respondent Sergojan avoided obtaining facts from the treating veterinarian to inform Wolf Haven's President and Directors of what they would need to know in decision-making; Respondent Sergojan specifically directed the treating veterinarian Dr. Brown NOT to euthanize Akela on January 5, 2005, after Dr. Brown had already arrived at Wolf Haven and driven into the parking lot with the intent of euthanizing Akela; Respondent Sergojan specifically directed that the treating veterinarian Dr. Brown NOT come to Wolf Haven to euthanize Akela on January 7, 2005, after Dr. Brown had conferred with the animal curator and cleared his calendar with the intent of euthanizing Akela; Respondent Sergojan avoided meeting with the USDA Veterinary Medical Officers, who arrived at Wolf Haven at about 4:30 pm on January 10, 2005, even though she had been notified that they were coming to Wolf Haven (Tr. 1265, 1473-76); Respondent Sergojan avoided completing paperwork with APHIS Investigator Michael McCann; and Respondent Sergojan avoided the realization that she had done anything wrong in connection with Akela's care and treatment during the final days of his life, January 5 through 10, 2005.

Conclusions

43. From January 5, 2005, through January 10, 2005, Respondent Susan Biery Sergojan was acting for and employed by respondent Wolf Haven, and Respondent Sergojan is liable under the Act for her acts, omissions and failures within the scope of her employment or office, pursuant to section 2139 of the Animal Welfare Act. 7 U.S.C. § 2139.
44. Beginning January 5, 2005, and persisting into January 10, 2005, Respondent Sergojan failed to have an attending veterinarian provide adequate veterinary care to a wolf (Akela), by canceling the attending veterinarian's scheduled appointments to euthanize Akela, and requiring the animal to remain outdoors in extremely cold conditions, in willful violation of section 2.40(a) of the Regulations. 9 C.F.R. § 2.40(a).
45. Beginning January 5, 2005, and persisting into January 10, 2005, Respondent Sergojan failed to ensure that respondent Wolf Haven's attending veterinarian had adequate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, and specifically, refused to adhere to the veterinary medical recommendations of respondent Wolf Haven's attending veterinarian (that Akela was dying, that further measures to prolong Akela's life would be futile and unduly stressful for Akela, and that Akela should be euthanized), and instead repeatedly undermined the attending veterinarian's authority by countermanding his veterinary medical recommendations and his decisions regarding animal care, made in conjunction with respondent Wolf Haven's animal curator, in willful violation of section 2.40(a)(2) of the Regulations. 9 C.F.R. § 2.40(a)(2).
46. Beginning January 5, 2005, and persisting into January 10, 2005, Respondent Sergojan failed to establish and maintain adequate programs of veterinary care that included the availability of appropriate services to comply with the Regulations, and specifically, failed to establish a program whereby euthanasia would be available for suffering animals, specifically Akela, in willful violation of section 2.40(b)(1) of the Regulations. 9 C.F.R. § 2.40(b)(1).
47. Beginning January 5, 2005, and persisting into January 10, 2005, Respondent Sergojan failed to handle an adult wolf as carefully and expeditiously as possible in a manner that does not cause unnecessary

discomfort, and, specifically, acted to impede the timely euthanasia of Akela, and which resulted in Akela's remaining outdoors in extremely cold conditions, in willful violation of section 2.131(b)(1) of the Regulations. 9 C.F.R. § 2.131(b)(1).

48. Beginning January 5, 2005, and persisting into January 10, 2005, Respondent Sergojan failed to take measures to alleviate the impact of climatic conditions that threaten an animal's well-being, and specifically refused to allow a dying adult wolf housed outdoors in extremely cold conditions to be euthanized, as recommended by respondent Wolf Haven's attending veterinarian, willful violation of section 2.131(e) of the Regulations. 9 C.F.R. § 2.131(e).

Order

49. The following **cease and desist** provisions of this Order (paragraph 50) shall be effective on the day after this Decision becomes final. [*See* paragraph 54.]

50. Respondent Susan Biery Sergojan, and her agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder.

51. Respondent Susan Biery Sergojan is assessed a civil penalties totaling **$10,000**, which she shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," within 90 days after this Decision becomes final. [*See* paragraph 54.]

52. Respondent Sergojan shall reference **AWA Docket No. 07-0119** on her certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties **shall be sent by a commercial delivery service, such as FedEx or UPS**, to, and received by, Colleen A. Carroll, Esq., at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Colleen A. Carroll, Esq.

South Building, Room 2343, Stop 1417
1400 Independence Avenue, SW
Washington, DC 20250-1417.

53. No Animal Welfare Act license shall be issued to Respondent Susan Biery Sergojan until she has met all requirements of the Animal Welfare Act, the Regulations, and the Standards; and until she has fully met her obligation to pay civil penalties imposed under the Animal Welfare Act.

Finality

54. This Decision shall be final and effective thirty five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix B to this Decision). Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

In re:	)	**AWA Docket No. 07-0119**
	)	
SUSAN BIERY SERGOJAN,	)	
an individual,	)	
	)	
Respondent	)	

The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Complainant"), is represented by Colleen A. Carroll, Esq. Susan Biery Sergojan, Respondent ("Respondent Sergojan" or "Respondent") is represented by Steven R. Meeks, Esq.

The hearing was held April 15-18, 2008, in Olympia, Washington. The following exhibits were admitted into evidence (or rejected, as indicated).

APHIS's Exhibits:
Admitted: CX 1 through CX 5, CX 7 (Tr. 343) through CX 14 [note, CX 10 is a videotape], CX 15 (Tr.110), CX 15A & CX 15B (Tr. 359), CX 16, CX 20 through 25, CX 29, CX 34 through CX 37 (Tr. 348-49), only portions of CX 38, CX 40, CX 42 through CX 43 (Tr. 348), and RWHX2.
Rejected: CX 19 was rejected; portions of CX 38 were rejected; CX 44 was rejected.

Respondent Sergojan's Exhibits:
None offered; none admitted or rejected.

Transcript:

Volumes	2008	Pages	rec'd by Hearing Clerk
I	April 15	1 - 435	May 13, 2008
II	April 16	436 - 800	May 13, 2008
III	April 17	801 - 1182	May 13, 2008
IV	April 18	1183 - 1586	May 13, 2008

APPENDIX B

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY 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

PINE LAKE ENTERPRISES, INC.
AWA Docket No. D-10-0014.
Decision and Order.
Filed April 8, 2010.

AWA.

Rastgoufard, for the Administrator, APHIS.
Zenas Baer, Hawley, MN, for Petitioner.
Initial decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Pine Lake Enterprises, Inc., initiated the instant proceeding on October 16, 2009, by filing a "Demand for Fitness Hearing" regarding the September 28, 2009, denial of Pine Lake Enterprises, Inc.'s Animal Welfare Act license application by Dr. Elizabeth Goldentyer, Director, Eastern Region, United States Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care [hereinafter the Director].

On November 6, 2009, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Respondent's Response to Request for Hearing" stating summary judgment would be the appropriate means of resolving the instant proceeding.

On December 17, 2009, Administrative Law Judge Jill S. Clifton [hereinafter ALJ Clifton] conducted a teleconference with the parties and scheduled an oral hearing to commence on March 31, 2010, in Fargo, North Dakota. ALJ Clifton also directed that any motion for summary judgment by the Administrator should be filed on or before January 11, 2010, and that Pine Lake Enterprises, Inc., should file a response to the motion for summary judgment by February 1, 2010. (ALJ Clifton's Dec. 18, 2009, Hearing Notice and Deadlines.) On January 11, 2010, and January 15, 2010, respectively, the Administrator filed "APHIS's Motion for Summary Judgment" and "Notice of Supplement to APHIS's Motion for Summary Judgment" [hereinafter Motion for Summary Judgment]. On February 1, 2010, Pine Lake Enterprises, Inc., filed "Pine Lake Enterprises, Inc.'s Memorandum in Response to APHIS's Motion for Summary Judgment."

On February 2, 2010, Acting Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] reassigned the instant proceeding to himself. On February 4, 2010, the Chief ALJ issued a Decision and Order in which he found no issue of material fact in dispute, granted the Administrator's Motion for Summary Judgment, and affirmed the Director's denial of Pine Lake Enterprises, Inc.'s application for an Animal Welfare Act license.

On March 4, 2010, Pine Lake Enterprises, Inc., appealed the Chief ALJ's Decision and Order to the Judicial Officer. On March 24, 2010, the Administrator filed "APHIS's Opposition to Petitioner's Appeal Petition." On March 29, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the Chief ALJ's Decision and Order.

Discussion

The Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], provides that dealers and exhibitors must obtain an Animal Welfare Act license from the Secretary of Agriculture, as follows:

> **§ 2134. Valid license for dealers and exhibitors required**
>
> No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

7 U.S.C. § 2134. The Secretary of Agriculture issues Animal Welfare Act licenses to dealers and exhibitors upon application therefor in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133). The Secretary of Agriculture's power to require and to issue licenses under the Animal Welfare Act includes the power to deny applications for Animal Welfare Act licenses.[1] The regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations] set forth the bases for denial of Animal Welfare Act license applications, including:

> **§ 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

[1] *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 81 (2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw,* 50 Agric. Dec. 499, 507 (1991).

> 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.
>
> . . . .
>
> (d) No license will be issued under circumstances that the Administrator determines would circumvent any order suspending, revoking, terminating, or denying a license under the Act.

9 C.F.R. § 2.11(a)(6), (d).

The Director concluded: (1) the September 8, 2009, application for an Animal Welfare Act license submitted by Allan Bauck on behalf of Pine Lake Enterprises, Inc., was an attempt to circumvent the impending termination of Kathy Jo Bauck's Animal Welfare Act license and 2-year disqualification of Kathy Jo Bauck from becoming licensed under the Animal Welfare Act (9 C.F.R. § 2.11(d));[2] and (2) Pine Lake Enterprises, Inc., was unfit to be licensed under the Animal Welfare Act and issuance of an Animal Welfare Act license to Pine Lake Enterprises, Inc., would be contrary to the purposes of the Animal Welfare Act (9 C.F.R. § 2.11(a)(6)). The Director based her conclusions on, among other things, the timing of Pine Lake Enterprises, Inc.'s Animal Welfare Act license application; Pine Lake Enterprises, Inc.'s relationship to Kathy Jo Bauck and entities under which Kathy Jo Bauck has done business; the information contained in Pine Lake Enterprises, Inc.'s Animal Welfare Act license application; the ownership interests at the address set forth in Pine Lake Enterprises, Inc.'s Animal Welfare Act license application, which is the same address as that of Kathy Jo Bauck's business; and Pine Lake Enterprises, Inc.'s inability to

[2]On December 2, 2009, I terminated Kathy Jo Bauck's Animal Welfare Act license and disqualified Kathy Jo Bauck for a period of 2 years from becoming licensed under the Animal Welfare Act. *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010). I stayed the December 2, 2009, order pending the outcome of proceedings for judicial review. *In re Kathy Jo Bauck* (Stay Order), 69 Agric. Dec. 528 (2010).

transact business in the State of Minnesota. (SJM Ex. 1B.[3]) Since the institution of the instant proceeding, additional reasons upon which denial of Pine Lake Enterprises, Inc.'s Animal Welfare Act license application might be based have come to light and are addressed in the Administrator's Motion for Summary Judgment.

The exhibits submitted by the Administrator in support of the Motion for Summary Judgment document the relationship between Pine Lake Enterprises, Inc., and Pick of the Litter, Inc., Puppies on Wheels, Inc., and Puppy's on Wheels, Inc., all of which are entities under which Kathy Jo Bauck has done business. Pine Lake Enterprises, Inc., is located at the same address as Pick of the Litter, Inc., Puppies on Wheels, Inc., and Puppy's on Wheels, Inc. Although Animal Welfare Act license number 41-B-0159 was issued to Kathy Jo Bauck, filings with the State of Minnesota Secretary of State from 1994 indicate that both Kathy Jo Bauck and her husband, Allan Bauck, intended to conduct or had conducted business under the assumed name of Pick of the Litter, Inc. (SJM Ex. 2). Allan Bauck and Kathy Jo Bauck incorporated Pick of the Litter, Inc., on March 4, 2003, with Allan Bauck and Kathy Jo Bauck both as directors (SJM Ex. 3-SJM Ex. 4). Pick of the Litter, Inc., amended its articles of incorporation to change its name to Puppies on Wheels, Inc., on August 22, 2008, and 5 days later filed an additional amendment to change the name to Puppy's on Wheels, Inc. (SJM Ex. 5-SJM Ex. 6). On October 9, 2009, 1 month after Allan Bauck submitted the Animal Welfare Act license application on behalf of Pine Lake Enterprises, Inc.,[4] a further amendment to the articles of incorporation was filed with the State of Minnesota Secretary of State changing the name of Puppy's on Wheels, Inc., to Pine Lake Enterprises, Inc. (SJM Ex. 1A, SJM Ex. 7).

Even were Pine Lake Enterprises, Inc., not a successor entity to entities under which Kathy Jo Bauck has done business, the record also

[3]References to the exhibits attached to the Administrator's Motion for Summary Judgment are cited as "SJM Ex. _."

[4]This delay provided the basis on which the Director concluded Pine Lake Enterprises, Inc., "does not appear to be authorized to transact business in Minnesota." (SJM Ex. 1B at 2.)

reflects that Allan Bauck may have sold dogs for resale as pets or for breeding purposes without first having obtained the required Animal Welfare Act license, in violation 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) (SJM Ex. 8). Allan Bauck could take the position that the dog sales were made under Kathy Jo Bauck's Animal Welfare Act license; however, such a position would be an implicit acknowledgment that Allan Bauck was operating as an agent or employee of Kathy Jo Bauck.

Pine Lake Enterprises, Inc.'s Appeal Petition

Pine Lake Enterprises, Inc., raises eight issues in its "Petition for Judicial Review of Summary Judgment Decision and Order Dated February 4, 2010" [hereinafter Appeal Petition]. First, Pine Lake Enterprises, Inc., asserts it has been denied its right to an oral hearing in accordance with 9 C.F.R. § 2.11(b) (Appeal Pet. at 1, 6).

The Regulations do not provide a *right* to an oral hearing, as Pine Lake Enterprises, Inc., asserts; instead, the Regulations provide that an applicant, whose license application has been denied, may *request* a hearing, as follows:

> **§ 2.11 Denial of initial application.**
>
> . . . .
>
> (b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied. The license denial shall remain in effect until the final legal decision has been rendered. Should the license denial be upheld, the applicant may again apply for a license 1 year from the date of the final order denying the application, unless the order provides otherwise.

9 C.F.R. § 2.11(b). Therefore, I reject Pine Lake Enterprises, Inc.'s assertion that it has been denied a *right* to an oral hearing in accordance with 9 C.F.R. § 2.11(b). Moreover, I have repeatedly held motions for summary judgment appropriate in cases involving termination and

denial of Animal Welfare Act licenses.[5] Oral hearings are unnecessary and futile when, as in the instant proceeding, there is no factual dispute of substance.[6]

Second, Pine Lake Enterprises, Inc., contends the Chief ALJ erroneously characterized Kathy Jo Bauck's conviction, in *State of Minnesota v. Bauck*, 56-CR-08-1131, of practicing veterinary medicine without a veterinary license as a conviction for violating a state law pertaining to animal cruelty (Appeal Pet. at 3).

Pine Lake Enterprises, Inc., does not cite to the portion of the Chief ALJ's Decision and Order in which the Chief ALJ characterizes Kathy Jo Bauck's conviction in *State of Minnesota v. Bauck*, 56-CR-08-1131, as a conviction for violating a state law pertaining to animal cruelty, and I cannot locate any such characterization by the Chief ALJ. Therefore, I find Pine Lake Enterprises, Inc.'s contention without merit.

Third, Pine Lake Enterprises, Inc., asserts it is not a successor entity of Puppy's on Wheels, Inc., Puppies on Wheels, Inc., and Pick of the Litter, Inc. (Appeal Pet. at 3-5).

Records certified by the State of Minnesota Secretary of State establish Pine Lake Enterprises, Inc., is a successor entity of Puppies on Wheels, Inc., Puppy's on Wheels, Inc., and Pick of the Litter, Inc. (SJM Ex. 2, SJM Ex. 6-SJM Ex. 7). Filings with the State of Minnesota Secretary of State from 1994 indicate that both Kathy Jo Bauck and Allan Bauck intended to conduct or had conducted business under the assumed name of Pick of the Litter, Inc. (SJM Ex. 2). Allan Bauck and Kathy Jo Bauck incorporated Pick of the Litter, Inc., on March 4, 2003, with Allan Bauck and Kathy Jo Bauck both as directors (SJM Ex. 3-SJM Ex. 4). Pick of the Litter, Inc., amended its articles of incorporation to change its name to Puppies on Wheels, Inc., on August 22, 2008, and 5 days later filed an additional amendment to change the name to Puppy's on Wheels, Inc. (SJM Ex. 5-SJM Ex. 6). On October 9, 2009,

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[5]*See In re Animals of Montana, Inc.*, 68 Agric. Dec. 92 (2009); *In re Amarillo Wildlife Refuge, Inc.*,68 Agric. Dec. 77 (2009); In re Loreon Vigne, 67 Agric. Dec. 1060 (2008); *In re Mark Levinson*, 65 Agric. Dec. 1026, 1028 (2006).

[6]*See In re Animals of Montana,* 68 Agric. Dec. 92, 103-04 (2009) citing *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F. 2d 601, 607 (D.C. Cir. 1987).

a further amendment to the articles of incorporation was filed with the State of Minnesota Secretary of State changing the name of Puppy's on Wheels, Inc., to Pine Lake Enterprises, Inc. (SJM Ex. 1A, SJM Ex. 7). Therefore, I find no genuine issue of fact regarding Pine Lake Enterprises, Inc.'s relationship to Puppy's on Wheels, Inc., Puppies on Wheels, Inc., and Pick of the Litter, Inc., and I conclude the Chief ALJ's finding that Pine Lake Enterprises, Inc., is a successor entity of Puppy's on Wheels, Inc., Puppies on Wheels, Inc., and Pick of the Litter, Inc., is not error.

Fourth, Pine Lake Enterprises, Inc., asserts Kathy Jo Bauck should not have been convicted of animal torture and animal cruelty in *State of Minnesota v. Bauck*, 56-CR-08-2271 (Appeal Pet. at 3-4, 7).

Pine Lake Enterprises, Inc., cannot relitigate Kathy Jo Bauck's past criminal convictions in this Animal Welfare Act license application proceeding.[7] If Pine Lake Enterprises, Inc., wishes to contest Kathy Jo Bauck's conviction in *State of Minnesota v. Bauck*, 56-CR-08-2271, Pine Lake Enterprises, Inc., must turn to the courts of the State of Minnesota.

Fifth, Pine Lake Enterprises, Inc., asserts, while Kathy Jo Bauck was convicted of four counts of animal cruelty and animal torture in *State of Minnesota v. Bauck*, 56-CR-08-2271, three of these four counts were vacated (Appeal Pet. at 4).

I agree with Pine Lake Enterprises, Inc.'s assertion; however, I find no error on the part of the Chief ALJ, who states three of the four counts in *State of Minnesota v. Bauck*, 56-CR-08-2271, were vacated, as follows:

> On or about May 1, 2009, [Kathy Jo Bauck] was sentenced in [*State of Minnesota v. Bauck*,] 56-CR-08-2271[,] to be confined in the county jail for a period of 90 days (with 70 days suspended for a period of one year with specified conditions), to pay a fine

[7] *See In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 862 (2009) (rejecting the respondent's attempt to relitigate a prior criminal conviction in an Animal Welfare Act license termination and disqualification proceeding), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 92, 103-04 (2009) (rejecting Amarillo Wildlife's attempt to relitigate a prior criminal conviction in an Animal Welfare Act license termination proceeding).

> of $1,000 (of which $500 was suspended), to be placed on formal supervised probation, to complete 80 hours of community service, and to allow inspections of her property as long as she was continuing to work with animals. On the same date, three of the four counts were vacated, leaving only Count 5 which involved torture of a Mastiff between the dates of May 14 and 24, 2008.

Chief ALJ's Decision and Order at 6 ¶ 2.

Sixth, Pine Lake Enterprises, Inc., contends there is no evidentiary support for the Chief ALJ's finding that Pine Lake Enterprises, Inc., is not authorized to transact business in the State of Minnesota (Appeal Pet. at 5).

I agree with Pine Lake Enterprises, Inc.'s contention that there is no evidentiary support for a finding that Pine Lake Enterprises, Inc., is not currently authorized to transact business in the State of Minnesota. However, I find no error on the part of the Chief ALJ, who states, at the time Pine Lake Enterprises, Inc., applied for an Animal Welfare Act license (September 8, 2009), Pine Lake Enterprises, Inc., was not authorized to transact business in the State of Minnesota (Chief ALJ's Decision and Order at 6 ¶ 3). The Chief ALJ bases this finding on Puppy on Wheels, Inc.'s failure to amend its articles of incorporation to change its name to Pine Lake Enterprises, Inc., until October 9, 2009, 1 month after Allan Bauck applied for an Animal Welfare Act license on behalf of Pine Lake Enterprises, Inc. (Chief ALJ's Decision and Order at 3). (See SJM Ex. 1A, SJM Ex. 7.)

Seventh, Pine Lake Enterprises, Inc., contends the record does not support the Chief ALJ's finding that Allan Bauck worked as an officer, agent, employee, or co-owner of a business operated by Kathy Jo Bauck (Appeal Pet. at 5).

The record establishes that Kathy Jo Bauck has done business as Pick of the Litter Inc., and that Allan Bauck was an incorporator and director of Pick of the Litter, Inc.; Allan Bauck was authorized to conduct business and a responsible official for Pick of the Litter, Inc.; and Allan Bauck was the vice president of Pick of the Litter, Inc. (SJM Ex. 1C, SJM Ex. 1E, SJM Ex. 2-SJM Ex. 3). Therefore, I reject Pine Lake

Enterprises, Inc.'s contention that the Chief ALJ's finding that Allan Bauck worked as an officer, agent, employee, or co-owner of a business operated by Kathy Jo Bauck, is error.

Eighth, Pine Lake Enterprises, Inc., contends Allan Bauck did not sell dogs without an Animal Welfare Act license, as required by the Animal Welfare Act and the Regulations (Appeal Pet. at 5, 7).

As an initial matter, the Chief ALJ did not find that Allan Bauck sold dogs without an Animal Welfare Act license, in violation of the Animal Welfare Act and the Regulations. Instead, the Chief ALJ found that Allan Bauck either sold dogs on behalf of Kathy Jo Bauck or sold dogs, in violation of the Animal Welfare Act, as follows:

> 5. Allan Bauck either sold numerous dogs for resale use as pets or breeding purposes on behalf of Kathy Bauck or engaged in the unlicensed sale of the animals without being properly licensed under the AWA as a dealer.

Chief ALJ's Decision and Order at 6 ¶ 5.

Minnesota Certificates of Veterinary Inspection issued by the Minnesota Board of Animal Health establish that Allan Bauck sold hundreds of dogs to various retail pet stores during the period August 17, 2009, through November 2, 2009, a period during which Allan Bauck did not have an Animal Welfare Act license (SJM Ex. 8, SJM Ex. 10). Therefore, I conclude the Chief ALJ's alternative finding that Allan Bauck sold dogs without being properly licensed under the Animal Welfare Act, is not error.

Findings of Fact

1. Pine Lake Enterprises, Inc., is a Minnesota corporation with a mailing address in New York Mills, Minnesota.

2. On or about September 8, 2009, Allan Bauck, on behalf of Pine Lake Enterprises, Inc., submitted an application for an Animal Welfare Act license to the Animal and Plant Health Inspection Service.

3. Pine Lake Enterprises, Inc., is a successor entity of Pick of the

Litter, Inc., Puppies on Wheels, Inc., and Puppy's on Wheels, Inc., all entities under which Kathy Jo Bauck has done business.

4. Pine Lake Enterprises, Inc., has the same address as Pick of the Litter, Inc., Puppies on Wheels, Inc., and Puppy's on Wheels, Inc.

5. On June 22, 2009, the Administrator instituted a disciplinary proceeding under the Animal Welfare Act and the Regulations against Kathy Jo Bauck (AWA Docket No. D-09-0139), based upon Kathy Jo Bauck: (a) having been found guilty, pursuant to her *Alford* plea, by the Otter Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, of one misdemeanor count of practicing veterinary medicine without a license in *State of Minnesota v. Bauck,* 56-CR-08-1131; and (b) having been found guilty by a jury verdict in the Otter Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, of four misdemeanor counts pertaining to animal cruelty and animal torture in *State of Minnesota v. Bauck*, 56-CR-08-2271. *In re Kathy Jo Bauck,* 68 Agric. Dec. 853, 866 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

6. On or about May 1, 2009, Kathy Jo Bauck was sentenced in *State of Minnesota v. Bauck*, 56-CR-08-2271, to be confined in the county jail for a period of 90 days (with 70 days suspended for a period of 1 year with specified conditions), to pay a fine of $1,000 (of which $500 was suspended), to be placed on formal supervised probation, to complete 80 hours of community service, and to allow inspections of her property as long as she was continuing to work with animals. On May 1, 2009, three of the four counts for which Kathy Jo Bauck was found guilty in *State of Minnesota v. Bauck*, 56-CR-08-2271, were vacated, leaving only Count 5, which involved Kathy Jo Bauck's torture of a Mastiff on or between the dates of May 14, 2008, and May 24, 2008. *In re Kathy Jo Bauck,* 68 Agric. Dec. 853, 866 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

7. On or about September 8, 2009, at the time Pine Lake Enterprises, Inc., submitted its Animal Welfare Act license application to the Animal and Plant Health Inspection Service, Pine Lake Enterprises, Inc., was not authorized to transact business in the State of Minnesota in the name of "Pine Lake Enterprises, Inc."

8. Allan Bauck is the spouse of Kathy Jo Bauck and worked as an officer, agent, employee, or co-owner of a business operated by Kathy Jo Bauck.

9. During the period August 17, 2009, through November 2, 2009, Allan Bauck: (a) sold numerous dogs for resale as pets or for breeding purposes without first having obtained the required Animal Welfare Act license; or (b) sold numerous dogs for resale as pets or for breeding purposes under Kathy Jo Bauck's Animal Welfare Act license as an agent or employee of Kathy Jo Bauck.

10. On September 28, 2009, the Director denied the September 8, 2009, application for an Animal Welfare Act license submitted by Allan Bauck on behalf of Pine Lake Enterprises, Inc.

Conclusions of Law

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

2. Issuance of an Animal Welfare Act license to Pine Lake Enterprises, Inc., a successor entity of entities operated by Kathy Jo Bauck, who has been found unfit to be licensed under the Animal Welfare Act, would be contrary to the purposes of the Animal Welfare Act (9 C.F.R. § 2.11(a)(6)). *See In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

3. Issuance of an Animal Welfare Act license to Pine Lake Enterprises, Inc., would circumvent an order terminating Animal Welfare Act license number 41-B-0159 and disqualifying Kathy Jo Bauck from becoming licensed under the Animal Welfare Act for a period of 2 years (9 C.F.R. § 2.11(d)). *See In re Kathy Jo Bauck*, 68 Agric. Dec. 863, 867 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

4. Denial of an Animal Welfare Act license application submitted by an applicant who has engaged in the unlicensed sale of dogs for resale as pets or breeding purposes, in violation of the Animal Welfare Act and the Regulations, would be appropriate (9 C.F.R. § 2.11(a)(6)).

ORDER

I affirm Dr. Elizabeth Goldentyer's September 28, 2009, denial of Pine Lake Enterprises, Inc.'s application for an Animal Welfare Act license. This Order shall become effective on Pine Lake Enterprises, Inc., immediately upon service of this Order on Pine Lake Enterprises, Inc.

_____

SHARON BEATTY AND TOM BEATTY a/k/a THOMAS BEATTY.
AWA Docket No. D-10-0082.
Decision and Order.
Filed April 9, 2010.

AWA – Unlicensed kennel.

Babak A. Rastgoufard, for the Administrator, APHIS.
Petitioners, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This action was initiated on January 29, 2010 by the Petitioner with the filing of an appeal of the January 12, 2010 denial of an Animal Welfare Act license by Robert Gibbens, DVM, Director of the Eastern Region, United States Department of Agriculture (USDA) Animal and Plant Inspection Service (APHIS) Animal Care[1]. Through counsel, the Respondent filed a Response to the Request for Hearing indicating that Summary Judgment would be appropriate means of resolving the issues. The Motion for Summary Judgment was filed on March 8, 2010 and a copy of the Motion was served on the Petitioners along with a letter from the Hearing Clerk indicating that they would have twenty days in which to file a Response to the Motion. No response was filed within the allotted time and the motion is before me for disposition.

As I find that there is no issue of material fact in dispute, I grant the Administrator's Motion for Summary Judgment and on the record before me will affirm the denial of the Petitioner's application for an

[1]Dr. Gibbens signed the January 12, 2010 letter for Ray Flynn, Assistant Regional Director.

Animal Welfare Act license as set forth in the Order which is a part of this Decision.

Discussion

The Animal Welfare Act (the Act or AWA) provides that the Secretary shall issue licenses to dealers and exhibitors upon application in such form and manner as the Secretary may prescribe (7 U.S.C. §2133).[2] The power to require and to issue licenses under the Act includes the power to terminate a license and to disqualify a person from being licensed. *In re: Animals of Montana*, 68 Agric. Dec. 92 (2009); *In re: Amarillo Wildlife Refuge, Inc.* 68 Agric. Dec. 77 (2009); *In re: Loreon Vigne,* 67 Agric. Dec. 962 (2008); *In re: Mary Bradshaw,* 50 Agric. Dec. 499, 507 (1991).

In this action, the Administrator of the Animal and Plant Health Inspection Service (APHIS) determined that the Petitioner was unfit to be licensed as a dealer under the Act. In reaching its conclusion, APHIS found that the applicants had engaged in deceptive practices with Yakima County, Washington officials and Investigative and Enforcement Services of USDA and that the applicants were operating a dog kennel operation in violation of local law. The exhibits submitted by the Administrator in support of the Motion for Summary Judgment clearly document the fact that the Petitioners were cited on more than one occasion for violation of the Yakima County Code provisions making it unlawful for any person to operate a kennel without obtaining the applicable license.[3] Similarly, the materials attached to the Petitioners' appeal of the denial of an AWA license clearly recount their unsuccessful efforts to obtain the applicable license from Yakima County. The record also amply documents a pattern of false or deceptive statements to the Yakima County Sheriff's Office concerning the number of dogs that they were housing at off site locations after being given specific limits on the number of dogs that they could house.

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[2]". . . Provided that no license shall be issued until the dealer or exhibitor shall have demonstrated that his facility complies . . "

[3]See Infraction Nos. IN-065255-YDP

Section 2.11 of the Regulations (9 C.F.R. §2.11) authorizes denial of a license for a variety of reasons, including:

> (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 issuance of a license would be contrary to the purposes of the Act.

Section 2.12 (9 C.F.R. §2.12) provides:

> A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to §2.11 after a hearing in accordance with the applicable rules of practice.

The Judicial Officer, speaking for the Secretary, has repeatedly held motions for summary judgment appropriate in cases involving the termination and denial of Animal Welfare Act licenses. *In re: Amarillo Wildlife Refuge, Inc., supra; In re Loreon Vigne, supra, In re: Mark Levinson,* 65 Agric. Dec. 1026, 1028 (2006). The Judicial Officer has also held that hearings are unnecessary and futile when there is no factual dispute of substance. *In re: Animals of Montana,* 68 Agric. Dec. 92 (2009), 2009 WL 624354 at *7 citing *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F. 2d 601, 607 (D.C. Cir. 1987).

Accordingly, based upon the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Petitioners are individuals residing in Selah, Washington.

2. The Petitioners were cited on more than one occasion for violation of the Yakima County Code provisions making it unlawful for any person to operate a kennel without obtaining the applicable license.
3. After being directed to shut down their unlicensed kennel operation (having as many as 130 dogs) in early 2009, the Petitioners failed to comply with the directives requiring them to dispose of the dogs within 30 days, but instead on October 15, 2009 merely moved dogs to other locations which Thomas Beatty indicated that he would not disclose to County Officials.
4. Acting on an anonymous tip that the Petitioners were keeping large numbers of dogs at various locations, including Sharon Beatty's mother's home, on October 16, 2009, Yakima County Sheriff's Office found 49 dogs in a kennel building at the Petitioners' property and an additional three adult nursing females and their litters inside the Petitioners' residence. (Infraction No. IN-065255-YDP).
5. On November 17, 2009, again acting on an anonymous tip, the Sheriff's Office inspected property belonging to Thomas Beatty and found 40 small breed dogs in a trailer located on the property. (Infraction No. IN-065256-YDP).
6. Information received by APHIS indicates that the Petitioners sold dogs to a purchaser in Washington State without having a license to do so and have a past history of previously paying a stipulated penalty for the unlicensed sale of dogs.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Issuance of an AWA license to Sharon Beatty and Tom Beatty, individuals whom have been cited by Yakima County, Washington on two occasions for operating a kennel with obtaining the applicable local license would be contrary to the purposes of the Act. 9 C.F.R. §2.11(a)(6).
3. Denial of the AWA license would be appropriate to anyone who had engaged in the unlicensed sale of dogs for resale as pets or

breeding purposes in violation of Federal regulations pertaining to the transportation, ownership, neglect, or welfare of animals. 9 C.F.R. §2.11(a)(6).

Order

1. The denial of the application of Sharon Beatty and Tom Beatty is **AFFIRMED.**
2. Sharon Beatty and Tom Beatty, their agents, and any entities in which either or both of them may hold a substantial interest are **DISQUALIFIED** from being licensed for a period of two (2) years.
3. This Decision and Order shall become 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 will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.

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JAMIE MICHELLE PALAZZO, d/b/a GREAT CAT ADVENTURES; AND JAMES LEE RIGGS.
AWA Docket No. 07-0207.
Decision and Order.
Filed May 10, 2010.

AWA – Cease and desist order – Civil penalty – Exhibitor – License suspension – Failure to make, keep and maintain records – Handling of tigers – Public – General viewing public – Sanction policy.

Colleen A. Carroll, for the Acting Administrator, APHIS.
Respondents, Pro se.
Initial decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On September 28, 2007, Kevin Shea, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding against Jamie Michelle Palazzo, an individual, d/b/a Great Cat Adventures, by filing a Complaint alleging willful violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]. On October 22, 2007, Ms. Palazzo filed an answer denying the material allegations of the Complaint.

On September 23, 2008, the Administrator filed an Amended Complaint adding James Lee Riggs[1] as a named respondent. On October 21, 2008, Ms. Palazzo and Mr. Riggs filed an answer[2] denying the material allegations of the Amended Complaint.

On August 24, 2009, through August 27, 2009, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted an oral hearing in Fort Worth, Texas. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Ms. Palazzo and Mr. Riggs appeared pro se. Twenty-seven witnesses testified (26 witnesses testified for the Administrator and Ms. Palazzo testified for Mr. Riggs and herself).[3] The

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[1]Mr. Riggs has been involved in two other disciplinary proceedings instituted under the Animal Welfare Act. Although not a named respondent in *In re Hedi Berry Riggs* (Consent Decision), 57 Agric. Dec. 1350 (1998), Mr. Riggs was married to Heidi Berry Riggs (now Heidi Berry) at the time the case was brought against Ms. Berry and Bridgeport Nature Center, Inc., and was engaged in Bridgeport Nature Center, Inc.'s touring operation that was the focus of the disciplinary action. Mr. Riggs is a named respondent in a second action, *In re Bridgeport Nature Center, Inc.,* 65 Agric. Dec. 1039 (2006), *remanded,* 67 Agric. Dec. 384 (2008).

[2]Ms. Palazzo and Mr. Riggs title all their filings as "Complaint."

[3]Transcript references are designated as "Tr. __."

Administrator, Ms. Palazzo, and Mr. Riggs introduced exhibits.[4]

On January 6, 2010, after the parties submitted post-hearing briefs, the ALJ filed a Decision and Order in which the ALJ: (1) found Ms. Palazzo and Mr. Riggs violated the Animal Welfare Act and the Regulations; (2) ordered Ms. Palazzo and Mr. Riggs to cease and desist from further violations of the Animal Welfare Act and the Regulations; (3) suspended Animal Welfare Act license number 74-C-0627 issued to Jamie Palazzo, d/b/a Great Cat Adventures, for a period of 3 years; and (4) assessed Mr. Riggs a $10,000 civil penalty.

On February 12, 2010, Ms. Palazzo and Mr. Riggs appealed the ALJ's Decision and Order to the Judicial Officer. On March 12, 2010, the Administrator filed "Complainant's Response to Petition for Appeal." On March 16, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I affirm the ALJ's Decision and Order.

DECISION

Discussion

The Administrator alleged Ms. Palazzo and Mr. Riggs committed 23 willful violations of the Animal Welfare Act and the Regulations during the period August 2006 through August 2008 (Amended Compl. ¶¶ 5-12). During the oral hearing, the Administrator moved, and was granted leave, to withdraw eight of the violations alleged in the Amended Complaint (Tr. 905-09, 940). The ALJ found the Administrator failed to prove 10 of the violations alleged in the Amended Complaint. Ms. Palazzo and Mr. Riggs appealed each of the five violations alleged in the Amended Complaint that the ALJ found Ms. Palazzo and/or Mr. Riggs committed.

Failure to Make, Keep, and Maintain Records That Disclose Required Information, in Violation of

[4]The exhibits introduced by the Administrator are designated as "CX __." The exhibits introduced by Ms. Palazzo and Mr. Riggs are designated as "RX __."

9 C.F.R. § 2.75(b) (Amended Complaint ¶ 9)

The Regulations require exhibitors to make, keep, and maintain records, as follows:

> **§ 2.75 Records: Dealers and exhibitors.**
>
> . . . .
>
> (b)(1) Every . . . exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals . . . purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that . . . exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.
>
> (i) The name and address of the person from whom the animals were purchased or otherwise acquired;
>
> (ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;
>
> (iii) The vehicle license number and State, and driver's license number (or photographic identification card for nondrivers issued by a State) and State of the person, if he or she is not licensed or registered under the Act;
>
> (iv) The name and address of the person to whom an animal was sold or given;
>
> (v) The date of purchase, acquisition, sale, or disposal of the animal(s);
>
> (vi) The species of the animal(s); and
>
> (vii) The number of animals in the shipment.

9 C.F.R. § 2.75(b)(1).

The ALJ concluded that, between October 2006 and November 2007, Ms. Palazzo and Mr. Riggs failed to make, keep, and maintain records or forms that fully and correctly disclose the required information, in

willful violation of 9 C.F.R. § 2.75(b) (ALJ's Decision and Order at 10-11, 20 ¶ 2).

On appeal, Ms. Palazzo and Mr. Riggs do not contend the ALJ's conclusion is error; however, they assert the ALJ found their violations of 9 C.F.R. § 2.75(b) "very minor" (Appeal Pet. at 2). Ms. Palazzo and Mr. Riggs do not cite, and I cannot locate, the portion of the ALJ's Decision and Order in which the ALJ characterizes their violations of 9 C.F.R. § 2.75(b) as "very minor." Therefore, I reject Ms. Palazzo and Mr. Riggs' assertion that the ALJ found their violations of 9 C.F.R. § 2.75(b) "very minor."

Failure to Handle a Tiger as Carefully as Possible, in Violation of 9 C.F.R. § 2.131(b)(1) (Amended Complaint ¶ 10a)

The Regulations require careful handling of animals, as follows:

§ 2.131 Handling of animals.

. . . .

(b)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. § 2.131(b)(1).

On August 9, 2006, at the Boone County Fairgrounds, Belvedere, Illinois, Chad Moore, an Animal and Plant Health Inspection Service [hereinafter APHIS], Animal Care inspector, observed Ms. Palazzo spray an 11-month-old tiger with a "tight stream of water from a garden hose" in an attempt to encourage the tiger to enter an enclosure. Mr. Moore states the tiger "reacted negatively" and, immediately upon being sprayed, the tiger moved into the tiger's enclosure. Mr. Moore completed an inspection report citing Ms. Palazzo with failing to handle

animals in manner so as to avoid trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort, in violation of 9 C.F.R. § 2.131(b)(1) (CX 8). In a letter dated August 29, 2006, to Dr. Robert M. Gibbens, Director, Western Region, Animal Care, APHIS, USDA, Ms. Palazzo appealed the violation report, admitting she sprayed the tiger, but claiming that, while the spraying "may have startled" the tiger, the spraying would not have been traumatic (CX 9). Ms. Palazzo (in her letter to Dr. Gibbens (CX 9)), Nancy Brown, and Joseph Schreibvogel all expressed the opinion that tigers enjoy water and playing in water (Tr. 772-73, 869-70).

The ALJ concluded Ms. Palazzo violated 9 C.F.R. § 2.131(b)(1) as alleged in the Amended Complaint ¶ 10a (ALJ's Decision and Order at 20 ¶ 3).[5] On appeal, Ms. Palazzo and Mr. Riggs assert the Administrator did not prove by a preponderance of the evidence that Ms. Palazzo violated 9 C.F.R. § 2.131(b)(1) on August 9, 2006; hence, the ALJ's conclusion is error (Appeal Pet. at 2).

Ms. Palazzo and Mr. Riggs offer no support for their assertions. Based upon my review of the record, I agree with the ALJ's finding that the Administrator proved by a preponderance of the evidence that Ms. Palazzo willfully violated 9 C.F.R. § 2.131(b)(1) on August 9, 2006; therefore, I reject Ms. Palazzo and Mr. Riggs' unsupported assertion that the ALJ's conclusion is error.

Three Allegations of Failure to Handle Animals so There Was Minimal Risk of Harm to Animals and to the Public, in Violation of 9 C.F.R. § 2.131(c)(1) (Amended Complaint ¶¶ 12c-12e)

In enacting the Animal Welfare Act, Congress found that regulation was necessary to ensure that animals intended for use for exhibition purposes are provided humane care and treatment (7 U.S.C. § 2131). The Regulations provide that, during public exhibition, animals must be

[5]The Administrator alleged both Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(b)(1) on August 9, 2006 (Amended Complaint ¶ 10a); however, the Administrator did not appeal the ALJ's Decision and Order concluding that only Ms. Palazzo violated 9 C.F.R. § 2.131(b)(1) on August 9, 2006.

handled so there is minimal risk of harm to the animals and to the public, as follows:

> **§ 2.131 Handling of animals.**
>
> . . . .
>
> (c)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(c)(1).

Ms. Palazzo and Mr. Riggs deny they handled their tigers in violation of 9 C.F.R. § 2.131(c)(1) claiming their public exhibition of tigers was within the parameters established in *In re Hedi Berry Riggs* (Consent Decision), 57 Agric. Dec. 1350 (1998), in which the exhibition of tigers less than 6 months of age and less than 75 pounds in weight in photographic sessions with members of the public is allowed (RX 50 at 3-8).

Ms. Palazzo and Mr. Riggs' argument overlooks a number of significant factors. First, the language of the Consent Decision in *Riggs* is restrictive, limiting its application to the named respondents, Ms. Berry and Bridgeport Nature Center, Inc.[6] Second, although Ms. Palazzo purchased equipment that may have previously been owned by Ms. Berry and/or Bridgeport Nature Center, Inc., no evidence was introduced that Ms. Palazzo acquired any interest in Bridgeport Nature Center, Inc., and the documents transferring ownership of the equipment to Ms. Palazzo make clear that her purchase of the equipment did not make her a successor in interest of either Ms. Berry or Bridgeport Nature

[6]The cease and desist provision in the Order in *Riggs* includes agents, employees, successors, and assigns (RX 50 at 4-6); however, subsequent provisions of the Order are limited to the named respondents (RX 50 at 1-2).

Center, Inc.[7] Last, even if the Consent Decision represents the Administrator's settlement position in *Riggs*, the Administrator's view is that big cats[8] become juveniles when they reach 12 weeks of age and that, if the public could come into direct contact with juvenile or adult big cats, there is more than minimal risk of harm to the big cats and to the public (CX 20 at 1).[9]

The Supreme Court made clear that enforcement policy can be changed from time to time. *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800 (2009). While an agency may be required to demonstrate good reasons for a new policy, the agency need not demonstrate that "the reasons for the new policy are *better* than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change adequately indicates." *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. at 1811 (emphasis in original). The Secretary of Agriculture has been delegated authority under 7 U.S.C. § 2151 to issue such rules, regulations, and orders as he deems necessary in order to effectuate the purposes of the Animal Welfare Act; the risk of harm to animals and to the public from direct contact between members of the public and

[7]Ms. Palazzo consistently maintained *In re Hedi Berry Riggs* (Consent Decision), 57 Agric. Dec. 1350 (1998), applied to her (CX 19, CX 146, CX 168). Ms. Palazzo also repeatedly referenced the 6-month and 75-pound standard in correspondence with APHIS (CX 24, CX 40A, RX 32). While the equipment Ms. Palazzo purchased may have at one time been owned by either Ms. Berry or Bridgeport Nature Center, Inc., the bills of sale for the equipment were executed by Mr. Riggs as the seller (RX 45-RX 47). After establishing a new § 501(c)(3) entity named Center for Animal Research and Education (CARE), Bridgeport Nature Center, Inc., allowed its Animal Welfare Act license to lapse (Tr. 427-31). Ms. Berry testified that she and CARE requested that Ms. Palazzo and Mr. Riggs remove references to Bridgeport Nature Center, Inc., from Great Cat Adventures promotional material on the internet and that neither she nor Bridgeport Nature Center, Inc., transferred any equipment or other property to Ms. Palazzo (CX 170-CX 171; Tr. 428-30, 435-36).

[8]The term "big cats" includes tigers.

[9]Dr. Gibbens testified that APHIS' policy precluding direct public contact with juvenile and adult big cats was in effect in 2004 (CX 2) and was placed on the USDA website in 2005 (RX 58).

juvenile and adult big cats justifies imposition of appropriate safeguards to protect the animals and the public; and the policy revision reflects the "belief" of APHIS that the revised standard is "better" designed to protect animals and the public.

Ms. Palazzo made repeated requests[10] to Dr. Gibbens either to homologate the *Riggs* standards or to articulate what public contact with big cats is allowed under the Regulations. Ms. Palazzo's requests were initially unanswered; however, the evidence establishes that beginning in April 2006 and continuing throughout 2007, APHIS repeatedly notified Ms. Palazzo and Mr. Riggs that big cats were considered to be juveniles upon reaching 12 weeks of age and that, after reaching 12 weeks of age, big cats were not suitable for direct public contact.[11]

On appeal, Ms. Palazzo and Mr. Riggs assert the ALJ erroneously used the terms "public" and "general viewing public" interchangeably. Ms. Palazzo and Mr. Riggs argue the term "public," as used in 9 C.F.R. § 2.131(c)(1), refers to "participating" members of the public (e.g., those persons who choose to have their pictures taken with a tiger) and the

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[10]Ms. Palazzo testified she wanted "clarification of some of the gray areas in the regulations, and I hoped to maybe come up with a magical age or weight limit to try to make sure everybody is under the same understanding." (Tr. 1039-40.) In her letter of August 29, 2005, to Dr. Gibbens, Ms. Palazzo responded to an undated Dear Applicant letter (CX 2), which defined a juvenile cat as over 3 months of age and asked for a hearing if she was not in compliance (CX 7). In her letter of July 17, 2007, Ms. Palazzo noted she had not received a response to her August 29, 2005, letter (CX 19). Dr. Kay Carter-Corker, Assistant Regional Director, Eastern Region, Animal Care, APHIS, USDA, answered Ms. Palazzo's July 2007 letter by reaffirming the 12-week standard (CX 20). In a letter dated August 16, 2007, Ms. Palazzo proposed using the 6-month standard, but indicated she wanted to follow the Regulations (CX 24). APHIS responded to Ms. Palazzo's August 2007 letter by again informing Ms. Palazzo of the 12-week standard (CX 29). Ms. Palazzo again wrote on October 12, 2007, reaffirming her intention to use a 6-month standard, but again asking for a meeting "so I can operate in compliance." (CX 40A.) Although APHIS answered Ms. Palazzo's October 2007 letter, no meeting was arranged and she was advised that she would continue to be cited without reference to any standard (CX 40B). APHIS also denied Mr. Palazzo's August 2008 request for an exact age and weight standard without referencing the 12-week standard (CX 145).

[11]RX 37.

term "general viewing public," as used in 9 C.F.R. § 2.131(c)(1), refers to members of the public who merely observe an animal exhibit and are not "participating" members of the public. Ms. Palazzo and Mr. Riggs contend the barrier and/or distance requirement only relates to that which must be between animals and the general viewing (non-participating) public. (Appeal Pet. at 5.)

Ms. Palazzo and Mr. Riggs provide no basis for their arguments that the term "public" refers to members of the public who participate in an event with an animal and that the term "general viewing public" refers to those members of the public who do not participate in an event with an animal, but only observe an animal exhibit. Moreover, Ms. Palazzo and Mr. Riggs' construction of 9 C.F.R. § 2.131(c)(1) would render the regulation patently absurd for their construction would require sufficient distance and/or barriers between the animal and the viewing, non-participating members of the public (*general viewing public*) so as to assure the safety of animals and the participating members of the public (*public*). Ms. Palazzo and Mr. Riggs do not state how barriers and/or distance between animals and one group of persons (the general viewing public) will assure the safety of a completely different group of persons (the public). Therefore, I reject Ms. Palazzo and Mr. Riggs' arguments regarding the meaning of the terms "public" and "general viewing public," as those terms are used in 9 C.F.R. § 2.131(c)(1).

Where different terms are used in a regulation, they are generally presumed to have different meanings;[12] however, I agree with the ALJ that the terms "public" and "general viewing public," as used in 9 C.F.R. § 2.131(c)(1), are interchangeable. In 1989, when APHIS proposed the current version of 9 C.F.R. § 2.131(c)(1), APHIS expressly stated that "exhibitors do not have a right to allow contact between the public and dangerous animals." (54 Fed. Reg. 10,835, 10,880 (Mar. 15, 1989).) Thus, the regulatory history establishes that APHIS treats the terms "public" and "general viewing public" synonymously for purposes of

[12]*See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004); *DirecTV Group, Inc. v. United States*, 89 Fed. Cl. 302, 310 (Fed. Cl. 2009). *See also In re Beef Nebraska, Inc.*, 44 Agric. Dec. 2786, 2811 (1985) (stating, where the legislature in the same sentence uses different words, we must presume that they were used to express different ideas), *aff'd*, 807 F.2d 712 (8th Cir. 1986).

interpreting and enforcement of 9 C.F.R. § 2.131(c)(1). Moreover, USDA decisions have consistently treated the terms "public" and "general viewing public," as used in 9 C.F.R. § 2.131(c)(1), as synonymous.[13] Further still, the United States Court of Appeals for the Fourth Circuit has upheld APHIS' interpretation of 9 C.F.R. § 2.131(c)(1) to require distance and/or barriers between juvenile and adult big cats and the public (including members of the public involved in photographic sessions). *Antle v. Johanns,* 264 F. App'x 271, 2008 WL 398864 (4th Cir. Feb. 12, 2008) (per curiam) (CX 151). The Fourth Circuit affirmed the United States District Court for the District of South Carolina's decision which held:

> In light of the text of 9 C.F.R. § 2.131, specifically the requirement in subsection (c)(1) of "sufficient distance and/or barriers between the [photographed] animal and the general viewing public," the Court is not prepared to conclude the Department of Agriculture's interpretation is unreasonable.

Antle v. Johanns, No. 4:06-1008, 2007 WL 5209982 at **8-9 (D.S.C. June 5, 2007).

August 16, 2007, Violation of 9 C.F.R. § 2.131(c)(1)
(Amended Complaint ¶ 12c)

Melissa Kay Radel, an APHIS Animal Care inspector, testified that she and Debra Sime, an APHIS veterinary medical officer, were present at the Steele County Fair, Owatonna, Minnesota, and observed Ms. Palazzo and Mr. Riggs' animal exhibit on August 16, 2007 (Tr. 221-22).

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[13] *In re Sam Mazzola*, 68 Agric. Dec. 822, 844-45 (2009) (holding the terms "public" and "general viewing public, as used in 9 C.F.R. § 2.131(c)(1), are synonymous). *See also In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 78 (2002) (stating the respondents should have known that some distance or barrier between the respondents' animals and the general viewing public is necessary so as to assure the safety of the respondents' animals and the public); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 154 (1996) (stating the respondent failed to handle his tiger so that there was minimal risk of harm to the tiger and to members of the public).

Ms. Radel identified a number of photographs she took during the inspection, including two which show Ms. Palazzo carrying a juvenile tiger through a public area without a barrier between the tiger and members of the public (CX 22 at 21-22). Other photographs show members of the public feeding juvenile tigers (CX 20, CX 22 at 10-18). Ms. Palazzo and Mr. Riggs' records, examined by APHIS inspectors, indicated the youngest tiger to be approximately 8 weeks old and the tigers represented to be 14 weeks old on the health certificates were in fact 24 weeks old (CX 28). The ALJ found the Administrator introduced ample evidence that there was more than minimal risk of harm to the animals and to the public without sufficient distance and/or barriers between the animals and the public so as to assure the safety of the animals and the public (ALJ's Decision and Order at 14-15, 20-21 ¶ 4a).

On appeal, Ms. Palazzo and Mr. Riggs assert the ALJ erroneously relied on only two photographs of their animal exhibition as evidence to support the conclusion that Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) on August 16, 2007 (Appeal Pet. at 3).

As an initial matter, Ms. Palazzo and Mr. Riggs cite no support for their argument that two photographs of their animal exhibition are not sufficient evidence to conclude that they violated 9 C.F.R. § 2.131(c)(1). Moreover, I find the ALJ did not only rely on two photographs as the basis for his conclusion that Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) at the Steele County Fair, Owatonna, Minnesota, on August 16, 2007. Instead, the ALJ's Decision and Order makes clear that he relied on Ms. Radel's testimony; Ms. Radel's affidavit (CX 28); and 11 photographs (CX 22 at 10-18, 21-22). In addition, the ALJ refers to the "inspectors' examination," and I infer from the use of the plural that the ALJ also relied on the testimony, affidavit, and statement of Dr. Debra Sime, who accompanied Ms. Radel during the August 16, 2007, inspection of Ms. Palazzo and Mr. Riggs' animal exhibit (Tr. 269-78; CX 25-CX 26). (ALJ's Decision and Order at 14-15.) Therefore, I reject Ms. Palazzo and Mr. Riggs' assertion that the ALJ only relied on two photographs as the basis for the conclusion that Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) on August 16, 2007.

September 7, 2007, Violation of 9 C.F.R. § 2.131(c)(1) (Amended Complaint ¶ 12d)

Dr. Susan Kingston, an APHIS veterinary medical officer, testified that she and Dr. Ken Kirsten, another APHIS veterinary medical officer, were present at the Shoppes at College Hill, Bloomington, Illinois, on September 7, 2007, for the purpose of inspecting Ms. Palazzo and Mr. Riggs' animal exhibit (Tr. 290-92). During the photograph sessions, the two veterinary medical officers observed, and Dr. Kingston photographed, a number of instances in which juvenile tigers were photographed with members of the public, including small children, having direct contact with the tigers (Tr. 291-93; CX 32). Several photographs show members of the public touching the tigers without the presence of any barrier. The ALJ found the Administrator introduced ample evidence that there was more than minimal risk of harm to the animals and to the public without sufficient distance and/or barriers between the animals and the public, in violation of 9 C.F.R. § 2.131(c)(1) (ALJ's Decision and Order at 15-16, 20-21 ¶ 4b).

On appeal, Ms. Palazzo and Mr. Riggs assert the ALJ erred by relying on the testimony of Dr. Gibbens as evidence to support the conclusion that Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) on September 7, 2007. Ms. Palazzo and Mr. Riggs assert Dr. Gibbens testified that their animal exhibition violated the Regulations "solely due to the age of the [p]atron" and that this new interpretation by Dr. Gibbens has never been shared with Ms. Palazzo, Mr. Riggs, any exhibitor, or any Animal Welfare Act licensee. (Appeal Pet. at 3-4.)

The ALJ does not rely on, or even mention, Dr. Gibbens' testimony in connection with the ALJ's conclusion that Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) while exhibiting animals at the Shoppes at College Hill, Bloomington, Illinois, on September 7, 2007 (ALJ's Decision and Order at 15-16, 19-20 ¶ 9). Therefore, I reject Ms. Palazzo and Mr. Riggs' contention that the ALJ erroneously relied on Dr. Gibbens' testimony.

October 5, 2007, Violation of 9 C.F.R. § 2.131(c)(1)
(Amended Complaint ¶ 12e)

On October 5, 2007, APHIS Animal Care inspectors Cathy Niebruegge and Karl Thornton observed Ms. Palazzo and Mr. Riggs' animal exhibit at the Oklahoma State Fair, Tulsa, Oklahoma. Mr. Thornton photographed Ms. Palazzo exhibiting a juvenile tiger on a platform where members of the public were photographed in close proximity to the tiger (Tr. 373-80; CX 37). The photographs corroborate the information contained on the inspection report prepared by Ms. Niebruegge and Mr. Thornton (CX 37) and reflect Ms. Palazzo holding the tiger with a leash and bottle-feeding the tiger with members of the public being photographed only 3 to 5 feet from the tiger without any barrier between the tiger and the photographed members of the public (CX 39), in violation of 9 C.F.R. § 2.131(c)(1). The ALJ concluded that Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) as alleged in the Amended Complaint ¶ 12e (ALJ's Decision and Order at 16-17, 20-21 ¶ 4c).

On appeal, Ms. Palazzo and Mr. Riggs assert the ALJ's conclusion is error because: (1) they did not permit their tigers to have contact with the public; (2) they had a minimum of 6 feet between the public and their 50-pound tiger that was tethered to Ms. Palazzo; and (3) Ms. Palazzo and Mr. Riggs were not cited for an identical animal exhibition that occurred 2 weeks prior to October 5, 2007.

The ALJ concluded that on October 5, 2007, Ms. Palazzo and Mr. Riggs violated 9 C.F.R. § 2.131(c)(1) based on evidence that Ms. Palazzo and Mr. Riggs photographed members of the public in close proximity to a tiger with no barriers between members of the public and the tiger (ALJ's Decision and Order at 16). The ALJ did not find any contact between the tiger and members of the public, but contact is not a necessary prerequisite to finding a violation of 9 C.F.R. § 2.131(c)(1), as Ms. Palazzo and Mr. Riggs appear to assert.

The ALJ did not find that Ms. Palazzo and Mr. Riggs maintained a minimum of 6 feet between their tiger and members of the public being photographed, as Ms. Palazzo and Mr. Riggs assert. Instead the ALJ found, as follows:

> The photographs corroborate the information contained on the Inspection Report [CX 37] and reflect Ms. Palazzo holding the tiger with a leash and feeding it a bottle with the members of the general public being photographed only 3-5 feet away without any barrier being present between them. CX 39.

ALJ's Decision and Order at 16-17.

I find the record supports the ALJ's finding of 3 to 5 feet between the tiger and members of the public, and I find no evidence supporting Ms. Palazzo and Mr. Riggs' contention that they maintained a minimum of 6 feet between the tiger and members of the public.

Ms. Palazzo and Mr. Riggs cite no evidence, and I can find no evidence, to support their assertion that they were inspected 2 weeks prior to October 5, 2007, and were not cited for a violation of 9 C.F.R. § 2.131(c)(1), even though they exhibited tigers in the same manner as they exhibited tigers on October 5, 2007. Moreover, even if I were to find that such an inspection occurred, I would find that inspection and the results of that inspection irrelevant.

The Sanction

The Administrator requested revocation of Ms. Palazzo's Animal Welfare Act license, the issuance of a cease and desist order, and assessment of a $35,750 civil penalty against Mr. Riggs (Amended Compl. at 7; Complainant's Post-Hearing Brief at 32-37). The ALJ found the remedial purposes of the Animal Welfare Act served by issuance of an order that Ms. Palazzo and Mr. Riggs cease and desist violations of the Animal Welfare Act and the Regulations, a 3-year suspension of Ms. Palazzo's Animal Welfare Act license, and assessment of a $10,000 civil penalty against Mr. Riggs (ALJ's Decision and Order at 17-18, 21). The Administrator did not appeal the sanction imposed by the ALJ.

On appeal, Ms. Palazzo and Mr. Riggs contend the ALJ's statements that Ms. Palazzo rejected the Secretary of Agriculture's interpretation of the handling regulations and that Ms. Palazzo and Mr. Riggs repeatedly

fulfilled their pledge not to comply with the handling regulations, which statements the ALJ made in connection with his discussion of sanction, are error (Appeal Pet. at 2-3).

Ms. Palazzo and Mr. Riggs' assignment of error is misplaced. The statements Ms. Palazzo and Mr. Riggs attribute to the ALJ are arguments advanced by the Administrator in support of the Administrator's request that the ALJ revoke Ms. Palazzo's Animal Welfare Act license, which the ALJ quotes as follows:

> In seeking revocation of Ms. Palazzo's license, the Complainant argues that "Palazzo has rejected the Secretary's interpretation of the handling Regulations" and "respondents have repeatedly fulfilled their pledge not to comply with the regulations." Complainant's Brief at 33.

ALJ's Decision and Order at 17.

The ALJ's quotation of the Administrator's arguments is not error; therefore, I reject Ms. Palazzo and Mr. Riggs' contention that the ALJ's statements are error.

The remainder of Ms. Palazzo and Mr. Riggs' appeal of the sanction imposed by the ALJ is focused on the ALJ's assessment of a civil penalty against Mr. Riggs. Ms. Palazzo and Mr. Riggs assert the ALJ assessment of a $10,000 civil penalty against Mr. Riggs, is error because: (1) Mr. Riggs does not make any of the decisions regarding the business and has no control over the daily operations of the business; (2) assessment of a civil penalty against Mr. Riggs is directed personally at Mr. Riggs; (3) assessment of a civil penalty against Mr. Riggs is severe and unfair; and (4) assessment of a civil penalty against Mr. Riggs is not consistent with the civil penalties assessed against others who have violated the Animal Welfare Act and the Regulations (Appeal Pet. at 5-6).

Ms. Palazzo and Mr. Riggs' assertion that Mr. Riggs does not make any of the decisions regarding the business and has no control over the daily operations of the business appears to be an argument that Mr. Riggs is not an "exhibitor," as that term is defined under the Animal Welfare Act, and, thus, may not be assessed a civil penalty. The Animal

Welfare Act authorizes the Secretary of Agriculture to assess a civil penalty against any exhibitor who violates the Animal Welfare Act or the Regulations, as follows:

> **§ 2149. Violations by licensees**
> . . . .
> **(b) Civil penalties for violation of any section, etc; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**
>
> Any . . . exhibitor . . . that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $2,500[14] for each such violation[.]

7 U.S.C. § 2149(b). The Animal Welfare Act defines the term "exhibitor," as follows:

> **§ 2132. Definitions**
>
> When used in this chapter—
> . . . .
> (h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not;

[14]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii)).

> but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

7 U.S.C. § 2132(h).

Based on the record to which he cites extensively, the ALJ found that Mr. Riggs participated in the operation of Great Cat Adventures on a daily basis and operated as an exhibitor during the period material to the instant proceeding (ALJ's Decision and Order at 6-8, 18). Ms. Palazzo and Mr. Riggs provide no support for their assertions that Mr. Riggs does not make any of the decisions regarding the business and has no control over the daily operations of the business. Therefore, I affirm the ALJ's finding that Mr. Riggs, along with Ms. Palazzo, was an exhibitor; hence, the Secretary of Agriculture is authorized to assess Mr. Riggs a civil penalty for violations of the Animal Welfare Act and the Regulations.[15]

As for Ms. Palazzo and Mr. Riggs' assertion that the ALJ's assessment of a civil penalty was "directed personally" against Mr. Riggs, I agree; however, I find no error. The Animal Welfare Act authorizes the Secretary of Agriculture to assess a civil penalty against "any" exhibitor who violates the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)). The ALJ was not required by the Animal Welfare Act, the Regulations, or the rules of practice applicable to the instant

[15]Multiple individuals may be liable for violations of the Animal Welfare Act if they all operate a business, even if only one of those individuals holds an Animal Welfare Act license. *See In re Micheal McCall*, 52 Agric. Dec. 986, 998 (1993) (finding spouses operating a kennel together jointly and severally liable for violations of the Animal Welfare Act, even though the Animal Welfare Act license is held by only one spouse); *In re Gus White III*, 49 Agric. Dec. 123, 154 (1990) (stating it is of no particular consequence that the Animal Welfare Act license was held in the name of Gus White III, alone; the business was operated by both respondents who are both exhibitors jointly and severally liable for the Animal Welfare Act violations); *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988) (holding three respondents were exhibitors and responsible under the Animal Welfare Act because each exercised control and authority over the treatment and handling of the animal in question when it was exhibited).

proceeding[16] to assess both Ms. Palazzo and Mr. Riggs a civil penalty for their violations of the Animal Welfare Act and the Regulations.

Ms. Palazzo and Mr. Riggs provide no support for their assertion that the $10,000 civil penalty assessed against Mr. Riggs is severe and unfair. A sanction by an administrative agency must be warranted in law and justified in fact.[17] The Secretary of Agriculture has authority to assess an exhibitor a civil penalty of $3,750 for each violation of the Animal Welfare Act or the Regulations.[18] Mr. Riggs committed numerous violations of 9 C.F.R. § 2.75(b) and three violations of 9 C.F.R. § 2.131(c)(1). Therefore, the ALJ's assessment of a $10,000 civil penalty against Mr. Riggs is warranted in law. Moreover, I find the ALJ's assessment of a $10,000 civil penalty against Mr. Riggs justified in fact.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.[19]

Ms. Palazzo and Mr. Riggs operate a medium-sized business, the gravity of Mr. Riggs' violations of the Regulations is great, and Mr. Riggs has not demonstrated good faith.[20]

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[16]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

[17]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam).

[18]7 U.S.C. § 2149(b); 28 U.S.C. § 2461 (note); 7 C.F.R. § 3.91(b)(2)(ii).

[19]7 U.S.C. § 2149(b).

[20]Specifically, the ALJ found that Mr. Riggs has a documented history of both flaunting the Secretary of Agriculture's Regulations and attempting to shield himself from responsibility by corporate artifice, manipulation of others, and by working under

(continued...)

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

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The Administrator recommended assessment of a $35,750 civil penalty against Mr. Riggs, but did not appeal the ALJ's Decision and Order assessing Mr. Riggs a $10,000 civil penalty.

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude the ALJ's assessment of a $10,000 civil penalty against Mr. Riggs is not severe or unfair, as Ms. Palazzo and Mr. Riggs assert.

Finally, Ms. Palazzo and Mr. Riggs cite no support for their assertion that the assessment of $10,000 civil penalty against Mr. Riggs is harsher than the civil penalties assessed against others who have violated the Animal Welfare Act and the Regulations. A review of recent Animal Welfare Act disciplinary proceedings in which the Secretary of

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[20](...continued)
the Animal Welfare Act licenses of others (ALJ's Decision and Order at 17).

Agriculture has assessed civil penalties for violations of the Animal Welfare Act and the Regulations belies Ms. Palazzo and Mr. Riggs' assertion.[21] Moreover, even if I were to find the civil penalty assessed against Mr. Riggs was more severe than civil penalties assessed against violators in other similar cases (which I do not so find), the $10,000 civil penalty assessed against Mr. Riggs would not be rendered invalid. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases. The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the Animal Welfare Act, and the Animal Welfare Act has no requirement that there be uniformity in sanctions among violators.[22]

Findings of Fact

1. Jamie Michelle Palazzo is an individual residing in Haltom City, Texas.

2. Jamie Palazzo, d/b/a Great Cat Adventures, is licensed under the Animal Welfare Act as a Class C Exhibitor, holding Animal Welfare Act license number 74-C-0627.

3. James Lee Riggs is an individual residing in Haltom City, Texas.

4. At all times material to the instant proceeding, Mr. Riggs operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations.

5. Ms. Palazzo and Mr. Riggs operate a moderate-sized business,

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[21] *See, e.g., In re Sam Mazzola*, 68 Agric. Dec. 822 (2009) (assessing the respondent a $21,000 civil penalty); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798 (2009) (assessing the respondent a $10,000 civil penalty); *In re Lorenza Pearson*, 68 Agric. Dec. 685 (2009) (assessing the respondent a $93,975 civil penalty), *appeal docketed*, No. 09-4114 (6th Cir. Sept. 10, 2009); *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007) (assessing the respondent a $13,750 civil penalty), *aff'd sub nom. Ramos v. U.S. Dep't of Agric.*, 332 F. App'x 814 (11th Cir. 2009).

[22] *In re Cheryl Morgan*, 65 Agric. Dec. 849, 874-75 (2006).

exhibiting big cats for profit.[23]

6. Although Ms. Palazzo previously was an employee of Bridgeport Nature Center, Inc., and purchased equipment from Mr. Riggs, which equipment was previously used by Bridgeport Nature Center, Inc., Ms. Palazzo did not purchase any interest in Bridgeport Nature Center, Inc., or in any other way become a "successor in interest" to Bridgeport Nature Center, Inc.

7. APHIS, at least since 2004, has consistently maintained that there is more than minimal risk of harm to big cats and to the public if the public could come into direct contact with juvenile or adult big cats and considered big cats to become juveniles when they reach 12 weeks of age.

8. On August 9, 2006, at the Boone County Fairgrounds, Belvedere, Illinois, Ms. Palazzo used a stream of water from a hose to encourage a tiger to enter its enclosure, causing the tiger behavioral stress.

9. From October 2006 to November 2007, Ms. Palazzo and Mr. Riggs failed to make, keep, and maintain records that fully and correctly disclosed required information. The records on multiple occasions reflected numerous inconsistent entries as to birth dates of the animals with the inference that Ms. Palazzo and Mr. Riggs' intent was that the animals might continue to be exhibited for longer periods of time and also reflected inaccurate information as to the means of acquisition of certain animals.

10. On August 16, 2007, at the Steele County Fair, Owatonna, Minnesota, Ms. Palazzo carried a juvenile tiger through a public area without a barrier between the tiger and members of the public, and Ms. Palazzo and Mr. Riggs allowed members of the public to feed juvenile tigers without sufficient distance and/or barriers between the tigers and the public.

11. On September 7, 2007, at the Shoppes at College Hill, Bloomington, Illinois, Ms. Palazzo and Mr. Riggs allowed juvenile tigers to be photographed with members of the public, including small children, having direct contact with the tigers without distance and/or

[23]Promotional literature indicates Great Cat Adventures has more than 35 big cats and feeds 3,000 pounds of meat per week (CX 156). The 2007 records of Bridgeport Animal Hospital, P.L.L.C., listed 39 animals owned by Great Cat Adventures (CX 106).

barriers between the public and the tigers.

12.On October 5, 2007, at the Oklahoma State Fair, Tulsa, Oklahoma, Ms. Palazzo and Mr. Riggs allowed juvenile tigers to be photographed with members of the public, including small children, without sufficient distance and/or barriers between the tigers and the public.

Conclusions of Law

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

2. Between October 2006 and November 2007, Ms. Palazzo and Mr. Riggs failed to make, keep, and maintain records or forms that fully and correctly disclosed the required information, in willful violation of 9 C.F.R. § 2.75(b).

3. On August 9, 2006, at Boone County Fairgrounds, Belvedere, Illinois, Ms. Palazzo failed to handle a tiger as carefully as possible in a manner that did not cause the tiger behavioral stress, in willful violation of 9 C.F.R. § 2.131(b)(1).

4. Ms. Palazzo and Mr. Riggs failed to handle animals during public exhibition in such a manner as to allow only minimal risk of harm to the animals and to the public with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in willful violation of 9 C.F.R. § 2.131(c)(1) on the following dates and places:

a. August 16, 2007, at the Steele County Fair, Owatonna, Minnesota;

b. September 7, 2007, at the Shoppes at College Hill, Bloomington, Illinois; and

c. October 5, 2007, at the Oklahoma State Fair, Tulsa, Oklahoma.

For the foregoing reasons, the following Order is issued.

ORDER

1. Jamie Michelle Palazzo and James Lee Riggs, their agents, employees, successors and assigns, directly or indirectly, through any

corporate or other device are ordered to cease and desist from further violations of the Animal Welfare Act and the Regulations, including:

a. failing to make, keep, and maintain records or forms that fully and correctly disclose the required information;

b. failing to handle animals as carefully as possible in a manner that does not cause animals behavioral stress; and

c. failing to handle animals during public exhibition in such a manner as to allow only minimal risk of harm to the animals and to the public with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public.

Paragraph 1 of this Order shall be effective immediately upon service of this Decision and Order on Ms. Palazzo and Mr. Riggs.

2. Animal Welfare Act license number 74-C-0627 issued to Jamie Palazzo, d/b/a Great Cat Adventures, as a Class C exhibitor, is suspended for a period of 3 years.

Paragraph 2 of this Order shall be effective 60 days after service of this Decision and Order on Ms. Palazzo.

3. James Lee Riggs is assessed a $10,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
1400 Independence Avenue SW
Room 2343 South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Mr. Riggs. Mr. Riggs shall state on the certified check or money order that payment is in reference to AWA Docket No. 07-0207.

RIGHT TO JUDICIAL REVIEW

Ms. Palazzo and Mr. Riggs have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Ms. Palazzo and Mr. Riggs must seek judicial review within 60 days after entry of the Order in this Decision and Order.[24] The date of entry of the Order in this Decision and Order is May 10, 2010.

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[24] 7 U.S.C. § 2149(c).

ADMINISTRATIVE WAGE GARNISHMENT

COURT DECISION

CURTIS LEE WEST AND DANA NICOLE WILLIAMS WEST v. USDA.
Civil Action No. 08-1897.
May 14, 2010.

[Cite as: 2010 WL 2024750].

AWG – In personam judgment.

United States District Court,
W.D. Louisiana, Monroe Division.

MEMORANDUM RULING

JAMES T. TRIMBLE, JR., District Judge.

Before the court is a motion for in personam judgment filed by plaintiff the United States of America ("Government").[1] The government's motion asserts that it is entitled to entry of judgment against defendants Curtis Lee West and Dana Nicole Williams West ("Defendants") on the basis that defendants defaulted on three separate promissory notes executed in favor of the government, acting through the Farmers Home Administration, United States Department of Agriculture ("FSA").[2] More specifically, the government asserts that it made substantial loans to defendants under a government loan program administered by the FSA as follows:

[1] R. 15.

[2] *Id*.

Loan No.	*Date of Note*	*Principal Sum*	*Interest Rate*
44-05	03/21/03	$55,000.00	3.50% per annum
44-06	11/04/03	$39,000.00	3.00% per annum
44-09	04/29/05	$75,000.00	4.25% per annum
43-11	06/07/06	$52,010.00	3.75% per annum [3]

Copies of the promissory notes at issue, filed in record by the government, show that on April 29, 2005, defendants applied for and were granted a consolidation of the notes previously executed on 3/21/03 and 11/04/03.[4] The resulting consolidation note was made in the amount of $83,922.08 and carried a 3.0% interest rate per annum.[5] As listed above, defendants also executed another promissory note in the amount of $75,000.00 on that date.[6]

The record further reflects that on June 1, 2006 defendants applied for and were granted a rescheduling and deferral of payments as to loan numbers 44-10, 44-05 and 44-06. The promissory note executed on June 1, 2006 to effect the rescheduling was made in the amount of $82,187.31 and bears an interest rate of 3.0% per annum.[7] Defendants were also granted a rescheduling of their prior loan number 44-09 and executed a promissory note in the amount of $63,872.63 bearing an interest rate of 4.25% per annum.[8]

The government's motion asserts that the following amounts are now due and payable under the notes described above by virtue of defendants' default.

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[3] R. 2, 15

[4] This loan is referred to as Loan No. 44-10. R. 2 at "Plaintiff's Exhibit 4-A

[5] *Id*.

[6] R. 2 at "Plaintiff's Exhibit 6 -A

[7] R. 2 at "Plaintiff's Exhibit 5-A."

[8] R. 2 at "Plaintiff's Exhibit 7-A."

Loan No.	*Date of Loan*	*Unpaid Principal*	*Unpaid Interest*	*Daily Accrual*
44-13	06-01-06	$21,358.76	$71.99	1.7555
44-14	06-01-06	$60,850.92	$3,989.08	7.0854
43-11	06-07-06	$3,450.00	$142.14	.3545 [9]

The government asserts that it made written demand for unpaid principal and interest on or about May 23, 2008 and, when defendants made no payment on these overdue accounts, instituted this action.[10] The record reflects that defendants were timely served with notice of this lawsuit on or about March 30, 2009.[11] Defendants have filed no answer to this suit and, for that reason, a preliminary default was entered against them by the clerk of court on April 21, 2009 pursuant to a motion for same by the government.[12] Defendants have similarly failed to answer the government's instant motion.

After review of the record in this case, including supporting documentation of the notes at issue, the court finds no reason why judgment in personam should not be entered against defendants in this matter. Although the promissory notes at issue were secured by duly recorded mortgages on property described "Lot 37 of Woodland Acres East, Unit No. 2, as per plat in official plat book 6," the government seeks in personam judgment because that real property was subject to a prior lien and was sold at Sheriff's sale, leaving the government with no collateral to pursue for repayment of these debts.[13] The court also notes that the government has demonstrated that defendants were provided with sufficient notice of this lawsuit and of the potential judgment

[9] Affidavit of John Robert Fontenot [R. 15-2].

[10] R. 15 at p. 3.

[11] R. 4, 5.

[12] R. 8.

[13] R. 15 at p. 3.

against them as is necessary to satisfy due process considerations.[14]

For the foregoing reasons, the court finds that the government's motion for judgment in personam should be granted.

WILLIAM O. RAWLINGS, et al. v. USDA.
Civil Action No. DKC 09-2112.
Filed June 3, 2010.

[Cite as: 2010 WL 2292508 (D.Md.).

AWG – Limitations not applicable to Federal claims – Joinder, when not applicable – Intervening rights.

Failure of USDA to bring suit within State Statute of limitations did not deprive USDA of cause of action. Borrower failed to show that necessary parties should be joined and their joinder would deprive the Court of jurisdiction.

United States District Court,
D. Maryland.

MEMORANDUM OPINION

DEBORAH K. CHASANOW, District Judge.

Presently pending and ready for resolution in this property case is a motion to dismiss (Paper 5). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, the motion to dismiss will be denied.

I. Background

This case revolves around the purchase of a home and farm in Charles

[14] *U.S. Rubber Co. v. Poage,* 297 So.2d 670 (5th Cir.1962) (court must be satisfied that sufficient notice to satisfy due process considerations has been given before rendering judgment in personam).

County, Maryland. On March 5, 1981 Defendants obtained two loans in the total amount of $161,000 to construct a home and purchase a 65-acre farm. (Paper 1 ¶ 4). One loan was for $35,000 and the other for $126,000. (*Id.*). Both loans were evidenced by the signing of promissory notes and were made payable to the Farmers Home Administration, the predecessor of Rural Development ("RD"), a unit of the United States Department of Agriculture. (*Id.* at ¶ 2). The loans were secured by a mortgage that was recorded on March 5, 1981 in the Charles County Land Records. (*Id.* at ¶ 5; Ex. B).On June 12, 1981, Defendants entered into a Subsidy Repayment Agreement in connection with their $35,000 loan. (*Id.* at ¶ 6). The Agreement, issued by RD, granted Defendants an interest subsidy that lowered their monthly payments (to keep their mortgage affordable). (*Id.* at ¶ 7). Defendants received a subsidy from RD, renewable annually, throughout the life of their loan. (*Id.* at ¶ 8).

Defendants paid the principal and interest due on the loan on or about April 6, 2006. (*Id.* at ¶ 9). They did not finish paying the subsidy repayment amount, however. The outstanding repayment due the United States is $48,921.88. (*Id.*).

Despite the fact that Defendants continued to owe over $45,000 to the federal government, the United States (mistakenly) issued a Release of Real Estate Mortgage ("Release") for both loans on May 10, 2006. It was properly recorded on July 21, 2006. RD later contacted Defendants in an attempt to reinstate the mortgage, to no avail. (*Id.* at ¶ 11).

On August 11, 2009, the United States filed a complaint in this court, asking that the real estate mortgage dated March 5, 1981 be reinstated and that the Release be nullified. On September 4, 2009, Defendants filed a motion to dismiss the complaint. (Paper 5). Plaintiff United States responded in opposition. (Paper 6).

II. Motion to Dismiss

Defendants bring a motion to dismiss under both Fed.R.Civ.P. 12(b)(6) and 12(b)(7). Plaintiff opposes the motion to dismiss.

A. Fed.R.Civ.P. 12(b)(6) Motion
1. Standard of Review

The purpose of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule 8(a), *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Nevertheless, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 n. 3, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal citations omitted).

In its determination, the court must consider all well-pled allegations in a complaint as true, *Albright v. Oliver,* 510 U.S. 266, 268, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783 (4th Cir.1999) (citing *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993)). The court need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs,* 882 F.2d 870, 873 (4th Cir.1989), legal conclusions couched as factual allegations, *Iqbal,* 129 S.Ct. at 1950, or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst,* 604 F.2d 844, 847 (4th Cir.1979). *See also Francis v. Giacomelli,* 588 F.3d 186, 193 (4th Cir.2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not 'show[n] ... that the pleader is entitled to relief.' " *Iqbal,* 129 S.Ct. at 1950 (quoting Fed. R .Civ.P. 8(a)(2)). Thus, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

2. Analysis

Defendants contend that the complaint must be dismissed because Plaintiff's claims are time-barred. Defendants claim that under Maryland law, a "civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Md.Code Ann., Cts. & Jud. Proc. § 5-101. Defendants argue that the Release of the real estate mortgage was prepared and issued by Plaintiff and was signed on May 10, 2006. (Paper 5, at 3). The Release was recorded in the Land Records of Charles County, Maryland on June 21, 2006. Plaintiff did not file suit until August 2009-more than three years after recording of the release. Defendants argue that because of this delay, the claims must be dismissed. The United States contests this characterization of the applicability of the statute of limitations and argues that it is not bound by the three year limit in Maryland. (Paper 6, at 5).

A motion to dismiss pursuant to 12(b)(6) does not generally permit an analysis of potential defenses defendants may have to the asserted claims. However, dismissal may be appropriate when a meritorious affirmative defense is clear from the face of the complaint. *Brooks v. City of Winston-Salem, N.C.,* 85 F.3d 178, 181 (4th Cir.1996) (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst,* 250 (4th Cir.1993); 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357, at 352 (1990) ("A complaint showing that the statute of limitations has run on the claim is the most common situation in which the affirmative defense appears on the face of the pleading," rendering dismissal appropriate.)).

Plaintiff's interpretation of the applicable statute of limitations is correct. Although Maryland law imposes a three-year statute of limitations for most civil claims, "[i]t is well settled that the United States is not bound by state statutes of limitation ... in enforcing its rights." *United States v. Summerlin,* 310 U.S. 414, 416, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940). The same rule applies whether the United States brings its suit in its own courts or in a state court. *Id.* (citing *Davis v. Corona Coal Co.,* 265 U.S. 219, 222, 44 S.Ct. 552, 68 L.Ed. 987 (1924)).

B. Fed.R.Civ.P. 12(b)(7) Motion

1. Standard of Review

Rule 12(b)(7) authorizes a motion to dismiss for failure to join a party to the original action under Rule 19, "when there is an absent person without whom complete relief cannot be granted or whose interest in the dispute is such that to proceed in his absence might prejudice him or the parties already before the court." 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1359 (2nd ed.1990). Upon a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(7), the court first must determine whether the absent person is necessary for a just adjudication of the action as set forth in Rule 19(a).[1] *Owens-Illinois, Inc. v. Meade,* 186 F.3d 435, 440 (4th Cir.1999); 7 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice & Procedure § 1611 (3rd ed.2001). If the court finds that the absentee is a necessary party, it then must order the absentee to be joined in the action, provided that joinder will not deprive the court of subject matter jurisdiction by destroying diversity of citizenship. *Owens-Illinois,* 186 F.3d at 440; 7 Federal Practice & Procedure § 1611. If joinder is not feasible, however, "the court must determine whether the proceeding can continue in its absence, or whether it is indispensable pursuant to Rule 19(b) and the action must be dismissed." [2] *Owens-Illinois,* 186 F.3d at

[1] Rule 19(a) provides, in pertinent part:
(a) *Persons to Be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
Fed.R.Civ.P. 19(a)

[2] Rule 19(b) provides:
(b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors
(continued...)

440; *see also Jordan v. Washington Mutual Bank,* 211 F.Supp.2d 670, 675 (D.Md.2002) ("dismissal is appropriate only when necessary parties should be joined and their joinder would deprive the Court of jurisdiction").

The burden is on the movant to show that the person who was not joined is necessary for a just adjudication and "the nature of the unprotected interests of the absent parties." 5A Federal Practice & Procedure § 1359; *see* 7 Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice & Procedure § 1609 (3rd ed.2001). To satisfy this burden, the movant should "present affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence." 5A Federal Practice & Procedure § 1359. In general, courts are "loath" to dismiss cases under Fed.R.Civ.P. 12(b)(7), "so dismissal will be ordered only when the resulting defect cannot be remedied and prejudice or inefficiency will certainly result." *Owens-Illinois,* 186 F.3d at 441. *See also Schlumberger Indus., Inc. v. National Sur. Corp.,* 36 F.3d 1274, 1285-86 (4th Cir.1994) ("Only necessary persons can be indispensable, but not all necessary persons are indispensable").

2. Analysis

Defendants argue that Plaintiff's complaint must be dismissed because it has failed to join two necessary parties: the State of Maryland and Colonial Farm Credit. (Paper 5, at 5). In order to understand Defendants' argument, more background information is necessary.After securing their mortgage, Defendants filed an application with the State of Maryland to sell an agricultural land preservation easement to the State. The Board of the Maryland Agricultural Land Preservation Foundation ("the Foundation") voted to obtain an option to buy a land

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[2](...continued)
to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
Fed.R.Civ.P. 19(b).

preservation easement on the property on May 24, 2005. (Paper 5, at 2). The State required approval of the easement purchase from the current lienholders. On behalf of Colonial Farm Credit, James Bevan signed the Option Contract in June 2005. The Farm Service Agency also approved the option contract, contingent upon the Agency's lien being paid in full. On March 7, 2006, Maryland elected to exercise its option to buy the agricultural land preservation easement and settlement occurred on April 6, 2006. At this time Defendants paid off the real estate mortgages owed to the United States. On May 10, 2006, a Release of Real Estate Mortgage was then issued. In November 2006, Defendants obtained a loan for $100,000 from Colonial Farm Credit secured by a recorded deed of trust.

Defendants now insist that the State of Maryland is a necessary party because the Foundation is the owner of an easement preserving the property. Reinstatement of the mortgage, therefore, would interfere with the Foundation's rights. Furthermore, because of the November 2006 loan to Defendants, Colonial Farm Credit has a recorded interest in the property as well. Defendants argue that it must be joined because any reinstatement of the real estate mortgage would interfere with Colonial Farm Credit's lien priority and impair its security interest. Defendant argues that the court cannot provide complete relief to Plaintiff without these two absent parties being joined.

Defendants' arguments regarding necessary parties are without merit, although the existence of these additional parties may be relevant to final resolution of the case. Indeed, Plaintiff has noted that it is "willing to subordinate its reinstated mortgage to the liens of the State of Maryland and Colonial Farm Credit" if the court ultimately does reinstate the mortgage. The presence or absence of the two parties, however, should not affect the ability of the court to afford complete relief.

III. Conclusion

For the aforementioned reasons, Defendants' motion to dismiss will be denied. A separate Order will follow.D.Md.,2010.

ADMINISTRATIVE WAGE GARNISHMENT

DEPARTMENTAL DECISIONS

YARTIZI TROUCHE PABON.
AWG Docket No. 09-0191.
Decision and Order.
Filed January 7, 2010.

AWG -Default on RD loan.

Mary E. Kimball and John Weaver for RD.
Petitioner, Pro se.
Decision and Order issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Yaritzi Trouche-Pabon, for a hearing in response to efforts of Rural Development, Respondent, to institute a federal administrative wage garnishment against her. On September 21, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. The Hearing date was initially set to be December 1, 2009.

No contact phone number was in the file for Petitioner. On December 1, 2009, I issued an Amended Pre-Hearing Order re-setting the date to December 11, 2009. The Amended Pre-hearing Order was sent to Petitioner via FedEx without a signature requirement for delivery. On December 10, 2009, Ms Troche-Pabon called me using cell[1] phone number 413-531- ##69 and stated that she has engaged an attorney and requested a postponement until January 2010. I denied the postponement request and reminded her that her attorney must enter his/her appearance, but that the hearing would not be postponed due to his/her schedule.

I issued a Second Amended Pre-Hearing Order re-setting the rescheduled hearing to December 22, 2009. The Order was sent to Petitioner via FedEx with a "Direct Signature "requirement. FedEx advised that they attempted three deliveries leaving notes at the front door on each occasion. On December 22, 2009, the hearing was

[1]Complete phone number maintained in USDA Records.

convened and Petitioner was reached via her cell phone (same as above) whereupon she advised that she was having an medical emergency with her children and again stated that she had engaged an attorney and she would have that attorney enter his/her appearance and provide USDA his/her contact information.

I issued a Third Amended Pre-Hearing Order via ordinary mail re-setting the hearing to January 5, 2009 at 11:30 E.S.T. When calls were placed to Petitioner at the appointed time and date and at the same cell number that she had used previously, she did not answer the call and a message was left on the cell phone.

I commenced the hearing with Mary Kimball and John Weaver representing Rural Development. The witnesses were sworn in.

RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on October 19, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner did not submit any documents or exhibits.

Petitioner owes $46,446.55 on the USDA RD loan as of January 5, 2010, and in addition, potential fees of $13,005.04 due to the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On July 26, 2004, Petitioner and Edgar Joel Melendez Santiago obtained a USDA Rural Development home mortgage loan for property located at *# **** St. St. Georgetti Dev, Barceloneta, PR 006##.[2] Petitioner signed a promissory note for $110,500.00 and a Rural Development Loan Guarantee. RX-1@ p. 1, 2.

2. On July 1, 2005, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative and Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $109,374.91. RX-2 @ p.8 of 10.

3. Petitioner and Mr. Santiago are jointly and severally liable for the debt.

4. The total debt attributed to Petitioner at the time of the foreclosure

[2]Complete address maintained in USDA records.

was $124,496.50 which included the additional interest and protective advances. RX-2 @ p. 8 of 10, RX-3.

4. The lender (Citi Mortgage, Inc.) acquired the property at the foreclosure sale on August 13, 2007 for a bid price of $73,666.67. Narrative, RX-2 @ p. 3 of 10.

5. The lender listed the property for sale on October 8, 2007 for $99,900.00 and after the property did not sell, re-listed the property on January 29, 2008 for $94,900.00. Narrative, RX-2 @ p. 4 of 10.

6. The Premier Properties Company of Puerto Rico did a broker's appraisal (BPO) dated September 17, 2007 valued the property as $92,500.00. An Rural Housing Service (RHS) appraisal on April 2, 2008 valued the property as $90,000.00 RX-2 @ 4 of 10.

7. The property was sold to a new purchaser for $92,000 on June 30, 2008. Narrative, RX-3. The net proceeds of the sale after foreclosure costs, protective advances, and accrued interest was $50,432.00. RX-2 @ p. 8 of 10.

8. After set-offs, the amount paid to Lender by RD under the Computer Loss Program is $46,310.04. RX-2 @ p. 9 of 10.

9. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $13,005.04. Ms. Kimball testimony, RX-5.

10. There was no testimony or exhibits from Petitioner regarding employment and RD has no knowledge that Petitioner is not fully employed.

11. Yaritzi Trocuhe-Pabon is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Yartzi Troche-Pabon is indebted to USDA's Rural Development program in the amount of $46,446.55.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $13,005.04.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address and employment circumstances.

5. Following compliance with 31 C.F.R.¶ 285.11(j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶ 288.11(j) have been met, the wages of the Petitioner, Yaritzi Troche-Pabon, shall be subject to administrative wage garnishment up to 15% of Monthly Disposable Income.

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

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JOSE ORTIZ.
AWG Docket No. 10-0010.
Decision and Order.
Filed January 8, 2010.

AWG – Default on RD loan – Guarantee.

Mary E. Kimball and John Weaver, for RD.
Petitioner, Pro se.
Decision and Order issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Jose Ortiz, for a hearing in response to efforts of Rural Development, Respondent, to institute a federal administrative wage garnishment against him. On October 23, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. The Hearing date was set to be January 5, 2010.

I commenced the hearing at the appointed date and time with Mary Kimball and John Weaver representing Rural Development. Petitioner was self represented. The witnesses were sworn in.

RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on November 24, 2009 with the OALJ Hearing Clerk and certified

that it mailed a copy of the same to Petitioner.

Petitioner did not submit any documents or exhibits.

Petitioner owes $27,656.40 on the USDA RD loan as of January 5, 2010, and in addition, potential fees of $7,743.49 due to the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On March 22, 2006, Petitioner Jose Ortiz obtained a USDA Rural Development home mortgage loan for property located at ### FM #17, West Dickson, TX 775##.[1] Petitioner signed a promissory note for $72,600.00 and a Rural Development Loan Guarantee. RX-1@ p. 1, 2.

2. On December 1, 2006, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative and Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $71,795.95. Narrative, RX-2 @ p.2 of 7.

3. The lender (JP Morgan Chase Bank) acquired the property at the foreclosure sale on December 1, 2006 for a bid price of $76,512.54. Narrative. RX-2 @ p. 3 of 7.

4. An eviction process upon Petitioner was not complete until October 4, 2007 which delayed recovery of the property.

5. A Broker's appraisal (BPO) of the property "as is" was obtained on October 29, 2007 in the amount of $38,000.00. RX-2 @ p. 3 of 7.

6. The lender listed the property for sale on November 7, 2007 for $53,000.00. The property was sold to a new owner on December 31, 2007 for $53,000.00. Narrative, RX-2 @ p. 4 of 7. The net proceeds of the sale after foreclosure costs, protective advances, and accrued interest was $42,970.56. RX-2 @ p. 6 of 7.

7. After set-offs, the amount paid to Lender by RD under the Computer Loss Program is $33,257.40. Narrative, RX-2 @ p. 6 of 7.

8. Post-foreclosure recoveries as Treasury Offsets in the amount of $5,601.00 reduced Petitioner debt to $27,656.40. RX-3.

9. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $7,743.49. Ms. Kimball testimony, RX-6.

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[1]Complete address maintained in USDA records.

10. Petitioner is fully employed and has submitted pay records from his employer covering the period from Sept. 25th through December 25th, 2009.

11. The AWG Garnishment calculation program shows a net monthly disposable income[2] as $2032.75 over the last 14 weekly pay periods.

12. Jose Ortiz is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Jose Ortiz is indebted to USDA's Rural Development program in the amount of $27,656.40.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $7,743.49.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address and employment circumstances.

5. Following compliance with 31 C.F.R.¶ 285.11(j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner at the maximum rate of 15% of the monthly disposal income calculated above.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶ 288.11(i) and (j) have been met, the wages of the Petitioner, Jose Ortiz, shall be subject to administrative wage garnishment up to 15% of his Monthly Disposable Income.

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

_____

JAY O. DAVIS.

[2]Monthly Disposable Income is Gross Wages less (Federal taxes, State Taxes, Local/City taxes, FICA, Medicare, Health Insurance)

AWG Docket No. 10-0026.
Decision and Order.
Filed January 14, 2010.

AWG – Default on RD loan.

Mary Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on January 12, 2010, at 1:00 PM Eastern Time. Petitioner, Jay O. Davis, and Respondent's representatives, Gene Elkin and Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development that were received as Exhibits RX-1 through RX-6. Petitioner's Exhibits PX-1 through PX-6 were introduced, identified and authenticated by Mr. Davis and were also duly received. At issue is the nonpayment of a debt owed to USDA, Rural Development on a home mortgage loan on property that Mr. Davis transferred to his former wife by a special warranty deed when they divorced (PX-1 and RX-6, pp.2-4).

The divorce decree that was entered on November 20, 2001 by the District Court for the 109th Judicial District, states the house that was the subject of the mortgage, was awarded to Petitioner's ex-wife, Robin Annette Davis, "as her sole and separate property, and the husband is divested of all right, title, interest, and claim in and to that property" (PX-1, page 21 of the decree). It further ordered and decreed that:

> …. Robin Annette Davis, shall pay …and indemnify and hold the husband harmless from any failure to discharge…. (t)he balance due, including principal, interest, tax, and insurance escrow, on the promissory note executed by Robin Annette Davis and Jay Owen Davis in the original principal sum of $69,450.00, dated July 3, 2000, payable to the United States Department of Agriculture-Rural Housing Service, and secured by deed of trust on the real property awarded in this decree to the wife…

PX-1, page 23 of the decree

Mr. Elkin explained that the Promissory Note that both Mr. Davis and his ex-wife signed on July 3, 2000,(PX-1), obligated both of them to repay whatever outlays USDA, Rural Development was required to make for its losses and expenses arising out of any failure to pay the mortgage loan. Mr. Elkin argued that inasmuch as USDA, Rural Development was neither a party nor participated in any way in the divorce proceeding, Mr. Davis is still subject to the debt under the promissory note he signed that states:

> OBLIGATIONS OF PERSONS UNDER THIS NOTE. If more than one person signs this note, each person is fully and personally obligated to keep all of the promises made in this note, including the promise to pay the full amount owed….The Government may enforce its rights under this note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this note…."

RX-1, page 3

Mr. Elkins further argued that such legal recourse as Mr. Davis may have is limited to seeking indemnification from his ex-wife for the amounts that he may be required to pay USDA, Rural Development. He acknowledged that Robin Davis was discharged from her obligation to pay the debt obligations in chapter 7 bankruptcy on August 31, 2007, but does not believe that the discharge relieved Mr. Davis from his obligation to pay the amounts under the promissory note that remain unpaid.

Mr. Davis testified that he was unrepresented in the divorce action, and sincerely believed all of his obligations under the promissory note had ended. Since the divorce, both Mr. Davis and his ex-wife have remarried. He further testified, and I hereby find, that to make any payments on the debt, or have any part of his wages garnished, at this time, would cause him undue financial hardship.

The evidence received in evidence proved that:

- On July 3, 2000, petitioner signed a promissory note, obligating him to reimburse USDA, Rural Development for any future loss claim, in respect to a mortgage loan in the amount of $55,500.00 for property located at 906 NW. 13th Street, Andrews, Texas 79714 (RX-1).
- The mortgage loan was defaulted upon and the property was sold in a foreclosure sale, on June 5, 2007, for $62,000.00. At that time, the amount due to USDA, Rural Development, and another lender, was $92,219.85. After the sale funds and an insurance refund were applied to the debt, the remaining balance was $29,556.88.
- Presently, the amount owed to USDA, Rural Development is $29,556. 88 and fees of $302.19 (RX-5).__
- Mr. Davis has remarried. He and his new wife lost a home they owned in Orange, Texas, as well as its contents, due to flood damage caused by Hurricane Ike. They are both 53 years old and have had to start their lives all over._____
- Mr. Davis is employed by the Kansas City Southern Railway as a Carman and earns a gross monthly salary of $4,808.00 (Consumer Debtor Financial Statement).
- The Consumer Debtor Financial Statement shows Mr. Davis has monthly expenses of $2,760.00

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he would suffer undue financial hardship if any amount of money is garnished from his disposable income at any time during the next eighteen (18) months. During that time, Mr. Davis shall make efforts to contact an attorney to see if he has any recourse under the divorce decree or through his former wife's discharge in bankruptcy. Moreover, he or his attorney shall contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's

wages are suspended and may not be resumed for eighteen (18) months from the date of this Order.

_____

SHARON HOWARD.
AWG Docket No. 10-0011.
Decision and Order.
Filed January 29, 2010.

AWG – Default on RD loan – Guarantee.

Mary Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

Pursuant to a Hearing Notice issued on November 24, 2009, I held a hearing by telephone, on January 13, 2010, at 1:30 PM Eastern Time, in consideration of a Petition challenging the existence of a debt that Respondent, USDA, Rural Development alleges Petitioner incurred under a Single Family Housing Loan Guarantee given to secure a home mortgage, which has resulted in the garnishment of Petitioner's wages for nonpayment.

Petitioner did not participate in the hearing. Petitioner was instructed by the Hearing Notice to file: 1. a narrative of events or reasons why she cannot pay the alleged debt and indicating what portion of the alleged debt she is able to pay through wage garnishment; 2. supporting exhibits; and 3. lists of the exhibits and witnesses who would testify in support of her petition. She was also instructed by an accompanying letter to contact my secretary, Ms. Diane Green and give her a telephone number where she could be reached at the time of the scheduled hearing. She failed to comply with any of the instructions. At the time of the scheduled hearing, she did not answer calls to her listed telephone which continued to be made for a half hour beyond the scheduled 1:00 PM Eastern starting time.

Respondent participated in the hearing through its representatives, Gene Elkin, Legal Liaison and Mary Kimball, Accountant for the New

Initiatives Branch, USDA Rural Development.

Under 31 C.F.R. § 285.11 (f)(2), a hearing on a Petition challenging wage garnishment may be at the agency's option, either oral or written. An oral hearing may be conducted by telephone conference and is only required when the issues in dispute cannot be resolved by review of the documentary evidence 31 C.F.R. § 285.11 (f)(3). An oral hearing was scheduled to commence on January 13, 2010, to decide Petitioner's challenge to the wage garnishment so that I might hear her concerns. In that Petitioner never advised the Hearing Clerk, the Respondent, or this office that she had moved or that she could not be personally contacted on her listed telephone number, and that all mail sent to her only listed address was never returned as undeliverable by the U.S. Post Office, I proceeded with the scheduled hearing without her presence, and took evidence on the existence of the debt that her Petition challenged.

Both Mr. Elkin and Ms. Kimball were duly sworn. Ms. Kimball identified and authenticated Respondent's Exhibits 1-5 which were received in evidence.

Respondent proved the existence of the debt owed by Petitioner Sharon Howard and John Howard, to Respondent for its payment of a loss sustained by JP Morgan Chase Bank, on a $123,000.00 home mortgage loan the bank had made to Petitioner and John Howard, on August 1, 2006, for property located at 102 Laney, Brenham, TX 77833. There were foreclosure proceedings and the property was resold. The present amount owed on the debt to Respondent is $30,322.32 plus collection fees owed to the United States Treasury Department which, added together, currently total $38,812.57. The Petitioner appears to be employed and has provided no evidence showing that the present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11. Therefore the Petition is DISMISSED and the proceedings to garnish Petitioner's wages may be resumed provided that amount of wages garnished does not exceed 15% of her disposable income.

Petitioner is advised, however, that if she telephones the private agency engaged by Treasury to pursue the debt's collection, she might be able to settle the debt at a lower amount with lower payments. She is advised to therefore immediately call Diversified Collection Services,

Inc. at 1-888-310-2006.

_____

SHARON WHITE.
AWG Docket No. 10-0023.
Interim Decision and Order.
Filed January 29, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Interim Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Sharon White, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On November 12, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the time agreed by the parties on January 29, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on December 11, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner submitted documents or exhibits PX-1 through PX-2 (including a sworn statement. Ms. Kimball acknowledged that RD had received the Petitioner's submissions faxed to her during the hearing.

Petitioner owes $54,898.42 on the USDA RD loan as of today, and in addition, potential fees of $15,371.56 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On February 2, 2005, Petitioner Sharon White obtained a USDA Rural Development home mortgage loan for property located at ## Spring Walk Way, Greenville, SC 295##.[1] Petitioner signed a promissory note for $127,000. RX-1.

2. On September 1, 2005, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative. At the time of the Default Notice, the balance due on the note was $126,334.63. Narrative, RX-2 @ p. 6 of 7.

3. The total principal, accrued interest and protective advances was $148,808.93. Narrative RX-2 @ p. 6 of 7.

4. The lender was paid $58,170.40 under the Loan Guarantee Agreement. RX-2- @ p. 7 of 7, RX-3.

5. After the final sale, there was an additional recovery (treasury offset) of $391.06 and $559.98 plus a recoupment of $1,878.16 from the lender which brought the Petitioner's debt down to $54,898.42. RX-3, Narrative.

6. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $15,371.56. Ms. Kimball testimony and RX-6 (as orally updated).

7. There was oral testimony from Petitioner that she has been continuously employed by her current employer for over 1 year.

8. Petitioner stated that her income included hourly wages and commissions and agreed to promptly furnish RD with 3 months of pay stubs.

9. Petitioner also agreed to promptly expand the explanation of her monthly expenses into finer detail which will clarify her Exhibits PX-1 & PX-2.

10. The Petitioner raised issues of financial hardship resulting from the garnishment process.

11. Sharon White is liable for the debt under the terms of the Promissory Note and RD Loan Guarantee.

Conclusions of Law

1. Petitioner Sharon White is indebted to USDA's Rural

[1]Complete address maintained in USDA records.

Development program in the amount of $54,898.42, but garnishment proceedings are suspended pending a review of Petitioner's wages and expenses.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $15,371.56.

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

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. Following compliance with 31 C.F.R. § 285.11(i) and (j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. § 288.11(i) & (j) have been met, the wages of the Petitioner, Sharon White, shall be subject to administrative wage garnishment following the Final Order. The Final Decision and Order will issue after the parties have been given a 10 day comment period on the "Hardship Calculations."

The calculation will be shown in M.S. Excel™ spreadsheet. Any new or additional financial information must be under the continuing oath of the hearing.

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

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CYLISTA M. RHINEHART, f/k/a CYLISTA M. SCHULTZ.
AWG Docket No. 10-0042.
Decision and Order.
Filed January 29, 2010.

AWG – Default on RD loan.

Mary Kimball and Gene Elkin, Esq., for RD.

Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of the Petitioner, Cylista M. Rhinehart, 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 December 7, 20009, a Prehearing Order was entered to facilitate a meaningful conference with the parties on the manner that the case would be resolved and to direct the exchange of information and documentation concerning the existence of the debt and if established, the Petitioner's ability to repay the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation. The Petitioner has provided financial information concerning her financial status to the Respondent which has now been reviewed by the Administrative Law Judge. At the time she requested a hearing, Ms. Rhinehart indicated that the loan had a co-signer who should be responsible for half the debt and further indicated that while she was willing to set up a payment plan, she could not afford more than $100 per month.

On January 27, 2010, a telephonic hearing was conducted. Cylista M. Rhinehart participated *pro se.* The Respondent was represented by Mary Kimball, Accountant for the New Program Initiatives Branch, USDA Rural Development (RD) and Gene Elkin, Legal Liaison for Rural Development, both from St Louis, Missouri. Diane Green, Secretary to the Chief Judge was also present.

The Narrative filed by the Respondent reflects that the Petitioner and Corey A. Schultz, her former husband, purchased a residence located at 811 W Jackson Street, Abingdon, Illinois by assuming an existing loan of $31,820.20 from Farmers Home Administration (FmHA, the predecessor of RD) on the property and obtaining a new loan from FmHA in the amount of $11,850.00. RX-1&3. Both notes were later modified to include unpaid principal, accrued unpaid interest and unpaid advances and fees. RX-2&4. The Schultzes defaulted on both loans and the property was sold in a foreclosure sale on September 18, 2007. A total of $70,667.22 was due on both loans; however, the proceeds from

the sale were only $23,582.16. The amount due to RD exclusive of Treasury fees is $53,935.22 due at this time. RX-5. Potential Treasury fees are assessed in the amount of $15,101.86 making the balance due to Treasury $69,037.08. RX-6.

The Petitioner's assertion that she should be liable for only half the debt is without merit.[1] Although the FmHA Form 1965-15 Assumption Agreement (RX-1) fails to expressly contain the joint and several provisions[2] found in the FmHA Form 1940-16 Promissory Note (RX-3), the Assumption Agreement requires assumption of the terms of the original note and the definition of borrower as being one or more persons as well as the joint and several liability provisions.

Upon examination of the Petitioner's financial condition which purportedly reflects expenses well in excess of the combined income of the Petitioner and her new husband, it is abundantly clear that the couple's current plight is largely self imposed. The questionable judgment demonstrated in incurring a major expense for a new 2010 automobile while still liable for significant school, multiple credit card debts and other existing loans is a strong disincentive to granting relief on hardship grounds.

On the basis of the record before me, and considering the testimony of the Petitioner concerning her current financial situation, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On November 16, 1994, the Petitioner, Cylista M. Schultz (now Cylista M. Rhinehart) and Corey A. Schultz, her former husband, purchased a residence located at 811 W Jackson Street, Abingdon, Illinois by assuming an existing loan of $31,820.20 from Farmers Home Administration (FmHA, the predecessor of

[1]The Petitioner's former husband was discharged from further liability for the debt by bankruptcy proceedings.

[2]The standard Promissory Note recites: FOR VALUE RECEIVED, the undersigned (whether one or more persons, herein call "Borrower") **jointly and severally** promise to pay to the order of the United States of America……. RX-3.

RD) on the property and obtaining a new loan from FmHA in the amount of $11,850.00. RX-1&3.
2. Both notes were later modified to include unpaid principal, accrued unpaid interest and unpaid advances and fees. RX-2&4.
3. The Petitioner and her former husband defaulted on both loans and the property was sold in a foreclosure sale on September 18, 2007. A total of $70,667.22 was due on both loans; however, only $23,582.16 was realized from the foreclosure sale. RX-5.
4. The Petitioner's former husband was discharged from further liability by virtue of bankruptcy proceedings.
5. Treasury offsets totaling $990.23 were received, but were later reversed, leaving the amount due after application of the foreclosure proceeds unchanged. RX-5.
6. Potential Treasury fees have been assessed against the debt in the amount of $15,101.86 making the balance due to Treasury $69,037.08. RX-6.
7. The remaining unpaid debt is in the amount of $69,037.08.

Conclusions of Law

1. The Petitioner, Cylista M. Rhinehart, formerly Cylista M. Schultz, is indebted to USDA Rural Development in the amount of $53,935.22 for the mortgage loans extended to her and her former husband, further identified as Loan account number 1082197453. Potential Treasury fees in the amount of $15,101.86 increase the amount due to $69,037.08.
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, Cylista M. Rhinehart, 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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CHRISTOPHER D. PALLENTE.
AWG Docket No. 10-0061.
Decision and Order.
Filed February 4, 2010.

AWG – Default on RD loan – Guarantee.

Mary Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

On February 4, 2010, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for a loss it incurred under a Single Family Housing Loan Guarantee. Petitioner, and Mary Kimball and Gene Elkin, who testified for Respondent, were duly sworn. Respondent proved the existence of the debt owed by Petitioner Christopher D. Pallente and his wife, Keirissa Palente, to Respondent for its payment of a loss sustained by JP Morgan Chase Bank, N.A., Loan number 1082842409, on the $156,060.00 home mortgage loan the bank had made to Petitioner and his wife. The mortgage loan had been made on January 10, 2007, for property located at 7239 Sun Valley Drive, Twenty Nine Palms, CA 92277. Prior to signing this loan, Mr. and Mrs. Pallente signed a Request for Single Family Housing Loan Guarantee, under which they certified and acknowledged that if USDA, Rural Development paid a loss claim on the requested loan, they would reimburse USDA, Rural Development. Mr. and Mrs. Pallente defaulted on the loan on July 1, 2007. After the sale of the property by the bank, USDA, Rural Development paid $81,352.51 to JP Morgan Chase Bank, N.A. Mr. and Mrs. Pallente have one child who is 2 ½ years old. Mr.

Pallente is employed as a truck driver earning $3,326 a month. Rent, car payments and other monthly expenses leave Mr. and Mrs. Pallente with very little disposal income. They intend to file for bankruptcy, but need time to borrow the money needed for attorney fees. Therefore the present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R.§ 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he would suffer undue financial hardship if any amount of money is garnished from his disposable income at any time during the next six (6) months. During that time, Mr. Davis shall make efforts to file for the protections of the bankruptcy laws. If he does not file for bankruptcy within the next six months, Mr. Pallente shall contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

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ELIZABETH HUTCHINSON.
AWG Docket No. 10-0035.
Decision and Order.
Filed February 16, 2010.

AWG – Default on RD loan – Guarantee.

Mary E. Kimball, Gene Elkin, Esq. and John Weaver for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Elizabeth Hutchinson, for a hearing in response to efforts of Rural Development, Respondent, to institute a federal administrative wage garnishment

against her. On November 24, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. The Hearing date was set to be February 11, 2010.

At the scheduled date and time for the hearing, I called Ms. Hutchinson on her phone number listed on her Petition at 813-704-40##[1] and left a voice mail message that the hearing was about to start. I commenced the hearing with Mary Kimball, Gene Elkin and John Weaver representing Rural Development. The witnesses were sworn in. Since Petitioner was properly notified of the hearing date and time under the rules, I proceeded with a "paper hearing." See 31 CFR ¶ 285.11(f)(3)(iii).

RD had filed a copy of a Narrative along with exhibits RX-1 through RX-4 on January 11, 20101 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. After the hearing, RD submitted RX-5 which were the computations for the Treasury fees that were testified to in the hearing.

Petitioner did not submit any documents or exhibits.

Petitioner owes $73,768.07 on the USDA RD loan as of February 11, 2010, and in addition, potential fees of $21,087.91 due to the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On December 23, 2005, Petitioner and her husband Ronnie Hutchinson obtained a USDA Rural Development home mortgage loan for property located at 30## Jim John*** Road, Plant City, FL 335##.[2] Petitioner signed a promissory note for $142,800 and a Rural Development Loan Guarantee. Narrative, RX-4@ p. 2 of 2.

2. Petitioner and her husband Ronnie Hutchinson are jointly and severally liable under the terms of the Note.

3. A suggestion of bankruptcy was subsequently filed for Ronnie Hutchinson.

4. On May 1, 2007, Petitioner defaulted on the note and was sent a

[1]Complete phone number maintained in USDA Records.

[2]Complete address maintained in USDA records.

Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative and Ms. Kimball's testimony. At the time of the Default Notice, the total balance due on the note was $140,228.32. Narrative, RX-1 @ 6 of 8.

5. The property was appraised "As is" for $115,000 on April 8, 2008. It also received a brokers appraisal (BPO) of $110,000 on April 15, 2008. RX-1 @3 of 8.

6. The property was initially listed for sale at $110,000 on April 25, 2008 and then re-listed for $99,300 on July 2, 2008. RX-1 @ p. 4 of 8.

7. The property was sold for $94,400 on August 1, 2008 to a new buyer wherein the lender released the property for resale while holding Petitioner liable for the unsecured debt.

8. The remaining balance due after the receipt of foreclosure sale proceeds was $75,313.95. RX-1 @ p. 7 of 8.

9. After the foreclosure sale, additional funds recovered by Treasury in the amount of $1,545.88 were attributed to Petitioner for a total now due of $73,768.07.
RX - 2.

10. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $21,087.91. RX-5.

11. There was no testimony or exhibit(s) received from Petitioner regarding employment and RD has no knowledge that Petitioner is not fully employed.

12. Elizabeth Hutchinson is jointly and severally liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Elizabeth Hutchinson is indebted to USDA's Rural Development program in the amount of $73,768.07.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $21,087.91.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address and employment circumstances.

5. Following compliance with 31 C.F.R.¶ 285.11(j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶ 288.11(j) have been met, the wages of the Petitioner, Elizabeth Hutchinson, shall be subject to administrative wage garnishment up to 15% of Monthly Disposable Income.

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

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TASHA YORK.
AWG Docket No. 10-0036.
Decision and Order.
Filed February 18, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Tasha York, for a hearing in response to efforts of Rural Development, Respondent, to institute a federal administrative wage garnishment against her. On November 24, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. The Hearing date was set to be February 11, 2010.

At the scheduled date and time for the hearing, I called Ms. York on her phone number listed on her Petition at 901-876-59##[1] and left a voice mail message that the hearing was about to begin.

I commenced the hearing with Mary Kimball and Gene Elkin

[1]Complete phone number maintained in USDA Records.

representing Rural Development. The witnesses were sworn in. Since Petitioner was properly notified of the hearing date and time under the rules, I proceeded with a "paper hearing." See 31 CFR ¶ 285.11(f)(3)(iii).

RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on December 23, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner did not submit any documents or exhibits.

Petitioner owes $36,227.38 on the USDA RD loan as of February 11, 2010, and in addition, potential fees of $10,143.67 due to the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On May 16, 2003, Petitioner obtained a USDA Rural Development home mortgage loan for property located at 1## Ruth Sha**** Drive, Atoka, TN 380##.[2] Petitioner signed a promissory note for $94,400. RX-1@ p. 1,3.

2. On June 8, 2007, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative and Ms. Kimball's testimony. At the time of the Default Notice, the total balance due on the note was $135,059.53. RX-4. Among the costs attributed to Petitioner due to the foreclosure were Insurance, property taxes, appraisal fees, and title report for a total of $3,010.34.

3. The property was sold in a properly advertized foreclosure sale for $100,000 wherein RD released the property for resale while holding Petitioner liable for the unsecured debt. RX-4.

4. The remaining balance due after the receipt of foreclosure sale proceeds was $35,059.53. RX-4.

5. After the foreclosure sale, additional foreclosure fees in the amount of $1,167.85 were attributed to Petitioner for a new balance due of $36,227.38. RX-4.

6. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $10,143.67. RX-5.

[2]Complete address maintained in USDA records.

7. There was no testimony or exhibits received from Petitioner regarding employment and RD has no knowledge that Petitioner is not fully employed.

8. Tasha York is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Tasha York is indebted to USDA's Rural Development program in the amount of $36,227.38.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $10,143.67.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address and employment circumstances.

5. Following compliance with 31 C.F.R.¶ 285.11(j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶ 288.11(j) have been met, the wages of the Petitioner, Tasha York, shall be subject to administrative wage garnishment up to 15% of Monthly Disposable Income.

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

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MARIA LEON.
AWG Docket No. 10-0045.
Interim Decision and Order.
Filed February 23, 2010.

AWG – Unauthorized rental assistance.

Mary E. Kimball and Gene Elkin, Esq. , for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Maria Leon, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her as a result of unauthorized rental assistance. On December 8, 2009, I issued a Pre-Hearing Order requiring the parties to exchange information concerning the amount of the debt. I conducted a telephone hearing at the scheduled time on February 10, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency. Witnesses for RD were Evelyn Suarez, Area Technician of the Florida field office, Tresca Clemmons of the Multi-Family Housing Programs. Cathy Swanson, Theresa Purnel, Catrina Southall, and Sandy Weiss were present but did not testify.

Petitioner was self represented.

The witnesses were sworn in. RD filed a copy of a Narrative along with exhibits RX-1 through RX-10 on January 8, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. After the hearing, RD filed "Addition to Narrative and RX-11 and RX-12.

Petitioner submitted documents or exhibits as follows: 14 numbered pages of a FAX dated 01/19/2010 (which I now number as PX-1 (page # of #), an exhibit numbering 3 pages of a FAX dated January 19, 2010 (which I now number as PX-2 (page # of #), an exhibit numbering 11 pages of a FAX dated January 10, 2010 (which I now number as PX-3 (page # of #), and a single page of the lower half of a RD-2560-8 form which carries a FAX date of January 7, 2008 (which I now number as PX-4). Ms. McQuaid acknowledged that RD had received the Petitioner's submissions subsequent to the Hearing.

Petitioner was available for the telephonic hearing, but she requested that the hearing be rescheduled for another date. I denied her request for a postponement. She then requested a English/Spanish interpreter. I denied her request. She stated she did not know what this hearing was

about. I reminded her that she had from November 17, 2009 until the date of the hearing to seek help and to have someone whom she trusted to translate the testimony. Since I had preliminarily reviewed the exhibits prior to the hearing, I noted that her hand-written Hearing Request of November 17, 2009 was composed of near perfect English and further that at other times letters by her or written on her behalf (PX-1 thru PX-3) seemed to grasp the essence of the issues.

Petitioner owes $6,745 on the USDA RD rental assistance program as of today, pursuant to the terms of the CFR regulations.

Findings of Fact

1. On March 16, 2005, Petitioner Maria Leon completed a monthly Budget/Financial Statement when she applied for rental assistance and signed as Applicant/Tenant with Initials "MEL" RX-11. Petitioner also signed a USDA-Tenant Certification effective June 1, 2005 again with her initials MEL. RX-12.

2. In the exhibits submitted by Petitioner, which included her four personal checks (PX-3 @ p. 9 of 11), OMB form No. 0575-0189 dated 7/08 (PX-3 @ p. 2 of 11) she signed important financial documents with only her initials MEL.

3. By signing the forms RX-11 and RX-12 with her initials MEL, she certified their accuracy and stated that her perspective annual income was $910/month (annual rate of $10,920) in March, 2005 and $5,418 per year in June 2005. She also included her mother's SSI income of $2000.

4. Contemporaneously while she was making an application for rental assistance and certifying the annual incomes in F.O.F. # 2 above, she was gainfully employed at the Wal-Mart Associates Company earning $6,592.48 for the first two quarters of 2005 and eventually earning $14,108.33 for the year of 2005. RX-2 (replacement copy).

5. The USDA RD rental assistance program is administered in accordance with 7 CFR ¶ 3560.151 *et seq*. which sets up a rational basis for state administrators to determine the allocation of the scare resources of multi-family housing stock for prospective tenants. RX-1

6. By submitting utterly false annual income statements, the Florida

state agency in reliance on Petitioner's income statement, allowed Petitioner to "jump the line" ahead of other applicants having lesser incomes.

7. The Rental Assistance program pays a portion of the monthly residential rent for eligible applicants. Rental Assistance paid a significant portion of Petitioner's rent at the Osprey Landing I Apartments rent for Unit No. 5##.[1] RX-3, RX-4, RX-5, RX-6, RX-7, RX-8, RX-9.

8. Under 7 CFR ¶ 3560.158, the Petitioner failed to meet the ongoing eligibility requirements of 7 CFR ¶ 3560.152.

9. The amount of unauthorized rental assistance attributable to Petitioner from May 1, 2005 through July, 1, 2007 as a result of her false financial documents is $6,745.00. RX-3.

10. Maria Leon is liable for recovery of Unauthorized Rental Assistance under the terms of 7 CFR ¶ 3560.701 *et seq*. (Unauthorized assistance).

11. Petitioner submitted a Wal-Mart Associates Pay stub for the week of January 7, 2010 showing her gross weekly wages and payroll deductions. PX-1 @ p. 3 of 14.

Conclusions of Law

1. Petitioner Maria Leon is indebted to USDA's Rural Development program in the amount of $6,745.

2. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

3. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

4. Following compliance with 31 C.F.R.¶ 285.11(i) and (j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶

[1]Complete addresses are maintained in USDA records.

288.11(i) & (j) have been met, the wages of the Petitioner, Maria Leon, shall be subject to administrative wage garnishment at the rate of 15% of Monthly Disposable Income.

The Hardship Calculation (attached herewith) has been printed in M.S. Excel™ Spreadsheet format. Any new or additional financial information must be under the continuing oath of the hearing.

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

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JESSICA JOHNSON.
AWG Docket No. 10-0024.
Decision and Order.
Filed February 26, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Jessica R. Johnson, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On November 12, 2009, I issued a Pre-Hearing Order requiring the parties to exchange information concerning the amount of the debt. I issued an Amended Pre-Hearing Order on January 28, 2010 revising the time and date of the Oral hearing. I conducted a telephone hearing at the scheduled time on February 2, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on December 15, 2009 with the

OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner submitted documents or exhibits PX-1 through PX-8 (which included her Current Income & Expenses and Assets & Liabilities under oath. Ms. Kimball acknowledged that RD had received the Petitioner's submissions prior to the Hearing.

Petitioner owes $14,586.13 on the USDA RD loan as of today, and in addition, potential fees of $4,084.11 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On October 7, 2004, Petitioner Jessica Johnson obtained a USDA Rural Development home mortgage loan for property located at ### Alpha Street, Bondurant, IA 500##.[2] Petitioner was signor to a promissory note for $129,000. Narrative, RX-1@ p. 1.

2. On November 6, 2006, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative, RX-3. At the time of the Default Notice, the balance due on the note was $151,279.44. Narrative, RX-4.

3. The property was sold in a "short sale" after notice to Petitioner to a new buyer for a price of $128,973.53. Narrative, Ms. Kimball testimony, RX-4 @ p. 1 of 2.

4. The total amount of debt owed after the short sale was $22,305.91. RX-4 @ p. 1 of 2.

5. After the final sale, there was an additional recovery (treasury offset) of $7,392.10 and waived fees of $259.25, but additional post-sale fees of $109.67 which brought the Petitioner's debt down to $14,586.13. Ms. Kimball testimony, RX-4 @ p. 2 of 2, Narrative.

6. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $4,084.11. Ms. Kimball testimony.

7. There was oral testimony from Petitioner that she has been

[2]Complete address maintained in USDA records.

continuously employed by her current employer for 3 years. Petitioner's maximum gross monthly income is $1910.40. PX-1. She testified that she sometimes is not fully employed at her current employer.

8. The Petitioner raised issues of financial hardship resulting from the garnishment process. Petitioner's Current Income and Expenses schedules PX-1 and PX-2 were evaluated using the Financial Hardship Calculation Program. The result is that RD is entitled to garnish $163.18 (10.6%) of Petitioner's wages at this time. The financial hardship Calculation Worksheet is attached[3] to this Order.

9. Jessica Johnson liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Jessica Johnson is indebted to USDA's Rural Development program in the amount of $14,586.13.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $4,084.11.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. Following compliance with 31 C.F.R.¶ 285.11(i) and (j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met, the wages of the Petitioner, Jessica Johnson, shall be subject to administrative wage garnishment in the amount of 10.6% of her Monthly disposable Income. The Final Decision

[3]The Financial Hardship Calculation is not posted online.

and Order will be effective after the parties have been given a 10 day comment period on the "Hardship Calculations."

Any new or additional financial information must be under the continuing oath of the hearing.

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

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MICHAEL O'BRIEN.
AWG Docket No. 10-0027.
Interim Decision and Order.
Filed February 26, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Interim Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Michael O'Brien, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On November 12, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on January 26, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency. Tom Weaver was present from RD but did not testify.

Petitioner was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on December 11, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. RD subsequently filed RX-6 and RX-7 with a copy to Petitioner.

Petitioner submitted documents or exhibits PX-1 through PX-11

(including a sworn statement, and a one page typed narrative dated 12/2/09. Ms. Kimball acknowledged that RD had received the Petitioner's submissions prior to the Hearing.

Petitioner owes $21,037.55 on the USDA RD loan as of today, and in addition, potential fees of $5,890.52 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On August 15, 2003, Petitioner Michael O'Brien and Michelle O'Brien obtained a USDA Rural Development home mortgage loan for property located at ### Main Street, Brewster, KS 677##.[1] Petitioner was co-signor to a promissory note for $31,000. RX-1@ p. 1.

2. On July 16, 2006, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative, RX-3, and Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $34,398.89. Narrative, RX-4.

3. The property was sold in a "short sale" after notice to Petitioner to a new buyer for a price of $12,000. Narrative, Ms. Kimball testimony, RX-6 and PX-11.

4. The total amount of debt owed after the short sale was $22,398.89. RX-4.

5. After the final sale, there was an additional recovery (treasury offset) of $927.78 and subsequent garnishments totaling $342.97 which brought the Petitioner's debt down to $21,037.55. Ms. Kimball testimony, RX-4, RX-7, Narrative, and supplemental Narrative..

6. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $5,890.52. Ms. Kimball testimony and RX-5 (as orally updated).

7. There was oral testimony from Petitioner that he has been continuously employed by his current employer for 5 years. Petitioner's

[1]Complete address maintained in USDA records.

gross monthly income is $1596.00. PX-2.

8. The Petitioner raised issues of financial hardship resulting from the garnishment process.

9. Michael O'Brien is jointly and severally liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Michael O'Brien is indebted to USDA's Rural Development program in the amount of $21,037.55, but garnishment proceedings are suspended pending a review of Petitioner's wages and expenses.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $5,890.52.

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

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. Following compliance with 31 C.F.R.§ 285.11(i) and (j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. § 288.11(i) & (j) have been met, the wages of the Petitioner, Michael O'Brien, shall be subject to administrative wage garnishment following the Final Order. The Final Decision and Order will issue after the parties have been given a 10 day comment period on the "Hardship Calculations."

The parties shall have until February 11, 2010 to comment upon the Hardship calculations. The calculation will be shown in M.S. Excel™ format on a CD. Any new or additional financial information must be

under the continuing oath of the hearing.

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

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BILLY ADAMS.
AWG Docket No. 10-0043.
Decision and Order.
Filed March 5, 2010.

AWG. – Default on RD loan – Guarantee.

Mary Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of the Billy Adams 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 December 7, 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 on December 18, 2009. The Petitioner failed to file anything further with the Hearing Clerk and repeated efforts to reach him by telephone were unsuccessful.[1] At the time he requested a hearing, the Petitioner indicated that he disputed the

[1]The file reflects that repeated efforts were made to contact the Respondent by phone and that messages were left for her at the number he/she provided on at least xx occasions.

debt and had requested a statement of pay history which he had not received. As a result of the unsuccessful efforts to contact him, on January 19, 2010, 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 issues before me 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 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 $41,977.30 for accrued interest, protective advances, liquidation costs and property sale costs. Potential fees of $11,730.95 due to the Treasury have been added and the total amount due at this time is now $53,730.95.

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 March 22, 2007, Billy Adams, applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) (Exhibit RX-1) and on May 11, 2007 obtained a home mortgage loan for property located at 802 Pinto Lane, Horseshoe Bend, Arkansas from J.P. Morgan Chase Bank, N.A. (Chase) for $71,400.00 (Loan Number 1082915230). RX-2.

2. In 2008, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.
3. Chase purchased the secured property at the foreclosure sale on April 8, 2008. The property was listed for sale by Chase, but did not sell within the marketing period and Chase submitted a loss claim. USDA paid Chase the sum of $41,977.30 for accrued interest, protective advances, liquidation costs and property sale costs. RX-2, 3.
4. Potential Treasury fees of $11,753.95 have been added to the balance due. RX-5.
5. The remaining unpaid debt is in the amount of $53,730.95.

Conclusions of Law

1. Billy Adams is indebted to USDA Rural Development in the amount of $41,977.30 for the mortgage loan guarantee extended to him, further identified as Loan account number 1082915230. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
2. The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Billy Adams shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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STANLEY MAURICE FLOYD.
AWG Docket No. 10-0003.
Decision and Order.
Filed March 18, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Stanley Floyd, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On October 9, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on December 3, 2009. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Mary Kimball testified on behalf of the RD agency. Tom Weaver was present from RD but did not testify.

Petitioner was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on November 6, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Petitioner submitted documents or exhibits (including a sworn statement of current income and expenses (8) pages), a one page hand-written narrative, his pre-hearing request documentation included a two page hand-written narrative dated 7/14/08, a pay stub for 9/13/09, a Consumer Debtor Financial Statement dated 9/21/09 (4) pages, a Consumer Debtor Financial Statement dated 1/30/09 (4) pages. Ms. Kimball acknowledged that RD had the Petitioner's submissions prior to the Hearing. After the hearing, RD forwarded additional exhibit RX-6 pages,1 thru 6, RD-7 and RX-8 dated 3/16/10 and a supplementary Narrative (#2). The additional exhibits were in response to clarifying

statements in the oral testimony relating to the initial RD narrative.

On March 15, 2010, Mr. Floyd revised and clarified his monthly expenses in a follow up teleconference hearing with Mary Kimball of RD and myself. Both parties agreed that they remained under oath.

Petitioner owes $9,977.79 on the USDA RD loan as of March 18, 2010, and in addition, potential fees of $2,793.78 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On July 10, 2003, Petitioner Stanley Maurice Floyd obtained a USDA Rural Development home mortgage loan for property located at ### Barron Park York, SC 297##.[1] Petitioner signed a promissory note for $69,300 and a Rural Development Loan Guarantee. RX-1@ p. 1.

2. On May 1, 2005, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative and Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $67,601.52 plus unpaid interest. RX-2 @ p. 6 of 7, RX-3 @ p. 1 of 3.

3. The total debt attributed to Petitioner at the time of the foreclosure was $73,506.36 which included the additional interest and protective advances. RX-2 @ p. 6 of 7, RX-3 @ p. 1 of 3.

4. The lender (Wells Fargo Home Mortgages) acquired the property at the foreclosure sale on May 1, 2006 for a bid price of $61,200. RX-2 @ p. 3 of 7.

5. The lender listed the property for sale on July 24, 2006 for $69,900 and after the property did not sell, re-listed the property on November 20, 2006 for $62,900. Narrative, RX-2 @ p. 3 of 7.

6. A RHS appraisal dated November 30, 2006 valued the property as $63,000.00. RX-2 @ p. 4 of 7.

7. The property was sold to a new purchaser for $62,900 on January 30, 2007. Narrative # 2, RX-6 @ p. 1 of 6, 2 of 6.

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[1]Complete address maintained in USDA records.

The net proceeds of the sale after foreclosure costs, protective advances, and accrued interest was $19,276.46. RX-3 @ p. 1 of 3.

8 After the final sale, there was an additional recoveries (treasury offset) of $4,243.00 and subsequent garnishments totaling $3,716.61 ($3,103.01 + $167.26 + $446.34) which brought the Petitioner's debt down to $11,316.85.

9. During the March 15th teleconference, Ms. Kimball advised that the new balance has been further reduced to $9,977.79 by additional recoveries. RX-8 (3/16/10), Narrative # 2.

10. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $2,793.78. Ms. Kimball testimony, RX-8.

11. There was oral testimony from Petitioner that he has been continuously employed by his current employer for 5 years, however his average weekly hours of employment have been involuntarily reduced by his employer from 40 down to as low as 20 hours per week and he states that the employment will cease on/about May 2010. Petitioner's gross hourly wages are currently $14.79.

12. The Petitioner raised issues of financial hardship resulting from the garnishment process. Petitioner's employer provided a gross wages only statement for the 4th quarter of 2009. RX-6. I used an on-line Federal Tax estimator and a South Carolina income tax estimator to approximate Federal and State payroll deductions for the purpose of the Financial Hardship Calculation program. Petitioner's Expenses provided in the follow-up teleconference were evaluated using the Financial Hardship Calculation Program. The result is that RD is entitled to garnish $192.13 per month (11.8%) of Petitioner's wages at this time. The Financial Hardship Calculation Worksheet, the compilation of Mr. Floyd's recent oral monthly expense statement and both on-line estimator forms are attached[2] to this Order.

Petitioners garnishment is temporarily reduced from 15% to 11.8% for one year after which time, the calculation may be reviewed for the purposes of calculating an appropriate garnishment under the regulations

[2]The Financial Hardship Calculation is not posted online.

31 C.F.R. § 285.11(j).

13. Stanley Maurice Floyd is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Stanley Maurice Floyd is indebted to USDA's Rural Development program in the amount of $9,977.79.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $2,793.78.

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

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. Following compliance with 31 C.F.R. § 285.11(j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. § 288.11(j) have been met, the wages of the Petitioner, Stanley Maurice Floyd, shall be subject to administrative wage garnishment in the amount of 11.8% of his wages.

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

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ASHLEY BECKER.
AWG Docket No. 10-0073.
Decision and Order.
Filed March 23, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Ashley Becker for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On January 14, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on March 22, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

I called Ms. Becker and left messages that the hearing was about to begin at 269-953-33**[1] which was the phone number Petitioner listed in her petition.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on February 12, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner did not submit any exhibits.

Petitioner owes $26,588.64 on the USDA RD loan as of today, and in addition, potential fees of $7,444.82 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On September 21, 2005, Petitioner Ashley P. Becker obtained a USDA Rural Development home mortgage loan for property located at

[1]Complete phone number maintained in USDA files.

12## Little Creek Road, Alger, MI 486**.[2] Petitioner was signor to a promissory note for $35,700. RX-1@ p. 2 of 2.

2. On June 1, 2007, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative, RX-3, and Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $34,580.74. Narrative, RX-3, RX-6.

3. The property was sold after notice to Petitioner to a new buyer for a price of $11,000. Narrative, Ms. Kimball's testimony, RX-4.

4. The total amount of debt owed after the sale was $29,271.20. RX @ p. 6 of 7, RX-4.

5. After the final sale, there were additional recoveries (treasury offset) of $144.33 and $21.80 totaling $166.13 which brought the Petitioner's debt down to $26,588.64. Ms. Kimball's testimony, RX-3, RX-6, Narrative.

6. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $7,444.82. Narrative and RX-6.

7. There was no testimony or exhibits from Petitioner regarding her employment status or wages.

8. The Petitioner raised issues of financial hardship resulting from the garnishment process, but provided no evidence to assess her claim.

9. Ashley P. Becker is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Ashley P. Becker is indebted to USDA's Rural Development program in the amount of $26,588.64.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $7,491.34.

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

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[2]Complete address maintained in USDA records.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. Following compliance with 31 C.F.R. § 285.11(i) and (j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. § 288.11(i) & (j) have been met, the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner at the rate of 15% of her Monthly Disposable Income.

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

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JEREMY DUTRA.
AWG Docket No. 09-0190.
Decision and Order.
Filed March 26, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Jeremy Dutra for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On October 21, 2009, former Chief Administrative Law Judge Marc. R. Hillson issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

On January 21, 2010, I was assigned to this case and on January 25,

2010, I issued a follow-up Pre-Hearing Order re-setting the hearing to February 2, 2010. As a result of unexpected inclement weather, the hearing did not occur on the scheduled date. Mr. Dutra agreed to be available for the hearing on March 25, 2010.

I conducted a telephone hearing at the scheduled time on March 25, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency. The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on November 9, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Dutra stated that he received RD's Exhibits and witness list.

Petitioner did not submit any exhibits.

Petitioner owes $55,706.68 on the USDA RD loan as of today, and in addition, potential fees of $15,597.87 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On November 30, 2005, Petitioner Jeremy Dutra obtained a USDA Rural Development home mortgage loan for property located at #5 Jeffer*** Street, Quincy, MI 490**.[1] Petitioner was signor to a promissory note for $90,500. RX-2 @ p. 2 of 7.

2. On October 1, 2006, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative, RX-2 @ p. 6 of 7. At the time of the Default Notice, the balance due on the note was $89,618.22. Narrative, RX-2 @p 6 of 7, RX-3.

3. It was appraised on November 8, 2007 for $81,500.00. It was reappraised by a real estate broker on November 26, 2007 for $55,000.00. It was received a RHS Liquidation appraisal on April 26, 2008 for $43,000.00. RX-2 @ p3,4 of 7.

[1]Complete address maintained in USDA records.

3. The property was sold after notice to Petitioner to a new buyer for a price of $47,000. Narrative, Ms. Kimball's testimony, RX-3.

4. The total amount of debt owed after the sale was $55,706.68. RX 3, RX-5.

5. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $15,597.87. Narrative, RX-3, RX-5.

6. Petitioner stated that he was involuntarily laid off from his normal employer.

7. Jeremy Dutra is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Jeremy Dutra is indebted to USDA's Rural Development program in the amount of $55,706.68.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $15,304.55.

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

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. As a result of Petitioner's involuntary unemployment, administrative wage garnishment is suspended for one-year.

Order

Administration Wage Garnishment is suspended for a period of one year. After one year, RD may determine the whether the requirements of 31 C.F.R. § 288.11(i) & (j) have been met, and may, if appropriate, administratively garnish the wages of the Petitioner.

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

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PATRICIA A. DENONN.
AWG Docket No. 10-0093.
Decision and Order.
Filed March 25, 2010.

AWG. – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

1. The hearing was held on Tuesday, March 23, 2010, by telephone, as scheduled. Ms. Patricia A. Denonn, the Petitioner ("Ms. Denonn") represented herself (appeared *pro se*). Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball and Gene Elkin. Also present throughout the call, were Legal Secretary Marilyn Kennedy, who works with me; and a Legal Services representative who is providing Ms. Denonn with assistance.
2. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. Ms. Denonn requested the hearing, writing that she does not owe the debt. Based on (1) the testimony of Ms. Kimball, and (2) Exhibits RX

1 through RX 6, which I admit into evidence, plus (3) the contents of the Narrative, Witness & Exhibit List, filed March 12, 2010, I find that Ms. Denonn DOES owe the debt, as described below in paragraph 6 and paragraph 7.

4. Ms. Denonn testified that she is working with an attorney to file Chapter 7 Bankruptcy, and that she, Ms. Denonn, is assisting to obtain pertinent information such as that kept by the credit reporting agencies. Ms. Denonn testified that she is disabled and receives social security disability; that she receives vocational rehabilitation services; and that she works as an "on-call" fill-in (for those on vacation or sick) for a group home for those with mental challenges. After hearing Ms. Denonn's testimony, USDA Rural Development agreed to my ordering a 90-day suspension of garnishment proceedings.

5. My 90-day suspension order will not affect any repayment of the debt through ***offset*** of Ms. Denonn's **income tax refunds** or other **Federal monies** payable to the order of Ms. Denonn.

Summary of the Facts Presented

6. Ms. Denonn owes to USDA Rural Development a balance of **$34,401.25** (as of March 23, 2010). *See* USDA Rural Development Exhibits, esp. RX 6, plus Ms. Kimball's testimony that an additional $721 obtained by *offset* is subtracted ($737 less the $16 fee).

7. Potential Treasury fees in the amount of 28% of $34,401.25 ($9,632.35 in potential Treasury fees; the collection agency keeps 25% of what it collects) would increase the current balance of Ms. Denonn's debt to USDA Rural Development at Treasury to $44,033.60.

8. **During a 90-day suspension of garnishment proceedings**, consideration of whether Ms. Denonn's disposable pay supports garnishment, up to 15% of Ms. Denonn's disposable pay (within the meaning of 31 C.F.R. § 285.11), is DEFERRED, together with consideration of whether Ms. Denonn has circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Ms. Denonn and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.
10. Ms. Denonn owes the debt described in paragraphs 6 and 7.

Order

11. Until the debt is fully paid, or is fully discharged in Bankruptcy, Ms. Denonn shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).
12. USDA Rural Development, and those collecting on its behalf, shall **not** proceed with garnishment, through **June 21, 2010**, which is 90 days from March 23, 2010. Before then, if I am notified that Ms. Denonn has filed for Chapter 7 Bankruptcy, I will entertain a request to order this case dismissed (without prejudice to Ms. Denonn to request a hearing timely, should garnishment be noticed). If not, beginning June 22, 2010, I will resume my determination, if requested, of whether Ms. Denonn's disposable pay supports garnishment.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties, with a COURTESY COPY mailed to Legal Services at the address shown below.

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BARBARA COOPER.
AWG Docket No. 10-0072.
Decision & Order.
Filed March 24, 2010.

AWG – Default on RD loan.

Petitioner Pro se.
Mary Kimball and Gene Elkin, Esq. for RD.
Decision and order by Victor W. Palmer, Administrative law Judge.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on March 23, 2010, at 1:00 PM Eastern Time. Petitioner, Barbara Cooper, and Respondent's representatives, Gene Elkin and Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development that were received as Exhibits RX-1 through RX-8. Petitioner had not completed preparation of her exhibits and none were introduced or received. At issue is the nonpayment of a debt owed to USDA, Rural Development on a home mortgage loan on property that Mrs. Cooper and her husband allowed to be sold at a short sale. The proceeds of the short sale were inadequate to eliminate the debt. Mrs. Cooper explained her present circumstances and those of her disabled husband. Her testiony showed that the collection of the debt by garnishment of her salary would cause her undue financial hardship.

Findings

The testimony and exhibits received in evidence proved that:
On December 20, 1991 and September 17, 1993, petitioner signed promissory notes, obligating her to reimburse USDA, Rural Development for any future loss claim, in respect to loans given her and her husband to purchase property located at 665 E. Cottrell Avenue, Holly Springs, MS 38635 (RX-1, RX-3 and RX-5).
The mortgage loan was defaulted upon and the property was sold in a short sale, on March 5, 2009, for $16,000.00. At that time, the amount due to USDA, Rural Development was $36,796.61. After the sale funds

and the receipt of $233.00, on May 14, 2009, from the United States Treasury Department were applied to the debt, the remaining balance was $20,563.61 (RX-7).

Presently, the amount owed to USDA, Rural Development is $20,536.61 plus fees assessed by Treasury of $5,757.81, or a total of $26,321.42 (RX-8).

Mrs. Cooper's husband is blind and disabled. In 2003, Mrs. Cooper obtained a degree to become a teacher and now teaches the second grade. Her bi-weekly income is $1,010.29. Her bi-weekly expenses for rent $327, medicine $200, car payments, $200 and gasoline $100, have caused her to restrict the amount she spends for food to $52, with virtually nothing left over for clothing and other necessities.

Conclusions

1. USDA, Rural Development has proven that Barbara Cooper is indebted to USDA, Rural Development in the amount of $20,536.61 plus fees assessed by Treasury of $5,757.81, or a total of $26,321.42.

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

3. Due to the undue financial hardship that it would cause, administrative wage garnishment is not authorized at this time and may not be again considered for twelve (12) months from the date of this Order.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Barbara Cooper, is not authorized at this time, and may not be again instituted for the next twelve (12) months.

This matter is stricken from the active docket.

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

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JOYCE A. BRAGG, a/k/a JOYCE A. STEVENS.
AWG Docket No. 10-0076.
Decision and Order.
Filed April 2, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Joyce A. Bragg for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On January 14, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on March 23, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency. Ms. Bragg was present and self-represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on February 12, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Following the hearing, RD submitted RX-6 which updated RX-5. At my request, RD then submitted a NET RECOVERY VALUE WORKSHEET (4 pages) which I now label as RX-7..

Petitioner owes $8,588.23 on the USDA RD loan as of today, and in addition, potential fees of $2,404.70 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On November 14, 1988, Petitioner Joyce A. Bragg (f/k/a Joyce A.

8tevens) obtained a USDA Rural Development home mortgage loan for property located at 6## Wal*** Street, Philadelphia, MI 393**[1] Petitioner was signor to a promissory note for $41,500. RX-1@ p. 3 of 3.

2. On February 4, 2008, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative, RX-3@ p. 1 of 5. At the time of the Default Notice, the balance due on the note was $37,575.29. Narrative, RX-4.

3. The property was sold on August 21, 2008 in a short sale, after notice to Petitioner, to a new buyer for a price of $22,600. Narrative, Ms. Kimball's testimony, RX-4.

4. The evaluation of the short sale price was prepared by RD on August 19, 2008. RX-7.

5. The total amount of debt owed after the sale was $14,975.29. RX 4.

6. After the final sale, there were additional recoveries (net treasury offset) of $4,985.54 which brought the Petitioner's debt down to $8,588.23. Ms. Kimball's testimony, RX-6, Supplemental Narrative.

7. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $2,404.70. Supplemental Narrative and RX-6.

8. There was no exhibits from Petitioner regarding her employment status or wages.

9. The Petitioner raised issues of financial hardship resulting from the garnishment process and testified that her work hours were not predictable and she less than full employment.

10. RD acquiesced to suspension of administrative wage garnishment for a period of 6 months after which Ms. Bragg's financial position may again be assessed.

11. Joyce A. Bragg is liable for the debt under the terms of the Promissory Note.

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[1] Complete address maintained in USDA records.

Conclusions of Law

1. Petitioner Joyce A. Bragg is indebted to USDA's Rural Development program in the amount of $8,588.23.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $2,404.70.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. Six months after the date of this order and following compliance with 31 C.F.R. ¶ 285.11(i) and (j), the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, provided the requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met, the USDA Rural Development Agency (RD) is entitled to administratively garnish the wages of the Petitioner at the rate of 15% of her Monthly Disposable Income.

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

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ANDRE WALKER.
AWG Docket No. 10-0063.
Decision and Order.
Filed April 6, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.

Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Andre Walker for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On January 5, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on March 16, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency. Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-4 on January 28, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Walker stated that he received RD's Exhibits and witness list. Following the hearing, on March 18, 2010 RD filed the US Treasury Computation (RX-5) which substantiated Ms. Kimball's testimony.

Petitioner did not submit any exhibits prior to the hearing, but on March 31, 2010 filed a financial statement (under oath) and a weekly pay stub from his employer.

Petitioner owes $34,763.00 on the USDA RD loan as of today, and in addition, potential fees of $9,733.64 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On August 27, 2004, Petitioner Andre Walker obtained a USDA Rural Development home mortgage loan for property located at 2## N. Wil***, Vicksburg, MI 490**.[1] Petitioner was signor to a promissory note for $89,500. RX-1 @ p. 1 of 2.

2. On March 1, 2007, Petitioner defaulted on the note and was sent

[1]Complete address maintained in USDA records.

a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative. At the time of the Default Notice, the balance due on the note was $86,622.58. Narrative, RX-3.

3. The residence was appraised on December 5, 2007 for $78,000. It was reappraised by a real estate broker on November 24, 2007 for $77,000. It was originally listed for sale at $78,900.00. RX-2 @ ps. 3 and 4 of 8. After 430 days of listing, it sold on May 22, 2008 for $54,000.00. RX-2 @ p. 4 of 8.

4. After the sale, Treasury recovered an additional $990.74 - thus reducing the amount due from Petitioner to $34,763.00 RX-3, RX-5.

5. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $9,733.64. Narrative, RX-5.

6. Petitioner stated that he has an unpaid 2008 Federal Tax liability of $5,000.00. Petitioner pays support for two children who do not live with him.

7. Using the Financial Hardship Calculation program, I used the income and expense schedules submitted under oath by Petitioner. I assumed that the IRS debt of $5000 could be negotiated to be paid in a 3-year payment schedule. I disallowed Petitioner's 401K retirement program. A copy of the Financial Hardship Calculation is attached.

8. Andre Walker is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Andre Walker is indebted to USDA's Rural Development program in the amount of $34,763.00.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $9,733.64.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. Using the Financial Hardship Calculation[2], RD is entitled to garnish Petitioner's wage at 10% of his Monthly disposable Income.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. RD may administratively garnish the wages of the Petitioner.

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

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WESLEY D. CRAMER.
AWG Docket No. 10-0124.
Corrected Decision and Order.
Filed April 8, 2010.

AWG – Default on RD loan.

Mary Kimball , for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Wesley D. Cramer 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 March 11, 2010, 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.

On March 24, 2010, Mr. Cramer left a voice mail message with the

[2] The Hardship Calculation is not posted on the OALJ Website.

Office of Administrative Law Judges indicating that he no longer wished to appeal the proposed administrative wage garnishment. Consistent with his request, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Wesley Cramer is indebted to the United States Department of Agriculture in the amount of $25,841.50.
2. Wesley D. Cramer has by voice mail message indicated that he no longer wishes to appeal the proposed administrative wage garnishment.

Conclusions of Law

1. All procedural requirements of 31 C.F.R. §285.11 have been met.
2. The Respondent is entitled to administratively garnish thee wages of the Petitioner.

Order

For the foregoing reasons, the wages of Wesley D. Cramer shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as may be specified in 31 C.F.R. §285.11(i).

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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MICHAEL SHONK.
AWG Docket No. 10-0077.
Decision and Order.
Filed April 13, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Michael Shonk for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On January 21, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on April 12, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner failed to provide a phone number at which he could be contacted and RD had no current phone number in their file.

I proceeded under the "paper hearing" rules of 31 CFR ¶ 285.11(f)(3)(iii).

Petitioner was not present but had submitted under oath a ten-page Financial Statement, dated February 21, 2010, which I now label as PX-1.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on February 12, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner's financial forms indicated that he had been employed for approximately 7 months (through today) as a Wal-Mart sales clerk. RD did not have any documentation to dispute Petitioner's contention.

Petitioner owes 31,877.80 on the USDA RD loan as of today, and in

addition, potential fees of $8,925.78 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On March 28, 2006, Petitioner and his wife Debra Shonk obtained a guaranteed USDA Rural Development home mortgage loan for property located at 12** South Mars***, Paris, IL 619**.[3] Petitioner was co-signor to a promissory note for $54,877.43. Narrative, RX-2 @ p. 2 of 7.

2. On October 1, 2006, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative. At the time of the Default Notice, the balance due on the note was $54,596.40. Narrative, (as orally modified) RX-2 @ p. 6 of 7.

3. The property was acquired at a foreclosure sale on October 22, 2007 by the lender for $46,750.00. RX-2 @ p. 3 of 7.

4. The residence was appraised on February 18, 2008 for $40,000. It was reappraised by a real estate broker on March 3, 2008 for $33,000. It was listed for sale on April 21, 2008 and was sold on April 30, 2008 for $40,000. RX-2 @ ps. 3,4 of 8.

5. After the foreclosure sale, Treasury recovered additional amounts of $948.11 and $173.09 from the Petitioner - thus reducing the amount due from Petitioner to $31,877.80 Narrative, Ms. Kimball's testimony and RX-3, RX-5.

6. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $8,925.70. Orally corrected Narrative, RX-5 (as corrected). 6. Michael Shonk is severally liable as a co-signor for the debt under the terms of the Promissory Note. RX-2 @ p. 2 of 2.

7. In reliance upon Petitioner's sworn financial statements, RD stated that it had no objection to the temporary suspension of the administrative wage garnishment procedures.

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[3]Complete address maintained in USDA records.

Conclusions of Law

1. Petitioner Michael Shonk is indebted to USDA's Rural Development program in the amount of $31,877.80.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $8,925.78.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. Administrative wage garnishment proceedings are temporarily suspended for six months, after which RD may re-evaluate Petitioner's financial position.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. Administratively wage garnishment is suspended for six months.

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

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PAMELA S. LEDWITH.
AWG Docket No.10-0130.
Decision and order.
Filed May 13, 2010.

AWG – Default on RD loan.

Petitioner, Pro se.
Mary Kimball and ene Elkin, Esq for RD
Decision And Order issued by Victor W. Palmer, Administrative Law Judge.

Pursuant to a Hearing Notice, I held a hearing in this proceeding by

telephone, on May 11, 2010, at 1:00 PM Eastern Time, Petitioner, Pamela S. Ledwith, and Respondent, United States Department of Agriculture, Rural Development (USDA-RD), through its representatives, Gene Elkin and Mary E. Kimball, participated and were sworn. Both parties introduced documents pertaining to a home mortgage loan for property located at 64 Elm Street, Peru, NY 12927, that Respondent made to Petitioner and her husband, Theodore W. Ledwith, on December 11, 1996. On January 9, 2001, the Respondent sent Pamela S. Ledwith a letter that stated in part:

> Because your debt is unreaffirmed, Rural Housing Service will not hold you personally liable for the debt. This means that in the event of default, Rural Housing Service will not seek a deficiency judgment and will look only to the security property for recovery of the debt.

The letter was precipitated by Theodore W. Ledwith's discharge in bankruptcy on July, 8, 1999 (RX-4), but was addressed to Petitioner, Pamela Ledwith. In reliance on the quoted paragraph, she assumed her liability for the loan was limited to her interest in the property that was the subject of the mortgage. She then assumed that all of her obligations in respect to the mortgage debt ended when Respondent sent her a "Discharge of Mortgage", dated April 5, 2002, that stated the mortgage on the property was "satisfied and discharged". (RX-5). She followed the directions given her by Respondent and filed the Discharge of Mortgage with the County Clerk, on April 17, 2002, together with a $16.00 filing fee. In 2006, the income tax refund check Petitioner expected to receive was withheld by the Treasury Department. Income tax refunds were also withheld in 2007 and 2009. On October 21, 2009, the Treasury Department's Debt Management Services asserted an administrative wage garnishment claim against Petitioner on behalf of Respondent in the amount of $30,164.92 that includes the amount that had been owed on the mortgage loan on April 10, 2002, when the loan

and property were declared a valueless lien, plus various fees, and less the withheld income tax refunds.

Petitioner is presently employed as a part time mail carrier by the United States Post Office and earns less than a $1,000.00 per month.

The regulations that apply to Administrative Wage Garnishment by federal agencies to collect money from debtors, specify that in a hearing requested by the debtor:

> …the debtor may present evidence that the terms of the repayment schedule are unlawful, would cause a financial hardship to the debtor, or that collection of the debt may not be pursued due to operation of law.

The facts developed n this proceeding show that Petitioner reasonably assumed that the debt underlying the home mortgage had ended in 2001, when she received a letter from Respondent to the effect. This assumption was reinforced in 2002, when she received a document from Respondent that pronounced the mortgage lien satisfied and discharged. Under the laws of New York, pursuit of a debt of this kind would be time-barred by the State's six-year statute of limitations. Respondent asserts that a State statute of limitation does not apply to the federal government in circumstances such as these. Implicit in statutes of limitation, however, is the doctrine of laches that precludes for reasons of fairness and equity, the pursuit of a claim that is first asserted after it has become stale through the passage of time. The neglect or omission to do what one should do warrants the presumption that one has abandoned the claim. *See, Shirley v. Van Every*, 159 Va. 762, 167 S.E. 345, 350; *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781, 784.

Though it is questionable whether the doctrine of laches may be asserted against the federal government, the equitable concerns underlying the doctrine have bearing upon the requirement of the regulations that control wage garnishment by federal agencies that consideration is to be given to whether the collection of a debt through

garnishment "would cause a financial hardship to the debtor". (31 CFR §285.11(f)(8)(ii)). Respondent's actions in 2001 and 2002 caused Petitioner to reasonably believe she no longer owed money to Respondent. Respondent did not initiate wage garnishment proceedings until 2009, seven years after it had pronounced the mortgage "satisfied and discharged". By then Petitioner had moved from New York to Colorado and started a new life. These facts and the fact that Petitioner's monthly gross income is less than $1,000.00, lead me to find and conclude that further collection of the debt would be inequitable, would cause Petitioner financial hardship and that collection of the debt may not be pursued due to operation of law.

Order

The relief sought in the petition is hereby granted, and the pending administrative wage garnishment to collect money from Petitioner's disposable pay to satisfy a nontax debt asserted by the Respondent, USDA-RD is hereby barred and dismissed.

This matter is stricken from the active docket.

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

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MARK BIRCHER.
AWG Docket No. 10-0089.
Decision and Order.
Filed April 14, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of the Petitioner, Mark Bircher, 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 February 17, 2010, 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 on March 3, 2010. The Petitioner filed his documentation with Rural Development and it was forwarded to the Hearing Clerk on April 14, 2010. In the materials provided, Mr. Bircher acknowledged signing the note and mortgage which gave rise to the obligation being sought to be collected, but expressed the belief that he should be liable for only half of the obligation. During the hearing, it was explained to Mr. Bircher that by the terms of the note the obligation was joint and several and that the Government was entitled to collect the full amount from him.

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 short sale with less being realized from the sale than the amount of the obligation owed. The total amount due prior to the sale was $79,672.00. Sale proceeds amounted to $68,924.53. After application of the sale proceeds, the balance owed was $10,747.47. USDA has received three payments totaling $2,956.00 (after deduction of Treasury fees), leaving the current balance owed of $7,791.47, exclusive of Treasury fees in the potential amount of $2,181.61.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On February 9, 1989, the Petitioner and his then wife, Susanna

Bircher received a home mortgage loan in the amount of $95,000.00 from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at 111 South Road, Templeton, Massachusetts. RX-1.

2. The property was sold at a short sale on July 22, 2002 with proceeds realized from that sale in the amount of $68,924.53, leaving a balance due of $10,747.47. RX-3.

3. Treasury offsets totaling $2,956.00 have been received. RX-3.

4. The remaining unpaid debt is in the amount of $9,973.08. RX-4.

Conclusions of Law

1. Mark Bircher is indebted to USDA Rural Development in the amount of $9,973.08 for the mortgage loan extended to him.

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 Mark Bircher shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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JAMES PEELER.
AWG Docket No. 10-0074.
Decision and order.
Filed April 14, 2010.

AWG – Default on RD loan.

Petitioner, Pro se.
Mary Kimball for RD.
Decision and order by Peter M. Davenport, Acting Chief Administrative Law Judge.

DECISION AND ORDER

This matter is before the Administrative Law Judge upon the request of the Petitioner, James Peeler, 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 January 20, 2010, 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 on February 1, 2010. The Petitioner filed schedules of his income and expenses and his assets and liabilities but failed to provide a working telephone number at which he might be reached. At the time he requested a hearing, the Petitioner indicated that he had spoken with someone at Treasury and that he had been informed that the debt had been forgiven. Nothing further having been received from the Petitioner, the request for hearing will be considered waived and the issues before me 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/she 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 $39,958.89 for accrued interest, protective advances, liquidation costs and property sale costs. Potential Treasury fess amount to $11,188.49 making the total amount due at this time $51,147.38.

On the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On October 12, 2007, James Peeler applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) (Exhibit RX-1) and on November 6, 2007 obtained a home mortgage loan for property located at 1935 Bluebird Drive, Pleasant View, Tennessee from (J.P. Morgan Chase Bank, N.A. (Chase)) for $135,660.00. RX-2.
2. In 2008, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.
3. Chase submitted a loss claim and USDA paid Chase the sum of $39,958.89 for accrued interest, protective advances, liquidation costs and property sale costs. RX-2, 3.
4. The remaining unpaid debt is in the amount of $51,147.38. RX-6.

Conclusions of Law

1. James Peeler is indebted to USDA Rural Development in the amount of $51,147.38 for the mortgage loan guarantee extended to him. RX-6.
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 James Peeler shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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JOSE MONTES.
AWG Docket No. 10-0100.
Decision and order.
Filed April 16, 2010.

AWG – Default on RD loan.

Petitioner Pro se.
Mary Kimball and Gene Elkin, Esq. for RD.
Decision and order by Victor W. Palmer, Administrative Law Judge.

Decision and Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on April 15, 2010, at 10:00 A.M. Eastern Time. Petitioner, Jose Montes, and Respondent's representatives, Gene Elkin and Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development that were received as Exhibits RX-1 through RX-6. Petitioner did not produce or introduce any documents for receipt as evidence. At issue is the nonpayment of a debt owed to USDA, Rural

Development on a home mortgage loan on property that Mr. Montes had owned.

The evidence received shows that subsequent to his divorce from his former wife, the property was sold in a short sale that, after payment of the remaining principal, interest and various expenses, left Mr. Montes still owing a debt to USDA, Rural Development. Mr. Montes has moved to Puerto Rico where he is employed by the Department of Veteran Affairs at a salary which, after deducting necessary living expenses, would result in undue financial hardship if more than $75.00 per month is garnished from his salary.

Findings

The testimony and exhibits received in evidence proved that:
On December 23, 1994, petitioner signed an assumption agreement with USDA Farmers Home Administration (now USDA, Rural Development) for the purchase of a home at 39 Belleview Avenue, Erial, New Jersey 08081.(RX-1).

The mortgage loan was not paid and the property was sold in a short sale, on October 31, 2003, for $79,710.86. At that time, the amount due to USDA, Rural Development was $92,527.72. After the funds from the short sale were applied, the amount of the debt still owed was $12,816.86. After the sale, additional fees of $786.24 were billed to the account. USDA, Rural Development has received two U.S. Treasury Department offset payments that total $710.49. The balance owed to USDA, Rural Development is $12,875.61. (RX-5). An additional $3,605.17 may be owed to Treasury for potential collection fees. (RX-6).

Mr. Montes lives with his girl friend and she pays some of their expenses. Mr. Montes is currently employed as a WG 9 carpenter by the United States Department of Veteran Affairs at an hourly wage of $16.89 that is paid bi-weekly at about $1,350.00. He and his girl friend split the monthly rent of $500.00 and when his share of the expenses for

food, gas for his car, and other necessities are deducted from his income, he has a maximum of $75.00 available for garnishment from his monthly, disposable income.

Conclusions

1. USDA, Rural Development has proven that Jose Montes is indebted to USDA, Rural Development in the amount of $12,875.61 plus potential fees of $3,605.17 owed to Treasury.
2. Based upon the Petitioner's current income and necessary living expenses, administrative wage garnishment of Petitioner's wages shall be at the rate of $75.00 per month. A higher amount of monthly garnishment would cause him undue financial hardship.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Jose Monte may be made provided the sum garnished each month does not exceed $75.00.
Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

JILL PRIVEE.
AWG Docket No. 10-0102.
Decision and order.
Filed April 16, 2010.

AWG – Default on RD loan.

Petitioner, Pro se.
Mary Kimball and Gene Elkin, Esq. for RD.

Decision and order by Victor M. Palmer, Administrative Law Judge.

Revised Decision and Order

The prior "Decision and Order" issued in this proceeding is herewith set aside and replaced by this "Revised Decision and Order".

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on April 15, 2010, at 11:00 AM Eastern Time. Petitioner, Jill Privee, and Respondent's representatives, Gene Elkin and Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development that were received as Exhibits RX-1 through RX-5. Petitioner introduced, identified and authenticated various documents that were received as PX-1 through PX-6. At issue is the nonpayment of a debt owed to USDA, Rural Development on a home mortgage loan on property that Mrs. Privee had owned with her former husband, Michael J. Shong.

The evidence received shows that subsequent to their divorce in 1994, Mr. Shong gave up his interest in the property by signing and filing a quit claim deed and that USDA, Rural Development thereupon released him from further liability for the debt. An assumption of $90,000.00 was completed on July 14, 1999, when the total amount due for principal, interest and for taxes and other expenses paid by USDA, Rural Development was $124,762.91. After the funds from the assumption were applied, the amount of the debt still owed was $34,762.91. Moreover, a payment adjustment was made, on August 2, 1999, for additional interest of $275.21 and taxes of $1,769.45. USDA, Rural Development has received payments on the remaining debt from the U.S. Treasury Department, after its deduction of fees for collection, that total $5,384.39. The balance owed to USDA, Rural Development is $31,423.18. An additional $8,798.49 is owed to Treasury for its collection fees.

Mrs. Privee explained her financial circumstances and those of her present husband. Her testimony showed that the collection of the debt by garnishment of any part of her salary at the present time would cause her undue financial hardship.

Findings

The testimony and exhibits received in evidence proved that:

On October 16, 1988, petitioner and her then husband, Michael J. Shong, signed a promissory note for $95,000.00, obligating her to reimburse USDA, Rural Development for any future loss claim, in respect to a home mortgage loan given her and her husband to purchase property located at Lot 4, Pineville Road, Killingly, Connecticut 06233. (RX-1).

Petitioner and Mr. Shong were divorced in April, 1994, and he signed and filed a Quit Claim Deed in July,1995 that resulted in his release from further liability for the debt. (PX-6).

The mortgage loan was not paid and the property was conveyed under an assumption agreement dated July 14, 1999 (RX-3) for $90,000.00.

At that time, the amount due to USDA, Rural Development was $124,762.91. After the funds from the assumption were applied, the amount of the debt still owed was $34,762.91. On August 2, 1999, a payment adjustment was made and billed to the account for additional interest of $275.21 and taxes of $1,769.45. (RX-4, page 1). USDA, Rural Development has received payments on the remaining debt from the U.S. Treasury Department that total, after its deduction of fees for collection, $5,384.39. The balance owed to USDA, Rural Development is $31,423.18. (RX-1, page 2). An additional $8,798.49 is owed to Treasury for its collection fees, and the curr$40,221.67. (RX-5).

Mrs. Privee lives with her three children ages 21, 15, and 13, all of whom are in school, and her present husband who is in an alcohol recovery program. Mrs. Privee is currently employed in a position that pays her a gross monthly income of about $2,500. Her present husband

earns about the same. She itemized their monthly expenses for housing, automobile transportation needed to work, electricity, gas, food, TV, medical expenses, clothing, heating oil and telephone, and they totaled $4,800.00.

Conclusions

1. USDA, Rural Development has proven that Jill Privee is indebted to USDA, Rural Development in the amount of $31,423.18 plus fees owed to Treasury of $8,798.49.
2. Based upon the Petitioner's current income and necessary living expenses, administrative wage garnishment of Petitioner's wages would cause her undue financial hardship.
3. Due to the undue financial hardship that it would cause, administrative wage garnishment is not authorized at this time and may not be again considered for six (6) months from the date of this Order.

Order

For the foregoing reasons, administrative wage garnishment of the wages of the Petitioner, Jill Privee, is not authorized at this time, and may not be again instituted for the next six (6) months.
This matter is stricken from the active docket.
Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

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SHEILA BRADBY.
AWG Docket No. 10-0090.
Decision and Order.
Filed April 21, 2010.

AWG – Default on RD loan.

Petitioner, Pro se.
Mary E. Kimball and Gene Elkins, Esq. for RD.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Decision

This matter is before the Administrative Law Judge upon the request of the Petitioner, Sheila Bradby, 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 February 17, 2010, 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 on March 3, 2010. The Petitioner filed documentation with Rural Development and it was forwarded to the Hearing Clerk on April 14, 2010. In the materials filed, Ms. Bradby acknowledged the debt, but indicated that she was employed only part time, the level of her income was less than the minimum prescribed in the Regulations and as a result, administrative garnishment was not appropriate.

A telephonic hearing was conducted on April 14, 2010. Those participating included Sheila Bradby, the Petitioner, Mary E. Kimball, Accountant for the New Program Initiatives Branch, USDA Rural Development, Gene Elkin, Legal Liaison for Rural Development, the Administrative Law Judge and Diane Green, Secretary to the Acting Chief Administrative Law Judge. During the hearing, it was indicated that the pay stubs referred to in the Petitioner's letter were not in the file. The Petitioner agreed to fax a copy of her 2009 Federal Income Tax Return to Ms. Kimball. A copy of her W-2 Form was received after the hearing which indicated that in fact, the Petitioner's income is less than the minimum threshold for administrative wage garnishment.

The Narrative filed by the Respondent reflects that a total current balance of $15,635.00 remains due and owing.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The remaining unpaid debt is in the amount of $15,635.00. RX-4.
2. The Petitioner's income is less than the minimum threshold for garnishment.

Conclusions of Law

1. Sheila Bradby is indebted to the United States Treasury in the amount of $15,635.00 for the mortgage loan extended to her.
2. 31 C.F.R. §285.11 precludes garnishment of the Petitioner's wages at this time.
3. The Respondent is NOT entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Sheila Bradby shall NOT be subjected to administrative wage garnishment at this time.

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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BRIAN E. WARD.
AWG Docket No. 10-0126.
Decision and Order.
Filed April 21, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Brian E. Ward, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 4, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on April 20, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-4 on April 2, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Ward stated that he received RD's Exhibits and witness list. Following the hearing, RD filed RX-5.

Petitioner submitted a financial statement under oath on April 20, 2010.

Petitioner owes $20,657.79 on the USDA RD loan as of today, and in addition, potential fees of $5,784.18 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On May 23, 1986, Petitioner Brian and Tami Ward obtained a

USDA FHA home mortgage loan for property located at 4## And***** Road, Vestal, NY, 138**.[1] Petitioner was co-signor to a promissory note for $54,518.42. RX-1 @ p. 1 of 3.

2. The property was sold in a "short sale" on November 6, 2000 for $61,500. At the time of the short sale, the balance due on the note was $72,862.96. Narrative, RX-3.

3. Petitioner stated that at the short sale closing, he heard an RD official state that Petitioner's remaining debt would be forgiven.

4. As a result of Petitioner's assertion, RD filed a post-closing letter dated November 28, 2000 (RX-5), which states on line one ". . . there is a balance of $21,448.76 remaining on your account. . ."

5. Gene Elkin stated that it is standard RD policy to acquiesce to "short sales" which release the RD lien from the legal title when it is in the interest of the agency to do so, but do not forgive the debt against the RD borrower.

6. Given the dichotomy of these two financial positions, I find that Petitioner was under a duty to seek corrections in the RD records, but Petitioner admitted that he had no documentation raising these concerns over the alleged multi-thousand dollar "error."

7. After the sale, Treasury recovered an additional $790.97 - thus reducing the amount due from Petitioner to $20,657.79. Narrative, RX-3, RX-4.

8. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $5,784.18. Narrative, RX-4.

9. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

10. Petitioner stated that he has been gainfully employed for a long term, but he raised issues of financial hardship.

11. Using the Financial Hardship Calculation program and data from Petitioner's sworn testimony and financial statement (which I now label as PX-1), I made two determinations (current and one year hence) of the appropriate wage garnishment. Petitioner has a short term personal loan

[1]Complete address maintained in USDA records.

which was said to be retired in one year. Petitioner is also paying back a loan on borrowed funds from his 401K account. For the first year, Petitioner my continue the 401K loan payback at the current rate. After one year, Petitioner will be only be allowed credit in the Financial Hardship Calculation for the 401K loan payback at half of the current rate. The two calculations are enclosed.[2]

Conclusions of Law

1. Petitioner Brian E. Ward is indebted to USDA's Rural Development program in the amount of $20,657.79.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $5,784.18.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. The administrative wage garnishment by RD against this debtor is suspended at this time.

6. After one year, RD may garnish the wages of Petitioner at the rate of 4% of his monthly disposable income.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. The Administrative Wage Garnishment against this debtor is suspended at this time. After one year, Debtor's wages may be garnished at the rate of 4%. After two years, RD may reassess Debtor's financial position and modify the garnishment percentage as circumstances dictate.

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

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[2]The Financial Hardship Calculation is not posted on the OALJ website.

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RICHARD BECKMAN.
AWG Docket No. 10-0088.
Decision and Order.
Filed April 22, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Decision

This matter is before the Administrative Law Judge upon the request of the Petitioner, Richard Beckman, 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 February 17, 2010, 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 on February 23, 2010. The Petitioner filed his documentation
on March 16, 2010. A telephonic hearing was held on April 13, 2010. Richard Beckman participated without counsel. Mary E. Kimball, Accountant for the New Program Initiatives Branch, USDA Rural Development and Gene Elkin, Legal Liaison for Rural Development represented the Respondent. Diane Green, Secretary to the Acting Chief Administrative Law Judge was also present.

During the hearing, the Petitioner questioned the discrepancy between the amount collected by way of offset and the amount credited

to the debt by Rural Development. *Cf.* PX 6 and PX 7, p. 3. Ms. Kimball explained that the difference in the amounts were the result of Treasury fees applied prior to remittance to Rural Development, but agreed to provide the Petitioner with a breakout reflecting the total amount of offset and the Treasury fees associated with each. As Mr. Beckman also questioned the amount of accrued interest, Ms. Kimball was asked to double check that computation and to send that with the breakout to the Petitioner.

The supplemental information was provided in an Additional Narrative and Exhibit List which was sent to the Petitioner by Federal Express on April 16, 2010. The recomputation contained in RX-6 resulted in the interest figure of $6,378.69 which is a reduction of $4.24. RX-7 reflected the amount of $19,434.05 received by USDA from Treasury offset together with their fees of $474.70.

The original Narrative filed by the Respondent reflects that foreclosure proceedings were brought against the Petitioner with the property selling for less than the amount of the obligation owed. The total amount due prior to the sale was $46,191.90. Sale proceeds amounted to $18,992.50. After application of the sale proceeds, the balance owed was $27,199.40. As indicated, USDA has received offsets totaling $19,434.05, exclusive of the Treasury fees amounting to $474.70. After application of all payments, the amount due to USDA is $7,767.85, exclusive of the potential Treasury fees of $2,175.00.

It appearing unnecessary for any further hearing, on the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On February 9, 1989, the Petitioner and his wife, Joanna Beckman received a home mortgage loan in the amount of $37,900.00 from the United States Department of Agriculture (USDA) Rural Development (RD) for property located in Terra

Alta, West Virginia. RX-1.

2. The property was sold at foreclosure on March 9, 1998 with proceeds realized from that sale in the amount of $18,992.50, leaving a balance due of $27,199.40. RX-3.
3. Treasury offsets totaling $19,434.05, exclusive of the Treasury fees amounting to $474.70 have been received. RX-3, 7.
4. The remaining unpaid debt is in the amount of $7,767.85, exclusive of the potential Treasury fees of $2,175.00. Additional Narrative, RX-4.

Conclusions of Law

1. Richard Beckman is indebted to USDA Rural Development in the amount of $7,767.85 for the mortgage loan extended to him.
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 Richard Beckman shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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R. SCOTT GILL.
AWG Docket No. 10-0127.

Decision and Order.
Filed April 23, 2010.

AWG – Default on RD loan .

Mary E. Kimball and Gene Elkin, Esq., for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

Decision

This matter is before me upon the request of the Petitioner, R. Scott Gill, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 16, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on April 22, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-7 on March 31, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Gill stated that he received RD's Exhibits and witness list.

Petitioner submitted an undated statement consisting of a typed letter (two pages) and three additional pages including a handwritten admission that "the numbers match" which I now label as PX-1 pages 1 thru 5.

Petitioner owes $27,701.11 on the USDA RD loan as of today, and in addition, potential fees of $7,756.31 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On July 7, 1994, Petitioner, R. Scott Gill and Kimberly A. Shacreaw obtained a USDA RD home mortgage loan for property located at 2## S. Ste**** Street, Blairsville, PA, 157**.[3] Petitioner was co-signor to a promissory note for $48,280. RX-1 @ p. 1 of 3.

2. During the time that the loan was current, on July 3, 1995, RD released co-borrower Kimberly Shacreaw from personal liability on the loan. RX-3.

3. On March 19, 1999, Petitioner, the remaining borrower, was sent a Notice of Default on the loan. RX-4 @ p. 1 of 3.

4. The property was sold in a "short sale" on September 22, 2000 for $30,000. At the time of the short sale, the balance due on the note was $61,894.77. Narrative, RX-6.

5. After the sale, Treasury recovered an additional $4,312.51, plus $97.90 - thus reducing the amount due from Petitioner to $27,701.11. Narrative, RX-6, RX-7.

6. The potential fees due U.S. Treasury pursuant to the Loan Agreement are $7,756.31. Narrative, RX-7.

7. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

8. Petitioner stated that he is currently unemployed as a result of his company closing and he raised issues of financial hardship. Petitioner's testimony, PX-1.

Conclusions of Law

1. Petitioner R. Scott Gill is indebted to USDA's Rural Development program in the amount of $27,701.11.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $7,756.31.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development

[3]Complete address maintained in USDA records.

of his current address, employment circumstances, and living expenses.

5. The administrative wage garnishment by RD against this debtor is suspended at this time.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. The Administrative Wage Garnishment against this debtor is suspended at this time.

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

NOREEN A. STAFFORD.
AWG Docket No. 10-0106.
Decision and order.
Filed April 27, 2010.

AWG – Default on RD loan .

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

Decision

Pursuant to a Hearing Notice issued on February 19, 2010, I held a hearing by telephone, on April 27, 2010, at 11:00 AM Eastern Time, in consideration of a Petition seeking to dispute the terms of a proposed repayment schedule for a debt that Petitioner incurred under a Single Family Housing Mortgage Loan. Petitioner had signed a promissory note to secure a home mortgage loan given her by Respondent, USDA, and Rural Development, which has not been fully repaid, and has

resulted in the garnishment of Petitioner's wages for nonpayment of the amount still owed.

Petitioner did not participate in the hearing. Petitioner was instructed by the Hearing Notice to file:

I, completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses;

2, a narrative of events or reasons why she cannot pay the alleged debt and indicating what portion of the alleged debt she is able to pay through wage garnishment;

3. supporting exhibits; and

4. lists of the exhibits and witnesses who would testify in support of her petition. She was further instructed to contact my secretary, Ms. Marilyn Kennedy, and give Ms. Kennedy a telephone number where Petitioner could be reached at the time of the scheduled hearing. Petitioner failed to comply with any of the instructions. At the time of the schedule hearing, she did not answer calls to her listed telephone.

Respondent participated in the hearing through its representatives, Gene Elkin Legal Liaison and Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development.

Under 31 C.F.R. § 285.11 (f) (2), a hearing on a Petition challenging wage garnishment may be at the agency's option, either oral or written. An oral hearing may be conducted by telephone conference and is only required when the issues in dispute cannot be resolved by review of the documentary evidence 31 C.F.R § 285.11 (f) (3). An oral hearing was scheduled to hear and decide Petitioner's concerns. In that Petitioner whenever advised Hearing Clerk, the Respondent, or this office that she had moved or that she could not be personally contacted on her listed telephone number, and that all mail sent to her only listed address was never returned as undeliverable by the U.S. Post Office, I proceeded with the scheduled hearing without her presence, and took evidence on the existence of the debt that her Petition challenged.

Both Mr. Elkin and Ms. Kimball were duly sworn. Ms. Kimball identified and authenticated Respondent's Exhibits 1-4 which were

received in evidence.

Respondent proved the existence of the debt owed by Petitioner to Respondent for the losses Respondent sustained as a $91,000.00 home mortgage loan it gave to Petitioner, on September 14, 1987, for property located at 145 Laurel Street Extension, Greenfield, MA. The property was sold at a short sale on June 29, 2000 for $85,000.00. The total amount due on the mortgage debt prior to the sale was $91,417.28. After the sale funds were applied to the debt, the amount due from Petitioner was $20,531.19. Respondent has received Treasury offset payments and the present balance of the debt is $14,917.96. Potential collection fees assessed by the United States Treasury Department $4,177.03 which makes the balance due at Treasury $19,094.99. The Petitioner appears to be employed and has provided no evidence showing that the present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11. Therefore the Petition is dismissed and the proceedings to garnish Petitioner's wages may be resumed provided the amount of the wages garnished does not exceed 15% of her disposable income.

Petitioner is advised, however that if she telephones the private agency engaged by Treasury to pursue the debt's collection, she might be able to settle the debt at a lower amount with lower payments. She should do so immediately.

CONSUELO W. SHALLCROSS.
AWG Docket No. 10-0271.
Decision and Order.
Filed May 7, 2010.

AWG – Default on RD loan.

Petitioner Pro se.

Mary Kimball for RD.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

Decision and Order

On August 24, 2010, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under and a loan given by Respondent to Petitioner, Consuelo W. Shallcross, and James McKinney. Petitioner, Consuelo W. Shallcross, represented herself. Respondent, USDA Rural Development, was represented by Mary Kimball. Petitioner, Consuelo W. Shallcross, and Mary Kimball who testified for Respondent, were each duly sworn.

Respondent proved the existence of the debt owed by Petitioner and James McKinney for payment of the loss Respondent sustained on the loan given to them to finance the purchase of a home located at 16062 Moter Ave., Milford, VA 22514. The loan was evidenced by a Promissory Note in the amount of $ 45,400 dated November 22, 1988 (RX-1).The note was reamortized on June 23, 1998. Loan payments were not made and a foreclosure sale was held on June 6, 2001, and USDA, Rural Development received $41,602.85 from the sale. Prior to the sale, the amount owed to Respondent, USDA, Rural Development, was $63,223.53 for principal, interest, and other expenses. After the sale, Petitioner owed $21,620.68. Since the sale, $173.70 has been collected by the U. S. Treasury Department in offsets from income tax refunds that Petitioner otherwise would have received. The amount that is presently owed on the debt is $21,446.98 plus potential fees to Treasury of $6,005.15 or $27,452.13 total.(RX-4). Petitioner has been unemployed since April of this year. Her father died on April 3, 2010 and she has suffered serious depression since that time requiring strong medication. Any salary she earns shall is subject to a 25% of her income garnishment order by the Hanover District Court for unpaid fines and court costs that she owes. At present there is no disposable income that

may be subject to wage garnishment. I have concluded that the present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that she has no present income and the pending garnishment proceeding for the unpaid loan by Respondent must therefore be dismissed.

Under these circumstances, these proceedings to garnish Petitioner's wages are hereby dismissed.

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ANN AMOS O'NEIL.
AWG Docket No. 10-0269.
Decision and order.
Filed May 7, 2010.

AWG – Default on RD loan – Guarantee.

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

On August 25, 2010, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under a loan assumed and a loan given by Respondent to Petitioner, Ann Amos O'Neil. Petitioner was represented by her attorney, Jonathan B. Young. Respondent, USDA Rural Development, was represented by Mary Kimball. Petitioner, Ann Amos O'Neil, and Mary Kimball who testified for Respondent, were each duly sworn.

Respondent proved the existence of the debt owed by Petitioner for payment of the losses Respondent sustained on the loans assumed and given to finance Petitioner's purchase of a home located at 662 Jefferson Street, Red Hill, PA 18076. The loans were evidenced by an Assumption Agreement for $62,526.44, dated May 27,1992, and a Promissory Note in the amount of $ 27,470 of the same date (RX-1and RX-3). Loan payments were not made and a foreclosure sale was held on September 23, 1999, and USDA, Rural Development received $47,955.56 from the sale. Prior to the sale, the amount owed on both accounts to Respondent, USDA, Rural Development, was $149,978.23 for principal, interest, and other expenses. After the sale, Petitioner owed $102,022.67 on the combined loan accounts. Since the sale, $7,620.55 has been collected by the U. S. Treasury Department in offsets from income tax refunds that Petitioner otherwise would have received. The amount that is presently owed on the debt is $94,402.12 plus potential fees to Treasury of $26,432.59, or $120,834.71 total (RX-5). Petitioner has been unemployed since August 25, 2010. At present there is no disposable income that may be subject to wage garnishment.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that she has no present income and the pending garnishment proceeding for the unpaid loan by Respondent must therefore be dismissed. Moreover, since she is presently unemployed, federal administrative wage garnishment hearings may not be reinstituted at any time before the passage of twelve (12) months from the time she becomes employed.

It is hereby so ordered.

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MIRANDA KEPHART.
AWG Docket No. 10-0095.
Decision and Order.
Filed May 14, 2010.

AWG – Default on RD loan.

Mary E.Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

1. The hearing was held as scheduled on May 14, 2010. Miranda Kephart, also known as Miranda H. Kephart, the Petitioner ("Ms. Kephart") failed to appear. [She did not answer at the telephone number on her Hearing Request dated November 5, 2009, and she had not provided any other telephone number.] Rural Development, an agency of the United States Department of Agriculture (USDA), is the Respondent ("USDA Rural Development") and was represented by Mary E. Kimball and Gene Elkin.
2. The address for USDA Rural Development for this case is

Mary E. Kimball, Branch Accountant
USDA / RD New Program Initiatives Branch
Bldg 105 E, FC-22, Post D-2
4300 Goodfellow Blvd
St Louis MO 63120-1703

mary.kimball@stl.usda.gov 314.457.5592 phone
314.457.4426 FAX

3. I encourage **Ms. Kephart and the collection agency** to work together to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Ms. Kephart's disposable pay. Ms. Kephart, obviously, will have to make herself available to the collection agency if she wants to negotiate. 4. This is Ms. Kephart's case (she filed the Petition), and in addition to failing to be available for the hearing, Ms.

Kephart failed to file with the Hearing Clerk any information. Ms. Kephart's deadline for that was April 30, 2010.

Summary of the Facts Presented

5. Ms. Kephart owes to USDA Rural Development a balance of **$51,888.05** (as of May 14, 2010) in repayment of the balance of a mortgage loan guaranteed by USDA Rural Development ("the debt") (*see* USDA Rural Development Exs., and Ms. Kimball's testimony, which included information regarding the recent $1,091.00 tax refund offset, of which $16.00 was applied to fee, and $1,075.00 applied to Ms. Kephart's $52,963.05 balance).
6. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects) on **$51,888.05** would increase the current balance to $66,416.70.
7. Ms. Kephart's disposable pay supports garnishment, up to 15% of Ms. Kephart's disposable pay.

Findings, Analysis and Conclusions

8. The Secretary of Agriculture has jurisdiction over the parties, Ms. Kephart and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.
9. Ms. Kephart owes the debt described in paragraphs 5 and 6.
10. Ms. Kephart's disposable pay supports garnishment, up to 15% of Ms. Kephart's disposable pay (within the meaning of 31 C.F.R. § 285.11); and Ms. Kephart has no circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Order

11. Until the debt is fully paid, Ms. Kephart shall give notice to USDA Rural Development or those collecting on its behalf, of any changes in her mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).
12. USDA Rural Development, and those collecting on its behalf, are

authorized to proceed with garnishment, up to 15% of Ms. Kephart's disposable pay.

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

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GEREMIC LOMAX.
AWG Docket No. 10-0115.
Decision and Order.
Filed May 19, 2010.

AWG – Default on RD Loan – Guarantee.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Decision and Order issued by Stephen M. Reilly, Hearing Official.

This matter is before me upon the request of the Petitioner, Geremic Lomax, for a hearing in response to efforts of Respondent, USDA's Rural Development Agency, Rural Housing Service, to institute a federal administrative wage garnishment against him. On February 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on May 3, 2010. Rural Housing was represented by Mary Kimball who testified on behalf of the agency. Mr. Lomax and his wife were present and each participated in the presentation of their position. The witnesses were sworn.

Rural Housing filed a copy of its Narrative along with exhibits RX-1 through RX-6 on March 4, 2010. Mr. Lomax acknowledged that he received a copy of Rural Housing's Exhibits. On May 3, 2010, Rural Housing filed a second Narrative and exhibits RX-1A and RX-1B which explained a page numbering discrepancy concerning exhibit RX-1 that I noted and raised in during the hearing. I conclude that Rural Housing used pages from two different versions of Form RD 1980-21, Request for Single Family Housing Loan Guarantee. Page 1 of the form signed by Mr. Lomax came from the 2003 version of the form, while page 2

came from the 2006 version. This filing satisfies me that RX-1 came from a single document.

On March 24, 2010, Mr. Lomax filed a handwritten statement stating his position. His filing included exhibits PX-1 through PX-3. On May 18, 2010 Mr. Lomax filed a copy of his Consumer Debtor Financial Statement.

Based on the testimony during the hearing and the record before me, I conclude that Mr. Lomax owes $33,434.06 on the USDA Rural Housing loan guarantee. In addition, there are potential fees of $9,361.53 due the US Treasury for the cost of collection. I encourage Mr. Lomax and the collection agency to work together to establish a repayment schedule rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Mr. Lomax's disposable pay.

Summary of the Facts Presented

1. On March 11, 2005, Geremic Lomax applied for and received a guaranteed home mortgage loan from Gateway Home Mortgage, LLC for the amount of $84,999.00. The property is located at 21 North King Drive, Fountain Inn, South Carolina 29644. The mortgage loan was later assigned to JP Morgan Chase Bank.

2. The mortgage loan guarantee resulted from an agreement between United States Department of Agriculture's Rural Development Agency, Rural Housing Service and Mr. Lomax as evidenced by the completed form RD 1980-21 that is signed both by a representative of Rural Housing and Mr. Lomax. RX-1. During the hearing, Mr. Lomax acknowledged signing the guarantee.

3. Mr. Lomax defaulted on the loan on July 1, 2006. The loan balance at that time was $83,684.23. On June 4, 2008, based on the loan guarantee, Rural Housing paid JP Morgan Chase Bank $40,932.06. RX-2, RX-3.

4. After the house finally sold, the Chase Bank refunded $5,576.00 to Rural Housing from the proceeds of the sale. RX-5, p.1-2. In addition, on February 18, 2009, Rural Housing received a Treasury offset payment in the amount of $1,922.00. Both amounts were credited

to Mr. Lomax's account leaving a balance due on the Loan Guarantee of $33,434.06. The potential fees due to the U.S. Treasury pursuant to the Loan Agreement are $9,361.53. Narrative, RX-6.

Findings, Analysis and Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Mr. Lomax and USDA Rural Development Agency, Rural Housing Service; and over the subject matter, which is administrative wage garnishment.

2. Petitioner Geremic Lomax is indebted to USDA's Rural Development Agency, Rural Housing Service program in the amount of $33,434.06.

3. In addition, Mr. Lomax is indebted for potential fees to the US Treasury in the amount of $9,361.53.

4. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

5. Mr. Lomax's disposable pay supports garnishment, up to 15% of Mr. Lomax's disposable pay (within the meaning of 31 C.F.R. § 285.11); and Mr. Lomax has no circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Order

Until the debt is fully paid, Mr. Lomax shall give notice to USDA Rural Development Agency, Rural Housing Service or those collecting on its behalf, of any changes in his mailing address; delivery address for commercial carriers such as FedEx or UPS; FAX number(s); phone number(s); or e-mail address(es).

USDA Rural Development Agency, Rural Housing Service, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Mr. Lomax's disposable pay.

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

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KORI MILLER.
AWG Docket No. 10-0145.
Decision and Order.
Filed May 18, 2010.

AWG – Default on RD loan – Guarantee.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Kori Miller 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 March 10, 2010, 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 on April 1, 2010. The Petitioner also responded, filing material which set forth a summary of her monthly expenses and repeating her position that as a single mother on limited income with no child support, she was unable to pay the amount alleged to be due. A telephonic hearing was scheduled to be conducted on May 18, 2010; however, Ms. Miller could not be reached by telephone. Nothing further having been received from the Petitioner, the request for hearing will be considered waived and the issues before me 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 she 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

$20,173.49 for accrued interest, protective advances, liquidation costs and property sale costs. Potential fees assessed by the Treasury are $5,648.57, making the balance due at Treasury $25,822.06.

On the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On July 20, 2005, Kori Miller applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) (Exhibit RX-1) and on August 8, 2005 obtained a home mortgage loan for property located at 211 S 4th Street, Colby, Wisconsin from Countrywide Home Loans for $68,000.00. RX-2.
2. In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-2.
3. The home did not sell during the six month marketing period and the lender's claim in the amount of $20,173.49 was paid based upon a liquidation appraisal of $62,000.00. The home later sold on November 21, 2008 for $45,000.00 resulting in no additional recovery. RX-4.
4. The remaining unpaid debt including potential Treasury fees is in the amount of $25,822.06.
5. The Petitioner has a gross income of approximately $1,700.00 per month prior to deductions for payroll taxes. Her monthly expenses which appear to be reasonable equal, if not exceed, her disposable income.

Conclusions of Law

1. Kori Miller is indebted to USDA Rural Development in the amount of $20,173.49 not including potential Treasury fees for the mortgage loan guarantee extended to her. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met; however, she has demonstrated sufficient financial hardship to preclude garnishment at this time.

2. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner for a period of one year.
3. Should review of the Petitioner's financial condition show significant improvement after a period of a year, new proceedings may be commenced after notice to the Petitioner.

Order

For the foregoing reasons, the administrative wage garnishment proceedings are **DISMISSED,** without prejudice to be being reinstituted after a period of a year upon a showing of significant improvement in her financial condition.

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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TIMOTHY MARTENS.
AWG Docket No. 10-0146.
Decision and Order.
Filed May 19, 2010.

AWG – Default on RD loan – Guarantee.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Timothy Martens 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 March 10, 2010, 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 on April 7, 2010. The Petitioner did contact the Office of Administrative Law Judges to provide a telephone number but did not file anything further with the Hearing Clerk. When he was contacted for the hearing on May 19, 2010, he declined to participate. At the time he requested a hearing, the Petitioner indicated he had been unaware that if he was foreclosed upon that he would owe. Nothing further having been received from the Petitioner, the request for hearing will be considered waived and the issues before me 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 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 $32,593.17 for accrued interest, protective advances, liquidation costs and property sale costs. The amount due has been reduced by Treasury Offsets amounting to $220.71 leaving $32,126.76 due at this time. This amount does not include Potential fees assessed by the Treasury which are estimated at $8,995.49 which amounts to $41,122.25 due at the current time.

On the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On November 12, 2004, Timothy Martens applied for and received a home mortgage loan guarantee from the United States Department of Agriculture (USDA) Rural Development (RD) (Exhibit RX-1) and on November 29, 2004 obtained a home mortgage loan for property located at 306 W. Hirschler, Moundridge, Kansas from J.P. Morgan Chase Bank, N.A. (Chase) for $84,500.00.
2. In 2006, the Petitioner defaulted on the mortgage loan and

foreclosure proceedings were initiated. RX-2

3. Chase submitted a loss claim and USDA paid Chase the sum of $32,593.17 for accrued interest, protective advances, liquidation costs and property sale costs. RX-2-4.
4. Treasury offsets totaling $220.71 ($306.38 less Treasury fees of $85.87) have been received. Narrative, p 2.
5. The remaining unpaid debt is in the amount of $41,122.25.

Conclusions of Law

1. Timothy Martens is indebted to USDA Rural Development in the amount of $32,126.76 for the mortgage loan guarantee extended to him.
2. After reduction by Treasury offsets and the addition of potential Treasury fees the remaining unpaid debt is in the amount of $41,122.25.
3. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
4. The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Timothy Martens shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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FRED M. WHITMORE.
AWG Docket No. 10-0120.
Decision and Order.
Filed May 20, 2010.

AWG – Default on RD loan .

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Fred M. Whitmore 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 March 11, 2010, 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 on March 31, 2010. The Petitioner has not responded. In his request for a hearing, the Petitioner indicated only that he had never been given a statement even after numerous requests. Efforts to contact him by telephone have not been successful.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On March 21, 1996 Fred M. Whitmore and Denise M. Whitmore assumed a Farmers Home Administration loan having a balance of $97,168.51 previously made to Daniel J. Caulfield and Judy L. Caulfield secured by a home mortgage on property located at 565 Cedar Street, Spring City, Pennsylvania. RX-1. A subsequent loan was obtained on the same date in the amount of $7,380.00 RX-2.
2. In 2002, the Whitmores defaulted on their loans and the property was sold at a foreclosure sale on April 30, 2002. The combined balance from both notes at the time of sale amounted to $137,058.35. The proceeds realized from that sale were in the amount of $68,598.10, leaving a balance due of $68,460.25. RX-

3.

3. USDA has received payments totaling $18,495.47 (after deduction of Treasury fees of $427.97). RX-4.
4. The remaining unpaid debt is in the amount of $49,964.78, exclusive of potential Treasury fees . RX-4.

Conclusions of Law

1. Fred M. Whitmore is indebted to USDA Rural Development in the amount of $49,964.78 (exclusive of potential Treasury fees) for the mortgage loans extended to and assumed by him.
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 Fred M. Whitmore shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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WANDA GRIFFITH, f/k/a WANDA ZWISLE.
AWG Docket No. 10-0121.
Decision and Order.
Filed May 20, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.

Decision and Order issued Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Wanda Griffith, formerly known as Wanda Zwisle 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 March 11, 2010, 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 on March 22, 2010. The Petitioner filed her material with the Hearing Clerk on April 8, 2010. In the materials provided, Ms. Griffith provided information concerning her limited financial status and explained that her husband is disabled and her 15 year old son also has health issues. During the hearing, it appeared that she understood that the obligation was joint and several and that although the Government was also attempted to collect the remaining amount from her husband, it was entitled to collect the full amount from her.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On October 13, 1989, the Petitioner and her then husband Mark Zwisle received a home mortgage loan in the amount of $55,900.00 from the United States Department of Agriculture's (USDA) Farmers Home Administration (FmHA) (now Rural Development (RD)) for property located at 124 Pleasant Acres Drive, York, Pennsylvania. RX-2.
2. The property was sold at a short sale on December 1, 2000 with proceeds realized from that sale in the amount of $34,288.65, leaving a balance due of $29,057.38. RX-4.
3. Treasury offsets totaling $14,662.56 have been received. RX-4.
4. The remaining unpaid debt is in the amount of $14,683.81

(exclusive of potential Treasury fees). RX-4.

5. The Petitioner's income is insufficient by itself to cover basic living expenses at this time, her husband is disable and not employed, and the family has significant recurring medical expenses.

Conclusions of Law

1. Wanda Griffith is indebted to USDA Rural Development in the amount of $14,683.81 (exclusive of potential Treasury fees) for the mortgage loan extended to her.
2. Although all procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met, sufficient hardship is demonstrated to defer garnishment action at this time.
3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner until such time as the financial hardship has been removed.
4. The Respondent may review the Petitioner's financial condition after a period of twelve months, or upon receipt of new information indicating that her financial hardship has been resolved.
5. This Decision does not affect other actions taken by Treasury to collect the amount due.

Order

For the foregoing reasons, the wages of Wanda Griffith may **NOT** be subjected to administrative wage garnishment for a period of twelve months or until such time as new information has been received indicating her financial hardship has been resolved.

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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PATRICIA DAWN HADDIX BAHR.
AWG Docket No. 10-0122.
Decision and Order.
Filed May 20, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Decision

This matter is before the Administrative Law Judge upon the request of Patricia Dawn Haddix Bahr 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 March 11, 2010, 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 on April 1, 2010. The Petitioner filed her material with the Hearing Clerk on April 8, 2010. In the materials provided, Ms. Bahr indicated that she had been told that she would owe nothing as she had been under the impression that the sale price was sufficient to satisfy the debt. During the hearing, it was explained to her that the obligation was joint and several and that the Government was entitled to collect the full amount from her.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On June 16, 1986, the Petitioner and her then husband Robert L. Haddix received a home mortgage loan in the amount of $55,000.00 from the United States Department of Agriculture's

(USDA) Farmers Home Administration (FmHA) (now Rural Development (RD)) for property located at 626 Bairdford Road, Gibsonia, Pennsylvania. RX-1.

2. The property was sold at a short sale on October 15, 1998 with proceeds realized from that sale in the amount of $33,592.38, leaving a balance due of $36,311.84. RX-4.
3. Treasury offsets totaling $7,463.89 have been received. RX-4.
4. The remaining unpaid debt is in the amount of $27,932.08 (exclusive of potential Treasury fees of $7,820.98). RX-4, 5.

Conclusions of Law

1. Patricia Dawn Haddix Bahr is indebted to USDA Rural Development in the amount of $27,932.08 (exclusive of potential Treasury fees) for the mortgage loan extended to her.
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 Patricia Dawn Haddix Bahr shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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KATHLEENMARIE B. PARKER, f/k/a KATE ELLIOTT.
AWG Docket No. 10-0156.
Decision and Order.
Filed May 20, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Kathleenmarie B. Parker, formerly known as Kate Elliott 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 March 29, 2010, 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 her documentation on April 7, 2010. In the materials filed, Ms. Parker indicated that after consulting her attorney, she is of the opinion that collection of the debt is precluded by the laws of New Mexico.

The Narrative filed by the Respondent reflects that foreclosure proceedings were brought by the lender against the Petitioner and the property was sold with less being realized from the sale than the amount of the obligation owed. The total amount due prior to the sale was $54,554.78. Sale proceeds amounted to $43,142.92. After application of the sale proceeds, the balance owed was $11,411.86. USDA has received payments totaling $8,457.14 (after deduction of Treasury fees of $307.98), leaving the current balance owed of $3,660.82, exclusive of potential Treasury fees.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On April 16, 1993 Kathleenmarie B. Parker (then Kate Elliott) received a home mortgage loan in the amount of $52,000.00 from the United States Department of Agriculture (USDA) Farmers Home Administration (now Rural Development (RD) for property

located at 603 Corona, Truth or Consequences, New Mexico. RX-1.

2. The property was sold at foreclosure sale on July 17, 2001 with proceeds realized from that sale in the amount of $43,142.92, leaving a balance due of $11,411.86. RX-3.
3. USDA has received payments totaling $8,457.14 (after deduction of Treasury fees of $307.98). RX-3.
4. The remaining unpaid debt is in the amount of $3,660.82, exclusive of potential Treasury fees . RX-3.

Conclusions of Law

1. Kathleeenmarie B. Parker (f/k/a Kate Elliott) is indebted to USDA Rural Development in the amount of $3,660.82 (exclusive of potential Treasury fees) for the mortgage loan extended to her.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. The statute of limitations on collection of a debt under New Mexico law is pre-empted by the Supremacy Clause (Article VI, clause 2) of the United States Constitution and the 2008 Farm Bill.
4. The Respondent is entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of Kathleenmarie B. Parker shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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JASON JAMES.
AWG Docket No. 10-0116.
Decision and order.
Filed May 20, 2010.

AWG – Default on RD loan.

Petitioner Pro se.
Mary Kimball and Gene Elkin, Esq. for RD.
Decision and order by Victor W. Palmer, Administrative Law Judge.

Decision

On July 22, 2010, I held on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for losses it incurred under an assumed Single Family Housing Loan and new given by Respondent to Petitioner Kenneth A. Sanchez and to his former wife Brenda S. Sanchez, Petitioner, Kenneth A. Sanchez, and Mary Kimball who testified for Respondent, were each duly sworn. Gene Elkin, attorney for Respondent, also participated in the hearing.

Respondent proved the existence of the debt owed by Petitioner for payment of the loss Respondent sustained on the loans assumed and given to Petitioner and his former wife to finance the purchase of a home located at 915 N. 5th St., Payette, ID 83661. The loans were evidenced by a Assumption Agreement and a Promissory Note both dated March 9, 1998. The home went back to another lender holding a first mortgage on it when it was foreclosed upon June 29, 2004. Prior to and after the foreclosure, the amount owed to Respondent, USDA, Rural Development, was $33,093.32. Since the foreclosure, $6,114.46 has been collected by the U.S. Treasury Department in offsets from income tax refunds that Petitioner otherwise would have received. The amount that is presently owed on the debt is $26,978.86 plus potential fees to Treasury of $7,554.08, or $34,532.94 total.

Mr. Sanchez is employed as a Highster Operator earning $14.00 an hour or $2,200.00 gross per month. His net monthly income is approximately $1,650.00. He is divorced from Brenda S. Sanchez. He

has 9 grandchildren and helps care for one of them. He has filed and testified to the accuracy of a Consumer Debtor Financial Statement that shows his monthly expenses to be: rent $450.00, gasoline $200.00, electricity-$67.86, natural gas-$30.00, food-$300.00, medical expenses-$100.00, clothing-$100.00, water-$54.91, car insurance-$71.00, phone-$121.00 and baby sitter/housekeeper-$150.00. These expenses total $1,645.00 and when deducted from his monthly income, Mr. Sanchez has no disposal income, and nothing may presently be subject to wage garnishment.

I have concluded that the present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R § 285.11.

USDA, Rural Development has met its burden under 31 C.F.R § 285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he would suffer undue financial hardship if any amount of money is garnished from his disposable income at any time during the next six (6) months. During that time, Mr. Sanchez will give consideration to contacting a Legal Aid attorney to help him decide whether he should file for bankruptcy or to help him to contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

SARAH B. DENNIS.
AWG Docket No. 10-0092.
Decision and order.
May 20, 2010.

AWG.

Petitioner Pro se.
Mary Kimball for RD
Decision and order by Peter W. Davenport, Acting Chief Administrative law Judge.

Editor's Note: This case is not published by order of the Acting Chief Administrative Law Judge.

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BETTY M. PIFER.
AWG Docket No. 10-0136.
Decision and Order.
Filed May 24, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Robert M. Hanak, Esquire, for Petitioner.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Betty M. Pifer 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 March 11, 2010, 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 on March 24, 2010. On April 7, 2010, Robert M. Hanak, Esquire, Hanak, Guido and Taladay of DuBois, Pennsylvania entered his appearance and faxed the Petitioner's Narrative. Hard copies followed which were filed on April 12 and 13, 2010.

In the materials filed by the Petitioner, Ms. Pifer acknowledged signing the note and mortgage which gave rise to the obligation being sought to be collected and her default on the loan, but reiterated her position set forth in multiple exhibits that USDA had been non-responsive to her efforts to avoid foreclosure, that she had been advised by Gary Reed, a USDA employee that if she could sell the house that

USDA would accept current fair market value in satisfaction of the outstanding mortgage,[1] that she had attempted to negotiate a sale of the property through assumption of her mortgage without success and that others similarly situated had been treated more favorably than she was the case with her. The file is extensive and amply documents USDA's lack of responsiveness. In response to her testimony that she had completed numerous packets in an effort to come to some settlement, Rural Development responded that while she may have disclosed her financial condition, she had failed to make an offer so packets were repeatedly sent to her apparently without explanation of the need to submit an offer.

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 short sale with less being realized from the sale than the amount of the obligation owed. The total amount due prior to the sale was $61,038.63. Sale proceeds amounted to $40,000.00; however, after expenses of sale, USDA received only $35,743.13, leaving a balance of $21,981.73. On Account #5979449, USDA has since received payments totaling $3,312.02 (after deduction of Treasury fees), and the remaining balance of $!.75 was waived. On Account #5979452, USDA has received $1,203.21 (after deduction of Treasury fess) leaving the current balance owed of $20,778.52, exclusive of Treasury fees in the potential amount of $5,817.99.

The Petitioner also provided information concerning her current financial condition which reflects reflects a marginal existence, with minimal ability to pay normal recurring necessary expenses and no current ability to liquidate the debt sought to be collected.

On the basis of the entire record before me, the following Findings

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[1]Property values had declined significantly; the Petitioner purchased the house by assuming an existing loan of $40,848.91 and executing a new note for $10,430.00; however, despite numerous improvements, by 1999, realtors looking at the house placed its value at between $29,000 and $39,000. PX-15, 35. USDA's letter of July 12, 2001 advising that although the short sale would be approved, any deficiency balance would require debt settlement was sent to the purchaser's attorney rather than to the Petitioner who testified that she believed that a sale for current fair market value would satisfy the outstanding balance and that she would not have made the sale had she been properly informed. PX-29.

of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On September 7, 1993, the Petitioner assumed an existing USDA loan of $40,848.91 and executed a new note to USDA for $10,430.00 to purchase a residence at R.R. #1, Box 130, DuBois, Pennsylvania. RX-1,2.
2. The property was sold at a short sale on July 13, 2001 with proceeds realized from that sale in the amount of $35,743.13, leaving a balance due of $25,295.50. RX-4.
3. Treasury offsets totaling $3,312.02 have been received on Account #5979449 and $1,203.21 on Account #5979452. RX-3.
4. The remaining unpaid debt is in the amount of $20,778.52, exclusive of potential Treasury fees. RX-4,5.
5. The Petitioner's financial condition reflects a marginal existence, with minimal ability to pay normal recurring necessary expenses and no current ability to liquidate the debt sought to be collected.

Conclusions of Law

1. Betty M. Pifer is indebted to USDA Rural Development in the amount of $20,778.52 for the mortgage loan(s) extended to her.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. Due to the Petitioner's financial hardship, the Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Betty M. Pifer **MAY NOT** be subjected to administrative wage garnishment.

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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BRYAN P. FINNEMORE.
AWG Docket No. 10-0167.
Decision and Order.
Filed May 24, 2010.

AWG – Default on RD loan.

Mary Kimball and Dale Theurer, for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Brian P. Finnemore 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 March 29, 2010, 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 on April 13, 2010. On April 23, 2010, the Petitioner faxed his materials to the Hearing Clerk.

The materials filed by the Petitioner relate only to his financial condition. In his dispute package, Mr. Finnemore indicated that he does not owe the debt because he was told by USDA that if he sold his home to someone else in the program, the debt would be paid in full. He also indicated that the transaction was completed in 1997, and that being it has been almost 13 years, he has no documentation and any witnesses no longer work there. The allegation that a USDA employee has told a borrower that USDA would accept current fair market value in satisfaction of the outstanding mortgage is commonly made and the passage of time before attempting collection action increases the difficulty of a borrower's ability to satisfy their burden of proof.

The Narrative filed by the Respondent reflects that the property was sold in a short sale with less being realized from the sale than the

amount of the obligation owed. The total amount due prior to the sale was $72,461.02. Sale proceeds amounted to $69,000.00 and were received by USDA[1]; however, due to the unpaid principal, accrued interest, and closing costs, the Petitioner owed $12,624.05 which was transferred to a new account (#80607930) which has continued to accrue interest.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On September 7, 1993, the Petitioner and Kim Finnemore obtained a existing USDA loan of $70,000.00 to purchase a residence at 17 Baker Street, Clinton, Missouri. RX-1.
2. The property was sold at a short sale on January 7, 1998 with proceeds realized from that sale in the amount of $69,000.00, leaving the following amounts due:

   a. $455.41 in unpaid principal.
   b. $3,005.61 accrued interest.
   c. $8,652.25 closing costs. RX-3.

3. The remaining unpaid debt is in the amount of $12,113.27, exclusive of potential Treasury fees.
4. The Petitioner's spouse is disabled and their financial condition reflects a marginal existence, with minimal ability to pay more than normal recurring necessary expenses and no current ability to liquidate the debt sought to be collected.

Conclusions of Law

1. Bryan P. Finnemore is indebted to USDA Rural Development in

[1]For reasons which are not clear, contrary to the usual practice, the closing costs were not deducted from the sales proceeds and by placing them in a new account, interest has continued to accrue. In determining the amount due, an adjustment will be made to stop the accrual of further interest.

the amount of $12,113.27 for the mortgage loan(s) extended to him.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met.
3. Due to the Petitioner's financial hardship, the Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Bruan P. Finnemore **MAY NOT** be subjected to administrative wage garnishment.

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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EDWARD HARVEY.
AWG Docket No. 10-0158.
Decision and Order.
Filed May 25, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Edward Harvey 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 March 29, 2010 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 on April 29, 2010. The Petitioner filed his documentation on April 23, 2010. The materials filed by the petitioner relate only to his financial condition and indicate that he is currently unemployed.

The Narrative filed by the Respondent reflects that the property was sold in a foreclosure sale with less being realized from the sale than the amount of the obligation owed. The total amount due prior to the sale was $79,609.63. Sale proceeds amounted to $32,234.55. After application of the sale proceeds, the balance owed was $47,013.09. Following the sale additional expenses were received which increased the amount owed by $969.50. USDA has received payments totaling $4,391.43 (after deduction of Treasury fees), leaving the current balance owed of $43,591.16, exclusive of potential Treasury fees.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On December 20, 1990, the Petitioner and his then wife, AE Kyong Harvey, assumed a home mortgage loan in the amount of $54,340.79 from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at 1350 Rigbie Hall Court, Belcamp, Maryland. RX-1. On the same day, they also executed a Promissory Note in the amount of $18,900.00 for the balance of the purchase price of the residence. RX-2.
2. The property was sold at a foreclosure sale on March 1, 1999 with proceeds realized from that sale in the amount of $32,234.55 leaving a balance due of $47,013.09. Following the sale additional expenses were received which increased the amount owed by $969.50. RX-4.
3. Treasury offsets totaling $4,391.43 exclusive of Treasury fees have been received. RX-4.
4. The remaining unpaid debt is in the amount of $43,591.16, exclusive of potential Treasury fees. RX-4.
5. The Petitioner is unemployed at the present time.

Conclusions of Law

1. Edward Harvey is indebted to USDA Rural Development in the amount of $43,591.16, exclusive of potential Treasury fees for the mortgage loan extended to him.
2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met; however, as the Petitioner is unemployed, no action may be taken at this time and not until he has been continuously employed for a twelve month period.
3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, **NO** action may be taken to subject the wages of the Petitioner to administrative wage garnishment until such time as he has been continuously employed for a twelve month period.

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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ANDREW T. GODFREY.
AWG Docket No. 10-0162.
Decision and Order.
Filed May 25, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request

of Andrew T. Godfrey 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 March 29, 2010, 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 on April 14, 2010. The Petitioner did not respond and failed to provide a working telephone number where he might be reached. Attempts to contact the Petitioner by telephone have been unsuccessful and his failure to comply with the Prehearing Order will be deemed to constitute a waiver of his request for a hearing and the matter will be decided upon the record.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On March 1, 1988, the Petitioner and Sherri Godfrey received a home mortgage loan in the amount of $75,000.00 from the United States Department of Agriculture (USDA) Farmers Home Administration (FmHA, now Rural Development [RD]) for property located at 32 Oak Lane, Little Egg Harbor, New Jersey. RX-1.
2. The property was sold at a short sale on November 30, 2001. The total amount due prior to the sale was $110,649.52, with proceeds realized from that sale in the amount of $93,750.70, leaving a balance due of $16,898.82. RX-3.
3. Three Treasury offsets totaling $4,910.00 (less fees of $71.83) have been received. RX-4.
4. The remaining unpaid debt is in the amount of $12,801.42 (exclusive of potential Treasury fees). RX-4.

Conclusions of Law

1. Andrew T. Godfrey is indebted to USDA Rural Development in the amount of $12,801.42 (exclusive of potential Treasury fees). for the mortgage loan extended to him.
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 Andrew T. Godfrey shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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JACQUELINE McCANN.
AWG Docket No. 10-0133.
Decision and Order.
Filed May 27, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
A. Clark Cannon, Esquire, for Petitioner.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Jacqueline McCann 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 March 10, 2010, 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 on March 24, 2010. Through her counsel, A. Clark Cannon, Esquire of Geneva, New York, Petitioner filed her documentation with the Hearing Clerk on April 7, 2010. A telephonic hearing was conducted on May 18, 2010. In the materials filed by the Petitioner are pleadings from the divorce proceedings between the Petitioner and her former husband, whose current whereabouts are not known. Although the divorce decree provided that the former husband was to assume responsibility for the mortgage debt, he defaulted on the loan and a valueless lien was approved on October 24, 2001 at which time the obligation from the loan was $33,387.68. Ms. McCann has also provided information concerning her current medical problems which require ongoing care and subsequent to the hearing provided information concerning her income and current monthly expenses.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On February 10, 1978, the Petitioner and her then husband Theodore McCann received a home mortgage loan in the amount of $24,500.00 from the Farmers Home Administration of United States Department of Agriculture (USDA) (now Rural Development (RD)) for property located at 11 Logan Street, Waterloo, New York. RX-1.
2. The Petitioner and her husband divorced in 1997. The divorce decree provided that the former husband was to assume responsibility for the mortgage debt; however, he defaulted on the loan and a valueless lien was approved on October 24, 2001 at which time the obligation from the loan was $33,387.68. Narrative, page 1, RX-3.
3. Theodore McCann's whereabouts are unknown.
4. The mortgage loan was a joint and several obligation and Jacqueline McCann was never released from the obligation.

5. Treasury offsets totaling $2,123.75 exclusive of fees have been received. RX-3.
6. The remaining unpaid debt is in the amount of $31,137.85, exclusive of potential Treasury fees. RX-4.

Conclusions of Law

1. Jacqueline McCann is indebted to USDA Rural Development in the amount of $31,137.85, exclusive of potential Treasury fees for the mortgage loan extended to her.
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 Jacqueline McCann shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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PETER MUDGE.
AWG Docket No. 10-0131.
Decision and Order.
Filed June 9, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Peter Mudge, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on May 17, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on April 23, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Mudge stated that he received RD's Exhibits and witness list.

Petitioner submitted a two page typed Narrative and PX-1 (7 pages) PX-2 (1 page) and PX-3 (4 pages).

Petitioner owes $22,695.93 on the USDA RD loan as of today, and in addition, potential fees of $6,354.76 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On May 3, 1985, Petitioner, Peter Mudge and Mindy Mudge obtained a USDA RD home mortgage loan for property located at # Banta Place, Stamford, NY 121**.[1] Petitioner was co-signor to a promissory note for $28,000. RX-1 @ p. 4 of 4.

2. On November 25, 1998, Petitioner was sent a Notice of Default on the loan by certified and regular mail to his last known address. RX-3 @ p. 3 of 3. I find that Petitioner's Exhibit1 (relating to the non-listing in his credit report of the RD debt) as not dispositive as to the extinguishment of his debt. I also find that he had a duty to properly give his creditors (including RD) his most current mailing address.

3. The property was sold in a "short sale" on June 25, 1999 for $16,500. At the time of the short sale, the balance due on the note was

[1]Complete address maintained in USDA records.

$36,240.71. Narrative, RX-4.

4. After the sale proceeds were posted, the balance remaining was $22,695.93. Narrative, RX-4, RX-6.

5. The potential fees due U.S. Treasury pursuant to the Loan Agreement are $6,354.86. Narrative, RX-6.

6. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

7. Petitioner stated that he is currently employed for more than one year, however he raised issues of financial hardship. Petitioner's testimony. PX-3.

Conclusions of Law

1. Petitioner Peter Mudge is indebted to USDA's Rural Development program in the amount of $22,695.93.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $6,354.76.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. A Financial Hardship Calculation[2] has been prepared with the result that the administrative wage garnishment by RD against this debtor is suspended at this time.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. The Administrative Wage Garnishment against this debtor is suspended at this time.

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

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[2]The Financial Hardship Calculation is not posted on the OALJ Website.

JEFFREY SMALL.
AWG Docket No. 10-0166.
Decision and Order.
Filed June 9, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Jeffrey Small 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 March 29, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt and setting the matter for telephonic hearing on May 25, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on April 14, 2010. The Petitioner failed to file any documentation prior to the hearing, but on June 4, 2010 filed the Consumer Debtor Financial Statement. In the materials requesting the hearing, Mr. Small denied owing the debt. During the hearing on May 25, 2010, Mr. Small indicated that the residence had been conveyed to his ex wife as part of the terms of the divorce decree and that she had been ordered to assume the debt and hold him harmless. The loan documents filed with the Narrative does indicate that the obligation was joint and several. The Narrative filed by the Respondent reflects that the property was sold in a short sale with less being realized from the sale than the amount of the obligation owed. Mr. Small indicated that he never had been given notice of his wife's

default and was unaware of the short sale. Although the Narrative indicates that Mr. Small was sent a Notice of Acceleration (RX-3) and a letter indicating that he would be "still financing [sic] liable for any remaining debt (RX-6), review of that letter indicates that it was not sent to his address at the time, but rather was sent to the property address after he had moved from there. Accordingly, it appears that Mr. Small was not properly afforded an opportunity to cure any default or to retake possession of the property and assume the underlying obligation.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On January 17, 1992, the Petitioner and his then wife, Deborah Small received a home mortgage loan in the amount of $52,500.00 from the United States Department of Agriculture (USDA) Rural Development (RD) for property located at 31601 Aberdeen Road, Wagram, North Carolina. RX-1.
2. The property was sold at a short sale on May 18, 1999 without giving proper notice to the Petitioner who was a joint obligor on the mortgage debt.
3. The notice of the short sale was not sent to the Petitioner's correct address and he never had notice of the proposed short sale or USDA's intention to hold him liable for any remaining deficiency.

Conclusions of Law

1. USDA Rural Development failed to properly give the Petitioner notice of the proposed short sale and in doing so failed to afford him the opportunity to cure the default or to retake possession of the residence and to assume the mortgage obligation.
2. By reason of the failure to give him proper notice, the Petitioner is **NOT** liable for the deficiency from the short sale and is **NOT**

indebted to UDSA RD in any amount.

Order

For the foregoing reasons, the administrative wage garnishment proceedings and all debt collection actions against the Petitioner on account of the mortgage loan are **ORDERED TERMINATED**.

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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PATRICIA KURZEJESKI.
AWG Docket No. 10-0098.
Decision and order.
Filed June 10, 2010.

AWG – Default on RD loan.

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

Decision

Pursuant to a Hearing Notice, I held a hearing by telephone, on April 27, 2009, at 10:00 AM Eastern local time. Petitioner participated with her attorney, Charles Talbot. Respondent, USDA Rural Development was represented by Gene Elkins, attorney, and Mary E. Kimball, Accountant for the New Programs Initiatives Branch at USDA Rural Development in St. Louis, MO.

The parties agree that Petitioner obtained a USDA RD home

mortgage loan, on January 5, 1990, for property located at 2345 Routes 5 & 20, Stanley, NY 14561, and signed a promissory note for $62,000.00. (RX-1). She defaulted on the loan and was sent a Notice of Acceleration letter by USDA Rural Development on February 3, 2000. (RX-3).

The sworn testimony of Petitioner and Respondent's representatives further establish that Respondent decided, in 2001, that the value of the property was so diminished that the institution of foreclosure proceedings would not be worth its costs, and Respondent declared the mortgage it held to be a valueless lien. At that time, the balance owed on the loan when unpaid interest, taxes and other expenses were added was $95,978.22, reduced in turn by $158.34, the total of two payments received from Treasury. (RX-4). Presently, upon the addition of fees for the debt's collection, the amount sought to be recovered through garnishment, amounts to $122,649.45. (RX-5).

On August 13, 2001, USDA RD filed with the Clerk's Office for the State of New York's Ontario County, a Discharge of Mortgage signed by a representative of USDA RD stating that the mortgage on the property owned by Petitioner: "has not been assigned and is satisfied and discharged and the United States of America does hereby consent that the same be discharged of record." (PX-1). Based on this fact, and the fact that Respondent made no collection efforts for 9 years from the Notice of Acceleration issued in 2000 until October 2009 when the Notice of Intent to Initiate Wage Garnishment Proceedings was issued, the debt should be considered discharged. Petitioner's attorney cites New York's Statute of Limitations, specifically NYS CPLR §213 which provides that legal actions to enforce a note secured by a mortgage must be commenced within six years. (PX-3).

Respondent asserts that its discharge of the mortgage which it concedes blocks it from filing suit in a New York State court, does not block it from using Federal administrative wage garnishment proceedings to collect the underlying debt. Such proceedings were not initiated until 2009 because Petitioner was unemployed until then. Respondent's attorney states there is supporting law for this position.

Petitioner testified that she is 59 years of age, and was disabled and receiving worker's compensation through 2009 when she settled her disability case and attempted to work again. She obtained a job at $11.21 an hour, on basically a part-time basis, as a Residential Therapist for troubled youth. She held the position for 3 months until let go because of her inability to perform some of the job's duties. She has not worked since and resides with a son.

Under these circumstances, wage garnishment proceedings are precluded in light of Petitioner's financial circumstances. She is unemployed and there are no wages available for garnishment. The administrative wage garnishment proceeding initiated against Petitioner is therefore dismissed. The dismissal is made without prejudice to Respondent's ability to fully brief in the future its contentions that it may pursue federal wage garnishment in circumstances where it either released a mortgage, or instituted wage garnishment proceedings after the time specified in a seemingly pertinent state statute of limitations. Inasmuch as those issues have not been fully briefed in this proceeding, no holding in their respect is intended and none should be inferred.

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JASON A. MARKLE.
AWG Docket No. 10-0064.
Decision and Order.
Filed June 14, 2010.

AWG – Default on RD loan .

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Jason Markle for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On January 5, 2010, I issued a Pre-hearing Order requiring the parties to exchange

information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on March 16, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency. Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on January 28, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Markle stated that he received RD's Exhibits and witness list.

Petitioner submitted a letter dated December 15, 2009 stating he does not dispute the debt but only wants to clarify the amount and why his ex-wife has not been pursued.

Petitioner owes $7,449.79 on the USDA RD loan as of today, and in addition, potential fees of $2,085.94 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On June 13, 2003, Petitioner Jason and Laura Markle obtained a USDA Rural Development home mortgage loan for property located at 1# East***, Conway, AR, 720**.[1] Petitioner was co-signor to a promissory note for $80,000. RX-1 @ p. 2 of 4.

2. On May 1, 2005, Petitioner defaulted on the note and was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative. At the time of the Default Notice, the balance due on the note was $74,536.77. Narrative, RX-2 @ p. 3 of 7.

3. The residence was appraised on July 28, 2008 for $80,000. It was sold at a public auction on August 21, 2008 for $68,001. RX-2 @ p. 3 of 7.

4. After the sale, Treasury recovered an additional $4,471.00, but reversed $806.04 - thus reducing the amount due from Petitioner to

[1]Complete address maintained in USDA records.

$7,449.79. Narrative, RX-3.

5. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $2,085.94. Narrative, RX-5.

6. Petitioner's ex-wife received a bankruptcy discharge on/about February 17, 2010.

7. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

8.Petitioner stated that he has been unemployed since August 2009.

Conclusions of Law

1. Petitioner Jason Markle is indebted to USDA's Rural Development program in the amount of $7,449.79.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $2,085.94.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. The administrative wage garnishment by RD against this debtor is suspended at this time.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. The Administrative Wage Garnishment against this debtor is suspended at this time.

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

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ELIZABETH DITTMAR.
AWG Docket No. 10-0159.

Decision and Order.
Filed June 15, 2010.

AWG – Default on RD loan.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Elizabeth Dittmar, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On March 23, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on June 3, 2010. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-3 on May 19, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Ms. Dittmar stated that she received RD's Exhibits and witness list. RD filed a revised Narrative and Exhibits RX-1 through RX-4 on June 4, 2010 which reflected changes to RX-3 and additional exhibit RX-4 to correspond with Ms. Kimball's oral testimony and on June 9, 2010 filed a single line amendment to the Narrative.

Petitioner owes $12,806.89 on the USDA RD loan as of today, and in addition, potential fees of $3,585.93 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On June 7, 1994, Petitioner, Elizabeth Dittmar obtained a USDA RD home mortgage loan for property located at 18## Second Avenue,

Lacoochee, FL 335**.[1] Petitioner was a signor to an Assumption agreement for $35,000. RX-1 @ p.3 of 3.

2. The Petitioner's loan became delinquent as of May 30, 1997. The property was sold for $34,800. After the funds of the sale were posted, Petitioner owed $15,301.38. RX – 3. There was a prior debt settlement chargeoff of $4,100.30 added back to the account and an adjustment of interest of $3,170.11 in Petitioner's favor on May 17, 2010. RX-3 (Revised).

3. Petitioner is liable on the debt under the terms of the Promissory Note.

4. Treasury received additional offset payments totally $3,424.68. Narrative, RX-3 (Revised) so that the balance remaining is $12,806.89. Narrative, RX-3 (Revised).

5. The potential fees due U.S. Treasury pursuant to the Loan Agreement are $3,585.93. Narrative, RX-4.

6. Petitioner stated that she is currently employed for more than one year by a part-time job but not more than one year from her full time job. Petitioner's testimony.

7. Petitioner did not raise issues of financial hardship but instead desired to make payment arrangements with Treasury.

Conclusions of Law

1. Petitioner Elizabeth Dittmar is indebted to USDA's Rural Development program in the amount of $12,806.89.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $3,585.93.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. RD is entitled to garnish the wages of Petitioner at the rate of 15%

[1]Complete address maintained in USDA records.

of the disposable monthly income.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. RD is entitled to garnish the wages of Petitioner at the rate of 15% of her disposable monthly income.

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

_____

MICHAEL NEFF.
AWG Docket No. 10-0135.
Decision and Order.
Filed June 15, 2010.

AWG –Default on RD loan.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Michael Neff, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on June 1, 2010. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on May 3, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to

Petitioner. Mr. Neff stated that he received RD's Exhibits and witness list.

Petitioner owes $14,940.01 on the USDA RD loan as of today, and in addition, potential fees of $4,183.20 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On December 21, 1991, Petitioner, Michael Neff obtained a USDA RD home mortgage loan for property located at #2 Crest Drive, Cheshire, MA 012**.[1] Petitioner was a signor to a Promissory Note for $95,000. RX-1 @ p.3 of 3.

2. The Petitioner's loan became delinquent and on September 28, 2001 the property was sold in a short sale with the amount of funds received from the sale of $82,773.93. RX-3, RX-4. After the funds of the sale were posted, Petitioner owed $15,515.32. RX -4.

3. Petitioner is liable on the debt under the terms of the Promissory Note.

4. Treasury received additional offset payments totally $575.21. Narrative, RX-4 @ p. 2 of 2. The balance remaining is $14,940.01. Narrative, RX-4.

5. The potential fees due U.S. Treasury pursuant to the Loan Agreement are $4,183.20. Narrative, RX-6.

6. Petitioner stated that he is currently unemployed.

7. Petitioner's testimony was that he was told that he would owe nothing after the short sale but was unable to show documentation which contradicts RX-3.

Conclusions of Law

1. Petitioner Michael Neff is indebted to USDA's Rural Development program in the amount of $14,940.01.

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[1]Complete address maintained in USDA records.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $4,183.20.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD is not entitled to garnish the wages of Petitioner at this time.

Order

The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met. Garnishment of Petitioner's wages is suspended at this time.

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

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CHERYL MORIN.
AWG Docket No. 10-0152.
Decision and order.
Filed June 17, 2010.

AWG – Default on RD loan.

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

Decision

Pursuant to a Hearing Notice issued on April 21, 2010, I held a hearing by telephone, on June 16, 2010, at 3:30 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's obligation to pay a debt that Petitioner and her former husband incurred under four

USDA FHA mortgage loans for property located at 2360 Main Street, Lancaster, MA 01523. Petitioner and her former husband had signed four promissory notes to secure the home mortgage loans given them by Respondent, USDA, Rural Development, which has not been fully repaid, and has resulted in the garnishment of Petitioner's wages for nonpayment of the amount still owed.

Petitioner did not participate in the hearing. Petitioner was instructed by the Hearing Notice to file: 1. completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses; 2. a narrative of events or reasons concerning the existence of the alleged debt and her ability to repay all or part of it; 3. supporting exhibits with a list of the exhibits and a list of witnesses who would testify in support of her petition.. She was further instructed to contact my secretary, Ms. Marilyn Kennedy, and give Ms. Kennedy a telephone number where Petitioner could be reached at the time of the scheduled hearing. Petitioner did give my Secretary such a telephone number but did not answer telephone calls to her at that number made at 3:00 PM, at 3:15 PM and at 3:30 PM on the day of the scheduled hearing. Petitioner also failed to comply with the other instructions and filed nothing in support of her assertion that she does not owe the debt that is the subject of the wage garnishment proceeding.

Respondent participated in the hearing through its representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development who gave sworn testimony showing that a balance of $28,229.89 is owed on the loans that are the subject of the wage garnishment proceedings. There are also potential fees being assessed by Treasury for its collection efforts.

Under 31 C.F.R. § 285.11 (f)(2), a hearing on a Petition challenging wage garnishment may be, at the agency's option, either oral or written. An oral hearing may be conducted by telephone conference and is only required when the issues in dispute cannot be resolved by review of the documentary evidence 31 C.F.R. § 285.11 (f)(3).

An oral hearing was scheduled to hear and decide Petitioner's concerns. Petitioner never advised the Hearing Clerk, the Respondent,

or this office that she could not be personally contacted on the day of the scheduled hearing at the telephone number she gave to my Secretary. Reasonable efforts were made on the day of the scheduled hearing to contact her, but were to no avail. Accordingly, the petition is being dismissed for Petitioner's failure to participate and present evidence or arguments to refute the documents provided by Respondent showing the existence of Petitioner's obligation to pay the debt still owed under the promissory notes she signed with USDA-RHS (RX-1).

The promissory notes were for $33,500.00, $8,580.00, $20,000.00 and $21,000.00, in respect to the four home mortgage loans USDA-FHA gave to Petitioner and her former husband for property located at 2360 Main Street, Lancaster, MA 01523 (Exhibit RX-1). . The property was sold at a short sale, on October 8, 2003. The total amount due prior to the sale was $121,005.98. After the sale proceeds were posted, there was a remaining balance due of 38,205.98 (Exhibit RX-3). Respondent has received payments from Treasury which after the deduction of fees leaves a present debt balance of $28,229.89. There are also potential collection fees that may be assessed by the United States Treasury Department. The Petitioner has provided no evidence showing that the present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R. § 285.11. Therefore, the Petition is dismissed and the proceedings to garnish Petitioner's wages may be resumed provided the amount of wages garnished does not exceed 15% of her disposable income.

Petitioner is advised, however, that if she telephones the private agency engaged by Treasury to pursue the debt's collection, she might be able to settle the debt at a lower amount with lower payments.

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ANTHONY K. ALDRIDGE.
AWG Docket No. 10-0153.
Decision and order.

Filed June 17, 2010.

AWG – Default on RD Loan.

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

Decision And Order

Pursuant to a Hearing Notice, I held a hearing in this proceeding by telephone, on June 16, 2010, at 4:00 PM Eastern Time. Petitioner, Anthony K. Aldridge, and Respondent's representative, Mary E. Kimball, participated and were sworn. Ms. Kimball introduced, identified and authenticated records regularly maintained by USDA, Rural Development that were received as Exhibits RX-1 through RX-5. Petitioner did not offer any documents. At issue is the nonpayment of a debt owed to USDA, Rural Development on a home mortgage loan on property that Mr. Aldridge had owned with his former wife, Tonia M. Aldridge.

Mr. Aldridge testified that under the terms of their divorce decree he and his wife were to be equally responsible for the mortgage loan given to them by USDA Farmers Home Administration. He further testified that his former wife has not paid her share of this debt whereas he has had offsets taken from income tax refunds to which he was otherwise entitled that represent at least half of the total debt owed.

Findings and Conclusions

The evidence establishes that Petitioner and his former wife obtained a loan from USDA Farmers Home Administration in the amount of $44,500.00 to finance the purchase of their primary residence at RR 2, Box 451, Midkiff, WV 25540-9801 that was secured by a promissory

note dated April 3, 1991.(Exhibit RX-1). They defaulted on the loan and the property was sold pursuant to foreclosure proceedings on March 28, 2000. The sale amount was $58,617.92 and the net funds received by USDA were $29,993.00. After the sale funds were posted, Petitioner and his former wife owed $28,624.92. Since the sale, USDA has received $9,284.87 from Treasury. A balance of $19,340.05 is still owed plus fees to Treasury for collection.

It was explained to Petitioner that under the terms of the promissory note that he and his former wife had signed, they are "jointly and severally" liable for its payment which means that all or any part that is unpaid may be collected by the Government, as the secured creditor, from either of them. Petitioner may have recourse under the terms of the divorce decree against his former wife for not paying her share of the debt, but that fact does not bar USDA from obtaining the balance owed to it by garnishing his wages. Petitioner also has the option of seeking to settle the debt with Treasury and was given a telephone number to call.

Inasmuch as USDA, Rural Development has proven that Petitioner, Anthony K. Aldridge is indebted to USDA, Rural Development in the amount of $19,340.05 plus fees to Treasury for collection, and has not presented evidence sufficient to show that payment of the debt may not be pursued due to operation of law or that its payment would cause him financial hardship within the meaning of 31 C.F.R. § 285.11(f)(8)(ii), his petition is dismissed. Respondent is therefore entitled to administratively garnish the wages of the Petitioner.

Order

For the foregoing reasons, the wages of the Petitioner, Anthony K. Aldridge, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as may be 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.

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JAMES CALMES.
AWG Docket No. 10-0142.
Decision and Order.
Filed June 18, 2010.

AWG – Default on RD loan – Guarantee.

Petitioner, Pro se.
Mary E. Kimball, for RD.
Decision issued by James P. Hurt, Hearing Official.

Decision

This matter is before me upon the request of the Petitioner, James Calmes, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on June 1, 2010. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on May 5, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Calmes stated that he received RD's Exhibits and witness list. Following the hearing, RD filed RX-6 and a revision to RX-3.

On May 14, 2010, Petitioner submitted his typed Narrative along with exhibits PX-1 and PX-2 (financial information) under oath. Since Mr. Calmes was married, I requested his wife's part –time income information for the Financial Hardship calculation.

Petitioner owes $9,627.93 on the USDA RD loan as of today, and in

addition, potential fees of $2,695.82 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On January 8, 2004, Petitioner James Calmes (individually) obtained a USDA FHA home mortgage loan in the amount of $55,000 for property located at #1 Landing Road, Columbus, MS 397**.[1] The borrower also signed a Loan Guarantee in favor of RD. RX-1 @ p. 1 of 2.

2. Borrower become delinquent on his payments and was defaulted on May 1, 2007. Narrative.

3. RD obtained a "As Is" appraisal on June 27, 2008 with an opinion that the value of the property was $56,000. RX-2. RD also obtained a brokers professional opinion (BPO) that the "As Is" value was $49,000.00 on June 30, 2008. RX-2 @ p. 3 of 8.

4. The property was listed for $56,000 on August 8, 2008 and relisted on November 8, 2008 for $50,600. RX-2 @ p. 4 of 8.

5. The property was sold for $47,600 on November 26, 2008. Narrative, RX-2 @ p. 4 of 8.

6. The net amount of sale proceeds received by RD was $40,356.20. RX-2 @ p. 6 of 8. At the time of the sale, the balance due on the note with interest was $56,157.83. Narrative, RX-2 @ p. 6 of 8, RX-3 @ p. 1 of 2.

7. After the sale, Treasury recovered an additional $8,092.23, but added a $1,535.70 "charge back" - thus reducing the amount due from Petitioner to $9,627.93. Narrative, RX-3 @ p. 2 of 3 (revised).

8. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $2,695.82. Narrative, RX-3 @ p. 2 of 3 (revised).

9. Petitioner stated that he has been gainfully employed in an equipment rental company for a long term, but he raised issues of

[1]Complete address maintained in USDA records.

financial hardship.

10. Petitioner provided a financial schedule of expenses and stated his gross weekly income along with a recent pay stub. PX-1, PX-2. He also provided statements of his wife's part-time income for four recent pay periods. I calculated the family unit income with and without his overtime pay. I took into consideration the below average expenditures for food, housing and transportation expenses.

11. Using the Financial Hardship Calculation program and data from Petitioner's sworn testimony and financial statement, I made a calculation of the appropriate wage garnishment. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner James Calmes is indebted to USDA's Rural Development program in the amount of $9,627.93.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $2,695.82.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD may administratively garnish Petitioners wages at this time in the amount of 8% of his monthly disposable income not including overtime or bonus pay.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.

2. RD may Administratively Garnishment wages against this debtor in the amount of eight (8) % of his monthly disposable income.

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[2]The Financial Hardship Calculation is not posted on the OALJ website.

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

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CRAIG MEEKER.
AWG Docket No. 10-0134.
Decision and Order.
Filed June 21, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Craig Meeker 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 March 10, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on May 19, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on April 2, 2010. The Petitioner filed his documentation with the Hearing Clerk on April 7, 2010. A Revised Narrative and Witness List was filed on April 28, 2010. In the request for the hearing, the Petitioner had questioned the amount of the debt indicating that money had been applied to the debt. Following the entry of the Prehearing Order, the Petitioner provided a Consumer Debtor Financial Statement explaining their financial situation and in the accompanying letter asked how the full amount of the debt had been calculated. At the hearing, the Petitioner was given two weeks in which to review the printout provided to him reflecting the application of all

payments made. No further contact has been made by the Petitioner.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On March 24, 1987, the Petitioner and Donna R. Meeker, his wife, received a home mortgage loan in the amount of $18,992.32 from the United States Department of Agriculture (USDA) Farmers Home Administration (FmHA) (now Rural Development (RD)) for property located at 25 Berkshire Road, Sicklerville, New Jersey. RX-1.
2. On the same date, the Petitioner and his wife assumed an existing FmHA loan from Kenneth Webb and Sue Webb, his wife, in the amount of $28,686.95. RX-2.
3. The Petitioner and his wife defaulted on the loans and foreclosure proceedings were initiated, with a judgment being entered against the Petitioners in August of 1998.
4. The property was sold at a foreclosure sale on October 2, 1998 with proceeds realized from that sale in the amount of $10,457.48, leaving a balance due of $55,950.05. RX-5.
5. Treasury offsets totaling $5,957.72 (after fees) have been received. RX-5.
6. The remaining unpaid debt is in the amount of $49,992.25 not counting fees assessed by the Treasury. Revised Narrative; RX-5.

Conclusions of Law

1. Craig Meeker is indebted to USDA Rural Development in the amount of $49,992.25 not counting fees assessed by the Treasury for the mortgage loan extended to him.
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 shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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.

KYLE SMITH.
AWG Docket No. 10-0144.
Decision and Order.
Filed June 22, 2010.

AWG – Default on RD loan – Guarantee.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Kyle Smith, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on June 2, 2010. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on May 5, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to

Petitioner. Mr. Smith stated that he received RD's Exhibits and witness list.

Following the hearing, Petitioner submitted a four page Financial Statement which I now label as PX-1 and two bi-weekly wage statements from his employer. Mr. Smith states that his wife is not employed. Mr. Smith provided the address of his prior spouse and co-debtor on this loan.

Petitioner owes $15,244.83 on the USDA RD loan as of today, and in addition, potential fees of $4,268.55 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On December 6, 2004, Petitioner Kyle Smith and Jodi Smith obtained a USDA FHA home mortgage loan in the amount of $93,000 for property located at 6## Idaho Street, Gooding, ID 833**.[1] The borrowers also signed a Loan Guarantee in favor of RD. RX-1 @ p. 1 of 2.

2. Borrowers become delinquent on their payments and were defaulted on were September 1, 2007. Narrative.

3. RD obtained a "As Is" appraisal on August 13, 2008 with an opinion that the value of the property was $88,000. RX-2 @ p. 3 of 8. RD also obtained a brokers professional opinion (BPO) that the "As Is" value was $75,000 on August 8, 2008. RX-2 @ p. 3 of 8.

4. The property was listed for $85,900 on August 22, 2008 and relisted on November 20, 2008 for $85,575. RX-2 @ p. 4 of 8.

5. The property was sold for $87,500 on December 3, 2008. Narrative, RX-2 @ p. 4 of 8.

6. The net amount of sale proceeds received by RD was $78,261.09. RX-2 @ p. 6 of 8. At the time of the sale, the balance due on the note with interest was $98,016.92. Narrative, RX-2 @ p. 6 of 8.

7. After the sale, Treasury recovered an additional $4,511.00 - thus

[1]Complete address maintained in USDA records.

reducing the amount due from Petitioner to $15,244.83. Narrative, RX-4.

8. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $4,268.55. Narrative, RX-5.

9. Petitioner stated that he has been gainfully employed in an truck driver, but he raised issues of financial hardship.

10. Petitioner provided a financial schedule of expenses and two bi-weekly pay stubs PX-1. I took into consideration his present credit card debt, his past lawyer fees and washer/dryer payments. I allowed a twelve month payoff of his credit card debt, but stretched out his washer/dryer appliance payments over 36 months and his past lawyer fees over 36 months.

11. Using the Financial Hardship Calculation program and data from Petitioner's sworn testimony and financial statement, I made a calculation of the appropriate wage garnishment. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner Kyle Smith is indebted to USDA's Rural Development program in the amount of $15,244.83.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $4,268.55.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD may not administratively garnish Petitioners wages at this time.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

[2]The Financial Hardship Calculation is not posted on the OALJ website.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.
2. The Administrative Garnishment against this debtor is suspended at this time.
3. After one year, RD may reassess Debtor's financial position and modify the garnishment percentage as circumstances dictate.
4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's office.

_____

ROBERT BARNES.
AWG Docket No. 10-0123.
Decision and Order.
Filed June 22, 2010.

AWG – Default on RD loan.

Mary E. Kimball and Gene Elkin, Esq. for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Robert Barnes, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 16, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on April 22, 2010. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq., and Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on March 31, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Barnes stated that he received RD's Exhibits and witness list. Following the hearing, RD filed RX-7. As a result of Petitioner's

inquiries concerning his prior escrow payments, RD filed additional Narrative and exhibits dated June 8, 2010 which I now label as RX-8 (25 pages).

Petitioner submitted his exhibits on April 12, 2010 consisting of a two-page hand written letter and Exhibits marked as EX-1 through EX-10. EX-10 contained his financial statement under oath.

Petitioner owes $45,165.25 on the USDA RD loan as of today, and in addition, potential fees of $12,646.27 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On July 2, 1990, Petitioner Robert and Carol Barns (a/k/a Carol Moore) obtained a USDA FHA home mortgage loan for property located at 1## W. P*** Street, Schuylkill Haven, PA, 179**.[1] Petitioner was co-signor to a promissory note for $61,500. RX-1 @ p. 1 of 3.

2. Borrowers become delinquent on their payments and were defaulted on August 23, 2003. RX-3.

3. RD obtained a comparative sales appraisal on November 3, 2003 with an opinion that the value of the property was $57,000. RX-7.

4. RD obtained a default judgment in Civil Action 1CV-04-1095 relating to a foreclosure against Petitioner and Carol Barnes-Moore on September 27, 2004. EX-8. Petitioner contends that he did file a timely answer to the foregoing civil action, but did have any documentation.

5. The property was sold in a judicial foreclosure sale on August 30, 2005 for $24,000. Narrative. The net amount of sale proceeds received by RD was $22,619.80. RX-4. At the time of the judicial sale, the balance due on the note was $72,981.05. Narrative, RX-4 @ p. 1 of 2.

6. After the sale, Treasury recovered an additional $5,298.00 - thus reducing the amount due from Petitioner to $45,165.25. Narrative, RX-4 @ p. 1 of 2.

7. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $12,646.27. Narrative, RX-5.

8. Carol Barnes was discharged in bankruptcy on October 1, 2008.

[1]Complete address maintained in USDA records.

RX-6 @ p 2 of 2.

9. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

10. Petitioner stated that he has been gainfully employed as a truck driver for a long term, but he raised issues of financial hardship.

11. Petitioner provided a financial schedule of expenses and stated his gross bi-weekly income. He subsequently provided a recent bi-weekly pay stub. His pay stub revealed that he was allowed to work a substantial number of paid overtime hours during the recent bi-weekly period. I apportioned the deductions according to the non-overtime wages.

12. I took into consideration the below average expenditures for food, housing and transportation.

13. Using the Financial Hardship Calculation program and data from Petitioner's sworn testimony and financial statement (EX 10), I made a calculation of the appropriate wage garnishment. Petitioner has a pending medical debt which was only partially paid by insurance due to a late filed claim. I am allowing a monthly retirement of half of that debt over twelve months. RD does not object to recognition of Petitioner's religious tithing. Petitioner's son is serving in Iraq and although the car payments are paid by the son's military pay, Petitioner will be allowed the monthly insurance to maintain the state license tags for the son's car. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner Robert Barnes is indebted to USDA's Rural Development program in the amount of $45,165.25.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $12,646.27.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD may **NOT** administratively garnish Petitioners wages at this time.

[2]The Financial Hardship Calculation is not posted on the OALJ website.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.
2. The Administrative Wage Garnishment against this debtor is suspended at this time.
3. After one year, RD may reassess Debtor's financial position and modify the garnishment percentage as circumstances dictate.
4. Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's office.

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KAREN PERO.
AWG Docket No. 10-0160.
Decision and Order.
Filed June 22, 2010.

AWG – Default on RD loan.

Mary Kimball and Dale Theurer, for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Karen Pero 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 22, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on June 21, 2010.

The Respondent belatedly complied with that Order and a Narrative

was filed, together with supporting documentation on May 19, 2010. On May 17, 2010, the Petitioner communicated that she had not received the Narrative which was to have been filed by May 12, 2010. Following her receipt of the Narrative, the Petitioner filed additional comments indicating her lack of knowledge concerning the debt, the passage of time and relating that her current employment is only part time and that it has been of short duration.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On December 13, 1985, the Petitioner and Gene A. Strout, then her husband, received a home mortgage loan in the amount of $47,000 from the United States Department of Agriculture (USDA) Farmers Home Administration (FmHA) (now Rural Development [RD]) for property located at RFD 1, Box 256, (later Crossroads), (West) Fairlee, Vermont. RX-1.
2. The property was sold following foreclosure with proceeds realized from that sale in the amount of $70,770.02, leaving a balance due of $16,227.29. RX-3. Following post of the sale proceeds, additional fees were paid and there was a one cent credit. Id.
3. Treasury offsets totaling $4,156.08 (after Treasury fees) have been received. RX-3.
4. The remaining unpaid debt is in the amount of $12,176.20. RX-3.
5. The Petitioner was terminated from her prior employment and has had her current part time employment for approximately four months.

Conclusions of Law

1. The Petitioner is jointly and severally indebted to USDA Rural Development in the amount of $12,176.20 for the mortgage loan

extended to her.

2. All procedural requirements for administrative wage offset set forth in 31 C.F.R. §285.11 have been met; however, due to the termination of her prior employment and the temporary nature of her current employment, her wages are not eligible for garnishment at this time.
3. The Respondent is **NOT** entitled to administratively garnish the wages of the Petitioner until such time as she has been continuously employed for a twelve month period.

Order

For the foregoing reasons, the wages of the Petitioner **MAY NOT** be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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ROSE CRAWFORD.
AWG Docket No. 10-0172.
Decision and order.
Filed June 22, 2010.

AWG – Default on RD loan – Guarantee.

Danny L. Littlefield, Jr, Esq. for Petitioner.
Mary Kimball for RD.
Decision and order by Victor W. Palmer, Administrative Law Judge.

Decision and Order

On June22, 2010, I held a hearing on a Petition to Dismiss an administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for a loss it incurred under a Single Family Housing Loan Guarantee. Petitioner was represented by Danny L. Littlefield, Jr., Esquire. Mary Kimball represented and testified for Respondent and was duly sworn. Respondent proved the existence of the debt owed by Petitioner, Rose Crawford, and her former husband, Dustin Crawford, to Respondent for its payment of a loss sustained by JP Morgan Chase Bank, N.A., on a $82,900.00 home mortgage loan the bank had made to Petitioner and her former husband, on August 13, 2004, for property located at 413 North Oklahoma Street, Pryor, OK. Prior to signing this loan, Rose Crawford and Dustin Crawford signed a Request for Single Family Housing Loan Guarantee, under which they certified and acknowledged that if USDA, Rural Development paid a loss claim on the requested loan, they would reimburse USDA, Rural Development. On January 26, 2006, the Rose Crawford and Dustin Crawford were divorced. Under the Divorce Decree, Dustin Crawford was to assume possession of the real property and ordered to pay the mortgage while holding Rose Crawford harmless. He defaulted on the loan on February 1, 2006. The property was sold on November 20, 2008 for $57,500.00. After the sale of the property by the bank, USDA, Rural Development paid $41,861.86 to JP Morgan Chase Bank, N.A. Dustin Crawford filed Chapter 7 bankruptcy and was discharged from the debt. He later committed suicide, leaving no estate. Rose Crawford was left without the indemnity protection envisioned in the divorce decree. She has since remarried, has a 10 year old step daughter, and a daughter who is 18 months old. Her gross wages are about $1,800.00 per month, but after normal monthly expenses, her disposable monthly income is about $150.00 to $200.00. For reasons of the financial hardship it would cause, wage garnishment is not presently authorized and may not again be instituted for the next twelve (12) months.

Order

For the foregoing reasons, administrative wage garnishment of the

wages of the Petitioner, Rose Crawford, is not authorized at this time, and may not be again instituted for the next twelve (12) months.
This matter is stricken from the active docket.
Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

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TRACY CHAMPAIGN.
AWG Docket No. 10-0155.
Decision and order.
Filed June 24, 2011.

AWG – Default on RD loan.

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

Decision and Order

Pursuant to a Hearing Notice, I held a hearing by telephone, on June 22, 2010, at 2:30 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's obligation to pay a debt that Petitioner incurred under a single family mortgage loan for property located at 315 Morris Street, Lake City, SC 29560. The mortgage loan was given to her by Respondent, USDA, Rural Development, which has not been fully repaid, and Respondent has initiated administrative garnishment of Petitioner's wages for the nonpayment of the amount still owed.

Petitioner did not participate in the hearing. Petitioner was instructed by the Hearing Notice to file: 1. completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses; 2. a narrative of events or reasons concerning the existence of the alleged debt and her ability to repay all or part of it; 3. supporting exhibits with a list of the exhibits and a list of witnesses who would testify in support of her petition. She was further instructed to contact my secretary, Ms. Marilyn Kennedy, and give Ms.

Kennedy a telephone number where Petitioner could be reached at the time of the scheduled hearing. Petitioner did give my Secretary such a telephone number, but did not answer telephone calls to her at that number made at various times on the day of the scheduled hearing. Petition also failed to comply with the other instructions and filed nothing in support of her assertion that she does not owe the debt that is the subject of the wage garnishment proceeding.

Respondent participated in the hearing through its representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development who gave sworn testimony proving the existence of the debt owed to it by Petitioner and that a balance of $34,483.49 is owed on the loan that is the subject of the wage garnishment proceedings. There are also potential fees of $9,655.38 being assessed by Treasury for its collection efforts.

Under 31 C.F.R. § 285.11(f)(2), a hearing on a Petition challenging wage garnishment may be, at the agency's option, either oral or written. An oral hearing may be conducted by telephone conference and is only required when the issues in dispute cannot be resolved by review of the documentary evidence 31 C.F.R. § 285.11 (f)(3).

An oral hearing was scheduled to hear and decide Petitioner's concerns. Petitioner never advised the Hearing Clerk, the Respondent, or this office that she could not be personally contacted on the day of the scheduled hearing at the telephone number she gave to my Secretary. Reasonable efforts were made on the day of the scheduled hearing to contact her, but were to no avail Accordingly, the petition is being dismissed for Petitioner's failure to participate and present evidence or arguments to refute the documents provided by Respondent showing the existence of Petitioner's obligation to pay the debt still owed under the promissory note she signed with USDA-Rural Development.

USDA-Rural Development has proved the existence of the debt owed to it by Petitioner and the present balance of the loan. The Petitioner has not provided evidence refuting the existence of the loan or its present balance. Petitioner has also failed to provide any evidence showing, within the meaning and intent of the provisions of 31 C.F.R. § 285.11, that collection of the loan balance by administrative wage garnishment would cause Petitioner a financial hardship, or that collection of the debt

may not be pursued due to operation of law. Therefore, the Petition is dismissed and the proceedings to garnish Petitioner's wages may be resumed provided the amount of wages garnished does not exceed 15% of her disposable income.

Petitioner is advised, however, that if she telephones the private agency engaged by Treasury to pursue the debt's collection, she might be able to settle the debt at a lower amount with lower payments.

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ERNEST A. JOHNSON.
AWG Docket No. 10-0184.
Decision and Order.
Filed June 25, 2010.

AWG – Default on RD loan.

Mary Kimball for RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Ernest A. Johnson 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 3, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on June 25, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 10, 2010. The Petitioner failed to file anything on his behalf and was not reachable on the date of the hearing. Accordingly, this matter will decided upon the record before me, and the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On September 9, 1994, the Petitioner and Anika Johnson, then his wife, received a home mortgage loan in the amount of $72,780.00 from Farmers Home Administration (FmHA) (now Rural Development (RD)) for property located at 1511 Faro Drive, Austin, Texas. RX-1.
2. The property was sold at a short sale on May 12, 1998 with proceeds realized from that sale in the amount of $74,000.00, leaving a balance due of $13,847.56. RX-3.
3. Treasury offsets totaling $8,285.35 (after fees) have been received. RX-3.
4. The remaining unpaid debt is in the amount of $5,562.21 (exclusive of potential Treasury fees). RX-4.

Conclusions of Law

1. Ernest A. Johnson is indebted to USDA Rural Development in the amount of $5,562.21 (exclusive of potential Treasury fees) for the mortgage loan extended to him.
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 shall be subjected to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as might be 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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FREDDIE E. THOMPSON, f/k/a FREDDIE E. POLKE and FREDDIE E. FORD.
AWG Docket No. 10-0196.
Decision and Order.
Filed June 25, 2010.

AWG – Default on RD loan.

Mary Kimball and Dale Theurer, RD.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Freddie E. Thompson 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 18, 2010, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case would be resolved, to direct the exchange of information and documentation concerning the existence of the debt, and setting the matter for a telephonic hearing on June 25, 2010.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 9, 2010. The Petitioner filed her documentation with the Hearing Clerk on June 8, 2010. In the materials filed, Ms. Thompson provided information concerning her financial situation which reflects only nominal income and very limited amount of ability to repay the obligation.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On April 13, 1993, the Petitioner received a home mortgage loan in the amount of $36,900.00 from Farmers Home Administration, United States Department of Agriculture (USDA) (now Rural Development (RD)) for property located at 118 Hilton Drive, Lyons, Georgia. RX-1.

2. The property was sold at a short sale on May 7, 2002 with proceeds realized from that sale in the amount of $23,170.00, leaving a balance due of $22,794.99. RX-3.
3. Treasury offsets totaling $4,777.12 (after fees) have been received. RX-3.
4. The remaining unpaid debt is in the amount of $18,017.87 (exclusive of potential Treasury fees). RX-4.
5. The Petitioner has limited income and has exhibited financial hardship.

Conclusions of Law

1. Freddie E. Thompson is indebted to USDA Rural Development in the amount of $ 18,017.87 (exclusive of potential Treasury fees) for the mortgage loan extended to her.
2. In light of the finding of financial hardship, administrative wage garnishment is not appropriate at this time, but the debt will remain at Treasury for collection.

Order

For the foregoing reasons, the wages of Freddie E. Thompson **MAY NOT** be subjected to administrative wage garnishment.

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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PAUL DUBE.
AWG Docket No. 10-0163.
Decision and Order.
Filed June 29, 2010.

AWG – Default on RD loan.

Mary E. Kimball, for RD.
Petitioner, Pro se.

Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Paul Dube, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On March 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on June 4, 2010. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on May 14, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Mr. Dube stated that he received RD's Exhibits and witness list. Following the hearing, Petitioner submitted two pages of financial information including a weekly pay stub which I now label as PX-1.

Petitioner owes $38,174.96 on the USDA RD loan as of today, and in addition, potential fees of $10,688.99 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On May 20, 1988, Petitioner Paul Dube and Dori Dube obtained a USDA FHA home mortgage loan for property located at RR## Box 25##, Winthrop, ME, 043**.[1] Petitioner was co-signor to a promissory note for $68,520. RX-1 @ p. 1 of 3.

2. Borrowers become delinquent on their payments and were defaulted.

3. The mortgaged property was sold in a foreclosure sale on December 17, 2001. RX-3.

4. The net amount of funds received by RD from the foreclosure sale was $60,052.34. RX-3.

5. At the time of the judicial sale, the balance due on the note was $100,098.36. Narrative, RX-3. After the sale, there was a charge back

[1]Complete address maintained in USDA records.

foreclosure fee of an additional $1,120.

6. After the sale, Treasury recovered an additional $2,991.06 - thus reducing the amount due from Petitioner to $38,174.96. Narrative, RX-3.

7. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $10,688.99. Narrative, RX-5.

8. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

9. Petitioner stated that he has been gainfully employed as a college custodian, but he raised issues of financial hardship.

10. Petitioner provided a financial schedule of expenses and stated his gross bi-weekly income. He subsequently provided a recent weekly pay stub. His pay stub did not show any overtime wages during the recent bi-weekly period. He primarily works on a evening shift but does not receive any shift work differential.

11. Using the Financial Hardship Calculation program and data from Petitioner's sworn testimony and financial statement (PX - 1), I made a calculation of the appropriate wage garnishment. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner Paul Dube is indebted to USDA's Rural Development program in the amount of $38,174.96.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $10,688.99.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of his current address, employment circumstances, and living expenses.

5. RD may **NOT** administratively garnish Petitioners wages at this time.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

[2]The Financial Hardship Calculation is not posted on the OALJ website.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.

2. The Administrative Wage Garnishment against this debtor is suspended at this time.

3. After one year, RD may reassess Debtor's financial position and modify the garnishment percentage as circumstances dictate.

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

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MARY WITCHLEY.
AWG Docket No. 10-0165.
Decision and Order.
Filed June 29, 2010.

AWG – Default on RD loan.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Decision issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Mary Witchley, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On March 18, 2010, I issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt.

I conducted a telephone hearing at the scheduled time on June 7, 2010. USDA Rural Development Agency (RD) was represented by Mary Kimball who testified on behalf of the RD agency.

Petitioner was present and was self represented.

The witnesses were sworn in. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on May 14, 2010 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner. Ms. Witchley stated that she received RD's Exhibits and

witness list. Petitioner submitted exhibits PX-1 (4 pages financial information) and PX-2 (Discharge of Mortgage) . I re-label the death certificate as PX-3 (3 pages). After the hearing Petitioner filed a single week's pay stub which I label as PX-4 .

Petitioner owes $82,134.07 on the USDA RD loan as of today, and in addition, potential fees of $22,997.54 due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On August 20, 1993, Petitioner Mary Witchley and David Witchley obtained a USDA FHA home mortgage loan for property located at 2## Hill Street, Chittenango, NY 130**.[1] Petitioner was co-signor to a promissory note for $69,500. RX-1 @ p. 1 of 3.

2. Borrowers become delinquent on their payments and were defaulted.

3. The mortgaged property was scheduled to be sold in a foreclosure sale on July 19, 2004. RX-3 @ p. 2 of 6.

4. Prior to the judicial sale, the principal balance due on the note was $82,935.07. Narrative. RX-3 @ p. 5,6 of 6, RX-4. The total balance due before the sale was $87,320.28. RX-4 @ p. 1 of 2.

5. Using the guidelines in USDA RHS servicing Handbook HB-2-3550, RD determined that the amount that would be recovered from the scheduled judicial sale after accounting for all costs would result in a zero or negative recovery of funds for the property. Hence, RD determined to re-schedule the underlying mortgage as a valueless secured lien and cancelled the judicial sale. See RD email to me dated June 22, 2010 in response to my inquiry.

6. The title to the property remained with the borrowers and RD filed a release of lien to the property dated September 28, 2004. PX-2.

7. However, The promissory note shown on RX-1 was not forgiven. The debt was converted from a secured debt to an unsecured debt. See RD email dated June 22, 2010.

8. After the sale, Treasury recovered an additional $5,173 - thus reducing the amount due from Petitioner to $82,134.07. Narrative, RX-

[1]Complete address maintained in USDA records.

4.

9. The potential fees due U.S. Treasury pursuant to the Promissory Note Agreement are $22,997.54. Narrative, RX-5.

10. Petitioner is jointly and severally liable on the debt under the terms of the Promissory Note.

11. Petitioner stated that (as of the date of the hearing) she has been gainfully employed part-time in a car dealership for ten months and has raised issues of financial hardship.

12. Petitioner provided a financial schedule of expenses and a weekly pay stub. I observe that Petitioner's expenses indicate no medical insurance coverage and conclude she is at-risk for future medical expenses.

13. Using the Financial Hardship Calculation program and data from Petitioner's sworn testimony and financial statement (PX1, PX 4), I made a calculation of the appropriate wage garnishment. The calculations are enclosed.[2]

Conclusions of Law

1. Petitioner Mary Witchley is indebted to USDA's Rural Development program in the amount of $82,134.07.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $22,997.54.

3. All procedural requirements for administrative wage garnishment set forth in 31 C.F.R. ¶ 285.11 have been met.

4. Petitioner is under a duty to inform USDA's Rural Development of her current address, employment circumstances, and living expenses.

5. RD may **NOT** administratively garnish Petitioners wages at this time.

6. After one year, RD may reassess Petitioner's financial hardship criteria.

Order

1. The requirements of 31 C.F.R. ¶ 288.11(i) & (j) have been met.

[2]The Financial Hardship Calculation is not posted on the OALJ website.

2. The Administrative Wage Garnishment against this debtor is suspended at this time.

3. After one year, RD may reassess Debtor's financial position and modify the garnishment percentage as circumstances dictate.

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

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WILLIAM HARRIS.
AWG Docket No. 10-0128.
Decision and Order.
Filed June 30, 2010.

AWG – Default on RD loan .

Mary E. Kimball and Gene Elkin for RD.
Petitioner, Pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

On June 28, 2010, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for a loss it incurred under a Single Family Housing Loan. Petitioner, William Harris, and Mary Kimball and Gene Elkin, who represented and testified for Respondent, were each duly sworn. Respondent proved the existence of the debt owed by Petitioner for payment of the loss Respondent sustained on the $ 50,000.00 loan that had been made to Petitioner and his wife, Melinda Harris to finance the purchase of a home located at 121 Knollwood Drive, Industry, PA. The loan was evidenced by a Promissory Note dated September 21, 1990. Mr. Harris and his wife defaulted on the loan and a short sale was held on November 12, 1998. The home was sold for $61,500.00. Prior to the sale, the amount owed to Respondent, USDA, Rural Development, was $75,250.48. After the sale of the property, USDA, Rural Development was still owed

$25,112.02. Since the sale, $10,601.79 has been collected by the U. S. Treasury Department in offsets from income tax refunds that Petitioner otherwise would have received. The amount that is presently owed on the debt is $14,510.23 plus potential fees to Treasury of $4,062.86, or $18,573,09 total. Mr. Harris was employed through April of this year by a real estate company managing the cleaning of swimming pools and hot tubs. He is presently self-employed in the business of cleaning swimming pools and hot tubs. He has no employees and presently has no earnings. He has been separated from his wife for 10 years. She now lives in Texas. He has no disposal income that may be subject to wage garnishment. The present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R.§ 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he would suffer undue financial hardship if any amount of money is garnished from his disposable income at any time during the next six (6) months. During that time, Mr. Harris shall either make efforts to file for the protections of the bankruptcy laws, or contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

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SHERRLYN DAVIS.
AWG Docket No. 10-0186.
Decision and Order.
Filed June 30, 2010.

AWG – Default on RD loan.

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

1. Pursuant to a Hearing Notice, I held a hearing by telephone, on June 29, 2010, at 3:00 PM Eastern Time, in consideration of a Petition seeking to dispute Petitioner's obligation to pay a debt that Petitioner incurred under a single family mortgage loan for property located at 315 Morris Street, Lake City, SC 29560. The mortgage loan was given to her by Respondent, USDA, Rural Development, which has not been fully repaid, and Respondent has initiated administrative garnishment of Petitioner's wages for the nonpayment of the amount still owed.
2. Petitioner did not participate in the hearing. Petitioner was instructed by the Hearing Notice to file: 1. completed forms respecting her current employment, general financial information, assets and liabilities, and monthly income and expenses; 2. a narrative of events or reasons concerning the existence of the alleged debt and her ability to repay all or part of it; 3. supporting exhibits with a list of the exhibits and a list of witnesses who would testify in support of her petition.. She was further instructed to contact my secretary, Ms. Marilyn Kennedy, and give Ms. Kennedy a telephone number where Petitioner could be reached at the time of the scheduled hearing, nor did Petitioner call my secretary so as to participate in the scheduled hearing. Petitioner also failed to comply with the other instructions and filed nothing in support of her assertion that she does not owe the full amount of the debt that is the subject of the wage garnishment proceeding.
3. Respondent participated in the hearing through its representative, Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development who gave sworn testimony proving the existence of the debt owed to it by Petitioner and that a balance of $1,496.23 is owed on the loan that is the subject of the wage garnishment proceedings. There are also potential fees of $418.94 being assessed by Treasury for its collection efforts.

Under 31 C.F.R. § 285.11 (f)(2), a hearing on a Petition challenging wage garnishment may be, at the agency's option, either oral or written.

An oral hearing may be conducted by telephone conference and is only required when the issues in dispute cannot be resolved by review of the documentary evidence 31 C.F.R. § 285.11 (f)(3).

An oral hearing was scheduled to hear and decide Petitioner's concerns. Petitioner never advised the Hearing Clerk, the Respondent, or this office how she could be personally contacted on the day of the scheduled hearing. Reasonable efforts were made to include her in the scheduled hearing, but were to no avail. Accordingly, the petition is being dismissed for Petitioner's failure to participate and present evidence or arguments to refute the documents provided by Respondent showing the existence of Petitioner's obligation to pay the debt still owed under the promissory note she signed with USDA-Rural Development.

USDA- Rural Development has proved the existence of the debt owed to it by Petitioner and the present balance of the loan. The Petitioner has not provided evidence refuting the existence of the loan or its present balance. Petitioner has also failed to provide any evidence showing, within the meaning and intent of the provisions of 31 C.F.R. § 285.11, that collection of the loan balance by administrative wage garnishment would cause Petitioner a financial hardship, or that collection of the debt may not be pursued due to operation of law. Therefore, the Petition is dismissed and the proceedings to garnish Petitioner's wages may be resumed provided the amount of wages garnished does not exceed 15% of her disposable income.

Petitioner is advised, however, that if she telephones the private agency engaged by Treasury to pursue the debt's collection, she might be able to settle the debt at a lower amount with lower payments.

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SCOTT L. WOOD.
AWG Docket No. 10-0185.
Decision and order.
Filed June 30, 2010.

AWG – Default on RD loan.

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

Decision and Order

On June 29, 2010, I held a hearing on a Petition to Dismiss the administrative wage garnishment proceeding to collect the debt allegedly owed to Respondent, USDA, Rural Development for a loss it incurred under a Single Family Housing Loan. Petitioner, Scott L. Wood, and his attorney, James W. Malys, were duly sworn as were Mary Kimball and Gene Elkin, who represented and testified for Respondent. Respondent proved the existence of the debt owed by Petitioner, Scott L. Wood, for payment of the loss Respondent sustained on the $ 29,780.00 loan that had been made to Petitioner to finance the purchase of a primary residence located at 322 Bissell Ave., Oil City, PA 16301. The loan was evidenced by a Promissory Note dated March 14, 1995. Mr. Wood defaulted on the loan and a short sale was held on April 14, 2000. Prior to the sale, Mr. Wood owed $32,486.78 for principal, $4,084.32 in accrued interest and $128.35 in fees, for a total of $36,699.45. After the sale of the property, USDA, Rural Development was still owed $15,865.16. Since the sale, $3,391.28 has been collected by the U. S. Treasury Department in offsets from income tax refunds that Petitioner otherwise would have received. The amount that is presently owed on the debt is $12,334.65 plus potential fees to Treasury of $3,453.70, or $15,788.35 total. Mr. Wood is employed as a machinist earning $3,514.00 a month. Withholding for income tax, rent, car payments, child support, food, medicine and other monthly expenses leave him with virtually no disposal income. He may need to file for bankruptcy, but would prefer to settle the debt. The present collection of any part of the debt would cause Petitioner undue, financial hardship within the meaning and intent of the provisions of 31 C.F.R.§ 285.11.

USDA, Rural Development has met its burden under 31 C.F.R. §285.11(f)(8) that governs administrative wage garnishment hearings, and has proved the existence and the amount of the debt owed by the Petitioner. On the other hand, Petitioner showed that he would suffer

undue financial hardship if any amount of money is garnished from his disposable income at any time during the next six (6) months. During that time, Mr. Wood shall either make efforts to file for the protections of the bankruptcy laws, or contact Treasury to discuss a settlement plan to pay the debt.

Under these circumstances, the proceedings to garnish Petitioner's wages are suspended and may not be resumed for six (6) months from the date of this Order.

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EQUAL OPPORTUNITY CREDIT ACT

COURT DECISIONS

VIRGIN ISLANDS (as Class Action Plaintiffs) v. USDA.
No. 08-4256.
Filed Jauary. 27, 2010.

[Cite as: 360 Fed.Appx. 451].

EOCA – APA – Burden shifting – Pattern or practice – Legitimate non-discriminatory reason.

United States Court of Appeals,
Submitted Under Third Circuit L.A.R. 34.1(a)

On Appeal from the United States District Court for the District of the Virgin Islands (D.C. Civil No. 00-cv-00004), District Judge: Honorable James T. Giles.

Before: McKEE, FUENTES, and NYGAARD Circuit Judges.

OPINION OF THE COURT

FUENTES, Circuit Judge:

Plaintiffs appeal the District Court's grant of Defendant's motion for summary judgment on their claims under the Equal Credit Opportunity Act ("ECOA"), the Fair Housing Act ("FHA"), and the Administrative Procedures Act ("APA"). For the following reasons, we will affirm the judgment of the District Court.[1]

I.

[1]The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Because we write primarily for the parties, we only discuss the facts and proceedings to the extent necessary for resolution of this case.[2] Plaintiffs filed this class action on January 10, 2000, alleging national origin discrimination in the United States Department of Agriculture's administration of two rural housing loan programs. The class definition, as modified by this Court in a prior decision, includes:

> All Virgin Islanders who applied or attempted to apply for, and/or received, housing credit, services, home ownership, assistance, training, and/or educational opportunities from the USDA through its Rural Development offices (and predecessor designations) located in the U.S. Virgin Islands at any time between January 1, 1981 and January 10, 2000.

Chiang v. Veneman, 385 F.3d 256, 274 (3d Cir.2004).

Plaintiffs' First Amended Complaint included six counts. Count I alleged discrimination prior to the distribution of loan applications. Count II alleged discrimination between distribution of the applications and the funding of loans. Count III alleged discrimination at or subsequent to the funding of loans. Counts IV and V included claims of discrimination under the FHA and the APA respectively. Finally, Count VI alleged a violation of the Equal Protection Clause. However, this final count was effectively withdrawn by Plaintiffs when they failed to amend it to provide a more definite statement of their claim, as required by the District Court. On August 20, 2008, 2008 WL 3925260, the District Court granted Defendant summary judgment on all of the Plaintiffs' claims.

II.

Plaintiffs raise five issues on appeal. First, they contend that the District Court erred in considering their ECOA "pattern or practice" discrimination claim as three separate claims. Second, they assert that the court erred in finding their claims were barred by the statute of

[2] A more detailed discussion of the factual background in this case can be found in our prior decision on an interlocutory appeal challenging the grant of class certification, *Chiang v. Veneman,* 385 F.3d 256 (3d Cir.2004).

limitations. Third, they challenge various elements of the court's analysis of their discrimination claims. Fourth, they argue that the court erred in denying their Rule 56(f) motion to withhold a decision on summary judgment pending additional discovery. Fifth, they claim the court erred by dismissing the entire action when the Plaintiffs' individual claims were not at issue.[3]

Substantially for the reasons set forth in the District Court's thorough and well-reasoned Memorandum and Order of August 20, 2008, this Court will affirm the District Court's order granting summary judgment in favor of Defendant.

We briefly comment on one issue raised in the briefs. Contrary to Plaintiffs' assertion that it is "the trial standard of proof," the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), was appropriately applied by the District Court in the context of summary judgment. As we have declared: "Under [the *McDonnell Douglas*] analysis, the employee must first establish a prima facie case. If the employee is able to present such a case, then the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment decision. If the employer is able to do so, the burden shifts back to the employee, who, *to defeat a motion for summary judgment,* must show that the employer's articulated reason was a pretext for intentional discrimination." *Doe v. C.A.R.S. Protection Plus, Inc.,* 527 F.3d 358, 364 (3d Cir.2008) (emphasis added).

We have considered the Plaintiffs' other arguments on appeal and find them to be without merit. For the foregoing reasons, we will affirm the District Court.

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CRAIG D. KROSKOB, AND LISA D. KROSKOB v. USDA.
No. 09-1209.
May 19, 2010.

[Cite as:378 Fed.Appx. 827].

[3]We exercise plenary review over a district court's summary judgment ruling. *Township of Piscataway v. Duke Energy,* 488 F.3d 203, 208 (3d Cir.2007).

EOCA – Debt restructuring, failure to qualify – DALR$ analysis – Administrative remedies, failure to exhaust.

FN* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), in this case Defendant-Appellee Tom Vilsack, sworn in January 21, 2009, is substituted for Ed Schafer as the Secretary of the United States Department of Agriculture.

United States Court of Appeals,
Tenth Circuit

Background: Farmers brought action against the Department of Agriculture's Farm Service Agency (FSA) and various government officials, seeking to compel the FSA to act on the National Appeals Division's (NAD's) remand order directing the FSA to reassess the farmers' request for restructuring of their family farm loan. While their case was pending, the FSA issued a decision finding that the farmers did not qualify for debt restructuring. The United States District Court for the District of Colorado dismissed the farmers' action as moot. Farmers appealed.

Before TYMKOVICH, EBEL, and ALARCÓN [FN**], Circuit Judges.
FN** The Honorable Arthur L. Alarcón, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

ORDER AND JUDGMENT[FN***]

FN*** This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

TIMOTHY M. TYMKOVICH, Circuit Judge.

Craig and Lisa Kroskob appeal the dismissal of their suit against the U.S. Department of Agriculture's Farm Service Agency (FSA). The appeal arises from the FSA's decision that the Kroskobs' family farm loan does not qualify for restructuring. The Kroskobs administratively

appealed that decision to an internal FSA review board pursuant to 7 U.S.C. § 6991 et seq. The review board ordered the FSA to reassess the family's restructuring request. Some time passed, and frustrated by the FSA's delay in issuing a new loan decision, the Kroskobs brought suit in federal court to compel the FSA to act. While their case was pending, the FSA issued a new decision, which the district court held mooted the Kroskobs' action.On appeal, the Kroskobs argue the FSA's new decision contains a number of errors. We hold the Kroskobs' case is not moot, but also conclude they have not exhausted their administrative remedies. Exercising jurisdiction under 28 U.S.C. § 1291, we therefore AFFIRM the district court's dismissal of the Kroskobs' case.

I. Background

Between 2001 and 2006, the Kroskobs and the FSA entered into a number of loan agreements to support the operation of the Kroskobs' farm in Fort Morgan, Colorado. The first loan in 2001 was an emergency loan secured by title to the Kroskobs' land and farm equipment. Over the next five years, the Kroskobs continued to have financial difficulties, which resulted in their bankruptcy, restructuring of debt, including the FSA loans, and eventual default on the restructured loans. Beginning in 2006, the FSA garnished federal payments to the Kroskobs to compensate for their default.The Kroskobs sought another loan from the FSA in 2006. To determine loan eligibility, the agency entered the Kroskobs' current financial information into its computerized Debt and Loan Restructuring System (DALR$). The DALR $ analysis showed no feasible restructuring plan was available to the Kroskobs, and they were informed that the FSA could not provide additional lending. In March 2007, the Kroskobs provided updated information to the FSA, but once again the DALR$ analysis showed the agency was unable to provide the family with a restructured loan.

Dissatisfied with the FSA's decision, in December 2007 the Kroskobs challenged the FSA's failure to restructure their loans before the National Appeals Division (NAD). The NAD is an appeals body within the Department of Agriculture charged with reviewing certain decisions made by the Department, including lending decisions under the

Agricultural Credit Act of 1987, 7 U.S.C. § 2001. In the course of the appeal, the NAD determined among other things that incorrect information had been inputted into DALR$. The NAD believed the incorrect information materially affected certain aspects of the FSA's decision, but the NAD could not determine from the record before it whether the Kroskobs would qualify for debt restructuring based on revised financial information. The NAD made clear that it was not making a ruling on the merits of the Kroskobs' appeal: "Because not all information used in DALR $ was correct, whether [the Kroskobs'] cash flow is enough to develop a feasible plan is unknown." Aplt.App., Vol. 2 at 456. The NAD remanded the matter to the FSA.

Following the NAD's decision, representatives of the FSA and the Kroskobs met in early February 2008 to discuss the matter. The agency then sent the Kroskobs a request for updated financial information. It is unclear from the record when the FSA received updated information from the Kroskobs, but in any event no new decision was forthcoming from the FSA.

Relying on a statutory command that requires Department of Agriculture agencies to "implement the [NAD's] final determination not later than 30 days after the effective date of the notice of the final determination," 7 U.S.C. § 7000(a), the Kroskobs filed suit in mid-2008 in federal district court to compel the agency to act. They argued that the NAD's determination entitled them to debt restructuring as a matter of right, and urged the district court to order the FSA to restructure their debt.

In February 2009, while the case was pending in district court, the FSA issued a new decision. The new decision concluded that the Kroskobs did not qualify for debt restructuring. Among other things, the FSA decision found the Kroskobs had acted in bad faith by failing to provide the FSA with records concerning the farm's crops, and the Kroskobs had no permissible reason for their loan payment delinquency. The decision also outlined the Kroskobs' right to administratively appeal the decision pursuant to agency regulations and statutory law. Within the 30-day appeal period, the Kroskobs sent a letter to the FSA requesting reconsideration of the decision. In light of these developments, the district court determined it lacked subject matter jurisdiction on mootness grounds and dismissed the Kroskobs' complaint.

II. Discussion

The Kroskobs argue their case still presents a justiciable controversy because the FSA's latest restructuring decision did not properly implement the NAD's determination. Concluding that the Kroskobs have yet to exhaust their administrative remedies before the NAD, we agree with the district court's dismissal.

A. Standard of Review

We review de novo the district court's legal conclusion that a case is moot, *see Wilderness Soc'y v. Kane County,* 581 F.3d 1198, 1214 (10th Cir.2009), *reh'g en banc granted,* 595 F.3d 1119 (10th Cir.2010), and we review for clear error the district court's findings of jurisdictional facts, *see Butler v. Kempthorne,* 532 F.3d 1108, 1110 (10th Cir.2008). "Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Marcus v. Kan. Dep't of Revenue,* 170 F.3d 1305, 1309 (10th Cir.1999) (internal punctuation omitted).

B. Mootness and Exhaustion

The Kroskobs argued before the district court that the FSA harmed them by failing to reissue a DALR$ analysis after the NAD directed it to do so. They contend that from the time they filed their suit in 2008 until February 2009, the FSA did not update their DALR$ information, and thus did not meet the 30-day statutory deadline for implementing the NAD's determination-although the reasons for the delay are in dispute. "Article III mootness is the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *S. Utah Wilderness Alliance v. Smith,* 110 F.3d 724, 727 (10th Cir.1997) (internal punctuation omitted). "If an event occurs while a case is pending that heals the injury and only prospective relief has been sought,

the case must be dismissed." *Id.*; *see also City of Herriman v. Bell,* 590 F.3d 1176, 1181 (10th Cir.2010) ("Our Article III case-or-controversy requirement continues through all stages of federal judicial proceedings.").

As the Kroskobs framed their case in district court, when the FSA issued its new decision in February 2009 they obtained their desired relief-the FSA implemented the NAD's final determination of their appeal. But they contend on appeal the district court misapprehended the relief they sought. They contend the FSA's February 2009 decision does not moot their claims since the NAD's determination did not allow the FSA discretion to reject their application a second time, but instead required the FSA to grant the requested loan restructuring. In other words, their complaint of agency *inaction* may well be moot, but they still contend the agency erred in *implementing* the NAD's remand order. The problem with this argument is that it challenges ongoing agency action for which no final determination has been made. The agency has not finally resolved their claim. Because the Kroskobs have failed to exhaust their administrative remedies, their federal claim is premature. As a matter of basic administrative law principles, "[o]ne challenging an agency decision must exhaust all administrative remedies before seeking judicial review." 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8398 (1st ed.2005). As one court summarized:

The exhaustion requirement serves four primary purposes. First, it carries out the congressional purpose in granting authority to the agency by discouraging the "frequent and deliberate flouting of administrative processes [that] could ... encourag[e] people to ignore its procedures." Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.

Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C.Cir.1984) (internal citation

omitted).

These principles apply here. Under federal law pertaining to the farm loan program, a challenge to FSA final decisions requires litigants to "exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law *before the person may bring an action in a court of competent jurisdiction* against" the Department of Agriculture. 7 U.S.C. § 6912(e) (emphasis added); *see also Forest Guardians v. U.S. Forest Serv.,* 579 F.3d 1114, 1121 (10th Cir.2009) ("The courts of appeals are split as to whether 7 U.S.C. § 6912(e) is jurisdictional.... Regardless of whether it is jurisdictional, the explicit exhaustion requirement in § 6912(e) is, nonetheless, mandatory.").

The Kroskobs have not completed the "administrative appeal procedures" set forth in the statutory scheme. Following the FSA's February 2009 decision, the Kroskobs' attorney wrote the FSA's Acting State Executive Director "to request reconsideration" of the agency's decision. Aplt.App., Vol. 2 at 492. Pursuant to this request, the Kroskobs were entitled to an informal hearing with the FSA. *See* 7 U.S.C. § 6995(a) ("If an officer, employee, or committee of an agency makes an adverse decision, the agency shall hold, at the request of the participant, an informal hearing on the decision.").

The informal hearing process does not satisfy the Kroskobs' administrative exhaustion requirement. The statute makes clear that only an NAD determination-not an informal hearing-serves as a precursor to federal court action. *See* 7 U.S.C. § 6997(d) (designating an NAD hearing officer's determination an "administratively final determination"); 7 U.S.C. § 6999 ("A final determination of the Division shall be reviewable and enforceable by any United States district court of competent jurisdiction ...."); *see also* 7 U.S.C. § 6912(e) ("[A] person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against" the Department of Agriculture.). Thus, for the Kroskobs to seek relief in federal court, they must appeal the FSA's February 10, 2009 decision to the NAD. If they are dissatisfied with the NAD's determination, at that time the Kroskobs may either bring an action in federal court, *see* 7 U.S.C. § 6997(d), or

seek formal review from the NAD's Director, which also can be challenged in federal court, *see* 7 U.S.C. § 6998.

Pursuant to these statutes, the Kroskobs have yet to exhaust their administrative appeals of the FSA's February 2009 decision. In those proceedings, the Kroskobs can argue to the agency that the FSA failed to comply with the NAD's remand decision. On appeal to the NAD, the Kroskobs also may argue that the FSA need not update the financial information and the FSA lacked the discretion to deny the application. The NAD is in the best position to administratively review whether the FSA properly implemented the NAD's 2006 determination. That is especially true in a case like this where the parties strongly disagree about the meaning of the 2006 order and the FSA's obligations on remand.[1]

In sum, until final agency review occurs, we do not have jurisdiction to review the Kroskobs' claims.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's dismissal of the Kroskobs' claim.

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[1] The Kroskobs suggest further appeals to the NAD would leave them in agency limbo. The record does not support this contention, and no showing of futility is obvious to us. Once the NAD makes its final review of the FSA's February 2009 decision, that determination can be appealed to district court. *See* 7 U.S.C. §§ 6997(d), 6999.

FEDERAL CROP INSURANCE ACT

COURT

KATHERINE A. TYSON v. USDA.
No. 09-1037.
Filed January 13, 2010.

[Cite as: 360 Fed. Appx. 451].

FCIA – Crop loss – Overpayment – Constructive knowledge of regulations.

United States Court of Appeals,
Fourth Circuit.

Before KING and SHEDD, Circuit Judges, and JOHN PRESTON BAILEY, Chief United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished PER CURIAM opinion.
Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

Appellant Katherine A. Tyson instituted these proceedings in the Eastern District of North Carolina in April of 2007, seeking judicial review, pursuant to the Administrative Procedure Act (the "APA"), of a Department of Agriculture ruling that she was obligated to return an overpayment received for tobacco crop losses.[1] Tyson had first unsuccessfully pursued her contrary contention-namely, that she was entitled to keep the $80,000 overpayment-through the administrative processes of the Department's National Appeals Division. In February 2007, the Division ruled against Tyson, concluding that the

[1] The APA authorizes judicial review of a final agency decision, providing that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ..., is entitled to judicial review thereof." 5 U.S.C. § 702.

Department's regulations required the overpayment to be returned. *See Tyson v. Farm Serv. Agency,* No.2006S000823 (Director Review Determination, Feb. 27, 2007) (the "Agency Decision").[2] Thereafter, on December 9, 2008, the district court awarded summary judgment to the Department, upholding the Agency Decision's determination that Tyson had to return the overpayment. *See Tyson v. U.S. Dep't of Agric.,* 589 F.Supp.2d 584 (E.D.N.C.2008) (the "District Court Decision"). Tyson has appealed the District Court Decision and, as explained below, we affirm.

I.

A.As the Agency Decision explains, Tyson is a tobacco farmer in Nash County, North Carolina. She owns and operates a complex farming business, where she utilizes multiple fields and farms to produce tobacco. Tyson also serves as vice chairman of the County Committee (the "COC") of the Department of Agriculture's Farm Service Agency (the "FSA") in Nash County. In 2003, excessive rains damaged Tyson's tobacco crop, prompting her to apply to the Nash County FSA (the "County FSA") in 2005 for benefits under the Department's Crop Disaster Program (the "CDP"). Pursuant to the CDP, farmers who suffered certain weather-related losses to their 2003, 2004, or 2005 crops were eligible to apply for CDP benefits for one of the affected years. The CDP provided for a maximum payment of $80,000 to eligible farmers for qualifying lost crops, with the farmer's total recovery-including insurance payments, harvested crops, and CDP-benefits being limited to 95% of what would have been the value of the farmer's undamaged crop. In determining whether to make such a CDP payment, the FSA was authorized to estimate the value of an eligible tobacco farmer's undamaged and harvested tobacco crops, if any, using the county average of tobacco prices during the relevant growing season. Under the then-existing tobacco regulatory system, quota allotments made by the Department of Agriculture dictated the quantity of tobacco a farmer could market in a given year (the "effective quota"). Thus, multiplication of an eligible farmer's effective quota by

[2] The Agency Decision is found at J.A. 21-28. (Citations herein to "J.A. ---" refer to the Joint Appendix filed by the parties in this appeal.)

the average tobacco price for the relevant county would, for CDP purposes, provide the expected value of the farmer's undamaged crop.[3]

During the CDP application period in 2005, a "Fact Sheet" detailing the CDP's requirements was posted at the County FSA Office.[4] The Fact Sheet explained that CDP benefits would be calculated in the same manner as under the 2000 CDP. The Fact Sheet further specified, inter alia, the following:

> Like the 2001/2002 crop disaster program, crop disaster payments will be reduced, as required by statute, if the sum of the: 1) disaster payment; 2) the net crop insurance indemnity; and 3) the value of the crop harvested exceeds 95 percent of what the value of the crop would have been in the absence of a loss.
> J.A. 305.

The Fact Sheet's explanation of the CDP benefits comported with the "[l]imitations on payments and other benefits" contained in the then-applicable regulations. More specifically, those regulations provided that[n]o producer shall receive disaster benefits under [the CDP] in an amount that exceeds 95 percent of the value of the expected production for the relevant period as determined by [the Commodity Credit Corporation]. The sum of the value of the crop not lost, if any; the disaster payment received under [the CDP]; and any crop insurance payment or payments received ... for losses to the same crop, cannot exceed 95 percent of what the crop's value would have been if there had been no loss.
7 C.F.R. § 1479.105 (2006).

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[3] By way of example, if a tobacco farmer's effective quota were 1000 pounds and the average tobacco price for the relevant county were $1.50 per pound, the value of the farmer's undamaged tobacco crop would be $1500. Accordingly, the aggregate value of the farmer's harvested tobacco crop, insurance payments, and CDP benefits could not exceed $1425-95% of $1500.

[4] In addition to its posting of the Fact Sheet, the County FSA mailed notifications to potentially eligible farmers in its jurisdiction, alerting them to the CDP and advising them to contact the County FSA for further information regarding the CDP.

B.

Tyson applied for CDP benefits in April 2005 through her husband, who had her power of attorney. In May 2005, the County FSA determined that Tyson was entitled to $80,000 in CDP benefits, the maximum payment an eligible farmer could receive. On May 9, 2005, an $80,000 payment was deposited into Tyson's bank account, and the related disbursement statement, sent by the County FSA to Tyson, explained that "[t]he payment information reflected on this transaction statement is for the CDP Program for 2003-2005 crop losses." J.A. 295.During spot checks of CDP applications in September 2005, calculation errors were identified in CDP benefits paid to thirty tobacco farmers in Nash County. Over the ensuing months, the FSA State Committee (the "STC"), the County FSA, and the COC conducted investigations and assessed whether the Department of Agriculture's ninety-day "Finality Rule" protected overpaid Nash County tobacco farmers from returning their overpayments.[5] The Finality Rule, as relevant here, provides that

> [a] determination by a State or county FSA committee ... becomes final and binding 90 days from the date the application for benefits has been filed ... unless ... [t] he participant had reason to know that the determination was erroneous.

7 C.F.R. § 718.306(a)(4).

"Reason to know" is defined by the FSA as "knowledge by way of a rule or provision that a person could or should have known such as, but not limited to, the following:" "statutes or public laws"; "published regulations"; "program applications"; "notices the person receives"; "and newsletters." J.A. 289 (FSA Handbook); *see also* Agency Decision 2 (citing FSA Handbook).

Ultimately, the FSA determined that certain tobacco farmers, who had received particularly excessive CDP overpayments, had "reason to know" that such payments were made in error, thus precluding application of the Finality Rule. More specifically, the FSA determined

[5] The STC and COC administered the CDP, under the general supervision of the Executive Vice President of the Commodity Credit Corporation. *See* 7 C.F.R. § 1479.101 (2006).

that a tobacco farmer had "reason to know" of such an overpayment if (1) the sum of the farmer's harvested crop and insurance payments equaled at least 92% of the market value of the farmer's effective quota, and (2) the sum of the harvested crop, insurance payments, and CDP benefits equaled or exceeded 110% of the market value of the farmer's effective quota. Accordingly, the recipient Nash County tobacco farmers who satisfied both criteria were not shielded by the Finality Rule from returning their CDP overpayments. Thus, in 2006, the FSA directed Tyson and eleven other Nash County tobacco farmers to return overpaid CDP benefits to the County FSA. [6]

C.

Thereafter, Tyson sought administrative review of the FSA's adverse determination through the Department of Agriculture's National Appeals Division. In December 2006, a Division Hearing Officer overturned the FSA's ruling, concluding instead that the Finality Rule protected Tyson from having to return the $80,000 overpayment. As it was entitled to do, however, the FSA promptly pursued further administrative review, and, by way of the February 2007 Agency Decision, the Division Director reversed the Hearing Officer.In ruling against Tyson, the Agency Decision explained that, under the Finality Rule, "constructive reason to know [is] knowledge by way of a rule or provision that a person could or should have known (including published regulations or press releases/newsletters)." Agency Decision 2 (citing FSA Handbook). The Agency Decision further emphasized that, although Finality Rule protection adheres when incorrect yields or calculations are used, it does not apply when payments simply exceed the regulatory limits, because tobacco farmers should be aware of such limitations. *Id.* Focusing on the

[6] In 2003, Tyson's effective quota was 327,858 pounds, and the Nash County seasonal average price for tobacco was $1.85 per pound. Hence, absent weather-related losses, Tyson could have earned $606,537 for her 2003 tobacco crop. With her weather-related crop losses in 2003, Tyson produced 201,222 pounds of tobacco, valued at $372,261, and received $263,083 in insurance payments, for an aggregate recovery of $635,344. Even prior to the CDP overpayment, Tyson had received nearly $29,000 more than she could have earned from selling her entire 2003 effective quota. Nevertheless, the $80,000 CDP payment increased her aggregate compensation to $715,344, giving her a windfall in excess of $108,000.

magnitude of the discrepancy here-and recognizing Tyson's extensive experience in FSA activities (including her position as vice chairman of her COC)-the Agency Decision concluded that Tyson had "reason to know" that she had received an erroneous overpayment, thereby rendering the Finality Rule inapplicable. *Id.* at 3, 7. More specifically, the Agency Decision determined that the magnitude of Tyson's overpayment placed her on notice of its erroneous nature, observing that it is "unrefuted" that "[Tyson] received total compensation that substantially exceeded the market value of her entire tobacco quota," even before applying for CDP benefits. *Id.* at 7. The Agency Decision thus concluded that

> [Tyson] had all the facts and figures needed to calculate that she had received as compensation for her poor crop over $108,000 more than she would otherwise receive if her crop was a success. Although [Tyson] was not expected to identify [County FSA] errors in the yields used to calculate benefits, she was reasonably expected to question receipt of over $108,000 in additional compensation she was not otherwise eligible to receive.
>
> *Id.*

In April 2007, after the Division Director denied her request for reconsideration, Tyson sought judicial review of the Agency Decision in the district court.[7] In March 2008, the parties filed cross-motions for summary judgment. By the District Court Decision of December 9, 2008, summary judgment was awarded to the Department of Agriculture, upholding the Agency Decision's ruling that the Finality Rule did not apply and that Tyson was obligated to return the $80,000 overpayment. More specifically, as the court explained:

> Evidence in the administrative record demonstrates a substantial evidentiary basis to find [Tyson] had "reason to know" that the CDP payment for her tobacco crop losses was erroneous. Based on the evidence, [Tyson] could have calculated the total effective income quota for the 2003 tobacco crop and compared that figure to the total amount [Tyson] received from

[7]. Pursuant to 7 U.S.C. § 6999, "[a] final determination of the [National Appeals] Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with [the APA]."

> the sale of the 2003 tobacco crop and the insurance recovery in order to determine her eligibility for CDP payments. [Tyson's] farm records provide that [Tyson's] actual 2003 income exceeded her effective income quota for the 2003 tobacco crop. Moreover, the fact sheet explaining CDP eligibility clearly provided the payment calculation required to be eligible for the program. In addition, [Tyson's] personal extensive experience in FSA farm programs and on the FSA county committee at the time of her application further supports that [Tyson] should have known the eligibility requirements for the program. In reviewing the record, a substantial basis for the conclusion the agency reached exists and no clear error of judgment has occurred.

Tyson, 589 F.Supp.2d at 587.

On January 5, 2009, Tyson filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo a district court's award of summary judgment. *See Holly Hill Farm Corp. v. United States,* 447 F.3d 258, 262 (4th Cir.2006). Pursuant to the APA, however, our review of the Agency Decision-is as was the district court's-limited to determining whether the agency's findings and conclusions were arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or unsupported by substantial evidence. *See* 5 U.S.C. § 706.[8] Such a standard of review is obviously quite narrow, and we are not entitled to substitute our judgment for that of the agency. *See Holly Hill,* 447 F.3d at 263 (explaining that courts "perform only the limited, albeit important, task of reviewing agency action to determine whether the agency ... has

[8] In relevant part, the APA, as codified, provides that a reviewing court shall set aside an agency action only when it is found to be:
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
* * *(E) unsupported by substantial evidence....
5 U.S.C. § 706(2).

committed a clear error of judgment" (internal quotation marks omitted)).

III.

A.

On appeal, Tyson primarily contends that the Agency Decision is unsupported by substantial evidence.[9] In pursuing this contention, Tyson emphasizes three points. First, she asserts that "one's [effective] quota-and by extension one's supposed knowledge of that quota-had nothing whatsoever to do with any presumed knowledge of a CDP overpayment." Br. of Appellant 17. Second, she contends that the Fact Sheet was ambiguous and that, in any event, there was no evidence that she ever saw it. Third, she maintains that her experience with FSA programs and her position as vice chairman of the COC simply had no "nexus" to her knowledge of CDP eligibility requirements. *See id.* at 25.

We need not tarry on Tyson's first point, as she failed to make her quota-based contention to the district court, thereby precluding appellate review thereof. *See Holland v. Big River Minerals Corp.,* 181 F.3d 597, 605 (4th Cir.1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal.").[10] Her second point is likewise

[9] Additionally, Tyson asserts that upholding the agency's determination would "nullify the Finality Rule" by, essentially, precluding application of the Rule any time there was an overpayment. *See* Br. of Appellant 28-30. To recognize the flaw in this contention, we need look no further than the fact that eighteen of the thirty Nash County tobacco farmers who received CDP overpayments were protected by the Finality Rule (even under the FSA's standard for "reason to know").

[10] Even had Tyson presented her quota-based contention to the district court, it would have been rejected as meritless. In 2003, tobacco was highly regulated and was controlled by effective quotas, as Tyson's farm records confirm. *See* J.A. 144-47; *id.* at 237-45; *see also id.* at 307-20 (affidavit of Miles Davis, N.C. FSA Agricultural Farm Program Specialist). Accordingly, Tyson cannot contend that such quotas are irrelevant to the objective determination of whether a tobacco farmer had reason to know of a CDP overpayment. Further, the assertion that effective quotas are irrelevant to the reason to know analysis-and that such an analysis should be focused on tobacco yields-contradicts Tyson's initial claim in the administrative process that she compared the CDP benefits she received to her insurance payment, see id. at 363, and not, as she now attempts to

(continued...)

unavailing, for the Fact Sheet clearly explains the statutory cap on CDP benefits and was prominently displayed in the County FSA office, where the CDP applications were submitted. *See* J.A. 297, 305. Moreover, and dispositive on Tyson's third point, the COC administered the CDP. *See* 7 C.F.R. § 1479.101 (2006); *see also* J.A. 260-66. Accordingly, it would be extremely difficult, in the first instance, for us to accept Tyson's claim of ignorance. And it would be inappropriate, under the applicable standard of review, for this Court to overturn the Agency Decision's determination that Tyson "had constructive knowledge of the [CDP's] rules," see Agency Decision 7.[11]

Accordingly, Tyson cannot contend that such quotas are irrelevant to the objective determination of whether a tobacco farmer had "reason to know" of a CDP overpayment. Further, the assertion that effective quotas are irrelevant to the "reason to know" analysis-and that such an analysis should be focused on tobacco yields-contradicts Tyson's initial claim in the administrative process that she compared the CDP benefits she received to her insurance payment, *see id.* at 363, and not, as she now attempts to assert, to her 2002 tobacco yield.

B.

Having carefully assessed the record, we are, like the district court, unable to say that the Agency Decision was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence. Simply put, we are unable to find fault with the Agency Decision's conclusion that Tyson, an experienced tobacco farmer and COC officer, had constructive knowledge of the applicable regulatory limitations and should have known that she had received a substantial overpayment. We therefore uphold the district court's

[10](...continued)
assert, to her 2002 tobacco yield.

[11] To the extent that Tyson contends that the FSA acted arbitrarily and capriciously in determining which tobacco farmers had "reason to know" of the overpayments, we also reject this contention. In short, the Agency Decision did not err in ruling that the FSA had applied a reasonable standard in determining which tobacco farmers had "reason to know" that their overpayments were erroneous.

affirmance of the Agency Decision, and we are content to do so on the basis of the court's reasoning. *See Tyson,* 589 F.Supp.2d 584.

IV.

Pursuant to the foregoing, we affirm the district court's award of summary judgment to the Department of Agriculture.*AFFIRMED.*

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WARSAW SUGAR BEET ASSOCIATION LPI, v. U.S.D.A.
No. 2:09-cv-04.
Filed February 18, 2010.

[Cite as: 2010 WL 597103].

FCIA – Sugar Beets – "Production method" – "Master yield" – Headlands and openings.

United States District Court,
D. North Dakota, Northeastern Division.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
RALPH R. ERICKSON, Chief District Judge.

The parties filed cross-motions for summary judgment. The Court has received a Report and Recommendation from the Honorable Karen K. Klein, United States Magistrate Judge, pursuant to 28 U.S.C. § 636, recommending that the National Appeals Division of the United States Department of Agriculture be affirmed in part and reversed in part (Doc. # 28). Neither party has filed an objection, as provided for Local Rule 72.1(D)(3).The Court has carefully reviewed the Report and Recommendation, along with the entire file, and agrees with the Magistrate Judge's analysis and recommendations. Accordingly, the Court hereby adopts the Report and Recommendation in its entirety. For the reasons set forth therein, Plaintiff Warsaw Sugar Beet Association

LPI's Motion for Summary Judgment (Doc. # 11) is **GRANTED** in part and **DENIED** in part, and Defendant Federal Crop Insurance Corporation's Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part (Doc. # 16). The NAD's decision is, therefore, affirmed in part and reversed in part, and the case is remanded for a determination as to whether Warsaw sustained a production loss due to drought on its 2006 sugar beet crops, after the FCIC adjusts Warsaw's Master Yield.
IT IS SO ORDERED. LET JUDGMENT BE ENTERED ACCORDINGLY.

REPORT AND RECOMMENDATION

KAREN K. KLEIN, United States Magistrate Judge.Plaintiff Warsaw Sugar Beet Association LPI ("Warsaw"), initiated this action under 7 U.S.C. § 6999 seeking judicial review of the final determination of the National Appeals Division ("NAD"), the United States Department of Agriculture, finding the Federal Crop Insurance Corporation's ("FCIC") decision denying Warsaw's claim for sugar beet production losses under its multi-peril crop insurance policy was not erroneous. Both parties have moved for summary judgment. (Doc. # 11, Doc. # 16).

Summary of Recommendation

The magistrate judge **RECOMMENDS** the decision of the NAD be **AFFIRMED** in part and **REVERSED** in part. The majority of the decision of the NAD is supported by substantial evidence in the record as a whole, and is not arbitrary, capricious, an abuse of discretion, or contrary to existing law. However, the determination that Warsaw misreported information is not supported by substantial evidence in the record as a whole.

Background

Warsaw is operated by John Gudajtes and his three sons Andrew, Lee

and James (collectively "Gudajteses").[1] Warsaw grew sugar beets in 2006 on contract with American Crystal Sugar Company in Grand Forks County, Pembina County, and Walsh County. The sugar beets were insured under a multi-peril crop insurance policy issued by Rain and Hail, LLC, ("Rain and Hail") and reinsured by the FCIC. Warsaw's insured acreage consisted solely of headlands and field openings divided into 26 units.[2] The main parts of the fields were farmed by one or more of Warsaw's partners through other entities, or as individuals.

Warsaw filed a claim for sugar beet production losses caused by drought in 2006 on 25 of its 26 units. Rain and Hail notified the FCIC of the large claim, and the FCIC elected to participate in the loss adjustment process. The Risk Management Agency ("RMA"),[3] on behalf of the FCIC, denied Warsaw's claim for production losses. (AR 91-96).[4] Warsaw filed an appeal with the NAD. The NAD Hearing Officer conducted two in-person hearings, and then issued his determination that the RMA decision was not erroneous, finding that different production methods were used by Warsaw to produce its 2006 sugar beet crop, and that the change in production methods should have been reported by the acreage reporting date. (AR 60-66). The Hearing Officer could not

[1] In addition to producing sugar beets for Warsaw, the Gudajtes family produced sugar beets individually and for several other entities as well in 2006. (Aug. HT 82; AR 347, 1085-1086).

[2] "Headlands is the term that the industry uses to describe the ends of the field where the farm equipment turns around while cultivating or caring for the crop in that field." (AR 92). Headlands are perpendicular to the main field rows. (Aug. HT 92). Field openings are where the grower makes the first passes through the fields. Openings are parallel to the crop rows. (Aug. HT 92).

[3] RMA manages and operates the FCIC.

[4] AR refers to the administrative record filed on CD with the court. The hearings before the NAD Hearing Officer were also filed on CD with the court. Warsaw's counsel filed written transcripts of the August 30, 2007, NAD hearing, and of the November 20, 2007, NAD hearing. The transcripts are not the official record of testimony from the NAD hearings; however, the FCIC does not object to the court using the written transcripts. *United States' Memorandum of Law in Support of Motion for Summary Judgment* at 24. Therefore, the court will cite to the August 20, 2007, NAD hearing transcript as Aug. HT, and will refer to the November 20, 2007, NAD hearing transcript as Nov. HT.

determine whether there had been a production loss caused by drought before the RMA adjusts the yield guarantee based on the production methods actually used by Warsaw in 2006, and before the RMA considers its corrective action for Warsaw's failure to report changes in its production methods. (AR 66). The decision of the Hearing Officer is considered the final determination of the Department of Agriculture. (AR 66).

Legal Standard

Review of the NAD determination is controlled by the Administrative Procedure Act ("APA"). 7 U.S.C. § 6999. Under the APA, an agency decision will be set aside if it is "unsupported by substantial evidence," or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). Under the arbitrary and capricious standard, the court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment ... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Erickson Transport Corp. v. I.C.C.,* 728 F.2d 1057, 1062 (8th Cir.1984) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)). The Hearing Officer must articulate a "rational connection between the facts found and the choice made." *Id.* "As long as the agency provides a rational explanation for its decision, a reviewing court will not disturb it." *Anderson v. Farm Serv. Agency of U.S. Dept. of Agric.,* 534 F.3d 811, 814 (8th Cir.2008) (citation omitted).

"Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Erickson Transport Corp.,* 728 F.2d at 1062 (citations omitted). Under the substantial evidence test, the court must consider the record as a whole and must take into account evidence that fairly detracts from the NAD determination. *Id.* at 1063. "The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's findings are unsupported by substantial evidence." *Id.*

Discussion

I. *Different Production Methods*

Warsaw contends the Hearing Officer erroneously concluded that different production methods were used for establishing the Master Yield than Warsaw used to produce its 2006 sugar beet crop,[5] and that Warsaw failed to report changes in its production methods as required by the multi-peril crop insurance policy. The Hearing Officer determined that turning equipment on the headlands and harvesting the entire insured sugar beet crop early, as Warsaw did, are reportable changes in production methods that are likely to result in a lower yield. (AR 65). The terms and conditions of multi-peril crop insurance policies are published in the Code of Federal Regulations. *See* 7 C.F.R. § 457.8. The Common Crop Insurance Regulations provide:

> [Y]our approved yield will be adjusted ... To an amount consistent with the production methods actually carried out for the crop year if you use a different production method than was previously used and the production method actually carried out is likely to result in a yield lower than the average of your previous actual yields. The yield will be adjusted based on your other units where such production methods were carried out or to the applicable county transitional yield for the production methods if other such units do not exist. You must notify us of changes in your production methods by the acreage reporting date. If you fail to notify us, in addition to the reduction of your approved yield described herein, you will be considered to have misreported information and you will be subject to the consequences in section 6(g). For example, for a non-irrigated unit, your yield is based upon acreage of the crop that is watered once prior to planting, and the crop is not watered prior to planting for the current crop year. Your approved APH yield will

[5] A Master Yield is the average of the actual yield history for all of a producer's sugar beets grown in a county. (Aug. HT 55, AR 62). Four years of actual production history are required to establish a Master Yield. (Aug. HT 54, AR 422). A Master Yield or approved yield is used to establish a yield guarantee or level of coverage for insurance purposes. 7 C.F.R. § 457.8 Subsection 1.

> be reduced to an amount consistent with the actual production history of your other non-irrigated units where the crop has not been watered prior to planting or limited to the non-irrigated transitional yield for the unit if other such units do not exist.

7 C.F.R. § 457.8 Subsection 3(g)(3).

Warsaw's Master Yield was based on whole fields which included headlands and openings, and it was based on partial early harvest for pre-pile purposes,[6] with the remaining sugar beets harvested later. (Aug. HT 195-96). Warsaw's 2006 insured acres consisted solely of headlands and openings, and all of its sugar beets were harvested early for pre-pile purposes.

A. *The Term "Production Method"*

Warsaw contends the term "production method" is ambiguous, and therefore the term should be construed in its favor. Where contract meaning is uncertain, "the ambiguities and doubts must be resolved against the party who prepared the contract." *A.W.G. Farms, Inc. v. Fed. Crop Ins. Corp.,* 757 F.2d 720, 726 (8th Cir.1985). The court finds the term "production method," while broad, is not ambiguous. Production methods can encompass many factors, and the Hearing Officer's interpretation of the term is reasonable. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "We must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (citations omitted).

B. *Turning Equipment on the Headlands*

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[6]American Crystal Sugar Company requires growers to harvest or "pre-pile" a certain portion of their sugar beets early to ensure it can process all of the stockpiled beets before they spoil. (AR 378-80).

Substantial evidence in the record as a whole supports the Hearing Officer's determination that turning equipment on the insured acreage reduces yield. Dr. Alan Dexter, a sugar beet specialist employed by North Dakota State University, explained that yield is lost on headlands due to turning around with machinery. (AR 388). John Gudajtes agreed with Dr. Dexter's assessment. (Aug. HT 111). Other evidence in the record indicates that Warsaw used agricultural practices to minimize yield loss on the headlands, and that sugar beets are resilient, resulting in minimal yield loss due to driving on the beets. (Aug. HT 93-97, 123-24). However, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Hearing Officer's] finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966).Warsaw's insured acreage consisted solely of headlands and openings. Therefore, the percentage of Warsaw's insured acreage on which the operator turned was greater than on the acreage used to determine Warsaw's Master Yield. The Hearing Officer found that "[w]hen headlands and field openings comprise the entire unit, the yield history is almost certain to be distorted from the history used for the Master Yield." (AR 65). The Hearing Officer acknowledged that some headland damage was included in the Master Yield, but since Warsaw's units consisted solely of headlands and openings there was a greater concentration of wheel track damage, which "made this additional turning a reportable change in production method." (AR 65). The Hearing Officer's determination is rationally based on relevant factors, and is not arbitrary, capricious, an abuse of discretion, or contrary to existing law.

C. *Early Harvest of the Sugar Beet Crop*

Warsaw harvested all of its sugar beets early during pre-pile. Its Master Yield was based primarily on later harvested beets from the main portions of the fields. The Hearing Officer acknowledged that some early harvest beets were included in the Master Yield, but "it is the early harvesting of 100 percent of the crop insured by [Warsaw] that distorts the production method used for the Master Yield." (AR 65). The Hearing Officer determined early harvest is a production method likely

to result in a lower yield, and that early harvest of all of Warsaw's insured beets is a reportable change in production methods. (AR 65).John and Lee Gudajtes testified that early harvest produces less yield. (Aug. HT 115, 192). However, Warsaw contends it was not its choice as to when to harvest its sugar beets. The court recognizes American Crystal Sugar Company requires growers to harvest early a certain amount of their sugar beets for pre-pile. (AR 378). Lee Gudajtes testified that American Crystal Sugar Company considers all of the partners' entities as one for pre-pile purposes. Therefore, their quota for early harvest was based on all of the Gudajtes entities and not just on Warsaw. In order to meet that quota, the Gudajtes family harvested all of Warsaw's sugar beets early. The evidence shows it is good management practice to harvest a field's headlands and openings first. (Aug. HT 90). However, the crop insurer does not view all of the Gudajtes entities as one for insurance purposes. Warsaw is viewed separately, and Warsaw harvested all of its beets early, which the Hearing Officer rationally determined is a reportable change in production methods likely to result in a lower yield. The Hearing Officer's finding is supported by substantial evidence, is based on relevant factors, and is not arbitrary, capricious, an abuse of discretion, or contrary to existing law.

II. *Misreported Information*

The Hearing Officer found that Warsaw "should have reported the changes in production method before the acreage reporting date," and that "RMA may determine that [Warsaw] misreported information and is subject to the consequences in Subsection 6(g) of the regulation." (AR 66). The Hearing Officer's determination that Warsaw failed to report its changes in production methods is not supported by substantial evidence. Rain and Hail's agent, Renae Fayette, a sugar beet insurance specialist (Aug. HT 46), knew that Warsaw's units consisted solely of headlands and openings (Aug. HT 52-53). Renae Fayette stated it was acceptable under the policy to insure headlands and openings separately, and she conveyed this information to Warsaw. (Aug. HT 49-50, 52-53, 79, 81, 115, Nov. HT 22, 26-27). Therefore, she knew that some of the sugar

beets on the insured acreage would be subjected to extra traffic, and she also knew that the headlands and openings would be harvested early for pre-pile purposes, or at least harvested earlier than the main fields. *See generally* (Nov. HT 29) (Renae Fayette testimony discussing the advantages of insuring the headlands separately, including opening up fields early for harvest). The court finds that by keeping Rain and Hail's agent advised of its farming practices, Warsaw did not misreport information and should not be subject to the consequences in Subsection 6(g) of the regulation.III. *Yield Adjustments*

The Hearing Officer determined that RMA must adjust the Master Yield to a level consistent with the production methods actually carried out by Warsaw. (AR 66). The Common Crop Insurance Regulations provide:[Y]our approved yield will be adjusted ... To an amount consistent with the production methods actually carried out for the crop year if you use a different production method than was previously used and the production method actually carried out is likely to result in a yield lower than the average of your previous actual yields. The yield **will** be adjusted based on your other units where such production methods were carried out or to the applicable county transitional yield for the production methods if other such units do not exist.
7 C.F.R. § 457.8 Subsection 3(g)(3) (emphasis added).

The Hearing Officer found that since RMA had not adjusted the Master Yield, he could not determine if there was actually a production loss due to drought. Warsaw argues that RMA has violated the principles of good faith and fairness by not adjusting the Master Yield. The court finds no such violation. If Warsaw had prevailed in this case, adjustment to the Master Yield would not be necessary. Waiting to see if an adjustment in the Master Yield is necessary does not violate the principles of good faith and fairness. The FCIC stated in its brief that if it prevails, "[Warsaw] may still request that FCIC adjust the 26-ton master yield to a yield consistent with [Warsaw's] production practices." *United States' Memorandum of Law in Support of Motion for Summary Judgment* at 36. The court recognizes FCIC may face a challenging task in adjusting the Master Yield, but there may exist some historical yield records which will make the adjustment less difficult, considering the Gudajteses testified that they, as well as other operators, have insured their headlands and openings separately in the past, and have been paid

for claims on headlands.

IV. *Insuring Headlands and Openings Separate from the Main Fields*

Warsaw contends substantial evidence does not support the Hearing Officer's determination that it is an uncommon practice to insure sugar beet headlands and field openings separately from the main field. Warsaw may be correct that it is a common insurance practice amongst large growers (Aug. HT 50, 74, 101, Nov. HT 16, 21-25, 34-35), but whether or not it is common has no bearing on the outcome of this case.

Conclusion

The NAD Hearing Officer's determination that different production methods were used to establish the Master Yield than were used to produce Warsaw's 2006 sugar beet crop is supported by substantial evidence, and is not arbitrary, capricious, an abuse of discretion, or contrary to existing law. The term "production method," although broad, is not ambiguous. The Hearing Officer's determinations that turning equipment on the headlands, and harvesting the entire insured sugar beet crop early are reportable changes in production methods that are likely to result in a lower yield, are reasonable and are supported by substantial evidence in the record as whole. "[The court] do[es] not substitute [its] judgement for that of the agency, even if the evidence would have supported the opposite conclusion." *Miller v. U.S. Dept. of Agric.,* 247 Fed.Appx. 841 (8th Cir.2007) (citation omitted). "If the agency's determination is supportable on any rational basis, [the court] must uphold it." *Id.*The NAD Hearing Officer's determination that Warsaw did not report the changes in its production methods is not supported by substantial evidence and is arbitrary, capricious, an abuse of discretion, or otherwise contrary to existing law because Warsaw did report its farming practices to its insurance agent. RMA did not violate the principles of good faith and fairness by waiting to adjust the Master Yield until the outcome of this case.

Accordingly, **IT IS RECOMMENDED** that the Hearing Officer's appeal determination be **AFFIRMED** in part and **REVERSED** in part,

and that the Motions for Summary Judgment filed by Warsaw Sugar Beet Association LPI (Doc. # 11) and the Federal Crop Insurance Corporation (Doc. # 16) be **GRANTED** in part and **DENIED** in part. The case should be remanded for a determination as to whether Warsaw sustained a production loss due to drought on its 2006 sugar beet crops, after the FCIC adjusts Warsaw's Mater Yield.

Notice of Right to Object

Pursuant to Local Rule 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy.

FEDERAL CROP INSURANCE ACT

DEPARTMENTAL DECISION

MILDRED PORTER.
FCIA Docket No. 09-0120.
Decision and Order.
Filed February 4, 2010.

FCIA. – Proof of loss – Materially false report.

Mark R. Simpson, Esquire, for the Manager, FCIC.
Terry G. Kilgore, Esquire, Gate City, VA, for Respondent.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Preliminary Statement

On May 21, 2009, William J. Murphy, the Acting Manager of the Federal Crop Insurance Corporation, United States Department of Agriculture, ("FCIC") initiated this disciplinary proceeding against the Respondent by filing a complaint alleging violations of the Federal Crop Insurance Act, (7 U.S.C. § 1501, *et seq*.) (the "Act"). On June 11, 2009, Counsel for the Respondent filed an Answer which denied generally the material allegations of the Complaint and requested that an oral hearing be scheduled.

An oral hearing was held on October 27, 2009 in Abingdon, Virginia. The Complainant was represented by Mark R. Simpson, Esquire, Office of General Counsel, United States Department of Agriculture, Atlanta, Georgia and the Respondent was represented by Terry G. Kilgore, Esquire of Gate City, Virginia. Eleven witnesses testified and 69 exhibits were identified and received into evidence during the hearing.[1]

Discussion

[1]CX-1 through CX-53; RX 1-13 and RX 15-17. References to the Transcript of the proceedings will be to "Tr." CX 55 was admitted post trial.

The Complaint in this action alleges that Mildred Porter willfully misrepresented material facts in connection with a loss claim under a federally insured crop insurance policy on burley tobacco raised by her during the 2004 crop year and that she provided false and inaccurate information when she certified a November 22, 2004 Production Worksheet/Proof of Loss that her total burley tobacco production on a 14.2 acre tract on farm FSN 2017 was 4,738 pounds.

7 C.F.R. § 400.454(a) provides:

> "any person who willfully and intentionally provides any materially false or inaccurate information to FCIC or to any approved insurance provider reinsured by FCIC with respect to an insurance plan or policy issued under the authority of the Federal Crop Insurance Act…may be subject to a civil fine…and disqualification from participation….

Because of the alleged misrepresentation and false certification, the Complaint seeks disqualification of Mildred Porter from receiving monetary or nonmonetary gain under certain specified federal programs for up to two years and imposition of a civil fine or penalty of $5,000.

On February 26, 2004, Ms. Porter made application to Rain and Hail LLC (Rain and Hail), a participating insurance provider for the Federal Crop Insurance Program for her 2004 tobacco crop insurance. CX-5. Crystal Porter Reesly's (her daughter) crop which was also raised on the same farm was not insured. Under the terms of the common crop policy, growers are required to certify the type of crop, where it was planted, the number of acres planted, the date the crop was planted and to identify the applicant's ownership share in the crop. CX-1. Ms. Porter's acreage report signed on July 14, 2004 indicated that she had planted burley tobacco on 14.2 acres on Farm FSN 2017 with a final planting date of May 18, 2004 and that her ownership interest was 100%. CX-11. Ms. Porter also completed an acreage report on Crystal Porter Reesly's behalf reflecting zero acres of burley being planted which she later acknowledged was false. CX-12, Tr. 235.

The disparity between Mildred Porter's burley tobacco yield per acre and that of her daughter became apparent as a result of Ms. Porter's application for a 2004 Crop Disaster payment. CX-33. Nelson Link, the

Farm Programs Chief of the Farm Services Agency (FSA) for the Virginia state office in Richmond, Virginia testified that his duties included implementing the Disaster Program in Virginia. Tr. 12. In 2005, Ms. Porter's case had been referred to him following County Committee review of the significant disparity between her production and that of her daughter. Tr. 16, CX-33. Consistent with handbook provisions and the mandate contained in the Agriculture Risk Protection Act of 2000[2] requiring FSA and RMA to work together, a referral report was sent to the Risk Management Agency (RMA) in Raleigh, North Carolina. Tr. 24, CX-41.

Upon receipt of the referral from FSA, Johnnie Perdue, then the Director of the Eastern Regional Compliance Office of RMA,[3] noted that Mildred Porter's insurance experience was considered statistically atypical in the basis of frequency of loss, severity of loss and amount of money collected over time,[4] and indicated that he had assigned the case to Chola Richards for investigation. Tr. 46-47.

Amanda Bell, a FSA Program Technician, testified that she took Ms. Porter's Farm and Tract Detail Listing from Ms. Porter on July 13, 2004 which reflected her as having a 100% interest in 14.2 acres of burley tobacco being grown on Farm FSN 2017.[5] CX-9. A later revision to that form completed the same day reported 2.0 acres of burley tobacco (tract

[2]114 Stat. 358, Public Law 106-224 (June 20, 2000).

[3]Mr. Perdue is currently the Assistant to the Deputy Administrator for Compliance. Tr. 41.

[4]One of the methods used by RMA to identify producers to monitor was to look at their loss or insurance experience to see if the experience was anomalous to the general area. Tr. 46.

[5]Farm FSN 2017 has two adjoining subtracts, 4026 on the south and 4124 to the north. The fields on each are numbered as well and alphanumeric designations are used to identify what part of each field is devoted to a particular crop. *See,* CX-53 and RX-2. The original report included tract 2AY as belonging to Mildred Porter in the 14.2 acres that were reported.

2AY) in Crystal Porter Reesly's name.[6] CX-10.

Although the evidence established burley tobacco production by Ms. Porter of only a tenth of that purportedly raised on the same farm by her daughter, Ms. Porter expressly denied any wrongdoing, asserting that her production mirrored that of much of Russell County, Virginia and that adverse weather conditions were the cause of her loss.

The unlikelihood of Ms. Porter's reported production being accurate was further highlighted in the testimony of Jamie Dickenson, a Field Assistant with FSA and a life-long tobacco producer. Tr. 71-72. Mr. Dickenson conducted two visits to Farm 2017 in 2004 to conduct spot checks, the first on July 14, 2004 and the second in late August or early September of the same year. Tr. 72, 78. On the first visit, Dickenson's assessment was that the fields were in fair to good condition. Tr. 74. On the second visit however he found the field that was not insured (2AY) to be in poor condition as a result of heavy rains which had washed one-third to one half of the crop away. Tr. 80. By way of contrast, he felt that the insured crop was in fair to good condition. CX-38. By his estimate, the crop should have produced between 1,000 and 1,200 pounds per acre. Tr. 79. This "fair to good" assessment by an individual knowledgeable in local tobacco crop yield without evidence of any intervening natural cause to explain the crop loss is highly inconsistent with Ms. Porter's low crop yield claim.

Mr. Dickenson's estimate closely resembled that of Billy Gray Smith, in 2004 a staff adjuster for Rain and Hail Crop Insurance, who completed an Appraisal Worksheet Tobacco on August 25, 2004 and projected crop production in the three insured fields as ranging from a low of 1,004 pounds per acre to a high of 1,035 pounds per acre. CX-20, Tr. 91, 103. Although Ms. Porter disagreed with his estimates as being too high, she signed his forms containing the estimates. CX-20, Tr. 111-112, 118, 130-131, 138-139. Mr. Smith was accompanied on his visit to the Porter farm on August 25, 2004 by Washington Ramsey. Mr. Ramsey returned to the farm on November 22, 2004 and completed a Production Worksheet/Proof of Loss which he initially completed in usual fashion, but after reflection became uneasy about the accuracy of

[6]The revised report also added an additional acre of production to each of two tracts (3BY and 4AY). CX-10, Tr. 64. Ms. Porter later attempted to increase the 2 acres to 4 acres,

Ms. Porter's claim and went back and processed it with Ms. Porter as a "non-waiver."[7] Tr. 141-142.

Chola Richards testified that as part of her investigation she prepared a comparison of Ms. Porter's production with that of farms adjacent to her. Tr. 165-170. She started with the five individuals Ms. Porter identified as being her closest neighbors and expanded the list to seven based upon proximity to the Porter farm, took the total production and divided it by the number of acres produced to calculate the pounds per acre for each individual. CX-51, Tr. 167-170. The average for those seven farms was 1,876 pounds per acre compared to Ms. Porter's production of 337 pounds per acre.[8] Tr. 170. Ms. Richards also prepared a loss ratio comparison, comparing the county average for Russell County, Virginia with Ms. Porter's loss ratio. Tr. 171. That computation reflected a county average at 3.35 for 2004, with Ms. Porter's loss ratio at 7.17 for that year.[9] CX-47, Tr. 171.

On the basis of all of the evidence before me, including the entire record, including the testimony at the oral hearing and all of the exhibits admitted, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

[7]By submitting the claim as a "non-waiver," it signifies that the adjuster may not agree with what is submitted. Tr. 147.

[8]While Mildred Porter claimed to have produced only 337 pounds per acre, Crystal Porter Reesly reported production of 3,349 pounds per acre. CX-49, Tr. 172. Although the reporting reflected only two acres, field 2AY is over 4 acres, all of which may have been in tobacco. CX-53. Chola Richmond's testimony indicated that Mildred Porter certified her daughter's production as being only two acres on at least three occasions. Tr. 182. Ms. Porter did attempt to get the report of her daughter's acreage increased to four acres, but was unsuccessful. Tr. 228. Had her daughter raised four rather than two acres of tobacco, her production would have been 1,674.5 pounds per acre, still well in excess of that of her mother. At the hearing, Ms. Porter testified that it had been four acres and the reporting was an acreage oversight. Tr. 226. Ms. Porter also admitted falsely submitting a report indicating that her daughter Crystal Porter Reesly had planted zero acres of tobacco. Tr. 235.

[9]The loss ratio reflects the indemnity divided by the premium. Tr. 172.

1. Mildred Porter is an individual currently residing in Castlewood, Virginia. She was a participant in the Federal Crop Insurance Program in the crop year 2004, insuring her burley tobacco crop of 14.2 acres which was raised in Russell County, Virginia on Farm FS 2017. CX-5, 6.
2. Mildred Porter applied for and obtained a federal crop insurance policy on burley tobacco from Ace Property and Casualty Insurance Company on a policy serviced by Rain and Hail LLC, an approved insurance provider under the federal crop insurance program, which policy was reinsured by FCIC. CX-11, 12.
3. The Common Crop Insurance Policy for the 2004 crop year required growers to certify the type of crop, where it was planted, the number of acres planted, the date the crop was planted and the applicant's share of the crop. CX-1, Tr. 10.
4. On July 14, 2004, Respondent Mildred Porter completed the Rain and Hail Acreage Report indicating that she had planted burley tobacco on 14.2 acres on Farm FS 2017 with a final planting date of May 18, 2004 and that her ownership interest in the crop was 100%. CX-11.
5. On July 14, 2004, using a Power of Attorney granted to her, Mildred Porter falsely completed the Rain and Hail Acreage Report on her daughter Crystal Porter Reesly's behalf indicating that her daughter had zero acres of tobacco. CX-5, 12.
6. Respondent Mildred Porter submitted a crop loss claim under her federally insured crop insurance policy for the insured tobacco grown for the 2004 crop year as well as a claim for a crop disaster payment. CX-29, 33.
7. Although tobacco yields for the year were lower than average throughout the Russell County, Virginia as a result of adverse weather, the pound per acre burley tobacco yield of Mildred Porter for the crop year 2004 of was significantly less than that for her daughter's uninsured tobacco grown on the same farm (FSN 2017) or that grown in the same general area by other growers in Russell County, Virginia. CX-49 (6 of 8).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. The Respondent Mildred Porter willfully provided false and incorrect information concerning the amount of her production of burley tobacco crop grown on Farm FS 2017 to Rain and Hail and to Farm Services Agency in violation of 7 C.F.R. § 400.454(a).
3. Ms. Porter also falsely certified her daughter as growing zero pounds of burley tobacco when in fact she grew two, if not four acres of burley tobacco. Tr. 235.
4. The reporting of false or incorrect acreage or production represents a material misrepresentation of fact under the Federal Crop Insurance program.

Order

1. 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), the Respondent Mildred Porter is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:
   (a) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524) *et seq*.;
   (b) The Agricultural Market Transition Act (7 U.S.C. § 7201 .), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333) *et seq*;
   (c) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq*.);
   (d) The Commodity Credit Corporation Charter Act (15 U.S.C. §§ 714 *et seq*.);
   (e) The Agricultural Adjustment Act of 1938 (7 U.S.C. §§ 1281 *et seq*.);
   (f) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq*.);
   (g) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq*.); and
   (h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2 Unless this Decision and Order 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, the Respondent 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).

3. A civil fine of $5,000 is imposed upon the Respondent pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. §1515(h)(3)(A) and (4)). 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
Fiscal Operations Branch
6501 Beacon Road, Room 271
Kansas City, Missouri 64133

4. This Decision and 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.

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

Done at Washington, D.C.

———————

CRYSTAL PORTER REESLY f/k/a CRYSTAL PORTER.
FCIA Docket No. 09-0121.
Decision and Order.
Filed February 18, 2010.

FCIA – Materially false report – Proof of loss.

Mark R. Simpson, for the Manager, FCIC.
Terry G. Kilgore, Gate City, VA, for Respondent.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law

Judge.

On May 21, 2009, William J. Murphy, the Acting Manager of the Federal Crop Insurance Corporation, United States Department of Agriculture, ("FCIC") initiated this disciplinary proceeding against the Respondent by filing a complaint alleging violations of the Federal Crop Insurance Act, (7 U.S.C. § 1501, *et seq*.) (the "Act"). On June 11, 2009, Counsel for the Respondent filed an Answer which denied generally the material allegations of the Complaint.

As the issues in the instant action and a related case[10] involved many of the same facts and the crops giving rise to the actions being brought were raised on the same farm in Russell County, Virginia, this action and that brought against the Respondent's mother, Mildred Porter, were consolidated for the purposes of hearing; however, by letter dated September 8, 2009 prior to the hearing, Respondent's counsel advised the Administrative Law Judge that the Respondent no longer wished to pursue the action. At a teleconference on September 17, 2009, Counsel for the Respondent confirmed the contents of his September 8, 2009 letter indicating that Crystal Porter Reesly no longer wished to contest the allegations contained in the Complaint and I directed that the parties submit a Consent Decision. The failure to file a Consent Decision was again broached with the parties in the Order entered on December 22, 2009.

As it now appears that despite the earlier indications that the action would no longer be contested, the parties have been unable to agree upon the terms of a Consent Decision, and rather than allowing further cothurnal posturing and delay, I will consider the Respondent's desire to no longer contest the action to be an admission of the facts alleged in the Complaint, a waiver of her right to a hearing, and will enter the following Findings of Facts, Conclusions of Law and Order.

Findings of Fact

1. Crystal Porter Reesly, formerly Crystal Porter, is an individual residing in Lebanon, Virginia.

[10] *In re: Mildred Porter,* FCIA Docket No. 09-0120 (February 4, 2009)

2. On September 10, 2002, Crystal Porter, later Crystal Porter Reesly, granted her mother Mildred Porter power of attorney appointing her to act for her and in her stead in connection with Farm Services Agency (FSA) and Commodity Credit Corporation (CCC) programs by completing Power of Attorney Form, FSA Form 211 which granted Mildred Porter authority to act as Respondent's attorney-in-fact with respect to all FSA and CCC programs and crops.
3. On February 26, 2004, Mildred Porter, the Respondent's mother signed a Multiple Peril Crop Insurance Application and Reporting Form transferring the coverage of her burley tobacco crop on Farm FSN 2017 to 4 States Crop Insurance Service, Inc. On the same date, Crystal Porter Reesly's coverage was also transferred to the same company.
4. For the 2004 crop year, Rain and Hail, LLC was the managing general agent for 4 States Crop Insurance Services, Inc., an approved insurance provider as described in 515(h) and 502(b)(2) of the Act.
5. On or about July 14, 2004, using a Power of Attorney granted to her by Crystal Porter Reesly, Mildred Porter falsely completed the Rain and Hail Acreage Report on her daughter Crystal Porter Reesly's behalf indicating that her daughter had zero acres of tobacco when in fact Crystal Porter Reesly had planted 2 or more acres of burley tobacco.
6. On or about July 14, 2004, Mildred Porter revised the FSA Form 578 certification to reflect that Crystal Porter Reesly had a 100% interest in 2.0 acres of tobacco on Farm FSN 2017.
7. Respondent Mildred Porter submitted a crop loss claim under her federally insured crop insurance policy for the insured tobacco grown for the 2004 crop year as well as a claim for a crop disaster payment.
8. Mildred Porter's burley tobacco yield per acre was only 337 pounds per acre; the Respondent's yield per acre was 3,349 pounds per acre[11]; however, the county average for Russell

[11]Although not addressed by the factual allegations of the Complaint which are being deemed admitted in this case, during the *Porter* case, evidence was admitted that (continued...)

County, Virginia was 1,782 pounds per acre.

9. Although tobacco yields for the year were lower than average throughout Russell County, Virginia as a result of adverse weather, the pound per acre burley tobacco yield of Mildred Porter for the crop year 2004 was significantly less without further intervening cause than that estimated for her crop by RH loss adjuster Billy Smith who performed a Growing Season/Pre-harvest Inspection of her tobacco acreage on August 25, 2004.
10. Burley tobacco production was shifted from Mildred Porter's insured acreage to the Respondent's uninsured acreage in order for Porter to claim a crop insurance loss.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Using a power of attorney granted to her by the Respondent, Mildred Porter falsely certified the Respondent as growing zero pounds of burley tobacco when in fact she grew two, if not four acres of burley tobacco.
3. The acts of Mildred Porter using the power of attorney granted to her by her daughter are legally binding and Crystal Porter Reesly is responsible for them as if she had performed them herself.
4. The reporting of false or incorrect acreage or production represents a material misrepresentation of fact under the Federal Crop Insurance program.
5. Crystal Porter Reesly marketed tobacco which was not grown on her reported acreage.

Order

1 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,

[11](...continued)
the Respondent may have raised four acres rather than the two reported which would have brought her per acre yield to an amount slightly less than the county average, but still well in excess of the estimated yield for her mother's insured crop.

subpart R), the Respondent Crystal Porter Reesly is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(a) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524) *et seq;*

(b) The Agricultural Market Transition Act (7 U.S.C. § 7201 *et seq*.), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);

(c) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq*.);

(d) The Commodity Credit Corporation Charter Act (15 U.S.C. §§ 714 *et seq*.);

(e) The Agricultural Adjustment Act of 1938 (7 U.S.C. §§ 1281 *et seq*.);

(f) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq*.);

(g) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq*.); and

(h) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2. Unless this Decision and Order 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, the Respondent 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).
3. A civil fine of $5,000 is imposed upon the Respondent pursuant to sections 515(h)(3)(A) and (h)(4) of the Act (7 U.S.C. §1515(h)(3)(A) and (4)). 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:

USDA/RMA
Beacon Facility-Stop 0814
P.O. Box 419205

Kansas City, Missouri 64141

4. Should the Respondent pay a civil penalty of $2,000 within 30 days of service of this Order upon her, the balance of the civil penalty of $5,000 will be suspended and one year of the two year period of disqualification will also be suspended, provided, however, that the Respondent commit no further violations under the Act for a period of five years from the date hereof. In the event of evidence further violations, upon Motion of the Complainant, the suspended portion of the civil penalty and period of disqualification shall be reinstated.
5. This Decision and 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.

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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MILDRED PORTER.
FCIA Docket No. 09-0120.
Decision and Order.
Filed April 7, 2010.

FCIA – Materially false report – Proof of loss .

Mark R. Simpson, for the Manager, FCIC.
Terry G. Kilgore, Gate City, VA, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

William J. Murphy, Acting Manager, Federal Crop Insurance Corporation [hereinafter the Manager], instituted this administrative proceeding by filing a Complaint on May 21, 2009. The Manager instituted the proceeding under the Federal Crop Insurance Act, as

amended (7 U.S.C. §§ 1501-1524) [hereinafter the Federal Crop Insurance Act]; regulations promulgated under the Federal Crop Insurance Act (7 C.F.R. pt. 400) [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 Manager alleged that Mildred Porter violated the Federal Crop Insurance Act and the Regulations by willfully and intentionally providing false or inaccurate information to her insurance provider, Rain and Hail, LLC, and to the Federal Crop Insurance Corporation. On June 11, 2009, Ms. Porter filed a response in which she denied the allegations of the Complaint.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted an oral hearing on October 27, 2009, in Abingdon, Virginia. Mark R. Simpson, Office of the General Counsel, United States Department of Agriculture, Atlanta, Georgia, represented the Manager. Terry G. Kilgore, Kilgore Law Office, Gate City, Virginia, represented Ms. Porter. Eleven witnesses testified and the ALJ received 68 exhibits into evidence. On January 7, 2010, the Manager filed a post-hearing brief, and on January 13, 2010, Ms. Porter filed a post-hearing brief.

On February 4, 2010, the ALJ issued a Decision and Order: (1) concluding Ms. Porter violated the Federal Crop Insurance Act and the Regulations by willfully providing false and incorrect information to Rain and Hail, LLC, and the Farm Service Agency, United States Department of Agriculture; (2) disqualifying Ms. Porter for 2 years from receiving any monetary or non-monetary benefit under seven specific statutory provisions and 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; and (3) assessing Ms. Porter a $5,000 civil fine (Decision and Order at 7-9). On February 18, 2010, the ALJ issued a Supplemental Order amending the address to which Ms. Porter was required to send the payment of the civil fine.

On March 8, 2010, Ms. Porter filed "Respondent's Supporting Statement for Appeal" [hereinafter Appeal Petition]. On March 31, 2010, the Manager filed "Complainant's Response to Respondent's Supporting Statement for Appeal." On April 5, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the ALJ's February 4, 2010, Decision and Order, as amended by the ALJ's February 18, 2010, Supplemental Order.

MS. PORTER'S APPEAL PETITION

Ms. Porter's Appeal Petition reads in its entirety:

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In Re:	**)**	
	)	
MILDRED PORTER	**)**	**FCIA Docket No. 09–0120**
RESPONDENT	**)**	

RESPONDENT'S SUPPORTING STATEMENT FOR APPEAL

Comes Now the Respondent, Mildred Porter, by Counsel and states the following:

1. The Decision and Order dated February 4, 2010 was not based upon the facts presented at the hearing held on October 27, 2009.
2. The Decision and Order was not based upon the law and procedures regarding this type of case.

MILDRED PORTER
BY: COUNSEL
TERRY G. KILGORE
KILGORE LAW OFFICE
P.O. BOX 669
GATE CITY, VA 24251
(276) 386-7701 – Phone
(276) 386-2377 – Facsimile

The ALJ's Decision and Order is replete with citations to the record which support the ALJ's Decision and Order. Based on my review of the transcript and the exhibits received into evidence and the ALJ's Decision and Order, I conclude the ALJ's Decision and Order is based upon the facts presented at the October 27, 2009, hearing. Moreover, the ALJ's Decision and Order is properly based on the Federal Crop Insurance Act and the Regulations and the ALJ conducted the proceeding in accordance with the Rules of Practice, as required by 7 C.F.R. § 400.454(a). Therefore, I reject Ms. Porter's contentions that the ALJ's Decision and Order was not based upon facts presented at the October 27, 2009, hearing, and the law and procedures applicable to a proceeding conducted under 7 U.S.C. § 1515(h) and 7 C.F.R. §§ 400.451-.458.

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's Decision and Order, dated February 4, 2010, as amended by the ALJ's Supplemental Order, dated February 18, 2010, is affirmed.

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FOOD AND NUTRITION SERVICE

DEPARTMENTAL DECISIONS

MICHAEL E. GALLEGOS.
FNS Docket No. 10-0067.
Decision and Order.
Filed June 11, 2010.

FNS – Ineligibly for benefits.

John B. Koch, Esquire, for Respondent.
Petitioner, Pro se.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of Michael E. Gallegos for a hearing to address the existence or amount of a debt alleged to be due which is being sought to be collected through the Treasury Offset Program.

The Respondent has filed a motion seeking to dismiss this action without prejudice suggesting that the Petitioner received benefits to which he was not entitled and questioning whether he has a legitimate challenge to the validity of the effort to recover the alleged debt. Filed with the Motion were attachments however including a document indicating that the petitioner was in fact discharged from his former place of employment, in which case the benefits he received were proper. Exhibit 2.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. The Petitioner Michael E. Gallegos was discharged from employment with Consumer Credit Service following a no call no show for his scheduled shift in April of 2005. Exhibit 2.
2. In view of the foregoing, the determination that he voluntarily

quit and not entitled to benefits was erroneous and without basis. Exhibit 3.

Conclusions of Law

1. The Petitioner is not indebted to the United States Department of Agriculture for improper receipt of food stamp benefits.
2. As there is no debt, any effort at collection by referral to the Treasury Offset Program should be terminated.

Order

For the foregoing reasons, the referral to the Treasury Offset Program is **ORDERED TERMINATED.**

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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FOOD AND NUTRITION SERVICE

COURT

STEPHEN C. FELLS, d/b/a STEPHEN SNACK FOODS CANDY & VARIETY v. USDA.
No. 08-C-782.
Filed January 5, 2010.

FNS – SNAP – Trafficking – Presumptions – Burden shifting.

United States District Court,
E.D. Wisconsin.

DECISION AND ORDER FOLLOWING COURT TRIAL

AARON E. GOODSTEIN, United States Magistrate Judge.

On September 16, 2008, proceeding pro se, Stephen C. Fells ("Fells") filed a complaint pursuant to 7 C.F.R. § 279.7 challenging the decision of the United States Department of Agriculture ("USDA"), Food and Nutrition Service ("FNS"), whereby Fells was permanently disqualified from participating in the Food Stamp Program (now referred to as SNAP). (Docket No. 1.) Fells was disqualified for "trafficking" which is "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food." 7 C.F.R. § 271.2.Upon all parties consenting to the full jurisdiction of a magistrate judge, this case was reassigned to this court. (Docket No. 12.) This court subsequently granted Fells' request for counsel and attorney Douglas P. Dehler agreed to represent Fells on a pro bono basis. (Docket No. 20.) A trial to the court was held on October 5, 2009, (Docket Nos. 31, 33), and the court ordered the parties to submit post-hearing briefs, (*see* Docket Nos. 34, 36, 37). The matter is now ready for resolution.

FINDINGS OF FACT

Fells was the sole proprietor of a small grocery store in a primarily residential neighborhood in Milwaukee. (Tr. 30-32.) The store had no aisles; all of the store's stock was displayed around the perimeter of the store. (Tr. 43-44.) The cash register had no UPC scanner but instead each price had to be entered manually. (Tr. 44.) The store did not provide grocery carts or baskets. (Tr. 45.) Only three people were allowed in the store at a time out of concern of theft. (Tr. 45.) One of the issues in this case is the number of "large" transactions which the agency characterizes as in excess of $30.00 each. Fells explained that he focused upon serving the needs of individuals in the area immediately surrounding his store. (Tr. 32-33.) As part of this strategy, Fells would purchase meat in bulk from stores such as Sam's Club and then resell it to his customers. (Tr. 33.) Other times, he would get meat from a supplier to a larger grocery store in the area that had surplus, which he would usually be able to sell in a day or two. (Tr. 48, 51.) When he received a supply of meat, he would generally let the neighborhood know about its availability by word of mouth, for example, by telling children when they came in for candy, who, in turn, would tell their parents, who would tell friends, and so on. (Tr. 34, 48.) Fells would try to accommodate a customer who wanted something in particular. For example, Fells knew that an individual who worked in the neighborhood liked lamb, so Fells special ordered this product for this customer. (Tr. 34.) Aside from meat, another big ticket item in his store was baby formula, which was priced from $12 to $24 a can. (Tr. 35, 40.)

Another issue is the frequency of even dollar transactions. Fells explained that if a customer made a purchase that was not an even dollar amount, in order to bring the total to an even dollar amount, Fells would often offer to throw in a few candy bars. (Tr. 35-36.) Rather than giving a customer change, he would often ask what the customer wanted to purchase with that change. This resulted in a sort of on-the-spot negotiation in an effort to let customers feel they were getting a good deal, so that they would want to keep coming back. (Tr. 36.) Another possible explanation for the high frequency of even dollar amount transactions is the fact that retailers may not charge sales tax on food stamp transactions. (Tr. 9-10.) Fells flatly denies having ever engaged

in food stamp trafficking or ever exchanging food stamps for anything other than food products. (Tr. 39.)

Michael Skaer ("Skaer"), the officer in charge of the Madison field office of the Food and Nutritional Service, was the individual who made the decision to permanently disqualify Fells from the food stamp program. (Tr. 4-5.) Fells had previously been investigated for trafficking in 2006-07 but that investigation ended with a conclusion that there was insufficient evidence to charge Fells. (Tr. 11-14.) Fells next came to the attention of Skaer as a result of an automated program that monitors food stamp transactions for suspicious activity. (Tr. 8.) Skaer reviewed transactions at Fells' store, and because of the store's size and previously observed stock levels, Skaer determined any transaction over $30.00 to be suspiciously large. (Tr. 8-9; *see also* Ex. 2.) Skaer also found it unusual that many of the transactions were for even dollar amounts. (Tr. 9-10.)

Fells was informed of the initial charging decision by way of a letter dated March 3, 2008. (Ex. 1); *see* 7 C.F.R. § 278.6(b)(2). This letter states that in lieu of permanent disqualification, he might be eligible for a civil monetary penalty ("CMP"), which would be in the amount of $54,000.00. (Ex. 1.) The $54,000.00 amount was an error; if Fells was determined to be eligible for a CMP, the correct amount would have been about $4,600.00. (Tr. 7.) However, Fells could not have been found eligible for a CMP because a prerequisite for a CMP is proof that the owner of the store was not involved in the trafficking and Fells was the owner and only employee of the store. (Tr. 108-09.) The charging letter informed Fells of his right to reply to the charges and stated that he could respond orally, in writing, or by scheduling an in-person meeting where he could be represented by counsel. (Ex. 1 at 2.)

In response to the charging letter, Fells provided numerous receipts in an effort to establish that he had, in fact, purchased stock sufficient to sustain the recorded food stamp transactions. (Tr. 16-20; *see also* Exs. 6, 10.) These receipts indicated that Fells had purchased $6,576.61 in inventory for his store during the relevant time period. (Tr. 17.) Records indicated that Fells' store had food stamp redemptions totaling $4,917.73 for the same period. (Tr. 17-18.)

Evaluation of the purchases of specific food stamp clients bore out Skaer's suspicion that Fells was engaged in trafficking. (Tr. 85-86.) For example, one client made a $108.26 purchase at a full line, well-stocked supermarket and then three hours later made a $51 .85 purchase at Fells' store. (Tr. 87.) In Skaer's opinion, it was very suspicious that an individual who had access to a full-line supermarket would within several hours make a sizable purchase at Fells' very small store. (Tr. 87-88.) Another household in one day made a $257.86 purchase at a full-line supermarket, 20 minutes later made a $32.29 purchase at another supermarket, and then about 5 hours later, made two transactions at Fells' store, the first for $25.00 and the second six minutes later for $200.00. (Tr. 88.) The transaction records of other food stamp clients were similarly suspicious to Skaer. (Tr. 88-92.)

Therefore, on March 27, 2008, Skaer wrote a letter to Fells informing him of the agency's decision to permanently disqualify Fells from participation in the food stamp program. (Ex. 4.) Fells appealed this decision, and on August 7, 2008, the USDA, FNS affirmed the decision of permanent disqualification. (Ex. 1022.)

In its final decision, the USDA, FNS determined that Fells engaged in trafficking based upon "clear and repetitive patterns of unusual, irregular, and inexplicable FSP activity for [Fells'] type of firm." (Ex. 1022.) The agency was not persuaded by Fells' explanation that these suspicious transactions were the result of large sales of surplus meat. (Ex. 1022.) Fells was advised that he bore the burden in his administrative appeal of the decision of the field office to "prove by a clear preponderance of the evidence, that the administrative actions should be reversed." (Ex. 1022.) But in the sentence that immediately follows, the agency decision suggests that a lesser burden of proof is required: "That means Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." (Ex. 1022.)

CONCLUSIONS OF LAW

Although it is undisputed that the USDA's finding that the plaintiff engaged in trafficking, as defined by 7 C.F.R. § 271.2, is subject to de

novo review, 7 U.S.C. § 2023(a)(15), the parties disagree as to which party bears the burden of proof. The court, in its pretrial order, determined that the burden of proof fell upon Fells. (Docket No. 29.) For the sake of completeness in this decision, the court shall largely recount its reasoning.Apparently, the first circuit court to have squarely addressed this question was the Fifth Circuit. *Redmond v. United States,* 507 F.2d 1007 (5th Cir.1975). In *Redmond,* the court noted that in many instances where a court's standard of review of an administrative decision is de novo, the burden remains with the party that had the burden at the administrative level. *Id.* at 1011. Nonetheless, the court determined that in rejecting the substantial evidence standard that ordinarily applies to judicial review of administrative decisions, Congress intended only to permit the court to look beyond the administrative record and did not intend to place the burden upon the government agency. *Id.* "In other words, the agency action stands, unless the plaintiff proves that it should be set aside." *Id.* at 1012.

Numerous other circuits have agreed with the Fifth Circuit that the burden lies with the plaintiff seeking to upset the administrative decision. *Warren v. United States,* 932 F.2d 582, 586 (6th Cir.1991) (citing *Goodman v. United States,* 518 F.2d 505, 507 (5th Cir.1975)) ("The burden of proof in the judicial review proceeding is upon the aggrieved store to establish the invalidity of the administrative action by a preponderance of the evidence."); *Plaid Pantry Stores, Inc. v. United States,* 799 F.2d 560, 563 (9th Cir.1986) (citing *Han v. FNS,* 580 F.Supp. 1564, 1567 (D.N.J.1984) ("Plaintiff has the burden of establishing by a preponderance of the evidence that the disqualification was factually wrong.");

The Seventh Circuit has not explicitly addressed this question, although several district courts from within the circuit have held that the "[p]laintiff has the burden of proving by a preponderance of the evidence on this fresh record that the administrative decision was invalid because violations did not occur." *Bros. Food & Liquor, Inc. v. United States,* 626 F.Supp.2d 875, 879 (N.D.Ill.2009); *Brooks v. United States Dep't of Agric.,* 841 F.Supp. 833, 839 (N.D.Ill.1994). Aside from the line of cases cited above, these courts have relied upon *Abdel v. United*

States, 670 F.2d 73, 76 n. 8 (7th Cir.1982), to support their conclusion. In a footnote, the court in *Abdel* discussed whether reversal was warranted due to the admission of allegedly improper evidence. The court stated, "[b]ecause Supermarket failed to meet its burden of proving by a preponderance of the evidence that the agency action was invalid the admission of the Transaction Reports was harmless error at worst." *Abdel,* 670 F.2d at 76 n. 8 (citing *Modica v.. United States,* 518 F.2d 374, 376 (5th Cir.1975)). Later in *Abdel,* in discussing whether the plaintiff had shown that it did not receive adequate notice, the court quoted the district court's decision in stating "Plaintiffs, however, have the burden of proving by a preponderance of the evidence that they did not receive a proper warning." *Id.* at 77.

More recently, relying upon this second quote from *Abdel,* the Seventh Circuit stated

> The district court rejected her argument that it was the government's burden to show that the agency's determination is valid. Because Estremera sought de novo review of the decision of the Administrative Review Branch, it was her burden to prove by a preponderance of the evidence that the agency's determination was invalid.

Estremera v. United States, 442 F.3d 580, 587 (7th Cir.2006).

The above quoted language from *Estremera* seemingly answers the question of which party has the burden of proof, but it is important to note that the court made this statement in regard to the penalty that was imposed, and not for the violation itself. The present parties agree that when it comes to the review of any penalty imposed by the agency, the plaintiff bears the burden of proving that the penalty imposed was arbitrary and capricious. The court in *Estremera* was not addressing the issue that is presently before this court, i.e. which party bears the burden of proof as to an underlying factual dispute of whether a violation occurred.

The court finds the case most helpful to the resolution of the present issue is *McGlory v. United States,* 763 F.2d 309, 310 (7th Cir.1985) (per curiam). In *McGlory,* at the close of the plaintiff's case in the trial to the court, the judge granted the defendant's motion to dismiss. At this point, the only evidence that had been received was the testimony of the plaintiff's employees, all of whom denied that the alleged violations occurred, and a letter from the agency that summarized the government's

version of events. The district court noted in its decision dismissing the action that the plaintiff "failed to prove a *prima facie* case that the action of the Department was arbitrary or capricious." *Id.* at 310.

On appeal, the Seventh Circuit noted that the district court clearly applied the wrong standard of review. The court further stated that based on a de novo standard, even if the court as the finder of fact disbelieved all of the plaintiff's witnesses who said that no violation occurred, there still must be evidence that the violations occurred to sustain a ruling in the defendant's favor. *Id.* at 311. The letter summarizing the allegation was insufficient because it was hearsay. *Id.* The court remanded the case for a trial de novo.

Despite the court's action in *McGlory,* the case does not stand for the proposition that if both parties walked into court on the day of trial and neither had any evidence to present, that the court would be obligated to rule in favor of the plaintiff. Rather, the court in *McGlory* suggests that, at a minimum, the defendant's obligation to present evidence that the alleged violations occurred is not triggered until there has been evidence presented denying the occurrence of the violations. *Id.* at 311. Thus, this suggests that the plaintiff maintains at least a minimal burden of production when it comes to the presentation of evidence. But does this burden of production translate into a burden of persuasion?

Apparently so. The Seventh Circuit indicates that the burden of persuasion lies with the plaintiff with this statement: "The plaintiff's trial 'de novo' is an opportunity to show that the factual determination was wrong, not solely that the procedures were irregular or the conclusions unsupported by substantial evidence." *Id.* at 311. Implicit in this statement is that it is incumbent upon the plaintiff to establish that the factual determinations are wrong. In support of this statement, the court cites, in part, *Modica v. United States,* 518 F.2d 374, 376 (5th Cir.1975), wherein the Fifth Circuit states, "[t]he party seeking judicial review has the burden of proving facts to establish that he was entitled to relief from the disqualification determination, and must establish the invalidity of the agency action by a preponderance of the evidence." *Modica,* 518 F.2d at 376.

Therefore, although not definitive, prior decisions of the Seventh

Circuit suggest that the burden of proof should lie with the plaintiff. Additionally, from this court's research, it appears that all courts that have directly addressed this issue have determined that the plaintiff bears the burden of persuasion. Because the plaintiff has not identified any case where a court reached a contrary conclusion, the court concludes that the burden of proof lies with the plaintiff. Thus, it is the conclusion of the court that the plaintiff must prove by a preponderance of the evidence that the violations found by the Agency did not occur.

Placing the burden of proof upon Fells is essentially requiring Fells to now prove his "innocence." This can be a difficult task in an ordinary case where the accuser points to a single discrete act and the accused is forced to muster proof so as to be able to prove a negative. But in a case such as this, Fells' task is much more difficult. Unlike a case where the charge might be outlined with the specificity of an indictment, e.g. "on X date, Y person, engaged in Z prohibited activity," in this case, there is no single transaction that the agency has pointed to as proof of trafficking. Rather, the government points to a number of irregular transactions, and while seemingly acknowledging that some of these could be accounted for by Fells' explained business practices, it is the agency's position that Fells' explanations could not account for *all* the unusual transactions. Thus, in the view of the agency, there must be some trafficking occurring in Fells' store; which specific transactions are trafficking as opposed to simply non-traditional but legitimate transactions, it cannot say.

In fact, the only point in the process where Fells apparently was presumed innocent was at the very first stage of the review by the field office. But the field office was hardly an impartial arbitrator of a dispute. The same individual who made the decision to charge Fells was the same person tasked with deciding whether Fells' explanation for the suspicious activity was persuasive. Although this dual role of investigation and adjudication might be common throughout administrative law, in this case where the gist of the evidence against Fells was the Skaer's own interpretation of circumstantial suspect data, the fact that the adjudicator would be simultaneously the investigator and expert witness is troubling to the court. It is all the more troubling when it is recognized that this was the only point in the process where Fells was not required to prove his innocence.

By the second and final step of the administrative review process the USDA, FNS placed the burden of proof upon Fells.

As quoted above, agency noted in its final decision that

> Appellant bears the burden of proving by a clear preponderance of the evidence, that the administrative actions should be reversed. That means Appellant has the burden of providing relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(Ex. 1022 at A.R. 12.)

Although this statement makes it clear that the agency placed the burden of proof upon Fells, the exact nature of such burden was not made clear. The closing sentence indicates that Fells faced a burden of proving his innocence by a mere preponderance of the evidence. But the preceding sentence which states that the burden is one of "a clear preponderance of the evidence," suggests that the agency might have imposed some sort of elevated burden upon Fells.

At trial and throughout the administrative process, Fells adamantly denied ever engaging in trafficking. The government's case largely rests on the opinion of Skaer, his interpretation of transaction data, and his expectations regarding the shopping habits of food stamp clients. The evidence in support of this conclusion is wholly circumstantial. There is no smoking gun; no undercover video of Fells agreeing to exchange food stamps for cash; no food stamp client saying he sold his food stamps to Fells for cash.

Despite the lack of such conclusive evidence, clearly, something strange was going on at Fells' store. It was a very small store that offered a very limited range of groceries. As its name would imply, it focused on snacks and candy. And, Fells was not a conventional store owner. He lived behind the store and testified that he would open if someone called and needed something. Nor was Fells a sophisticated businessman. He does not appear to have maintained any sort of bookkeeping or inventory control procedures; rather, his business records appear to have consisted of various loose receipts. His sales strategy was also somewhat non-conventional. He negotiated with customers, throwing in a few

more items at reduced cost in order to bring the total to a round number. And despite being essentially a neighborhood candy and snack store, he testified he also offered customers bulk meat when a supplier had extra that he was able to get at a good price. This all might be unusual, but does it establish trafficking at Fells' store?

Exhibit 2 outlines the transactions that the agency regards as suspicious. They span from August 2007 to January 2008 and list all food stamp transactions occurring in Fells' stores during that time that exceeded $30.00. There are 71 transactions totaling $4,263.00. The transactions range from a high of $200.00 to $30.00 (the limit chosen by Skaer) with the average transaction being $60.05. To this court, these transactions are rightfully suspect. When Fells' store was repeatedly inspected, it was observed to have a very limited stock of eligible items. (*See, e.g.,* Ex. 1010.) The 71 suspect transactions were conducted by 32 different households. Most transactions were the product of returning customers; only 15 households are identified as conducting a single suspicious transaction at Fells' store. One household, identified as 1853 conducted 10 transactions at Fells' store during the relevant time period ranging from $30.25 to $81.89 for an average of $45.81. The transactions occurred generally once or twice a month in the middle of the month. Notably, there are three transactions in December, all for even dollar amounts: $40.00 on December 14; $40.00 on December 18; and $50.00 on December 20.

The household responsible for the highest value transaction, household number 4844, was also a regular customer of Fells, despite living about 80 miles away in Oshkosh, (Ex. 1009 at A.R. 119), and accounted for eight separate transactions ranging from $31.29 to $200.00 for an average of $91.96. On December 10, 2007 alone, this household made nearly $300.00 in purchases from two Milwaukee full-line grocery stores and less than five hours later engaged in two transactions from Fells' store, the first for $25.00 and the second, six minutes later, for $200.00. (Ex. 1008 at A.R. 120; *see also* Tr. 88.)

During the relevant time period, Fells store had a total of 170 food stamp transactions. (Ex. 3 at A.R. 31.) Thus, nearly 30% of Fells' food stamp transactions were for more than $30.00; the average of all food stamp transactions was nearly $24.00. (Ex. 3 at A.R. 31.) In the view of FNS, this transaction activity is inconsistent with a sparsely stocked

convenience store. (Ex. 3 at A .R. 31.)

These high dollar value transactions are certainly suspicious for a store that had been observed as having a very small stock of eligible food items and which admittedly focuses upon snacks and candy. But how do unexpected sales automatically add up to a conclusion that Fells must be trafficking? It might not be expected but it certainly is possible for a food stamp client to spend more than $30.00 at Fells' store. Fells produced receipts that demonstrate he purchased sufficient stock to sustain these transactions. (*See* Ex. 6.) Notably, Skaer testified that a transaction in the amount of $161.88 at Walgreens, a store that Skaer stated had a similar stock of eligible items as Fells' store, would not be suspicious. (Tr. 90, 131.) If it would not be suspicious at Walgreens, why would it be suspicious at Fells' store? The government does not answer this question.

Even if the court were to conclude that something amiss was occurring on at Fells' store, is the activity trafficking or some other sort of malfeasance for which the appropriate sanction would be something less than permanent disqualification?

One explanation Fells gives is that the high dollar transactions were the result of acquiring surplus meat from a supplier that he would then resell to his neighborhood customers. Such occasional special orders of higher end products in what is primarily a candy and snack shop could certainly create transactional records that would initially look suspicious while being entirely legitimate.

Fells also testified that baby formula was the other high dollar item he sold in his store. He pointed out that there was a daycare right across the street from his store, (Tr. 58), and formula could sell for up to $24.00 a can. So just a few cans of baby formula could add up to a very large amount. However, as the government points out, one would not expect a food stamp client to primarily rely upon food stamps to purchase baby formula. Rather, such an individual would most likely rely upon WIC benefits for purchasing baby formula, because WIC benefits can be used only for a far more limited variety of items as compared to food stamps. (Tr. 41, 105.) But individuals might turn to purchase formula with food stamps rather than WIC benefits if, for example, the individual ran out

of WIC benefits. (Tr. 41.)

In the opinion of the court, the evidence that Fells was engaged in trafficking of food stamps is weak. There are certain unexpected transactions, but Fells' explanation that these larger transactions were the result of customers making purchases that included high value items such as meat and / or baby formula is plausible. A customer making a relatively large purchase in a somewhat unexpected place is not synonymous with trafficking. If FNS does not regard a transaction of $160.00 at Walgreens to be indicative of trafficking at Walgreens, then it should not automatically jump to the conclusion that Fells is engaging in trafficking because of similar transactions for similar items at his store. If the question was whether the government has proven that Fells engaged in trafficking, the court would likely answer that question in the negative.

Unfortunately for Fells, that is not the question. Rather, in light of this court's conclusion that the burden of proof falls on Fells, the question before this court is whether Fells has proven by a preponderance of the evidence that he has not engaged in trafficking? In answer to this question, the court concludes that Fells has failed to persuade the court that he did not engage in trafficking. Specifically, his explanations for his high value transactions are unpersuasive.

As the government contends, one would not expect food stamp clients to regularly make large purchases of baby formula using food stamps. Individuals would be far more likely to utilize the more-limited WIC benefits. If the individual ran out of WIC benefits but was in need of formula, the individual would most likely purchase just enough product to last until the receipt of additional WIC benefits. Such a person would not be likely to purchase 8 cans of premium formula, as would be required to provide an explanation for a $200.00 transaction at Fells' store.

As for Fells' contention that the high value transactions were the result of meat sales, Fells has failed to demonstrate sufficient proof to corroborate his claims. Fells did provide evidence that he purchased meat, from retailers like Lena's Food Market, Save-a-Lot, Aldi Foods, and Sam's Club. His purchases would range from top sirloin and lamb to pig tail and buffalo fish, (Ex. 1014 at A.R. 52), as well as jumbo butterfly shrimp, (Ex. 1014 at A.R. 58), chuck steak, (Ex. 1014 at A.R.

61), ground beef, (Ex. 1014 at A.R. 57), and chicken, (Ex. 1014 at A.R. 60). But these purchases were relatively small, and could hardly be expected to account for a substantial portion of Fells' suspect high dollar transactions.

Fells' primary claim was that the large dollar value transactions were the result of unexpectedly receiving significant amounts of meat when a wholesaler stopped by with surplus product. However, despite testifying that he received receipts, (Tr. 60-61), the court has been unable to identify, anywhere in the record, a single receipt from a meat wholesaler to corroborate Fells' story of a supplier dropping off surplus meat for his store. Also, if this were the reason for the high dollar value transactions, one would expect the transactions to cluster around certain dates, i.e. the dates that Fells received these unexpected deliveries of surplus meat. However, there is no such discernable pattern to the transactions set forth in Exhibit 2. Rather, the transactions are dispersed throughout the months.

CONCLUSION

Requiring an individual to, in effect, prove his innocence is of great concern to this court. However, when the court is reviewing the administrative decision of the USDA, FNS, this is the burden placed upon retailers disqualified from the food stamp program. Faced with the circumstantial evidence of transactions that seem inconsistent with the size and stock of his store, Fells offered certain explanations for these suspicious transactions. The explanations given are not persuasive and are not borne out by the evidentiary record. Fells has failed to sustain his burden of establishing that the suspicious transactions were the result of innocent legitimate food stamp redemptions rather than trafficking. Accordingly, the court must affirm the decision of the agency and enter judgment against Fells and in favor of the United States.The court thanks Attorney Douglas P. Dehler and the law firm of Shepherd Finkelman Miller & Shah LLC, for accepting this pro bono appointment and providing the plaintiff with excellent representation. Upon request of counsel, the court shall relieve Attorney Dehler of any further

obligation to represent Fells in this matter.

IT IS THEREFORE ORDERED that the Clerk of Court shall enter judgment in favor of the defendant, the United States of America, and against the plaintiff, Stephen C. Fells.

_____

SALEM FUAD ALJABRI v. USDA .
No. 07-3391.
Filed February 2, 2010.

[Cite as: 363 Fed.Appx. 403].

FSP – SNAP – Trafficking - Proceeds – Money laundering.

United States Court of Appeals,
Seventh Circuit.

Before JOEL M. FLAUM, Circuit Judge, ANN CLAIRE WILLIAMS, Circuit Judge, and DIANE S. SYKES, Circuit Judge.

ORDER

In 2007 the United States charged Salem Fuad Aljabri in a superseding indictment with nine counts of wire fraud in violation of 18 U.S.C. § 1343, five counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), and eleven counts of structuring under 31 U.S.C. § 5324(a)(3). The case went to trial and the jury returned a verdict of guilty on all counts.[1] Aljabri was then sentenced to a prison term of 90 months. On appeal Aljabri challenges the sufficiency of the evidence supporting his money-laundering and structuring convictions. The government concedes that Aljabri's money-laundering convictions must be vacated, and we accept this concession. The structuring counts were supported by sufficient evidence however, and we therefore affirm

[1] The district court granted the government's motion to dismiss one of the structuring counts, Count 14, before the case was submitted to the jury.

Aljabri's convictions on those counts.

I. Background

Although it led to a lengthy 25-count indictment, Aljabri's criminal activity was rather simple. Aljabri, along with his codefendant Hope Cordova, schemed to defraud and obtain money from the United States Department of Agriculture Food and Nutrition Service's Food Stamp Program ("program") by purchasing program benefits ("food stamps") from customers for discounted amounts of cash. This relatively common form of food-stamp fraud is sometimes referred to as "trafficking." Aljabri was the owner of the Sobba Food Mart, a neighborhood grocery store in Chicago that was enrolled as an authorized retailer in the federal food-stamp program. From March 2003 to June 2004, Aljabri, through Sobba, unlawfully purchased program benefits from food-stamp recipients. After redeeming over $1 million in program benefits, Sobba was terminated from the program. In 2005 Aljabri was once again able to access program benefits by instructing Cordova, his girlfriend, to open a new store, the White Bird grocery store. White Bird successfully enrolled in the program, and Aljabri resumed his trafficking scheme. Aljabri was arrested in August of 2006 for this fraudulent activity and charged with multiple counts of wire fraud, money laundering, and structuring.

A. Wire Fraud

The government was able to pursue wire-fraud charges against Aljabri because of the manner in which program benefits must be processed. While the food-stamp program was formerly coupon-based, it no longer operates in that manner. Instead, program recipients-at least those in Illinois-are provided with a "Link card," which functions much like a debit card. Benefits are automatically credited to recipients' Link card accounts each month. Accredited retailers, such as Sobba and White Bird, are provided with "Link card machines." After selecting food items, the program recipient swipes his Link card through this machine. The machine then interfaces with a computer system located

in Austin, Texas, which maintains data on each Link card account and approves (or rejects) all program-benefit transactions. At the end of each day, the Texas computer then tallies the totals owed to each retailer and correspondingly credits that retailer's account. The food-stamp program explicitly prohibits the redemption of benefits for cash, but the government presented overwhelming evidence that Aljabri repeatedly engaged in such behavior. In addition to testimony from program recipients who admitted selling their benefits to Aljabri for cash, the government presented convincing circumstantial evidence that Aljabri was defrauding the program. For instance, from March of 2003 until June of 2004, Sobba redeemed over $1.2 million in program benefits, which accounted for over 97% of its total business during that time. Many of these Link card transactions involved "purchases" exceeding $100 in value even though Sobba apparently had a limited food selection and no shopping carts or baskets. Finally, Mohammad Malkawi, who purchased Sobba from Aljabri, testified that despite the fact that he had improved the store's facilities and expanded its inventory, his successor store averaged $14,000 to $17,000 in monthly business, and only half of that involved Link transactions. The government presented similar evidence (both direct testimony from program recipients as well as circumstantial evidence based on the nature and quantity of Link transactions processed) to show that Aljabri conducted similar fraud at the White Bird grocery store.

B. Money Laundering

The government pursued money-laundering charges against Aljabri on the theory that Aljabri would use the cash he received from earlier trafficking transactions in order to acquire program benefits from subsequent "customers." The premise was that because each time Aljabri illegally purchased program benefits he needed to front the cash before getting reimbursed at the end of the day by the Link system, he required a steady stream of funds to keep his operation afloat. The government presented evidence that Aljabri would routinely make large cash withdrawals from his designated Link account in order to facilitate these illegal payments to program recipients. To bolster its case that these withdrawals were made for the purpose of trafficking and not for some

legitimate pursuit, the government introduced evidence that Aljabri did not generally use cash to cover other operational expenses such as inventory purchases, utilities, and rent. The government argued to the jury that in this way Aljabri knowingly used the "proceeds" of one instance of wire fraud to "promote" another.

C. Structuring

As we have noted, Aljabri's trafficking operation required Aljabri to keep large sums of cash on hand in order to transact business with program recipients. Sobba maintained an account with the Cole Taylor Bank in Chicago. All of Sobba's Link reimbursements were wired to this account. In order to fund future Link purchases, Aljabri obtained cash from this account by writing checks to cash. The government presented evidence that from March 2003 through June 2004, Aljabri cashed at least 155 such checks from this account, withdrawing approximately $942,485 in total. Excluding those checks cashed in the days immediately preceding Sobba's disqualification from the program, Aljabri only cashed two checks in excess of $10,000. Counts 12-13 and 15-22 pertained to ten separate transactions that the government asserted were instances of structuring. In each instance the government alleged that Aljabri structured the transaction to avoid the $10,000 threshold for currency transaction reporting requirements by purposefully arranging to withdraw an amount in excess of $10,000 by cashing a series (between two and four) of checks that summed to a total greater than $10,000 but had individual values below this amount. The government further alleged that for each count the financial transactions involved were all "conducted" on a single date. In addition to this circumstantial evidence, Immigration and Customs Enforcement Special Agent Tamara Yoder testified that following his arrest, Aljabri, who had waived his right to remain silent, admitted he was aware of the federal reporting requirements for currency transactions in excess of $10,000.

II. Discussion

On appeal Aljabri argues the evidence was insufficient to convict him

of money laundering and structuring. In considering a sufficiency-of-the-evidence challenge, "[w]e review the evidence at trial in the light most favorable to the government and 'will overturn a conviction based on insufficient evidence only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt.' " *United States v. Hampton,* 585 F.3d 1033, 1040 (7th Cir.2009) (quoting *United States v. Severson,* 569 F.3d 683, 688 (7th Cir.2009)).

A. Money Laundering

Aljabri was convicted of five counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), which prohibits the use of "the proceeds of some form of unlawful activity" in a financial transaction "with the intent to promote the carrying on of specified unlawful activity." To convict Aljabri of money laundering, the government was required to prove the following four elements beyond a reasonable doubt: (1) Aljabri knowingly conducted the charged financial transactions; (2) those transactions involved the proceeds of illegal activity; (3) Aljabri knew the property involved in these transactions represented illegal proceeds; and (4) Aljabri conducted the charged transactions with the intent to promote the carrying on of the unlawful activity.[1] Aljabri contends that the government did not present sufficient evidence that the charged financial transactions involved "proceeds" of illegal activity as that term has been defined in recent opinions of this circuit and of the Supreme Court. The government concedes this error and agrees that Aljabri's money-laundering convictions (Counts 7-11) should be vacated.

The term "proceeds" is not defined in the money-laundering statute. In *United States v. Scialabba,* 282 F.3d 475, 475 (7th Cir.2002), this court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be net income [rather than gross income]; otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." The Supreme Court's recent decision in *United States v. Santos,* 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), addressed this issue; unfortunately, *Santos* yielded a fractured

result. As we have recently explained:

> Four Justices in *Santos* concluded that 'proceeds' in § 1956 always means net income. Four concluded that the word always means gross income. Justice Stevens concluded that the meaning depends on the nature of the crime-that it means net income for unlicensed gambling (the subject of *Santos* and *Scialabba*) but could mean gross income for drug rings.
> *United States v. Hodge,* 558 F.3d 630, 633 (7th Cir.2009).

Since the government concedes that the "net income" definition applies in this case, we need not decide whether, under Justice Stevens's approach, a conviction for money laundering involving proceeds from wire fraud (for food-stamp trafficking) would require the use of "net income" or "gross income" from that fraud.[2] *See id.* at 634 ("Such a concession cannot bind the court to one legal rule rather than another, but it can forfeit the benefit of a particular rule for one case."). The government further acknowledges that at trial it failed to introduce sufficient evidence to satisfy its burden of proof concerning this "net proceeds" element of the money-laundering offense. While the government presented evidence that Aljabri used Link funds to pay for program benefits, it never articulated a theory as to why those food-stamp purchases should properly be considered a reinvestment of the net profits of Aljabri's fraudulent enterprise.

B. Structuring

Aljabri was convicted of ten counts (Counts 12-13 and 15-22) of structuring under 31 U.S.C. § 5324(a)(3). Federal law requires financial institutions to file a Currency Transaction Report with the government for financial transactions in which a customer makes a "deposit, withdrawal, exchange of currency or other payment or transfer ... involv[ing] ... currency of more than $10,000." 31 C.F.R. § 103.22(b)(1); 31 U.S.C. § 5313(a). Section 5324(a)(3) then prohibits individuals from deliberately "structuring" their financial transactions

[2]Also, because of the government's concession, we need not consider whether the jury was properly instructed as to the correct definition of "net proceeds."

"for the purpose of evading th[ose] reporting requirements."Aljabri challenges his structuring convictions on two different grounds. Aljabri first claims that he cannot legally be found guilty of structuring on Counts 17, 18, 20, 21, and 22 because the financial transactions relating to each of those five counts all took place on different days. In making this argument, Aljabri seizes on Cole Taylor's particular method of processing checks. At Cole Taylor, "banking" activities cease for the week every Friday at 3 p.m. even though the bank remains open past 3 p.m. on Fridays and is open on Saturdays as well. Thus a customer can cash a check at Cole Taylor after 3 p.m. on a Friday, but that check will not be officially processed until the following Monday. In such a circumstance, the bank's records will reflect the time that the check was actually presented to be cashed (say 4:57 p.m.), but will provide the date that corresponds to the following Monday (or whatever is the next "banking" day).

Aljabri argues that with respect to five of the structuring counts, the government misled the jury to believe that the alleged transactions took place on a single day when they were in fact spread out over multiple days. The problem with this argument is that financial transactions need not occur, or even be processed, on a single date in order to constitute structuring. Treasury regulations have defined "structuring" as follows: [A] person structures a transaction if that person ... conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this part. 'In any manner' includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. *The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.* 31 C.F.R. § 103.11(gg) (emphasis added). Additionally, in *United States v. Davenport,* 929 F.2d 1169, 1173 (7th Cir.1991), this court held that § 5324(a)(3) can apply to financial transactions that were conducted on separate days. There is no colorable argument for why § 5324(a)(3) should be confined only to transactions that occur during a single day;

in fact, as the government correctly points out, such a construction would undermine the purpose of the provision by providing a roadmap for legally evading the reporting requirements.[3]

Finally, Aljabri attacks his structuring convictions (all of them this time) on the ground that the government failed to establish that he had the requisite intent to structure. This argument is without merit. In addition to the hefty circumstantial evidence the government presented relating to Aljabri's consistent practice of conveniently withdrawing large sums of money in short intervals just under the $10,000 reporting threshold, there was also the testimony of Special Agent Yoder that Aljabri acknowledged his awareness of the reporting requirements. When viewed in total, there is more than enough evidence to uphold the jury's verdict, particularly in light of the high burden Aljabri must meet to prevail on a sufficiency challenge. *See, e.g., United States v. Bustamante,* 493 F.3d 879, 884 (7th Cir.2007) ("[T]he Court will reverse only if 'the fact finder's take on the evidence was wholly irrational.' " (quoting *United States v. Hoogenboom,* 209 F.3d 665, 669 (7th Cir.2000))).

III. Conclusion

Aljabri's money-laundering convictions are VACATED, and his structuring convictions are AFFIRMED. This case is REMANDED to the district court for resentencing on the surviving wire-fraud and structuring counts.C.A.7 (Ill.),2010.

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[3] Aljabri also argues that his convictions on these five structuring counts should be vacated on the grounds that the government's theory at trial was inconsistent with the language of the superceding indictment, which alleged that each set of structured transactions was "conducted" on the same day. This "variance" claim was first raised in Aljabri's reply brief and is therefore forfeited. *United States v. Boyle,* 484 F.3d 943, 946 (7th Cir.2007).

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

KIMBERLY COPHER BACK, LINDA RUTH PATTON, d/b/a SWEET REVENGE STABLES, AND RICHARD EVANS.
HPA docket No. 08-0007.
Decision and Order.
Filed March 17, 2010.

HPA – Soring – Palpation – Statutory presumptions – DVM, unlicensed .

Robert A. Ertman, for the Acting Administrator, APHIS.
David F. Brokerick & Christopher T. Davenport, Bowling Green, KY, for Kimberly Copher Back, Linda Ruth Patton & Richard Evans.
Initial decision issued by Peter M. Davenport, ALJ.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On October 22, 2007, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], initiated this disciplinary proceeding against Kimberly Copher Back, Linda Ruth Patton, d/b/a Sweet Revenge Stables, and Richard Evans by filing a Complaint alleging violations of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. On November 13, 2007, counsel for Ms. Back, Ms. Patton, and Mr. Evans filed an Entry of Appearance and Answer denying the material allegations of the Complaint, raising affirmative defenses, and requesting oral hearing.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a hearing on February 2, 2009, in Louisville, Kentucky. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. David F. Broderick and Christopher T. Davenport, Broderick & Associates, Bowling Green, Kentucky, represented Ms. Back, Ms. Patton, and Mr. Evans. Eleven witnesses testified and nine

exhibits were identified and received into evidence.[1] On May 12, 2009, the ALJ issued a decision in which he held that a horse known as "Reckless Youth" was not "sore," as that term is defined in the Horse Protection Act, and dismissed the Complaint. On August 13, 2009, the Administrator filed a timely appeal of the ALJ's decision. On October 14, 2009, Ms. Back, Ms. Patton, and Mr. Evans filed a response to the Administrator's appeal petition and requested oral argument before the Judicial Officer. On October 19, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based on the discussion in this Decision and Order, *infra*, I affirm in part and reverse in part.

DECISION

Ms. Back, Ms. Patton, and Mr. Evans' Request for Oral Argument

Ms. Back, Ms. Patton, and Mr. Evans' request for oral argument, which the Judicial Officer may grant, refuse, or limit,[2] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Discussion

The Administrator alleges that on or about April 20, 2007, Ms. Back violated 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, Ms. Back, Ms. Patton, and Mr. Evans violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg,

[1]GX 1 through GX 8 and RX 1. Transcript references are designated "Tr."

[2]7 C.F.R. § 1.145(d).

Kentucky, while the horse was sore; and that on or about April 20, 2007, Ms. Back violated 15 U.S.C. § 1824(2)(D) by allowing the entry for the purpose of 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.

Ms. Back, Ms. Patton, and Mr. Evans, in filing their Answer to the Complaint, raised collateral estoppel and/or judicial estoppel, any applicable statutes of limitations, and res judicata, as affirmative defenses. The affirmative defenses may be disposed of summarily. The United States is not bound by any state statutes of limitations.[3] 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 5 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 United States may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases.[4] Even if all the requisite threshold elements necessary to trigger such defenses were present, 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 Administrator bar a subsequent enforcement action by the Administrator for the same event has been previously considered and answered adversely to Ms. Back, Ms. Patton, and Mr. Evans by both the Judicial Officer and the United States Court of Appeals for the Sixth Circuit. *In re Jackie McConnell*, 64 Agric. Dec. 436 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006).

Congress enacted the Horse Protection Act to end the cruel practice

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[3]*United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Board of Comm'rs of Jackson County v. United States*, 308 U.S. 343, 350-51 (1939); *United States v. Thompson*, 98 U.S. 486, 490-91 (1878); *FHA v. Muirhead*, 42 F.3d 964, 965 (5th Cir.), *cert. denied*, 516 U.S. 806 (1995); *United States v. Merrick Sponsor Corp*., 421 F.2d 1076 (2d Cir. 1970).

[4]*OPM 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) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *FCIC v. Merrill*, 332 U.S. 380 (1947).

of deliberately "soring" Tennessee Walking horses for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, usually by using chains or chemicals, "the intense pain which the horse suffers when placing his forefeet on the ground causes him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking horse. (H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.)

Congress' reasons for prohibiting soring were twofold. First, soring inflicts great pain on the animals; and second, trainers who sore horses gain an unfair competitive advantage over trainers who rely on skill and patience. In 1976, Congress significantly strengthened the Horse Protection Act by amending it to make clear that intent to sore the horse is not a necessary element of a violation.[5] *See Thornton v. U.S. Dep't. of Agric.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

Section 2(3) of the Horse Protection Act (15 U.S.C. § 1821(3)) defines the term "sore," as follows:

§ 1821. Definitions

> As used in this chapter unless the context otherwise requires:
> . . . .
> (3) The term "sore" when used to describe a horse means that–
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

[5]The Horse Protection Act also provides for criminal penalties for "knowingly" violating the Horse Protection Act (15 U.S.C. § 1825(a)). This provision is not at issue in the instant proceeding.

> (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 . . . .

The Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity is "sore":

> **§ 1825. Violations and penalties**
>
> . . . .
>
> **(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**
>
> . . . .
>
> (5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5). The Horse Protection Act prohibits certain conduct, including:

> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
>
> . . . .
>
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore . . . (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

15 U.S.C. § 1824(2)(A)-(B), (D). Violators of the Horse Protection Act are subject to civil and criminal sanctions. Civil sanctions include both civil penalties (15 U.S.C. § 1825(b)(1)) and disqualification for a specified period from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction" (15 U.S.C. § 1825(c)). The maximum civil penalty for each violation is $2,200 (15 U.S.C. § 1825(b)(1)).[6] In making the determination concerning the amount of the monetary penalty, the Secretary of Agriculture must "take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." (15 U.S.C. § 1825(b)(1).)

As to disqualification, the Horse Protection Act further provides:

> **§ 1825. Violations and penalties**
>
> . . . .
>
> (c) **Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**
>
> In addition to any . . . civil penalty authorized under this section, any person . . . who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not

[6]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824. The current maximum civil penalty for violating the Horse Protection Act is $2,200. (7 C.F.R. § 3.91(b)(2)(viii).)

> less than one year for the first violation and not less than five years for any subsequent violation.

15 U.S.C. § 1825(c).

The material facts are not in dispute. On the evening of April 20, 2007, Mr. Evans, trainer of "Reckless Youth," presented the horse, entry number 35, class number 49, to Designated Qualified Person [hereinafter DQP] Greg Williams for inspection prior to showing at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.[7] Mr. Williams did not find that "Reckless Youth" was sore or that "Reckless Youth" had any abnormality that would preclude the horse from showing. Ms. Back, owner of the horse, rode "Reckless Youth" in the show and the horse finished third in his class. Because "Reckless Youth" finished third in his class, "Reckless Youth" was required to be examined after showing.

Dr. Miava Binkley, one of the USDA veterinarians at the show, conducted the first post-show examination of "Reckless Youth." She found pain responses on the left foot when she palpated the lateral bulb on the rear of the foot. She repeated the palpation of this area several times eliciting a pain response each time. On her examination of the right foot, she found repeated pain responses when she palpated the medial bulb on the back of this foot. When she palpated the front of the foot on the lateral side, she found a repeated strong pain response. Dr. Binkley then asked DQP Williams to examine the horse. (GX 6). Mr. Williams testified, when he examined the right foot of "Reckless Youth," there was some movement at one spot, but he did not get a repeated response. Mr. Williams indicated he thought the horse "was fine with me." (Tr. 217.)

Dr. Binkley next asked Dr. Lynn Bourgeois, the second USDA veterinarian at the show that evening, to examine "Reckless Youth." Dr.

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[7]United States Department of Agriculture [hereinafter USDA] veterinarians swabbed the hooves of nine horses entered into competition on the evening of April 20, 2007, including "Reckless Youth," to determine the presence of foreign substances. Seven of the nine horses swabbed tested positive for foreign substances; however, because the swabs were for a general study of the frequency of the use of foreign substances, the swabs were not identified to specific horses. Therefore, the swabbing is not relevant to whether "Reckless Youth" was sore. (Tr. 35-36, 95-101.)

Bourgeois' examination found "abraded epithelium in the pocket area" and when he palpated the lateral heel bulb of the left foot he "elicited repeatable and reproducible pain responses" which included withdrawal of the limb and "strong clenching of shoulder and abdominal muscles." Palpation of the lateral aspect of the pastern along the coronary band produced similar pain reactions. Examination of the right foot also revealed abraded epithelium. Palpation of the medial heel bulb and the entire anterior pastern along the coronary band produced "repeated, reproducible pain responses." (GX 7.)

After the examinations, the two USDA veterinarians discussed the horse, agreeing "Reckless Youth" was bilaterally sore (GX 6 at 2, GX 7 at 2). Dr. Binkley then completed an APHIS FORM 7077, Summary of Alleged Violations, marking on the diagram in block 31 the locations where both USDA veterinarians found pain responses. After Dr. Binkley signed the form, Dr. Bourgeois indicated his agreement by signing the form. (GX 1.)

As noted by the ALJ, most cases rely on the statutory presumption found in 15 U.S.C. § 1825(d)(5) to find a horse sore. In this case, in addition to a finding of soreness under the statutory presumption, the record contains sufficient evidence to find "Reckless Youth" was "sore," as that term is defined in 15 U.S.C. § 1821(3). Both Dr. Binkley and Dr. Bourgeois stated that, in their professional opinions, "Reckless Youth" was sored using either caustic/irritating chemicals or a mechanical device/overwork in chains (GX 6 at 2, GX 7 at 2). Furthermore, Dr. Binkley testified that "Reckless Youth" would suffer pain while walking or moving as a result of the soring and use of action devices/chains (Tr. 17-18).

The ALJ presented a number of reasons for dismissing this case. First, the ALJ questioned the abilities of the USDA veterinarians to determine whether a horse is "sore" because they do not maintain licenses to practice veterinary medicine. (*See* ALJ's Initial Decision, nn.5, 7, 8, 21). Dr. Binkley, who has been a USDA veterinary medical officer for over 20 years, received her Doctor of Veterinary Medicine degree from Kansas State University in 1983. Prior to joining USDA, Dr. Binkley was in private practice for approximately 4 years in

Michigan. She attends numerous USDA-conducted training sessions, as well as other professional meetings, every year. (Tr. 7-8, 31-32, 38-39.)

Dr. Bourgeois received his Doctor of Veterinary Medicine degree from Louisiana State University and was in private practice for approximately 3 years in Louisiana before joining USDA over 29 years ago (Tr. 104). Dr. Bourgeois has examined approximately 7,200 to 9,600 horses for Horse Protection Act compliance while employed by USDA (Tr. 106-07). He, too, attended USDA training sessions regarding examining horses for violations of the Horse Protection Act. In fact, Dr. Bourgeois was an instructor at USDA training sessions for DQPs. (Tr. 134-35.)

Dr. Binkley and Dr. Bourgeois are very experienced in the detection of "sore" horses. That neither Dr. Binkley nor Dr. Bourgeois chooses to pay annually for a license to practice veterinary medicine, which is not required or necessary for his or her job, is immaterial and carries no weight. In fact, based on their training and experience, I find Dr. Binkley and Dr. Bourgeois are experts in determining whether horses are "sore."

The challenge to the use of digital palpation for detecting sore horses is equally unavailing. As noted by the ALJ, various United States Courts of Appeals have upheld my findings that digital palpation is an appropriate method for determining whether a horse is "sore" under the Horse Protection Act. These cases include decisions issued after *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), relied on by the ALJ in his decision (ALJ's Initial Decision at 9 n.12). Ms. Back, Ms. Patton, and Mr. Evans presented no argument that has not previously been presented to me in earlier cases addressing the validity of digital palpation for determining whether horses are "sore" under the Horse Protection Act. My decisions in these earlier cases have been upheld by the various United States Courts of Appeals. Absent convincing new reasoning supporting the theory that digital palpation is not an appropriate method for determining soreness, I decline to disregard the teachings of the United States Courts of Appeals that have upheld my position that digital palpation is a valid and appropriate method for determining whether horses are "sore" under the Horse Protection Act.

Therefore, based on my finding that Dr. Binkley and Dr. Bourgeois are experts in the detection of "sore" horses and that their digital palpation of "Reckless Youth" showed significant evidence that the horse was sore in each front foot, I find "Reckless Youth" was "sore" when entered and shown on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.[8]

The Administrator alleged Ms. Back violated 15 U.S.C. § 1824(2)(A) by showing or exhibiting "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore. Ms. Back rode "Reckless Youth" into the ring during the competition for class number 49 at the show. Therefore, I find Ms. Back showed the horse on April 20, 2007, at the Spring Jubilee Charity Horse Show (Tr. 300-01; GX 8) and conclude Ms. Back violated 15 U.S.C. § 1824(2)(A) by showing or exhibiting "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

The Administrator alleged Mr. Evans violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of 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. My position has long been that "the entering of the horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited." *Elliott v. Administrator, Animal and Plant Health Inspection Serv.*, 990 F.2d 140, 143-44 (4th Cir. 1993), citing *In re William Dwayne Elliott*, 51 Agric. Dec. 334 (1992). The United States Court of Appeals for the Fourth Circuit concluded "that the USDA's interpretation of 'entering' is reasonable and not contrary to Congressional intent and thus we are bound to give it effect." *Elliott*, 990 F.2d at 145, citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842 (1984).

One of the activities required to be completed before a horse can be

[8]This finding in no way questions the truthfulness or character of the DQP who found "Reckless Youth" was not sore. In my view, based on the testimony and evidence in the record, the DQP erred during his examination of the horse.

shown is presenting the horse to the DQP for inspection. On April 20, 2007, Mr. Evans presented "Reckless Youth" to DQP Williams for inspection prior to Ms. Back's riding the horse in the show (Tr. 276). Furthermore, Mr. Evans admitted he entered "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show on April 20, 2007 (Tr. 277). I find Mr. Evans entered the horse on April 20, 2007, at the Spring Jubilee Charity Horse Show. Therefore, I conclude Mr. Evans violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of showing or exhibiting "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore.

The Administrator alleges that Ms. Patton violated 15 U.S.C. § 1824(2)(B) by entering for the purpose of 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. To find Ms. Patton in violation of 15 U.S.C. § 1824(2)(B), I must make two specific findings. First, I must find that "Reckless Youth" was sore. As stated in this Decision and Order, *supra*, I find "Reckless Youth" was "sore," when entered and shown on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky. Next, I must find Ms. Patton participated in at least one of the "activities required to be completed before a horse can actually be shown or exhibited." *Elliott*, 990 F.2d at 144.

The evidence regarding Ms. Patton's participation in the entry process is scant. The interview log, summarizing Ms. Patton's interview with APHIS investigators, states: "Mrs. Patton stated she was not at the show . . . . However she paid the entry fee and was reimbursed by Kim Back as part of monthly fees." (GX 4 at 2.) (See also GX 5 at 1.) When asked at the hearing if the interview log was "an accurate presentation of the interview" she responded "Yes." (Tr. 312.) However, when asked on cross-examination if she operated the stables where Mr. Evans trained "Reckless Youth," Ms. Patton said "No, I just own it." Her testimony continued:

[BY MR. BRODERICK:]

Q. It's on property that you own.

A. Yes.

Q. Who operates it?

A. Richard Evans.

Q. Other than you owning the land, do you have anything to do with it?

A. No.

Tr. 313-14.

I find no other evidence that demonstrates Ms. Patton participated in the entry process of "Reckless Youth." Absent additional evidence, such as a check for the entry fees with her signature or an entry form with her signature, I cannot find, by a preponderance of the evidence, that Ms. Patton entered (or participated in the entry process of) "Reckless Youth" as entry number 35, class number 49, on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky. Therefore, I conclude Ms. Patton did not violate the Horse Protection Act.

I have examined the other issues raised and found they do not alter the disposition of the instant proceeding; therefore, discussing those issues would be nothing more than an advisory opinion, and I do not address those issues.

Findings of Fact

1. Kimberly Copher Back is a resident of Mount Sterling, Kentucky. At all times material to the instant proceeding, Ms. Back owned "Reckless Youth," a Tennessee Walking Horse.

2. Richard Evans is a resident of Mount Sterling, Kentucky. Mr. Evans trained "Reckless Youth" at Sweet Revenge Stables, which is located on property owned by his mother-in-law, Linda Ruth Patton, for

approximately 24 months prior to entering "Reckless Youth" in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 20, 2007.

3. Richard Evans entered "Reckless Youth" as entry number 35, class number 49, in the Spring Jubilee Charity Horse Show held on April 19-21, 2007, in Harrodsburg, Kentucky, for the purpose of showing or exhibiting "Reckless Youth" in the show.

4. Linda Ruth Patton is a resident of Mount Sterling, Kentucky, where she owns the land upon which Sweet Revenge Stables is located. Richard Evans is responsible for training horses at, and stable operation of, Sweet Revenge Stables.

5. On April 20, 2007, Mr. Evans, trainer of "Reckless Youth," presented the horse, entry number 35, class number 49, to DQP Greg Williams for inspection prior to showing "Reckless Youth" at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.

6. On April 20, 2007, at the pre-show inspection for class number 49, DQP Greg Williams did not find that "Reckless Youth" was sore or that "Reckless Youth" had any abnormality that would preclude "Reckless Youth" from competing in the Spring Jubilee Charity Horse Show.

7. On April 20, 2007, Kimberly Copher Back rode "Reckless Youth" during the competition at the Spring Jubilee Charity Horse Show and finished third in the class competition. By reason of placing in the class, "Reckless Youth" was subjected to a post-show inspection, during which "Reckless Youth" was examined by two USDA veterinarians, Dr. Miava Binkley and Dr. Lynn Bourgeois, and DQP Greg Williams.

8. DQP Greg Williams had 1 or 2 years of experience as a DQP on April 20, 2007 (Tr. 204).

9. Dr. Miava Binkley and Dr. Lynn Bourgeois are each graduates of a school of veterinary medicine and each has a Doctor of Veterinary Medicine degree. Neither Dr. Binkley nor Dr. Bourgeois is currently licensed to practice veterinary medicine. A license to practice veterinary medicine is not required for employment as a USDA veterinary medical officer.

10. On the post-show inspection of "Reckless Youth," both USDA veterinarians found pain responses on each front foot when palpated. The two USDA veterinarians conferred about their findings and

concluded "Reckless Youth" was "sore." DQP Greg Williams found some movement on one foot and concluded "Reckless Youth" was not "sore."

11. The record does not contain any evidence that "Reckless Youth" exhibited any abnormality of gait, locomotion, swelling, redness, scarring, blisters, or chemical odor.

Conclusions of Law

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

2. On the basis of the evidence in the record before me, I conclude "Reckless Youth" was "sore," as that term is defined in the Horse Protection Act, when entered and shown on April 20, 2007, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky.

3. On April 20, 2007, Kimberly Copher Back showed "Reckless Youth" as entry number 35, class number 49, at the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, while the horse was sore, in violation of 15 U.S.C. § 1824(2)(A).

4. On April 20, 2007, Richard Evans entered for the purpose of showing and 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, in violation of 15 U.S.C. § 1824(2)(B).

5. On the basis of the evidence in the record before me, I conclude Linda Ruth Patton did not enter "Reckless Youth" in the Spring Jubilee Charity Horse Show in Harrodsburg, Kentucky, on April 20, 2007. Therefore, I conclude Ms. Patton did not violate the Horse Protection Act.

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824. However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C.

§ 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(viii)). The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation of the Horse Protection Act and not less than 5 years for any subsequent violation of the Horse Protection Act (15 U.S.C. § 1825(c)).

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

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

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Although the maximum civil penalty authorized by statute and regulation is $2,200, the Administrator recommends that I assess Ms. Back and Mr. Evans only a $2,000 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, and Order, and Memorandum in Support Thereof at 5). The extent and gravity of

Ms. Back's and Mr. Evans' violation of the Horse Protection Act are great. Two USDA veterinary medical officers found "Reckless Youth" sore. Dr. Binkley and Dr. Bourgeois found palpation of "Reckless Youth's" forelimbs elicited consistent, repeatable pain responses. Weighing all the circumstances, I find Ms. Back and Mr. Evans each culpable for a violation of 15 U.S.C. § 1824(2).

Neither Ms. Back nor Mr. Evans presented any argument that he/she is unable to pay a $2,000 civil penalty or that a $2,000 civil penalty would affect his/her ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[9] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed, I would not find a maximum penalty in this case to be inappropriate. However, the administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act request a civil penalty less than the maximum; therefore, I assess Ms. Back and Mr. Evans the civil penalty recommended by the Administrator, $2,000 each.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish this end is the authorization for disqualification which Congress specifically added to

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[9] *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); *In re Mike Turner*, 64 Agric. Dec. 1456, 1475 (2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[10]

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider certain specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[11]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are

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[10]*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

[11]*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1505-06 (2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); *In re Mike Turner*, 64 Agric. Dec. 1456, 1476 (2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); *In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

not elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Ms. Back's and Mr. Evans' violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

For the foregoing reasons, the following Order is issued.

ORDER

1. Kimberly Copher Back is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Robert A. Ertman
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Ms. Back's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 6 months after service of this Order on her. Ms. Back shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 08-0007.

2. Kimberly Copher Back is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from

any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Ms. Back shall become effective on the 60th day after service of this Order on her.

3. Richard Evans is assessed a $2,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Robert A. Ertman
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Mr. Evans' payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 6 months after service of this Order on him. Mr. Evans shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 08-0007.

4. Richard Evans is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Mr. Evans shall become effective on the 60th day after service of this Order on him.

RIGHT TO JUDICIAL REVIEW

Ms. Back and Mr. Evans have the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which he/she resides or has his/her place of business or in the United States Court of Appeals for the District of Columbia Circuit. Ms. Back and/or Mr. Evans must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[12] The date of the Order in this Decision and Order is March 17, 2010.

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[12]15 U.S.C. § 1825(b)(2), (c).

INSPECTION AND GRADING

COURT DECISION

LION RAISINS, INC., LION RAISIN COMPANY; LION PACKING COMPANY; ALFRED LION, JR., DANIEL LION, JEFFREY LION, BRUCE LION, LARRY LION, AND ISABEL LION v. USDA.
No. 1:10-CV-00217-OWW-DLB.
Court Decision.
Filed June 23, 2010.

I&G – Dismissal via Consent.

United States District Court
Eastern District of California
Fresno Division

STIPULATION OF DISMISSAL; ORDER THEREON

Oliver W. Wagner, United States District Judge

IT IS HEREBY STIPULATED by and between the parties to this action through their designated counsel that the above-captioned action be and hereby is dismissed without prejudice pursuant to FRCP 41(a)(1).

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INSPECTION AND GRADING

DEPARTMENTAL DECISION

LION RAISINS, INC. f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
Decision and Order.
Filed May 12, 2010.

AMS – I&G – Debarment – Fabricating or altering inspection certificates – Raisins – Moisture content.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this debarment proceeding by filing a Complaint on January 12, 2001.[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 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

[1]The Administrator filed an Amended Complaint on February 15, 2001, and a Second Amended Complaint on July 2, 2002. On March 9, 2004, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Granting Complainant's Motion to Amend Second Amended Complaint to Conform to Proof, and Changing Caption." The Second Amended Complaint, as amended by the ALJ's March 9, 2004, Order, is the operative pleading in the instant proceeding.

Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice]. The Administrator seeks an order debarring Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter the Lions] from the receipt of inspection services under the Agricultural Marketing Act for violations of the Agricultural Marketing Act and the Regulations.

The Administrator alleges, during the period March 14, 1997, through April 27, 1998, the Lions caused the issuance and use of six false inspection certificates and facsimile forms and engaged in misrepresentation or deceptive or fraudulent practices or acts, in willful violation of 7 U.S.C. § 1622(h) and 7 C.F.R. § 52.54(a) (Second Amended Compl. ¶¶ 8-18). The Lions filed an answer denying the material allegations of the Second Amended Complaint and asserting affirmative defenses.

The ALJ conducted a 72-day hearing in Fresno, California, beginning January 28, 2002, and ending March 31, 2006. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Wesley T. Green, Corporate Counsel for Lion Raisins, Inc., Selma, California, and James A. Moody, Washington, DC, represented the Lions. Daniel A. Bacon, Fresno, California, also represented Bruce Lion.

On May 4, 2009, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order in which she: (1) consolidated the instant proceeding with *In re Bruce Lion*, I & G Docket No. 03-0001; (2) found Lion Raisins, Inc.'s shipping department violated the Agricultural Marketing Act and the Regulations, as alleged in the Second Amended Complaint; (3) debarred Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, and Bruce Lion from receiving inspection services under the Agricultural Marketing Act for a period of 3 years; (4) debarred Dan Lion from receiving inspection services under the Agricultural Marketing Act for a period of 3 months; and (5) determined that Al Lion, Jr., and Jeff Lion were not culpable for Lion Raisins, Inc.'s shipping department's violations of the Agricultural Marketing Act and the Regulations (ALJ's Initial Decision at 6 ¶ 10; 16-17 ¶¶ 36-43).

On July 24, 2009, the Administrator filed "Complainant's Petition for Appeal" [hereinafter the Administrator's Appeal Petition]. On July 27,

2009, the Lions filed "Respondents' Appeal Petition from the Decision of the Judge on May 4, 2009" [hereinafter the Lions' Appeal Petition] and requested oral argument before the Judicial Officer. On August 13, 2009, the Administrator filed "Complainant's Response to Petition for Appeal," and on August 26, 2009, the Lions filed "Respondents[']Reply to Complainant's Petition for Appeal." On August 31, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 19, 2010, I severed the instant proceeding from *In re Bruce Lion*, I & G Docket No. 03-0001, and remanded *In re Bruce Lion*, I & G Docket No. 03-0001, to Acting Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] for further proceedings in accordance with the Administrative Procedure Act and the Rules of Practice (Judicial Officer's January 19, 2010, Order Severing Cases and Remanding I & G Docket No. 03-0001). On January 21, 2010, I returned the record in the instant proceeding to the Hearing Clerk to make corrections to the transcript, as ordered by the ALJ. (See ALJ's Initial Decision at 5 ¶ 9.) On February 23, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

DECISION

Decision Summary

Based upon a careful review of the record, I 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 inspection results during the period March 14, 1997, through April 27, 1998, in willful violation of 7 U.S.C. § 1622(h) and 7 C.F.R. § 52.54(a), as alleged in the Second Amended Complaint. To maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary of Agriculture is directed and authorized to administer, I debar each of the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 3 years.

Introduction

The Lions provided inspection certificates to customers to apprise the customers of the condition and quality of raisin shipments. The inspection certificates provided by the Lions to their customers did not, at times, match the United States Department of Agriculture [hereinafter USDA] copies of inspection certificates in USDA's files. The Lions assert the fault lay with USDA's record-keeping failures. Evidence to the contrary comes from two sources: (1) documentation surrounding inspection certificate issuance found in the Lions' and USDA's files; and (2) the experience of the Lions' employees who were responsible for creating inspection certificates that USDA never issued. The Administrator's explanation: In order to convey to the Lions' customers that the customers got what they ordered, Lion employees forged, altered, or otherwise falsified USDA results. The Lions' explanation: USDA did determine the condition of the raisins to be as stated on the inspection certificates that the Lions provided to the their customers, but USDA's record-keeping did not accurately reflect USDA determinations. Further, the Lions assert the inspection certificates they provided to their customers conveyed the true condition of the raisins.

Six inspection certificates are at issue in the instant proceeding. Of the six inspection certificates the Lions provided to their customers, one inspection certificate has a discrepancy between the U.S. Grade, based on USDA records, and the grade shown to the Lions' customer as if it were the U.S. Grade as determined by USDA. The remaining five inspection certificates have discrepancies between the moisture content, based on USDA records, and the moisture content shown to the Lions' customers as if it were the moisture content as determined by USDA.

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over the Lions and the subject matter involved in the instant proceeding.

2. Lion Raisins, Inc., is a California corporation, formerly known as Lion Raisins and Lion Enterprises, Inc. Lion Raisins, Inc., produces, packs, and sells processed raisins. (CX 29, CX 38.)

3. Lion Raisins, Inc., has several affiliated business entities,

including Lion Raisin Company and Lion Packing Company (CX 16d-CX 16e, CX 16m, CX 17f, CX 17i, CX 26, CX 147b; Tr. 477-78).

4. Lion Raisins, Inc., is a closely held subchapter S corporation (Complainant's Response to "Respondent's Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict," Attach. B at 38-40; Tr. 13,753-56, 13,787-88).

5. Al Lion, Jr., owned 50 percent of Lion Raisins, Inc., and, during the period 1996 through 2000 was a director, the president, the chief executive officer, the chief financial officer, and the registered agent of Lion Raisins, Inc. (CX 38, CX 72).

6. During the period 1997 and 1998, Al Lion, Jr., and his three sons, Dan Lion, Jeff Lion, and Bruce Lion, handled and controlled Lion Raisins, Inc.'s business affairs (Tr. 1555, 13,523-24, 13,756, 13,977, 14,006).

7. Dan Lion managed Lion Raisins, Inc.'s production, including packing. Dan Lion was a vice president of Lion Raisins, Inc. (CX 36a, CX 72 at 2; Tr. 1554-55.)

8. Jeff Lion managed growers who dealt with Lion Raisins, Inc. Jeff Lion was a vice president of Lion Raisins, Inc. (CX 72 at 1-2, 4-6; Tr. 1554-55.)

9. Bruce Lion managed Lion Raisins, Inc.'s office, sales, and shipping. Bruce Lion was a director and officer of Lion Raisins, Inc. (CX 36a, CX 38 at 4, CX 72 at 1, 4-6; Tr. 1554-55.)

10. Lion Raisins, Inc., did not observe the formalities required of a California corporation and did not operate as an entity separate from Lion Raisin Company, Lion Packing Company, Al Lion, Jr., Dan Lion, Jeff Lion, and Bruce Lion.

11. In 1997 and 1998, the Lions fabricated or altered USDA inspection certificates when inspector worksheets (the inspector's worksheet is used to communicate the findings that are to be included on the inspection certificate) reflected something other than customer specifications (CX 31a-CX 31b, CX 36-CX 36a).

12. By fabricating or altering USDA inspection certificates, the Lions attributed to USDA unfounded statements of quality and condition of raisins. Thus, since USDA had not made the findings, the Lions'

creation of inspection certificates that stated USDA had made the findings, were misrepresentations, or deceptive or fraudulent practices or acts.

13. Even when fabricated or altered inspection certificates were more accurate as to the quality and condition of raisins than the unfabricated or unaltered inspection certificates, the Lions' fabrication and alteration of inspection certificates constituted misrepresentations, or deceptive or fraudulent practices or acts, because the statements of the quality and condition of raisins were falsely attributed to USDA.

14. Measuring raisin moisture content is not an exact science. Moisture content in raisins varies from raisin to raisin: Twelve 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-pound 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. Many raisin shipments lose moisture during shipping. Many of the Lions' customers used different equipment to measure moisture than that used by the inspectors at Lions' plant. If the Lions needed to communicate these factors to their customers to assure customers they were getting what they requested, despite USDA inspection certificates that reflected a different moisture content finding, a cover letter or a telephone call could have been the remedy, rather than the unauthorized and unlawful alteration or fabrication of USDA inspection certificates.

15. The Administrator seeks an order debarring each of the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 36 years (Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof at 105, 180). While I find the Lions' violations of the Agricultural Marketing Act and the Regulations egregious, I conclude a 36-year debarment of the Lions is not justified by the facts. Instead, to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary of Agriculture is directed and authorized to administer, I debar each of the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 3 years.

16. Regarding the credibility of witnesses, to the extent that Bruce

Lion did not acknowledge knowing of the fabrication and alteration of USDA inspection certificates in 1997 and 1998 by Lions' employees, I conclude that Bruce Lion did know. Especially valuable witnesses were Maralee Berling, Dorothy Proffitt Hamilton, Ken Turner, and David Trykowski, each of whom had an impressive command of facts relevant to the instant proceeding and each of whom was credible.

17. Order Number 34912. On February 24, 1997, FDB Grocery, Albertslund, Denmark, contracted with the Lions for 1,720 cases of certified U.S. Grade B raisins. On March 7, 1997, and March 14, 1997, USDA inspectors sampled processed raisins at the Lions' plant and graded the officially drawn samples[2] for order number 34912 as U.S. Grade C. The Lions requested a USDA inspection certificate, and on March 21, 1997, USDA issued inspection certificate number Y-819260 which states the raisins sampled were officially drawn and were certified as U.S. Grade C. The Lions altered USDA inspection certificate number Y-819260 to falsely state USDA certified the raisins in order number 34912 as U.S. Grade B and provided altered USDA inspection certificate number Y-819260 to FDB Grocery. (CX 4a-CX 4b, CX 10, CX 16a, CX 16c, CX 16g-CX 16j, CX 27 at 7, CX 28 at 5; Tr. 495-96, 4447-70.)

18. Order Number 40650. On April 16, 1998, Ka Vo Mao Iec Cong Si [hereinafter Ka Vo], Macao, China, contracted with the Lions for 1,480 cases of certified U.S. Grade B raisins having no more than 16% moisture. On April 22, 1998, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 40650 as having 16.0% to 16.4% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number Y-815117 which states the raisins sampled were officially drawn and certified as having 16.0% to 16.4% moisture. The Agricultural Marketing Service found two certificates in the Lions' shipping file for order number 40650. First, the original USDA inspection certificate number Y-815117, which had been obliterated and altered by the placement of an "X" across its face, and notations in pen,

[2] "'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 [7 C.F.R. pt. 52]." (7 C.F.R. § 52.2.)

stating:

> 16.0 Max Moisture per Bruce
> 4/23/98
> RW[3]

CX 15q. Second, USDA inspection certificate number Y-815119 (an inspection certificate never issued by USDA) which falsely states USDA certified the raisins as having 16.0% moisture, falsely indicates that it was issued by inspector D. Dobbs, and bears the forged signature of D. Dobbs. The Lions provided fabricated and forged USDA inspection certificate number Y-815119 to Ka Vo. (CX 2, CX 5-CX 7, CX 14, CX 15c, CX 15p-CX 15q, CX 24A-CX 24B, CX 37 at 1-2; Tr. 496-99, 4548-73.)

19.Order Number 38799. On December 1, 1997, Navimpex, Charenton, France, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 16% moisture. On December 18, 1997, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 38799 as having 16.0% to 17.8% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number B-032572 which states the raisins sampled were officially drawn and certified as having 16.0% to 17.8% moisture. The Lions' inside invoice contains a note stating "USDA cert must show moisture as 16% maximum!" (CX 17b.) The Lions' invoice trail bears a post-it note on which the Lions' shipping clerk, Susan Danes, states:

> USDA moisture
> is over 16%
> Sould [sic] we do re-do
> one?
> sd

CX 17a; Tr. 4503. The handwritten answer is "Yes." (CX 17a.) The Lions' shipping file for order number 38799 contains USDA inspection

[3]"RW" is a reference to Rosangela Wisley, one of the Lions' employees in the Lions' shipping department (Tr. 497).

certificate number B-032585 (an inspection certificate never issued by USDA) which falsely states USDA certified the raisins as having 15.9% moisture, falsely indicates that it was issued by inspector J. Brower, and bears the forged signature of J. Brower. The Lions provided fabricated and forged USDA inspection certificate number B-032585 to Navimpex. (CX 3, CX 17a-CX 17b, CX 17h, CX 17j, CX 20, CX 23A-CX 23C, CX 46; Tr. 4490-4514.)

20.Order Number 38962. On December 12, 1997, Farm Gold, Neudorf, Austria, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 17% moisture. On December 18, 1997, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 38962 as having 18% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number B-032570 which states the raisins sampled were officially drawn and certified as having 18% moisture. The Lions' shipping file for order number 38962 contains USDA inspection certificate number B-032573 (an inspection certificate never issued by USDA) which falsely states USDA certified the raisins as having 17% moisture, falsely indicates that it was issued by inspector J. Brower, and bears the forged signature of J. Brower. (CX 23A-CX 23C, CX 43, CX 44a-CX 44c, CX 44r; Tr. 4518-29, 12,189-99.)

21.Order Number 38802. On December 1, 1997, Navimpex, Charenton, France, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 15% moisture. On March 18, 1998, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 38802 as having 16.0% to 16.6% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number Y-809431 which states the raisins sampled were officially drawn and certified as having 16.0% to 16.6% moisture. In response to the Agricultural Marketing Service's request for a copy of the USDA inspection certificate the Lions provided Navimpex in connection with order number 38802, Navimpex provided a "Lion USDA" certificate which mimics the USDA certificate and represents that the raisins sampled were officially drawn and certified at 15% moisture. A copy

of the "Lion USDA" certificate for order 38802 was found in the Lions' shipping files for order number 38802. (CX 1, CX 18c-CX 18f, CX 18o, CX 18r, CX 21-CX 22, CX 26, CX 49; Tr. 4624-41.)

22. Order Number 39924. On February 25, 1998, Navimpex, Charenton, France, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 15% moisture. On April 27, 1998, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 39924 as having 14.8% to 16.8% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number Y-815121 which states the raisins sampled were officially drawn and certified as having 14.8% to 16.8% moisture. In response to the Agricultural Marketing Service's request for a copy of the USDA inspection certificate the Lions provided Navimpex in connection with order number 39924, Navimpex provided a "Lion USDA" certificate which mimics the USDA certificate and represents that the raisins sampled were officially drawn and certified at 15% moisture. A copy of the "Lion USDA" certificate for order 39924 was found in the Lions' shipping files for order number 39924. (CX 12-CX 13, CX 19a-CX 19g, CX 19i, CX 19o, CX 19r, CX 25 at 5, CX 47 at 1-2.)

23. Each of the Lions' acts and practices described in Findings of Fact and Conclusions of Law numbers 17 through 22 was a willful violation of 7 U.S.C. § 1622(h) and 7 C.F.R. § 52.54(a).

24. The acts and practices described in Findings of Fact and Conclusions of Law numbers 17 through 22 constitute sufficient cause for debarment of the Lions from receiving services under the Agricultural Marketing Act and the Regulations for a period of 3 years.

The Lions' Request for Oral Argument

The Lions' request for oral argument, which the Judicial Officer may grant, refuse, or limit,[4] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

The Lions' Appeal Petition

[4] 7 C.F.R. § 1.145(d).

The Lions raise 31 issues in the Lions' Appeal Petition. First, the Lions contend the ALJ erroneously found Bruce Lion was the Lions' shipping department manager in 1997 and 1998. The Lions assert that, in 1997 and 1998, Bruce Lion was the Lions' sales manager, and Ken Turner was the shipping manager from 1996 until February 1997, after which Yvonne Adams became the shipping manager. (Lions' Appeal Pet. ¶¶ 1, 10.)

The ALJ found Bruce Lion was the manager of Lion Raisins, Inc.'s shipping department (ALJ's Initial Decision at 4 ¶ 6). The record supports the ALJ's finding that Bruce Lion was Lion Raisins, Inc.'s shipping manager in 1997 and 1998 and supervised Ken Turner and the shipping department employees (Tr. 455-56, 1552-58, 1573-78). Therefore, I reject the Lions' contention that the ALJ's finding that Bruce Lion was the shipping manager in 1997 and 1998, is error.

Second, the Lions contend the ALJ's finding that the Lions altered USDA inspection certificate Y-819260 to falsely state USDA had graded the raisins to be U.S. Grade B, is error. The Lions assert, while the USDA-retained copy of USDA inspection certificate Y-819260 states USDA graded the raisins as U.S. Grade C, the Lions presented unrebutted evidence that the grade was probably updated by an inspector. (Lions' Appeal Pet. ¶ 2.)

The Lions cite no evidence to support their assertions regarding USDA inspection certificate Y-819260, and I cannot locate any evidence to support the Lions' assertions; therefore, I reject the Lions' contention that the ALJ's finding that the Lions altered USDA inspection certificate Y-819260 to falsely state USDA had graded the raisins to be U.S. Grade B, is error.

Third, the Lions contend the ALJ erroneously relied on USDA's inspection procedures and record-keeping and the ALJ's failure to find that USDA's test results and records were untrustworthy, is error (Lions' Appeal Pet. ¶¶ 3-4, 6-9, 33-34, 40-43).

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 USDA's test results unreliable and USDA's record-keeping untrustworthy, I would not dismiss the instant

proceeding. The ALJ's findings regarding the Lions' fabrication or alteration of the six inspection certificates in question is fully supported by the record.

Fourth, the Lions contend Ken Turner and Dorothy Proffitt Hamilton were the only Lion shipping department employees that testified and Mr. Turner and Ms. Hamilton were biased, untruthful, and lacked personal knowledge of any of the allegations in the Second Amended Complaint (Lions' Appeal Pet. ¶¶ 5, 25-26, 46).

I agree with the Lions that Mr. Turner and Ms. Hamilton were the only Lion shipping department employees that testified; however, the ALJ does not state that shipping department employees other than Mr. Turner and Ms. Hamilton testified. Therefore, I do not find the ALJ erred with respect to the number and identity of the Lions' shipping department employees that testified.

The ALJ found both Mr. Turner and Ms. Hamilton credible (ALJ's Initial Decision at 7 ¶ 20; 13 ¶ 33). As for the Lions' assertion that Mr. Turner and Ms. Hamilton were not credible, the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence.[5] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision.[6] Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

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[5]*In re KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1474 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. U.S. Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001).

[6]5 U.S.C. § 557(b).

> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[7] I have examined the record and find no basis upon which to reverse the ALJ's credibility determinations with respect to Mr. Turner and Ms. Hamilton.

Fifth, the Lions contend the ALJ erroneously failed to mention that the hearing in the instant proceeding was the longest in USDA's history, the hearing spanned the course of 4 years, the transcript consists of approximately 40,000 pages, approximately 40,000 pages of exhibits were admitted into evidence, and the proceeding involves 40,000 shipping files (Lions' Appeal Pet. ¶ 12).

The ALJ is not required to include in the decision a recitation of the length of the hearing, the number of transcript and exhibit pages, and the number of shipping files involved in the instant proceeding. Therefore,

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[7] *In re KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1476 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 608 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. U.S. Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001).

I reject the Lions' contention that the ALJ's failure to mention length of the hearing, the number of transcript and exhibit pages, and the number of shipping files involved in the instant proceeding, is error.

Sixth, the Lions assert the ALJ erroneously consolidated the instant proceeding with *In re Bruce Lion*, I & G Docket No. 03-0001, and decided the consolidated proceeding without first giving the respondents in *In re Bruce Lion*, I & G Docket No. 03-0001,[8] an opportunity to present their case (Lions' Appeal Pet. ¶ 13).

I agree with the Lions that the ALJ erroneously consolidated *In re Bruce Lion*, I & G Docket No. 03-0001, with the instant proceeding and decided the consolidated proceeding before giving the respondents in *In re Bruce Lion*, I & G Docket No. 03-0001, an opportunity to present their case. On January 19, 2010, I severed the instant proceeding from *In re Bruce Lion*, I & G Docket No. 03-0001, and remanded *In re Bruce Lion*, I & G Docket No. 03-0001, to the Chief ALJ for further proceedings in accordance with the Administrative Procedure Act and the Rules of Practice (Judicial Officer's January 19, 2010, Order Severing Cases and Remanding I & G Docket No. 03-0001).

Seventh, the Lions contend the ALJ's denial of their petition to reopen and supplemental petitions to reopen, is error (Lions' Appeal Pet. ¶ 14).

The 72-day hearing in the instant proceeding concluded on March 31, 2006. During the hearing, the Lions introduced hundreds of pages of exhibits and presented the testimony of 12 witnesses. On February 26, 2007, the Lions filed a petition to reopen the hearing for the admission of additional exhibits and previously identified exhibits that were not admitted into evidence.

As an initial matter, exhibits that have been adduced at the hearing, but were not admitted into evidence, are not properly the subject of a petition to reopen the hearing; therefore, as to the exhibits that were adduced at the hearing, I conclude the ALJ's denial of the Lions' February 26, 2007, petition to reopen (ALJ's Initial Decision at 6 ¶ 15), is not error. Moreover, as to the exhibits that were not adduced at the hearing, based on my review of the reasons provided by the Lions for their failure to adduce the evidence at the hearing, I conclude the ALJ's

[8]The respondents in *In re Bruce Lion*, I & G Docket No. 03-0001, are the Lions, Larry Lion, and Isabel Lion.

ruling denying the Lions' February 26, 2007, petition to reopen (ALJ's Initial Decision at 6 ¶ 15), is not error. As for the Lions' supplemental petitions to reopen the hearing, the Rules of Practice do not provide an automatic right to file more than one petition to reopen the hearing.[9] The Lions did not seek leave to file multiple petitions to reopen the hearing. Therefore, I conclude the ALJ's denial of the Lions' supplemental motions to reopen (ALJ's Initial Decision at 6 ¶ 15), is not error.

Eighth, the Lions assert, while the ALJ denied the Administrator's Motion to Rescind Order Assigning Mediator (ALJ's Initial Decision at 6 ¶ 14), the ALJ did not provide any direction on how to overcome the Administrator's reluctance to engage in mediation. The Lions assert the Administrator's counsel, Ms. Carroll, has refused to engage in mediation or in meaningful settlement negotiations. (Lions Appeal Pet. ¶ 16.)

On November 6, 2008, the ALJ issued an Order Assigning Mediator pursuant to 7 C.F.R. § 1.140, which provides that the administrative law judge "may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing[.]" The oral hearing before the ALJ concluded March 31, 2006; therefore, I find the ALJ's Order Assigning Mediator moot.

Ninth, the Lions contend the ALJ erroneously failed to specifically rule on the Lions' motion to accept rejected exhibits (Lions' Appeal Pet. ¶ 18).

The ALJ specifically denied the Administrator's Motion to Rescind

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[9] *In re Lion Raisins, Inc.* (Ruling on Respondents' Petitions to Reopen), 68 Agric. Dec. 383, 386 (2009) (stating the Rules of Practice do not provide an automatic right to file more than one petition to reopen a hearing and denying respondents' supplemental motions to reopen because the respondents had not sought leave to file multiple petitions to reopen the hearing). *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).

Order Assigning Mediator and provided that "[a]ll other pending motions are denied, to the extent that they are not addressed in this Decision and Order." (ALJ's Initial Decision at 6 ¶¶ 14-15.) The Rules of Practice do not require an administrative law judge to rule on each individual motion specifically; therefore, I reject the Lions' contention that the ALJ's failure to specifically address the Lions' motion to accept rejected exhibits, is error.

Tenth, the Lions contend the Secretary of Agriculture has no authority under the Agricultural Marketing Act to debar the Lions from inspection services (Lions' Appeal Pet. ¶ 20).

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.[10] 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.[11] 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:

> American Raisin's contention that 7 U.S.C. § 1622(h)

[10]7 U.S.C. § 1622(c).

[11]7 U.S.C. §§ 1622(h), 1624(b).

> 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, I have previously held that the Secretary of Agriculture has authority under the Agricultural Marketing Act to debar persons from

USDA inspection services.[12]

Eleventh, the Lions assert the Administrator seeks to debar the Lions from inspection required under the order regarding "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA] (Lions' Appeal Pet. ¶¶ 21, 29).

The instant proceeding concerns only debarment from receiving USDA inspection services under the Agricultural Marketing Act. The instant proceeding was not instituted under the AMAA or 7 C.F.R. pt. 989. Therefore, I reject the Lions' description of the order sought by the Administrator in the instant proceeding.

Twelfth, the Lions contend the ALJ erroneously failed to find USDA conducted an extensive criminal investigation of the Lions that was abandoned in July 2007 without the indictment of any of the Lions (Lions' Appeal Pet. ¶¶ 21, 29).

The instant proceeding is an administrative proceeding in which the Administrator seeks to debar the Lions from receiving inspection services under the Agricultural Marketing Act. A finding that USDA conducted and abandoned a criminal investigation of the Lions is not relevant to the instant proceeding. Therefore, I reject the Lions' contention that the ALJ's failure to find that USDA conducted and abandoned a criminal investigation of the Lions, is error.

Thirteenth, the Lions contend the ALJ's findings that the Lions fabricated and altered inspection certificates and provided those fabricated and altered inspection certificates to their customers, are error (Lions' Appeal Pet. ¶¶ 22-24, 29, 47).

The ALJ's findings that the Lions fabricated and altered inspection certificates and provided the fabricated and altered inspection certificates to their customers, are supported by the record. Moreover, the ALJ cites portions of the record which support her findings (ALJ's Initial Decision at 7 ¶ 20). Therefore, I reject the Lions' contention that the ALJ's findings regarding the fabrication and alteration of inspection

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[12]*In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 288-89 (2009), *appeal docketed*, No. 1:10-CV-00217-AWI-DLB (E.D. Cal. Feb. 10, 2010); *In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004).

certificates and use of those fabricated and altered inspection certificates, are error.

Fourteenth, the Lions contend the ALJ erroneously found Bruce Lion was aware of the fabrication and alteration of USDA inspection certificates by the Lions' employees. (See ALJ's Initial Decision at 7 ¶ 20.) (Lions' Appeal Pet. ¶¶ 27, 34, 45-46.)

As an initial matter, the record contains evidence that Bruce Lion knew of the violations of the Agricultural Marketing Act and the Regulations (Tr. 15,920-23). Moreover, knowledge is not a prerequisite to debarment. The Regulations provide that 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 under 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. Therefore, even if I were to conclude the ALJ's finding that Bruce Lion knew of the fabrications and alterations of USDA inspection certificates, was error (which I do not so conclude), I would not dismiss the proceeding as to Bruce Lion because he is an officer and agent of Lion Raisins, Inc., and, as such, may be debarred from benefits under the Agricultural Marketing Act based upon Lion Raisins, Inc.'s violations of the Agricultural Marketing Act and the Regulations.

Fifteenth, the Lions contend the ALJ did not have sufficient cause to debar Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion because it is unlikely that the Lions fabricated or altered inspection certificates, the Lions made changes designed to ensure that violations of the Agricultural Marketing Act and the Regulations do not occur in the future, the Agricultural Marketing Service has exhibited bad faith, and debarment would have an impact on the entire industry (Lions' Appeal Pet. ¶¶ 28, 33).

As an initial matter, the record belies the Lions' contention that it is unlikely that they fabricated or altered USDA inspection certificates. Moreover, the Lions' post-violation changes, the Agricultural Marketing Service's purported bad faith, and the impact of debarment of the Lions

on the California raisin industry are not relevant to whether the Lions violated the Agricultural Marketing Act and the Regulations or whether debarment is necessary to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary of Agriculture is directed and authorized to administer.

Sixteenth, the Lions contend the ALJ's failure to find that the Lions' modifications of inspection certificates are attributable to undocumented or undisclosed retest, recheck, reinspection, or updated evaluations by inspectors, is error (Lions' Appeal Pet. ¶ 30).

The Lions cite no evidence to support their claim that their modifications of inspection certificates were based upon retests, rechecks, reinspections, or updated evaluations by inspectors. To the contrary, the Lions state these retests, rechecks, reinspections, and updated evaluations are "undocumented or undisclosed[.]" The ALJ's failure to make a finding based upon actions not evidenced in the record, is not error.

Seventeenth, the Lions assert the Administrator failed to produce any Lion customer as a witness and made no effort to calculate any financial damages (Lions' Appeal Pet. ¶ 30). I infer the Lions contend the instant proceeding should be dismissed based on the Administrator's failures to call at least one of the Lions' customers as a witness and to prove the Lions' misrepresentations or deceptive or fraudulent practices or acts resulted in financial damage to the Lions' customers.

In order to prevail, the Administrator must show that the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in violation of the Agricultural Marketing Act and the Regulations. The Administrator need not show that those misrepresentations or deceptive practices or acts resulted in financial damage to those who were the recipients of the Lions' fabricated or altered inspection certificates. The Administrator's failures to call a Lion customer as a witness and to establish that the Lions' customers were financially damaged by the Lions' violations are not bases upon which to dismiss the instant proceeding.

Eighteenth, the Lions assert the inspection certificates they provided customers accurately reflected moisture content of the Lions' raisins on arrival (Lions' Appeal Pet. ¶¶ 31-32).

Even if I were to find that the inspection certificates the Lions

provided to customers more accurately reflected the moisture content of raisins on arrival than the USDA inspection certificates, 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 fabricated or altered inspection certificates more accurately reflect the moisture content of raisins on arrival than USDA inspection certificates. I find the relative accuracy of USDA inspection certificates and the inspection certificates as fabricated or altered by the Lions irrelevant to the instant proceeding.

Nineteenth, the Lions contend the ALJ's finding that the Agricultural Marketing Service has good cause to be outraged, is error (Lions' Appeal Pet. ¶ 33).

The Agricultural Marketing Service is not a sentient being capable of emotion. I find whether the Agricultural Marketing Service has good cause to experience an emotion that it cannot possibly experience, irrelevant to the instant proceeding. I do not adopt the ALJ's finding that the Agricultural Marketing Service has good cause to be outraged.

Twentieth, the Lions assert Ms. Carroll, the Administrator's counsel, was married to Neil Blevins, a sanction witness for the Administrator. The Lions assert Mr. Blevins and Ms. Carroll concealed their marriage, but, in May 2008, after an investigation, the Lions discovered the marriage. The Lions contend Mr. Blevins and Ms. Carroll violated USDA ethics regulations and were required to withdraw from the instant proceeding or seek a waiver (presumably from the Lions) allowing both Ms. Carroll and Mr. Blevins to participate in the proceeding. (Lions' Appeal Pet. ¶ 33.)

The Lions do not cite, and I cannot locate, any provision in USDA's ethics regulations[13] that prohibits a USDA attorney and a USDA witness, without a waiver from the adverse parties, from participating in an administrative proceeding because of a spousal relationship between that attorney and the witness. Therefore, I reject the Lions contention that Ms. Carroll and Mr. Blevins committed violations of USDA's ethics

[13]I infer the Lions' reference to "USDA ethics regulations" is a reference to 5 C.F.R. pts. 2635 and 8301.

regulations.

Twenty-first, the Lions assert David W. Trykowski, a witness for the Administrator, committed perjury when he stated he had nothing to do with drafting the complaints, a team of investigators was not assigned to investigate the Lions' violations of the Agricultural Marketing Act and the Regulations, his involvement did not begin until after the Complaint was filed, and he had never seen a signed worksheet (Lions' Appeal Pet. ¶¶ 14, 35).

The ALJ found Mr. Trykowski "totally credible." (ALJ's Initial Decision at 13 ¶ 33.) While the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence,[14] the consistent practice of the Judicial Officer is to give great weight to the credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[15] I have examined the record and find no basis upon which to reverse the ALJ's credibility determination with respect to Mr. Trykowski.

Twenty-second, the Lions contend the ALJ's debarment of Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion from receiving inspection services under the Agricultural Marketing Act, is error, because none of them knew, or were in a position to know, of the violations of the Agricultural Marketing Act and the Regulations (Lions' Appeal Pet. ¶ 35).

Knowledge is not a prerequisite to debarment. The Regulations provide that 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 under 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. Therefore, even if I were to conclude that Lion Raisin Company, Lion Packing Company, Bruce Lion, and

[14]See note 5.

[15]See note 7.

Dan Lion did not know of the violations of the Agricultural Marketing Act and the Regulations and had no reason to know of the violations, I would not dismiss the proceeding as to Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion because they are agents, officers, subsidiaries, or affiliates of Lion Raisins, Inc., and, as such, may be debarred from benefits under the Agricultural Marketing Act based upon Lion Raisins, Inc.'s violations of the Agricultural Marketing Act and the Regulations.

Twenty-third, the Lions assert Neil Blevins (not the Administrator) sought a 36-year debarment of the Lions. The Lions contend Mr. Blevins intends to punish the Lions and his recommended period of debarment demonstrates his loss of impartiality based upon his marriage to Ms. Carroll, the Administrator's counsel. (Lions' Appeal Pet. ¶ 36.)

Mr. Blevins testified that the 36-year period of debarment was not his personal recommendation designed to punish the Lions, but rather, the Agricultural Marketing Service's proposed recommendation for a remedy (Tr. 15,693-94). Therefore, I reject the Lions' assertion that the recommendation for a 36-year period of debarment was Mr. Blevins' personal recommendation designed to punish the Lions. Since the recommendation is not Mr. Blevins' personal recommendation, but rather, the recommendation of the Agricultural Marketing Service, I reject the Lions' contention that the recommendation demonstrates Mr. Blevins' loss of impartiality based upon his marriage to Ms. Carroll.

Twenty-fourth, the Lions contend debarment of the Lions would have no deterrent effect (Lions' Appeal Pet. ¶ 37).

The purpose of debarring those who engage in misrepresentation or deceptive or fraudulent practices or acts in violation of the Agricultural Marketing Act and the Regulations is to protect the integrity of the inspection service and to protect the public.[16] The exclusion of such persons helps to ensure that quality and condition standards are uniform

[16]*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.").

and consistent, so that consumers may be able to obtain the quality product that they desire unaffected by corrupt influences. Therefore, whether debarment has a deterrent effect is irrelevant to the instant proceeding.

Twenty-fifth, the Lions contend debarment would constitute a "death penalty" (Lions' Appeal Pet. ¶ 37).

Debarment is not a penalty. Debarment is "the act of precluding someone from having or doing something" and "does not extract payment in cash or in kind."[17] Debarment from the benefits of the Agricultural Marketing Act is strictly remedial.[18] Therefore, I reject the

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[17]*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), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); *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)).

[18]*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

(continued...)

Lions' claim that debarment would constitute a "death penalty."

Twenty-sixth, the Lions assert debarment would encourage the Agricultural Marketing Service to engage in legal and ethical abuses (Lions' Appeal Pet. ¶ 37).

The Lions' assertion that debarment of the Lions will encourage the Agricultural Marketing Service to engage in legal and ethical abuses is speculative; therefore, the Lions' assertion is rejected.

Twenty-seventh, the Lions assert debarment, as applied by Ms. Carroll, the Administrator's counsel, would deprive Lion Raisins, Inc., and Bruce Lion of both "voluntary" and "mandatory" inspection services (Lions' Appeal Pet. ¶ 38).

I find nothing in the record to indicate that debarment of the Lions will be "applied by" counsel for the Administrator. The Order in this Decision and Order debars the Lions from receiving "voluntary" inspection services under the Agricultural Marketing Act and the Regulations; the Order does not relate to mandatory inspection services, as the Lions assert.

Twenty-eighth, the Lions contend debarment is discretionary, and the ALJ's failure to consider the Lions' good faith remedial actions, as well as the positive changes implemented by USDA, is error (Lions' Appeal Pet. ¶ 39).

I agree with the Lions' contention that the ALJ had discretion to impose no period of debarment despite her finding that the Lions' shipping department engaged in misrepresentation or deceptive or fraudulent practices or acts. The Regulations provide that any misrepresentation or deceptive or fraudulent practice or act "may be

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[18](...continued)
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).

deemed sufficient cause for . . . debarment[.]"[19] However, I find no indication that the ALJ was unaware that she 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. Contrary to the Lions' assertion, the ALJ did consider "all the changes during the past 11 years that make it impossible for the wrongdoing to happen again." (ALJ's Initial Decision at 10 ¶ 29.)

Twenty-ninth, the Lions contend they were at a disadvantage because the ALJ did not adopt the Lions' theory that the most believable explanation of the discrepancies between USDA records and the inspection certificates issued by the Lions is USDA's correction of errors or USDA's update of inspection results (Lions' Appeal Pet. ¶ 43).

An administrative law judge's refusal to adopt a litigant's theory of a case is a litigation risk, not a "disadvantage." Moreover, based upon my review of the record, I agree with the ALJ's rejection of the Lions' theory of the case.

Thirtieth, the Lions contend USDA inspectors improperly signed inspection certificates for each other (Lions' Appeal Pet. ¶ 44).

The record establishes that USDA inspectors have power of attorney to sign inspection certificates for each other and that they routinely sign for each other (Tr. 933-34, 1859-60). Therefore, I reject the Lions' contention that USDA inspectors' signing inspection certificates for other inspectors is "improper."

Thirty-first, the Lions contend the ALJ's Initial Decision is inadequate in that it does not contain a ruling on each proposed finding of fact and proposed conclusion of law, as required by 5 U.S.C. § 557(c)(3)(A) (Lions' Appeal Pet. ¶ 48).

The Administrative Procedure Act does not require that each initial decision contain a ruling on each proposed finding of fact and proposed conclusion of law submitted by the parties. Instead, the Administrative Procedure Act provides that all initial decisions shall contain findings and conclusions, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
>
> . . . .

[19] 7 C.F.R. § 52.54(a).

> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. *All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—*
>
> *(A) findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record;* and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c) (emphasis added). Nothing in 5 U.S.C. § 557(c) requires that an initial decision contain a ruling on each proposed finding of fact and proposed conclusion of law submitted by the parties.

The Administrator's Appeal Petition

The Administrator raises seven issues in the Administrator's Appeal Petition. First, the Administrator contends the ALJ erroneously concluded both that Al Lion, Jr., and Jeff Lion violated the Agricultural Marketing Act and the Regulations, as alleged in the Second Amended Complaint, and that Al Lion, Jr., and Jeff Lion had no culpability for their violations of the Agricultural Marketing Act and the Regulations. The Administrator argues Al Lion, Jr., and Jeff Lion cannot have violated the Agricultural Marketing Act and the Regulations and also not be culpable for their violations. The Administrator requests that I set aside these purportedly inconsistent conclusions. (Administrator's

Appeal Pet. at 5-7.)

The ALJ concluded Al Lion, Jr., and Jeff Lion were not culpable for the violations of the Agricultural Marketing Act and the Regulations which she found to have occurred (ALJ's Initial Decision at 15 ¶ 35); however, the ALJ's Initial Decision does not indicate that she found Al Lion, Jr., and Jeff Lion committed any violations of the Agricultural Marketing Act and the Regulations. Instead, the ALJ states the "Lion's shipping department" committed violations (ALJ's Initial Decision at 13-15 ¶ 34(A)-(F)). Therefore, I reject the Administrator's contention that the ALJ inconsistently found Al Lion, Jr., and Jeff Lion violated the Agricultural Marketing Act and the Regulations, but were not culpable for their violations of the Agricultural Marketing Act and the Regulations.

Second, the Administrator contends the ALJ's failure to find that Lion Raisins, Inc., is not an entity separate and apart from the individual respondents, is error (Administrator's Appeal Pet. at 7-11).

The record supports findings that Lion Raisins, Inc., failed to observe corporate formalities and did not operate as a California corporation and that Lion Raisins, Inc.'s principals operated Lion Raisins, Inc., as a family business. I have adopted findings and conclusions to that effect.

Third, the Administrator contends the ALJ erroneously failed to debar all of the violators for a sufficient period of time (Administrator's Appeal Pet. at 11-22).

The ALJ made debarment of each of the Lions contingent upon a showing of knowledge of the violations, responsibility for the violations, or contribution to the violations (ALJ's Initial Decision at 2 ¶ 1; 9 ¶ 25; 12-13 ¶ 32; 15 ¶ 35). Based upon that premises: (1) the ALJ debarred Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; and Bruce Lion for 3 years; (2) the ALJ debarred Dan Lion for 3 months; and (3) the ALJ did not debar Al Lion, Jr., or Jeffrey Lion (ALJ's Initial Decision at 2 ¶ 1; 9 ¶ 25; 16-17 ¶¶ 37-43).

The Regulations provide that 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. Nothing in the Regulations requires knowledge of the violations, responsibility for the violations, or contribution to the violations as elements for an order of debarment of the agents, officers, subsidiaries, or affiliates of the person who committed or caused the commission of a violation. Thus, Lion Raisins, Inc.'s violations subjected Lion Raisins, Inc.'s agents, officers, subsidiaries, and affiliates to debarment. Therefore, I find the ALJ's conclusions that no debarment is necessary, appropriate, or warranted for Al Lion, Jr., and Jeff Lion and that only a 3-month debarment is necessary and appropriate for Dan Lion, error. Instead, I debar each of the Lions for a period of 3 years.

Fourth, the Administrator contends the ALJ's consideration of the Lions' complaints that USDA's inspection results were unreliable, is error (Administrator's Appeal Pet. at 22-23).

The ALJ took into account the Lions' complaints that USDA's inspection results were not reliable (ALJ's Initial Decision at 10-11 ¶ 30). I find irrelevant the Lions' complaints about USDA's inspection program. 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's inspection system did not result in accurate determinations as to the quality and condition of the Lions' raisins, the Lions would be prohibited from fabricating and altering USDA inspection certificates and misrepresenting USDA inspection results to their customers. Therefore, I do not adopt the ALJ's findings and conclusions regarding the Lions' complaints about USDA's inspection program.

Fifth, the Administrator contends the ALJ's finding that the Lions were at a disadvantage during the instant proceeding, is error (Administrator's Appeal Pet. at 23-26).

I have not adopted the ALJ's discussion regarding the Lions' disadvantage during the instant proceeding. The ALJ bases her conclusion that the Lions were "at a tremendous disadvantage" on proceedings that were not before her, including a criminal investigation of the Lions conducted by the United States government and the Lions'

Freedom of Information Act requests. The ALJ found, despite the Lions' purported disadvantage, the Lions received a fair hearing. I agree with the ALJ's conclusion that the Lions received a fair hearing. My examination of the record reveals that the proceeding was conducted in accordance with the Administrative Procedure Act and the Rules of Practice and the Lions were provided due process.

Sixth, the Administrator contends the ALJ's failure to find Bruce Lion's testimony not credible, is error. In particular, the Administrator contends the ALJ cannot both reject Bruce Lion's testimony regarding the central issue in the case — that the Lions fabricated and falsified inspection certificates and misrepresented USDA inspection results to the Lions' customers — and also rely on Bruce Lion's testimony as support for her findings as to other issues. (Administrator's Appeal Pet. at 26-28.)

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence.[20] However, the consistent practice of the Judicial Officer is to give great weight to the credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[21] I have examined the record and find no basis upon which to reverse the ALJ's credibility determinations with respect to Bruce Lion. Moreover, I reject the Administrator's contention that the ALJ cannot both find Bruce Lion's testimony regarding the central issue in the case unreliable and rely on Bruce Lion's testimony as support for her findings as to other issues. The legal maxim *falsus in uno, falsus in omnibus* is not a command, and the ALJ may find Bruce Lion's testimony credible in part and not credible in part.

Seventh, the Administrator contends the ALJ's denial of the Administrator's Motion to Rescind Order Assigning Mediator, is error (Administrator's Appeal Pet. at 29-33).

On November 6, 2008, the ALJ issued an Order Assigning Mediator pursuant to 7 C.F.R. § 1.140, which provides that the administrative law judge "may direct the parties or their counsel to attend a conference at

[20]See note 5.

[21]See note 7.

any reasonable time, prior to or during the course of the hearing[.]" The oral hearing before the ALJ concluded March 31, 2006; therefore, I find the ALJ's Order Assigning Mediator moot.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion are debarred for a period of 3 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. Paragraph 1 of this Order shall become effective 30 days after service of this Order on Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion.[22]

2. Lion Raisin Company and Lion Packing Company are debarred for a period of 3 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. Paragraph 2 of this Order shall become effective July 20, 2011.[23]

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[22]In a related proceeding, I issued an order debarring Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. *In re Lion Raisins, Inc.* (Order Denying Pet. to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 69 Agric. Dec. 641 (2010); *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009). However, that 5-year period of debarment is not effective as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion because it has been stayed pending the outcome of proceedings for judicial review. *In re Lion Raisins, Inc.* (Stay Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 69 Agric. Dec. 661 (2010). Therefore, the 3-year debarment period as to Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion in the instant proceeding is effective beginning 30 days after service of the instant Order on Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion.

[23]In a related proceeding, the Chief ALJ issued an order debarring Lion Raisin Company and Lion Packing Company for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. *In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 232-33 (2006). The Chief ALJ's Order became effective as to Lion Raisin Company and Lion Packing Company on July 20, 2006, and Lion Raisin Company's and Lion Packing Company's 5-year debarment period ends July 19, 2011.
(continued...)

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SUGAR MARKETING ACT

COURT DECISION

CENTER FOR FOOD SAFETY, et al. v. USDA
No. C 08-00484 JSW.
Filed March 16, 2010.

[Cite as: 2010 WL 964017 (N.D.Cal.)].

SMA – Preliminary Injunction – NEPA – Genetically modified.

United States District Court,
N.D. California.

ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION
JEFFREY S. WHITE, District Judge.

Now before the Court is the motion for a preliminary injunction filed by plaintiffs Center for Food Safety, Organic Seed Alliance, Sierra Club, and High Mowing Organic Seeds (collectively, "Plaintiffs"). Having considered the parties' arguments and relevant legal authority, and having had the benefit of oral argument, the Court hereby DENIES Plaintiffs' motion for preliminary injunction.[1]

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[23](...continued)
See In re Lion Raisins, Inc. (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 246 n.3 (2009). Therefore, the 3-year debarment period as to Lion Raisin Company and Lion Packing Company in the instant Order is effective beginning July 20, 2011.

[1] The Court GRANTS the parties' requests to file supplemental declarations by Paul H. Achitoff, John Navazio, and David Berg. The Court GRANTS Defendant-Intervenors's request to file the designated portions of the Declarations of Susan Henley Manning, Ph.D., Richard J. Sexton, David Berg, Richard Gerstenberger, Duane Grant, Michael Hofer, Russell Mauch, Michael Petersen, and John Snyder under (continued...)

BACKGROUND

In September 2009, the Court ruled that the decision by the United States Department of Agriculture ("USDA") and its Animal and Plant Health Inspection Service ("APHIS") to deregulate a variety of genetically engineered sugar beets without preparing an environmental impact statement ("EIS") violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 ("NEPA"). Plaintiffs now move for a preliminary injunction to preclude all further planting, cultivation, processing, or other use of genetically engineered Roundup Ready sugar beets or sugar beet seeds, including but not limited to permitting any Roundup Ready sugar beet seed crop to flower. Plaintiffs' proposed preliminary injunction would include requiring the sugar beet seed crop that has already been planted to be pulled up. Defendants Edward T. Schafer, in his official capacity as Secretary of the United States Department of Agriculture, and Cindy Smith, in her official capacity as Administrator of the Animal and Plant Health Inspection Service (collectively, "Defendants"), and Defendant-Intervenors American Sugarbeet Growers Association, Ervin Schlemmer, Mark Wettstein, John Synder, and Duane Grant, American Crystal Sugar Company, the Amalgamated Sugar Company, Western Sugar Cooperative, Wyoming Sugar Company, LLC, United States Beet Sugar Association, Betaseed, Inc., Monsanto Company, Syngenta Seeds, Inc., and SESVanderHave USA, Inc. (collectively, "Defendant-Intervenors") all oppose Plaintiffs' motion.

The Court shall discuss additional facts as necessary in the analysis.

ANALYSIS

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[1](...continued)
seal and Plaintiffs' request to file portions of their reply brief and Exhibits 50 through 69 to the confidential and supplemental declarations of Paul H. Achitoff under seal.
Defendant-Intervenors submitted voluminous evidentiary objections. To the extent the Court relied on evidence objected to in resolving Plaintiffs' motion, the objections are overruled. To the extent the Court did not need to consider such evidence in order to resolve the motion for preliminary injunction, the Court need not rule on the admissibility of such evidence at this time.

A. Legal Standards Applicable to Motion for a Preliminary Injunction. In order to obtain a preliminary injunction, Plaintiffs "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council,* 129 S.Ct. 365, 374 (2008) (citations omitted). The *Winter* court also noted that because injunctive relief is "an extraordinary remedy," it "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 375-76 (citing *Mazurek v. Armstrong,* 520 U .S. 968, 972 (1997) (*per curiam*)). Thus "[i]n each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.' " *Id.* at 376 (citing *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542 (1987)). " 'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' " *Id.* at 376-77 (citing *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982)).**B. Discussion.**

1. Likelihood of Success on the Merits.

Plaintiffs have done more than shown a likelihood of success on the merits. By order dated September 21, 2009, the Court has already found, on the merits, that Defendants have violated NEPA by failing to conduct an EIS before deregulating genetically engineered sugar beets. Therefore, Plaintiffs have already succeeded on the merits.

2. Likelihood of Irreparable Harm.

Upon review of the record currently before the Court, the Court also finds that Plaintiffs have demonstrated a likelihood of irreparable harm. Defendants and Intervenor-Defendants expend a great amount of time in an effort to demonstrate that the chances of genetically engineered sugar beets cross-pollinating with conventional sugar beets, Swiss chard, or table beets are minuscule, if they exist at all. However, there is evidence in the record to show that genetically engineered sugar beets may mix with and contaminate Swiss chard, table beets or conventional sugar beets through mechanical, or other means. Jay Miller, the product manager of Intervenor-Defendant Betaseed, admits that "[n]o matter

how careful a seed producer is, when the same facility is being used to process and ship both [genetically engineered] and conventional seed, there is no way to completely prevent conventional seed from being found in shipments of [genetically engineered] seed, and vice versa." (Declaration of Jay Miller, ¶ 34.) Producers of sugar beet seed, including Betaseed, produce both genetically engineered and conventional seed. (*Id.*)The Court also finds it significant that genetically engineered sugar beet stecklings were found in a large pile of compost or potting soil being sold at a nursery in Oregon. (Declaration of Carol Savonen, ¶¶ 8-14; Declaration of Casper Lehner, ¶¶ 19-20.) Although Intervenor-Defendant Betaseed took efforts to retrieve the soil with these stecklings from the nursery and from customers who had already purchased it, and have taken precautions to guard against such an event from occurring again, the fact that it already did happen demonstrates that, based on human error, genetically engineered sugar beets may not be contained and may contaminate conventional sugar beets, Swiss chard, or table beets. Moreover, the Court finds it significant that there have been instances in which genetically engineered corn, cotton, soybean and rice have mixed with and contaminated the conventional crops. This mixing or contamination occurred with soybean despite the fact that soybeans are largely self-pollinating. (Declaration of Doug Gurian-Sherman, ¶¶ 23-29, Exs. 4-7; Declaration of Harvey Howington, ¶¶ 4-14.) [2]

Therefore, the Court finds that the growth and processing of genetically engineered sugar beets creates a likelihood that such genetically engineered seeds and plants will mix with, and thus, contaminate conventional sugar beets, Swiss chard, or table beets. Depending on when and how they mix, and when the contamination is discovered, the difficulty and length of time involved in decontaminating the conventional sugar beets, Swiss chard, or table beets varies greatly. (Supplemental Declaration of John Navazio, Ph .D., ¶¶ 9-20.)

[2] Plaintiffs cite to large exhibits without providing pin cites. The parties are directed to provide pin cites for all evidence in future filings with the Court.

3. Balance of the Equities and the Public Interest.

Despite the Court's finding regarding the likelihood of harm to the environment, upon balancing the equities and considering the public's interest, the Court finds that issuing a preliminary injunction is not warranted. The Court finds Plaintiffs' delay in seeking a preliminary injunction significant. As Judge Breyer noted in *Geertson Farms Inc. v. Johanns,* 2007 WL 776146, *1 (N.D.Cal. March 12, 2007) (quoting *Idaho Watersheds Project v. Hahn,* 307 F.3d 815, 833 (9th Cir.2002)), "[i]n the run of the mill NEPA case, the contemplated project ... is simply delayed until the NEPA violation is cured." However, the court in *Geertson Farms* found the case was, in some respects, not a typical NEPA case because, in reliance on the deregulation decision, some growers had already planted genetically engineered alfalfa. *Id.* The court noted that those "plantings [had] occurred because plaintiffs did not seek an injunction prior to the Court's ruling on the merits of their claim." *Id.* Therefore, the court declined to issue an injunction to order the growers to remove the genetically engineered alfalfa or to prohibit them from harvesting, using, or selling the genetically engineered alfalfa that had already been planted. *Id.* On the other hand, the *Geertson Farms* court noted that the case was a typical NEPA case with respect to alfalfa growers who had not yet planted the genetically engineered alfalfa. *Id.* at *2. Nevertheless, to minimize the harm to the growers who imminently intended to plant the genetically engineered alfalfa, the court allowed those growers who intended to plant the genetically engineered alfalfa within the next three weeks who had already purchased the seed to proceed with the planting. The court merely preliminarily enjoined those growers who had not yet purchased or did not have imminent plans to grow genetically engineered alfalfa from switching over from conventional to genetically engineered alfalfa. *Id.*Here, Plaintiffs request this Court to issue a preliminary injunction that is much broader than the one issued in *Geertson Farms* and seek to alter the status quo. *See Stanley v. University of Southern Cal.,* 13 F.3d 1313, 1319 (9th Cir.1994) (internal quotations omitted) (if "a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction."). Despite the admonition from Judge Breyer in

Geertson Farms regarding the impact of the plaintiffs delay in moving for a preliminary injunction with respect to genetically engineered alfalfa, Plaintiffs here did not move for a preliminary injunction until five years after genetically engineered sugar beets were deregulated, three years after this case was filed, and four months after the Court granted Plaintiffs' motion for summary judgment on the merits. During the time in which genetically engineered sugar beets have been deregulated and Plaintiffs did not move for a preliminary injunction, the industry has overwhelmingly converted to the use of genetically engineered sugar beets. Ninety-five percent of sugar beets currently being grown and processed are genetically engineered. Counsel represented at the hearing on the motion for preliminary injunction that 99.9% of the seed that has been or will be planted this spring has already been purchased and almost all of the seed has been or will be delivered by the end of March.

If this Court were to ban the planting and processing of the genetically engineered sugar beet root crop, there would not be enough conventional seed for a full crop this year. (Declaration of Susan Henley Manning, Ph.D. ("Manning Decl."), ¶¶ 15-17, Ex. H .) Although the degree of the shortage would vary among the eight different sugar beet processors, all but two of the processors would not be able to produce the vast majority of their intended crop. (*Id.,* Ex. H.)[3] The economic impact of such a shortage would be dramatic and wide-spread. According to Defendant-Intervenor's expert, Richard J. Sexton, Ph.D., at least fourteen of the twenty-one sugar beet plants in the United States would close due to the lack of sugar beets. (Declaration of Richard J. Sexton, Ph.D., ¶ 7.) Dr. Sexton projects that this would cause a loss of

[3] Plaintiffs submit evidence regarding the alleged ability of one of these processors to produce a crop this year using conventional seed. Even if this evidence did demonstrate the ability of this company to produce a full crop, such evidence would show, at most, that just one of the eight processing companies could produce a full conventional crop. Notably, it is one of the two companies that would be least affected by an injunction banning the use of genetically engineered sugar beets. Relying on the evidence submitted by Defendant-Intervenors, this company would be able to produce more than sixty percent of its intended crop this year using conventional seed. (Manning Decl., Ex. H.)

approximately 5,800 full-time and seasonal jobs in the rural communities where the sugar beets are planted and that sugar beet growers would lose approximately $283.6 million in gross profits if they were precluded from planting the genetically engineered crop. (*Id.*) Accounting for multiplier effects, Dr. Sexton estimates that the total economic loss that would be incurred by the rural communities where sugar beets are grown would be $1.469 billion. (*Id.*) The seed growers and technology companies would lose over $180 million. (Declaration of Bryan Meier, ¶ 35; Declaration of John Enright, ¶ 4; Declaration of Steve Fritz, ¶ 10; Declaration of Robert D. Nixon (Docket No. 29), ¶ 14.) Moreover, an injunction which would ban the planting and processing of genetically engineered sugar beets in 2010 would have a large detrimental impact on the United States' domestic sugar supply and price. (Declaration of Scott K. Gregory, ¶ 5.)

The Court finds that Plaintiffs' delay in filing this suit and, in particular, in moving for a preliminary injunction, weighs in favor of denying a preliminary injunction. "Laches is not a favored defense in environmental cases." *Coalition for Canyon Preservation v. Bowers,* 632 F.2d 774, 779 (9th Cir.1980). Nevertheless, "[a]lthough a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction." *Quince Orchard Valley Citizens Association, Inc. v. Hodel,* 872 F.2d 75, 80 (4th Cir.1989) (quoting *Citibank, N.A. v. Citytrust,* 756 F.2d 273, 276 (2d Cir.1985)) (denying preliminary injunction in environmental case based on the plaintiffs' delay and noting that the costly impacts of an injunction could have been obviated if the plaintiffs had diligently brought suit); *see also Headwaters, Inc. v. Bureau of Land Management, Medford Dist.,* 665 F.Supp. 873, 876 (D.Or.1987) (declining to bar suit for laches in an environmental case, but denying preliminary injunction based on plaintiff's delay in bringing suit: "[Defendant]'s hardship would have been largely avoided had plaintiff acted promptly.").

***5** In light of the dramatic economic impact a mandatory injunction altering the status quo would have, and considering Plaintiffs' long delay, the Court finds that upon balancing the equities and considering

the public's interest, issuing the type of preliminary injunction sought by Plaintiffs is not warranted. The Court notes that the costly impacts from such an injunction could have been obviated if Plaintiffs had diligently brought suit and moved for a preliminary injunction earlier. Moreover, in contrast to the genetically engineered alfalfa crop at issue in *Geertson Farms,* the use of which was estimated to expand by five times within the next year, Defendant-Intervenors represented at the hearing that there are no plans to expand the use of genetically engineered sugar beets beyond the current ninety-five percent. Therefore, a prohibitory preliminary injunction, similar to the one issued in *Geertson Farms,* would not provide much, if any, benefit here. Accordingly, the Court DENIES Plaintiffs' motion for a preliminary injunction.

The parties should not assume that the Court's decision to deny a preliminary injunction is indicative of its views on a permanent injunction pending the full environmental review that APHIS is required to conduct. Rather, while the environmental review is pending, the Court is inclined to order the Intervenor-Defendants to take all efforts, going forward, to use conventional seed. In light of Plaintiffs' showing of irreparable harm to the environment, the Court is troubled by maintaining the status quo that consists of ninety-five percent of sugar beets being genetically engineered while APHIS conducts the environmental review that should have occurred before the sugar beets were deregulated. Moreover, the length of time that is necessary to conduct the full environmental review, as compared to the several months between the preliminary and permanent injunction hearing, could increase the likelihood and potential amount of irreparable harm to the environment. In addition, the absence of an imminent planting season and the ability to have to time adjust back to conventional sugar beets could help alleviate any harm to Defendant-Intervenors from an injunction. Finally, the Court notes that Plaintiffs' delay, if it does not warrant the application of laches, would have less weight in consideration of a permanent injunction. Thus, the balance of the equities may likely shift when the Court considers whether to issue permanent injunction.

CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' motion for preliminary injunction. **IT IS SO ORDERED.**

MISCELLANEOUS ORDERS
(Full Text)

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at:
http://www.dm.usda.gov/oaljdecisions/aljmisdecisions.htm.

AMERICAN DRIED FRUIT CO.
AMA Docket No. FV-10-0170.
Opinion and Order.
Filed May 27, 2010.

AMA-FV – Marketing order terms – "Shall cause" – "Shall obtain" - Failure to state cause.

Colleen A. Carroll, Esquire, for AMS.
Kalem Barserian, for Petitioner.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

This action was brought by American Dried Fruit Co., a California proprietorship owned and operated by Kalem H. Barserian, on March 11, 2010 seeking relief under the provisions of 7 U.S.C. §608c(15)(A) of the Agricultural Marketing Agreement Act , as amended[1] (AMAA) and a determination that the Administrator of the Agricultural Marketing Service's application of certain obligations imposed in connection with the Federal Raisin Marketing Order (Marketing Order) are not in accordance with law. After seeking and receiving an extension of time in which to answer the Petition, on April 14, 2010, the Administrator moved to dismiss the Petition. The Petitioner filed its opposition to the Motion on May 11, 2010.

The Administrator seeks dismissal of the Petition on both procedural and substantive grounds. The Administrator argues that the Petition

[1] 7 U.S.C. §608c(15)(A).

should be dismissed for failure to comply with the Rules of Practice, asserting that the Petition is deficient as it fails to contain information required by Sections 900.52(b)(2), (3), and (4).

The AMAA provides that "[a]ny handler subject to an order may file a written petition with the Secretary of Agriculture..."[2] The Rules of Practice applicable to proceedings on such petitions require that such a petition contain the following information:

> (1) The correct name, address, and principal place of business of the petitioner. If the petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;
> (2) Reference to the specific terms of provisions of the marketing order, or the interpretation or application thereof, which are complained of;
> (3) A full statement of the facts...upon which the petition is based...setting forth clearly and concisely...the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;
> (4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;
> (5) Prayers for the specific relief which the petitioner desires the Secretary to grant;
> (6) An affidavit by the petitioner is not an individual; by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in

[2] *Id*.

good faith and not for purposes of delay.[3]

The first deficiency suggested is that American Dried Fruit Co. is not a proper petitioner as it is not a "person" as defined by the Marketing Order. The Marketing Order defines "person" as an individual, partnership, corporation, association or any other business unit.[4] The cited deficiency could in any case be cured by amendment and in view of the fact that the definition allows "any other business unit," but the definition does appear to be sufficiently broad and encompassing as to include proprietorships. As Paragraph 2 of the Petition identifies Kalem H. Barserian, d/b/a American Dried Fruit Co. as a sole proprietorship as do the numerous RAC Form 5s (RX-3) filed with by the Raisin Administrative Committee, even if American Dried Fruit Co. is not a proper party, it will not preclude consideration and discussion of the other deficiencies raised.

The Administrator also argues that the Petition does not refer to specific terms complained of; however, the Petition does cite and complains of two provisions of the Marketing Order, to wit, 7 C.F.R. §989.58(d) and 989.59(d). While the Petition suggests that section 989.58(d) only requires inspection and certification "prior to the acquisition of natural condition raisins,"[5] and sections 989.58(d) and 989.59(d) only require handlers to "cause" an inspection, but does not control who to pay for it,[6] the current section 989.58(d) specifically states that the inspection obligation is triggered after acquisition or receipt of raisins (with certain specific exceptions), and both current sections 989.58(d) and 989.59(d) provide for the handler to pay for the inspection.

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[3]7 C.F.R. §900.52(b).

[4]7 C.F.R. §989.3

[5]Petition at 2-3; but compare Petition at 6, ¶ 13 ("Petitioner is merely obligated to cause "incoming" and "outgoing" inspections and to obtain "meeting" certificates, e.g. FR-ss Worksheet and/or FV-146 Certificate, prior to acquisition or shipment of raisins; 989.58 and 989.59 and 989.158 and 989.159.")(emphasis added).

[6]Petition at 2-3.

7 C.F.R. § 989.58

. . .

(d) *Inspection and certification*. (1) Each handler shall cause an inspection and certification to be made of all natural condition raisins **acquired or received by him**, except with respect to: (i) an interplant or interhandler transfer of offgrade raisins as described in paragraph (e)(2) of this section, unless such inspection and certification are required by the rules and procedures made effective pursuant to this amended subpart; (ii) an interplant or interhandler transfer of free tonnage raisins as described in § 989.59(e); (iii) raisins received from a dehydrator which have been previously inspected pursuant to paragraph (d)(2) of this section; (iv) any raisins for which minimum grade and condition standards are not then in effect; (v) raisins received from a cooperative bargaining association which have been inspected and are in compliance with requirements established pursuant to paragraph (d)(3) of this section; (vi) any raisins, if permitted in accordance with such rules and procedures as the committee may establish with the approval of the Secretary, acquired or received for disposition in eligible nonnormal outlets. The handler shall be reimbursed by the committee for inspection costs incurred by him and applicable to pool tonnage held for the account of the committee. Except as otherwise provided in this section, prior to blending raisins, acquiring raisins, storing raisins, reconditioning raisins, or acquiring raisins which have been reconditioning, each handler shall obtain an inspection certification showing whether or not the raisins meet the applicable grade and condition standards; *Provided*, That the initial inspection for infestation shall not be required if the raisins are fumigated in accordance with such rules and procedures as the committee shall establish with the approval of the Secretary. The handler shall submit or cause to be submitted to the committee a copy of such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization

> and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their certification by a handler.[7] (emphasis added)

7 C.F.R. § 989.59

. . .

> (d) *Inspection and certification*. Unless otherwise provided in this section, **each handler shall, at his own expense**, before shipping or otherwise making final disposition of *raisins, cause an[] inspection to be made of such raisins to determine whether they meet* the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations."[8] (emphasis added)

Contrary to the Petition, section 989.58(d) provides for post-acquisition and post-receipt inspection of natural condition raisins (with certain

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[7] 7 C.F.R. § 989.58(d.

[8] 7 C.F.R. § 989.59(d)(2010).

enumerated exceptions not mentioned by Petitioner) and sections 989.58(d) and 989.59(d) provide that the cost of inspections is borne by the handler.

The Administrator also suggests that the Petition neither contains a full statement of facts nor does it state the grounds upon which the Order's Terms are challenged are not in accordance with Law. Although the facts alleged in the Petition may not be as complete as the Administrator might wish, it nonetheless clearly appears that the claims set forth in the Petition have already been heard and adjudicated, in a case instituted in the United States District Court for the Eastern District of California by Lion Bros., an non-handler affiliate of Lion Raisins, Inc.,[9] and in an administrative case brought by Mr. Barsarian's former (if not present) employer, Lion Raisins, Inc., against the Secretary of Agriculture.[10]

Discussion

The Petitioner raised financial issues related to disparities in the marketing order related to inspection costs depending on who seeks the inspection. (See Petition at p. 4). The doctrine of s*tare decisis* makes it clear that I need not consider these issues.

> Arguments about costs are not appropriate for consideration in these proceedings. Moreover, the Supreme Court of the United States makes clear that arguments based upon competition are inapposite in the context of a marketing order, where marketing order committee members and handlers are engaged in what the Court describes as "collective action[.]" *Lion Raisins, Inc., and*

[9]*Lion Bros v. U.S. Dep't of Agriculture*, Not reported in F.Supp.2d, 2005 WL 2089809 (E.D. Cal. 2005)(Order Dismissing Case for Lack of Subject Matter Jurisdiction).

[10]*In re Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005)(Decision and Order); *See Lion Raisins, Inc., v. U.S. Dep't of Agriculture*, Case No. 1:05-CV-00640 OWW SMS, Not reported in F.Supp.2d, 2008 WL 783337 (E.D. Cal. 2008) (Memorandum Decision re Granting in Part and Denying in Part Cross-Motions for Summary Judgment) and 2008 WL 2762176 (E.D. Cal. 2008)(Memorandum Decision re Denying Motion to Amend/Motion for Reconsideration).

Boghosian Raisin Packing Co., Inc., 64 Agric. Dec. 11, 22 (2003), citing *Glickman v. Wileman Bros. & Elliott, Inc*., 521 U.S. 457, 461-62 (1997).

Petitioner seeks to exploit the nuances of the two verbs "shall cause" and "shall obtain" in the two cited sections related to raisin inspection certificates. The Administrator has promulgated the regulations after public hearings and has chosen to interpret the duties of the raisin handler related to obtaining an inspections certificate by resolving the word "cause" as defined the Webster's Seventh New Collegiate Dictionary "something that occasions or effects a result" as synonymous with "obtain"[11]

Conclusion

Accordingly, rather than finding any technical deficiency to the Petition, the Motion to Dismiss is **GRANTED** upon the grounds that the Petition fails to state a claim upon which relief might be granted, the issues having previously been raised and found to be without merit. *Lion Bros. v. U.S. Dep't of Agriculture*. *op. cit*; *In re: Lion Raisins, Inc.*, 64 Agric. Dec. 27 (2005)(Decision and Order); *See Lion Raisins, Inc., v. U.S. Dep't of Agriculture*. *op. cit*

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

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LION RAISINS, INC.
AMA-FV Docket No. 09-0050.
AMA-FV Docket No. 09-0051.
AMA-FV Docket No. 10-0030.
Dismissal Order.
Filed June 17, 2010.

[11]*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)).

AMA-FV.

Frank Martin, Jr., Esquire, for AMS.
James A. Moody, Esquire and Wesley T. Green, Esquire, for Petitioner.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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GH DAIRY.
AMA Docket No. M-10-0283.
Rulings Denying Motion for Review and Dismissing Motion to Intervene and Order Dismissing Petition.
Filed June 28, 2010.

AMA-M.

Heather M. Pichelman, for the Administrator, AMS
Alfred W. Ricciardi, Phoenix, AZ, and Ryan K. Miltner, Waynesfield, OH, for Petitioner.
Rulings issued by William G. Jenson, Judicial Officer.

GH Dairy instituted this administrative proceeding by filing a Petition[1] and a "Motion for Direct Expedited Review and Issuance of Final Order, by the Secretary" [hereinafter Motion for Direct Review], on May 19, 2010. GH Dairy instituted the proceeding 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]. GH Dairy seeks direct review of its Petition by the Secretary of Agriculture or his delegate, the Judicial Officer, without having any part of the instant proceeding conducted before an administrative law judge (Mot. for Direct Review at 1, 7-8; Pet. at 17).

On May 28, 2010, International Dairy Foods Association and National Milk Producers Federation filed "Motion for Leave to Participate, and Brief of the International Dairy Foods Association and

[1]GH Dairy entitles its Petition "Verified Petition for Expedited Adjudicatory Review of Final Agency Decision, Published at 75 Fed. Reg. 10122 (Mar. 4, 2010), and of Final Order, Published at 75 Fed. Reg. 21157 (Apr. 23, 2010), in National Hearing Docket No. AMS-DA-09-0007" [hereinafter Petition].

the National Milk Producers Federation in Opposition to Petitioner's Request for Expedited, Direct Review" [hereinafter Motion to Intervene]. On June 7, 2010, the Administrator, Agricultural Marketing Service, United States Department of Agriculture, filed "Opposition to Petitioner's Motion for Direct Expedited Review, and Issuance of Final Adjudicatory Order, by the Secretary."

On June 22, 2010, GH Dairy filed "Consolidated Response in Opposition to the Intervention of the National Milk Producers Federation (NMPF) and the International Dairy Foods Association (IDFA) and Reply in Support of Motion for Direct and Expedited Review by the Secretary." On June 24, 2010, the Hearing Clerk transmitted the record to me for a ruling on GH Dairy's Motion for Direct Review, a ruling on International Dairy Foods Association and National Milk Producers Federation's Motion to Intervene, and consideration of the Petition.

The Rules of Practice provide for issuance of a decision by the Judicial Officer, without the prior benefit of an administrative law judge's initial decision, as follows:

> **§ 900.71 Hearing before Secretary.**
>
> The Secretary may act in the place and stead of a judge in any proceeding hereunder. When he so acts the hearing clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions and orders, and the Secretary shall thereupon, after due consideration of the record, issue his final order in the proceeding: *Provided*, That he may issue a tentative order in which event the parties shall be afforded an opportunity to file exceptions before the issuance of the final order.

7 C.F.R. § 900.71.

However, the plain language of 7 C.F.R. § 900.71 provides that the procedures in the Rules of Practice, through the expiration of the period provided for the filing of proposed findings of fact, conclusions, and orders, be completed prior to the Hearing Clerk's transmission of the record to the Judicial Officer for issuance of the Judicial Officer's

decision. Those procedures have not been completed in the instant proceeding, and the Rules of Practice contain no provision for truncating a proceeding in the manner sought by GH Dairy.

GH Dairy cites two cases in support of its Motion for Direct Review and Petition; I find both of these cases inapposite. *Milk Industry Foundation v. Glickman*, 949 F. Supp. 882 (D.D.C. 1996), does not address the Rules of Practice. *In re Exeter Orchards Ass'n* (Order With Respect to Answer to Application for Interim Relief), 28 Agric. Dec. 1 (1969), addresses the time for filing a response to a request for interim relief under 7 C.F.R. § 900.70. GH Dairy has not requested interim relief.

Thus, GH Dairy's Motion for Direct Review is denied and GH Dairy's Petition, which seeks premature "[d]irect adjudicatory review by the Secretary or his delegate, the Judicial Officer" (Pet. at 17), is dismissed. As GH Dairy's Petition is dismissed, I also dismiss International Dairy Foods Association and National Milk Producers Federation's Motion to Intervene, as moot.

For the foregoing reasons, the following Rulings and Order are issued.

RULINGS AND ORDER

1. GH Dairy's Motion for Direct Review, filed May 19, 2010, is denied.

2. GH Dairy's Petition, filed May 19, 2010, is dismissed.

3. International Dairy Foods Association and National Milk Producers Federation's Motion to Intervene, filed May 28, 2010, is dismissed.

DAVID L. NOBLE, d/b/a NOBLE FARMS.
A.Q. Docket No. 09-0033.
Order Denying Motion for Reconsideration.
Filed January 20, 2010.

AQ.

Darlene Bolinger, for the Administrator, APHIS.
R.C. von Doenhoff, Crockett, TX, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On October 14, 2009, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order: (1) concluding David L. Noble violated the Animal Health Protection Act, as amended (7 U.S.C. §§ 8301-8321) [hereinafter the Animal Health Protection Act], and the regulations promulgated under the Animal Health Protection Act (9 C.F.R. §§ 77.1-.41), as alleged in the Complaint; and (2) assessing Mr. Noble a $5,000 civil penalty (Decision and Order at 2). The Hearing Clerk served Mr. Noble with the ALJ's Decision and Order on October 19, 2009.[1]

On November 23, 2009, the Assistant Hearing Clerk issued a Notice of Effective Date of Default Decision and Order informing Mr. Noble and the Administrator that the ALJ's Decision and Order became effective on November 23, 2009. On November 24, 2009, Mr. Noble filed an appeal to the Judicial Officer. On December 14, 2009, the Administrator filed a Response to Appeal Petition. On December 17, 2009, I issued an Order denying the late appeal filed by Mr. Noble. *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009).

On January 11, 2010, Mr. Noble filed a "Motion for Reconsideration" of *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec.1060 (2009). On January 14, 2010, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a "Response to Motion for Reconsideration" in which the Administrator opposed Mr. Noble's Motion for Reconsideration. On January 19, 2010, the Hearing Clerk transmitted the record to me for a ruling on Mr. Noble's Motion for Reconsideration.

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[1]United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7022 7480.

CONCLUSION BY THE JUDICIAL OFFICER

Section 1.146(a)(3) of the rules of practice applicable to the instant proceeding[2] provides that a party to a proceeding must file a petition to reconsider the Judicial Officer's decision within 10 days after service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of decision of the Judicial Officer.**
>
> (a) *Petition requisite*— . . . .
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition . . . to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). The Hearing Clerk served Mr. Noble with *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009), on December 23, 2009.[3] Therefore, Mr. Noble's Motion for Reconsideration was required to be filed no later than January 4, 2010; instead, Mr. Noble filed the Motion for Reconsideration on January 11, 2010, 19 days after the Hearing Clerk served Mr. Noble with *In re David L. Noble* (Order Denying Late Appeal), 68 Agric. Dec. 1060 (2009). Accordingly, Mr. Noble's Motion for Reconsideration is

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[2]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under Certain Acts (9 C.F.R. pt. 99) [hereinafter the Rules of Practice].

[3]United States Postal Service Domestic Return Receipt for article number 7005 1160 0001 3559 9051.

late-filed and denied.[4]

For the foregoing reasons, the following Order is issued.

ORDER

1. David L. Noble's Motion for Reconsideration, filed January 11, 2010, is denied.

2. Administrative Law Judge Peter M. Davenport's Decision and Order, filed October 14, 2009, is the final decision in this proceeding.

RONALD WALKER, ALIDRA WALKER, AND TOP RAIL RANCH, INC.
A.Q. Docket No. 07-0131.
Stay Order.
Filed March 18, 2010.

AQ.

Lauren Axley and Darlene Bolinger, for the Administrator, APHIS.
Brenda L. Jackson, Canon City, CO, for Respondents.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

I issued *In re Ronald Walker*, 69 Agric. Dec. 40 (2010). On March 10, 2010, Ronald Walker, Alidra Walker, and Top Rail Ranch, Inc. [hereinafter Respondents], filed "Motion to Stay Agency Decision Pending Judicial Review." On March 16, 2010, Kevin Shea, Acting

[4]*See In re Mitchell Stanley* (Order Denying Pet. for Recons.), 65 Agric. Dec. 1171 (2006) (denying, as late-filed, a petition to reconsider filed 13 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (denying, as late-filed, a petition to reconsider filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch* (Order Denying Pet. for Recons.), 61 Agric. Dec. 593 (2002) (denying, as late-filed, a petition to reconsider filed 15 days after the date the Hearing Clerk served the respondent with the decision and order).

Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Response to Motion to Stay Agency Decision Pending Judicial Review" stating the Administrator does not oppose a stay of the Order issued in *In re Ronald Walker*, 69 Agric. Dec. 40 (2010), pending the outcome of proceedings for judicial review.

In accordance with 5 U.S.C. § 705, Respondents' "Motion to Stay Agency Decision Pending Judicial Review" is granted.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *In re Ronald Walker*, 69 Agric. Dec. 40 (2010), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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ROY JOSEPH SIMON, d/b/a JOE SIMON ENTERPRISES, INC.
A.Q. Docket No. 07-0103.
Order Denying Late Appeal.
Filed June 23, 2010.

AQ – Late-filed appeal.

Tom Bolick, for the Administrator, APHIS.
David L. Durkin, Washington, DC, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this administrative proceeding by filing a Complaint on May 7, 2007. The Administrator alleges that Roy Joseph Simon, d/b/a Joe Simon Enterprises, Inc., committed violations of sections 901-905 of the Federal Agriculture Improvement and Reform

Act of 1996 (7 U.S.C. § 1901 note) [hereinafter the Commercial Transportation of Equine for Slaughter Act] and the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations]. On June 15, 2007, Mr. Simon filed a timely answer denying the allegations in the Complaint.

On October 21 and 22, 2008, then Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ][1] conducted a hearing in Minneapolis, Minnesota. On August 5, 2009, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision in which he found Mr. Simon committed numerous violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations and assessed Mr. Simon a $36,500 civil penalty.

The Administrator received the Chief ALJ's Decision on August 6, 2009.[2] Mr. Simon received the Chief ALJ's Decision on August 11, 2009.[3] On September 10, 2009, the Administrator filed "Complainant's Appeal Petition" [hereinafter Appeal Petition] and a brief in support of the Appeal Petition. On December 4, 2009, Mr. Simon filed "Respondent's Combined Response to Complainant's Appeal Petition Pursuant to 7 C.F.R. § 1.145(b), or, in the Alternative, Petition to Reopen Hearing, for Rehearing, or Reargument of Proceeding for Limited Purposes Pursuant to 7 C.F.R. § 1.146" [hereinafter Response to the Administrator's Appeal Petition] and a brief in support of the Response to the Administrator's Appeal Petition. On December 7, 2009, the Hearing Clerk transmitted the record to me for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

The Administrator's Appeal Petition

[1]The Chief ALJ retired from federal service effective January 2, 2010.

[2]United States Department of Agriculture, Office of Administrative Law Judges, Hearing Clerk's Office, Request for Special Service, dated August 6, 2009.

[3]United States Postal Service Domestic Return Receipt for article number 7004 1160 0004 4085 9735.

The rules of practice applicable to the instant proceeding[4] provide that a party must appeal an administrative law judge's written decision to the Judicial Officer within 30 days after that party receives service of the written 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, . . . a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a). Therefore, the Administrator was required to file his Appeal Petition with the Hearing Clerk no later than 30 days after receiving service of the Chief ALJ's decision: namely, no later than September 8, 2009.[5] Instead, the Administrator filed the Appeal Petition

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[4]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

[5]The Administrator received service of the Chief ALJ's Decision on August 6, 2009. Thirty days after the date the Administrator received service of the Chief ALJ's Decision was Saturday, September 5, 2009. The Rules of Practice provide that when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

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

7 C.F.R. § 1.147(h). The next business day after Saturday, September 5, 2009, was, because of the Labor Day holiday, Tuesday, September 8, 2009. Therefore, the Administrator was required to file the Appeal Petition with the Hearing Clerk no later

(continued...)

2 days late, on September 10, 2009. Therefore, I deny the Administrator's Appeal Petition as untimely.

Mr. Simon's Response to the Administrator's Appeal

The Rules of Practice provide that an administrative law judge's decision becomes final and effective 35 days after service upon the respondent, as follows:

> **§ 1.142 Post-hearing procedure.**
>
> . . . .
>
> (c) *Judge's decision*. . . .
>
> . . . .
>
> (4) The Judge's decision shall become final and effective without further proceedings . . . if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145[.]

7 C.F.R. § 1.142(c)(4). Neither the Administrator nor Mr. Simon appealed the Chief ALJ's Decision to the Judicial Officer within 30 days after receiving service of the Chief ALJ's Decision, as provided in 7 C.F.R. § 1.145. Therefore, the Chief ALJ's Decision became final and effective 35 days after the Hearing Clerk served Mr. Simon with the Chief ALJ's Decision. The Hearing Clerk served Mr. Simon with the Chief ALJ's Decision on August 11, 2009,[6] and the Chief ALJ's Decision became final and effective on September 15, 2009. The Judicial Officer has no jurisdiction over a proceeding after an administrative law judge's decision becomes final and effective. Therefore, I have no jurisdiction to consider Mr. Simon's Response to the Administrator's Appeal Petition.

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[5](...continued)
than September 8, 2009.

[6]See note 3.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Administrator's Appeal Petition, filed September 10, 2009, is denied.

2. The Chief ALJ's Decision, filed August 5, 2009, is the final decision in the instant proceeding.

ZOOCATS, INC., MARCUS COOK, a/k/a MARCUS CLINE-HINES COOK, MELISSA COODY, a/k/a MISTY COODY d/b/a ZOO DYNAMICS AND ZOOCATS ZOOLOGICAL SYSTEMS; SIX FLAGS OVER TEXAS, INC. AND MARIAN BUEHLER.
AWA Docket No. 03-0035.
Stay Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody.
Filed January 8, 2010.

AWA.

Colleen A. Carroll, for the Administrator, APHIS.
Brian L. Sample, Dallas, TX, for Respondents ZooCats, Inc., Marcus Cook, and Melissa Coody.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

I issued *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. 737 (2009). Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], and ZooCats, Inc., Marcus Cook, and Melissa Coody [hereinafter Respondents] each filed a petition to reconsider the July 27, 2009, Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody. Subsequently, I issued *In re ZooCats, Inc.* (Order Denying Respondents' Petition To Reconsider And Administrator's Petition To Reconsider), 68 Agric. Dec. 1072 (2009).

On December 23, 2009, Respondents filed a motion for a stay of the Orders in the July 27, 2009, Decision as to ZooCats, Inc., Marcus Cook,

and Melissa Coody and the December 14, 2009, Order Denying Respondents' Petition To Reconsider And Administrator's Petition To Reconsider, pending the outcome of proceedings for judicial review. I provided the Administrator 7 days within which to respond to Respondents' motion for a stay.[1] The Administrator failed to file a timely response to Respondents' motion for a stay.

In accordance with 5 U.S.C. § 705, Respondents' motion for a stay is granted.

For the foregoing reasons, the following Order is issued.

ORDER

The Orders in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. 737 (2009), and *In re ZooCats, Inc.* (Order Denying Respondents' Petition To Reconsider And Administrator's Petition To Reconsider), 68 Agric. Dec. 1072 (2009), are stayed pending the outcome of proceedings for judicial review. This Stay Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

CURTIS MOORE, RACINE MOORE and VIDAL CORDOVA, d/b/a WALK ON THE WILD SIDE.
AWA Docket No. D-10-0021.
Dismissal Order.
Filed January 19, 2010.

AWA

Frank Martin, Jr. for APHIS.
Respondent Pro se.
Dismissal Order issued by Acting Chief Administrative Law Judge Peter M. Davenport.

[1]See Hearing Clerk's letter dated December 29, 2009.

JULIUS VON UHL d/b/a CIRCUS WINTERQUARTERS.
AWA Docket No. 07-0177.
Memorandum Order.
Filed January 26, 2010.

AWA.

Colleen A. Carroll, for APHIS.
Respondent, Pro se.
Order issued by Acting Chief Administrative Law Judge, Peter M. Davenport.

ORDER

This matter is before the Administrative Law Judge upon the Motion of the Administrator of the Animal and Plant Health Inspection Service (APHIS) to Enforce Terms of Consent Decision and Order issued in this matter on December 16, 2008. In that Consent Decision and Order the Respondent Von Uhl was assessed a $3,750.00 civil penalty which was suspended on condition that the Respondent spend no less than $3,750 on or before December 31, 2009 to expand each primary enclosure used to house large felids so as to provide each animal with sufficient space to make normal postural and social adjustments with adequate freedom of movement in its primary enclosure.

As the Decision and Order provided that the Administrative Law Judge shall issue an enforcement Order upon the Motion of the Administrator in the event the Respondent failed to make the required expenditures, the following Order is issued.

A Motion having been filed by the Administrator, which Motion is supported by the Declaration of Elizabeth J. Goldentyer, D.V.M. attesting as to the failure of the Respondent to make the expenditures required by the Consent Decision and Order entered in this case, it is **ORDERED** as follows:

1. So much of the Consent Decision and Order entered on December 16, 2008 as suspended payment of a civil penalty of $3,750.00 upon condition of making specified expenditures is **VACATED**

and the Respondent Julius Von Uhl, an individual d/b/a Circus Winterquarters is **ASSESSED** and **ORDERED** to pay a civil penalty of $3,750.00.
Payment should be notated as being in AWA Docket No. 07-0177 and delivered to:

Colleen A. Carroll, Esquire
Office of General Counsel
United States Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-1417

2. The Animal Welfare Act License No. 32-C-0102 issued to the Respondent is **SUSPENDED** until such time as payment of the civil penalty is received by Counsel for APHIS.

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

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KATHY JO BAUCK d/b/a PUPPY'S ON WHEELS, a/k/a "PUPPIES ON WHEELS" AND "PICK OF THE LITTER".
AWA Docket No. D-09-0139.
Stay Order.
Filed February 16, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Zenas Bear & Associates, Hawley, MN, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

I issued *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), in which I terminated Ms. Bauck's Animal Welfare Act license and disqualified Ms. Bauck from becoming licensed under the Animal Welfare Act for 2 years. On January 21, 2010, Ms. Bauck filed a "Motion for Stay

Pending Appeal Pursuant to 5 U.S.C. § 705" [hereinafter Motion for Stay], and a "Memorandum in Support of Motion for Stay Pending Appeal." Ms. Bauck also incorporated by reference a "Memorandum in Support of Motion to Stay Agency Decision Pending Appeal" which she has filed with the United States Court of Appeals for the Eighth Circuit.

On February 5, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Opposition to Respondent's Motion for Stay." On February 16, 2010, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Ms. Bauck's Motion for Stay.

Ms. Bauck's motion for a stay, pending before the United States Court of Appeals for the Eighth Circuit, would normally deprive me of jurisdiction to rule on the Motion for Stay pending before me; however, the Administrator asserts the Eighth Circuit has directed the United States Department of Agriculture to advise the court when I have ruled on Ms. Bauck's Motion for Stay (Complainant's Opposition to Respondent's Motion for Stay at 4). After a careful review of Ms. Bauck's filings in support of her Motion for Stay and the Administrator's filing in opposition to Ms. Bauck's Motion for Stay, I grant Ms. Bauck's Motion for Stay in accordance with 5 U.S.C. § 705.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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SAM MAZZOLA d/b/a WORLD ANIMAL STUDIOS, INC. AND WILDLIFE ADVENTURES OF OHIO, INC.
AWA Docket No. 06-0010.
and
SAM MAZZOLA.
AWA Docket No. D-07-0064
Order Denying Petition to Reconsider and Ruling Denying Motion for Oral Argument.
Filed February 19, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

I issued a Decision and Order in the instant proceeding on November 24, 2009. *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009). On December 2, 2009, the Hearing Clerk served Sam Mazzola with the Decision and Order.[1] Section 1.146(a)(3) of the Rules of Practice provides that a petition to reconsider the Judicial Officer's decision must be filed within 10 days after the date of service of the decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . . .

[1]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3860 8668.

> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). Therefore, Mr. Mazzola was required to file a petition to reconsider no later than December 14, 2009; however, I extended the time for Mr. Mazzola's filing a petition to reconsider to January 22, 2010.[2] On January 25, 2010, Mr. Mazzola filed a petition to reconsider *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), and a motion for oral argument on his petition to reconsider. On February 17, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed "Complainant's Opposition to Respondent's Petition for Reconsideration." On February 18, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), and a ruling on Mr. Mazzola's motion for oral argument.

CONCLUSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Mr. Mazzola's petition to reconsider, which Mr. Mazzola filed 3 days after the date it was due, was filed too late. Accordingly, Mr. Mazzola's petition to reconsider must be denied.[3] Moreover, since Mr. Mazzola's

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[2]See December 9, 2009, Informal Order Extending Time To File Petition To Reconsider in which I extend Mr. Mazzola's time for filing a petition to reconsider to January 8, 2010; and January 6, 2010, Informal Order Extending Time To File Petition To Reconsider in which I extend Mr. Mazzola's time for filing a petition to reconsider to January 22, 2010.

[3]*See In re David L. Noble* (Order Denying Motion for Recons.), 69 Agric. Dec. 617 (2010) (denying, as late-filed, the respondent's motion for reconsideration filed 19 days after the Hearing Clerk served the respondent with the order denying late appeal); *In re*

(continued...)

petition to reconsider is denied, Mr. Mazzola's motion for oral argument on the petition to reconsider is denied.

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

ORDER

1. Sam Mazzola's petition to reconsider, filed January 25, 2010, is denied.

2. Sam Mazzola's motion for oral argument on the petition to reconsider, filed January 25, 2010, is denied.

SAM MAZZOLA d/b/a WORLD ANIMAL STUDIOS, INC. AND WILDLIFE ADVENTURES OF OHIO, INC.
AWA Docket No. 06-0010.
and
SAM MAZZOLA.
AWA Docket No. D-07-0064
Order Vacating Order Denying Petition to Reconsider and Ruling Denying Motion for Oral Argument.
Filed March 1, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.

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[3](...continued)
Mitchell Stanley (Order Denying Pet. for Recons.), 65 Agric. Dec. 1171 (2006) (denying, as late-filed, a petition to reconsider filed 13 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (denying, as late-filed, a petition to reconsider filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch* (Order Denying Pet. for Recons.), 61 Agric. Dec. 593 (2002) (denying, as late-filed, a petition to reconsider filed 15 days after the date the Hearing Clerk served the respondent with the decision and order).

Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

I issued a Decision and Order in the instant proceeding on November 24, 2009. *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009). On December 2, 2009, the Hearing Clerk served Mr. Mazzola with the Decision and Order.[1] The rules of practice applicable to the instant proceeding[2] provide that a petition to reconsider the Judicial Officer's decision must be filed within 10 days after the date of service of the decision. Therefore, Mr. Mazzola was required to file a petition to reconsider no later than December 14, 2009; however, Mr. Mazzola requested and I granted two extensions of time within which to file a petition to reconsider.[3] On January 25, 2010, Mr. Mazzola filed a petition to reconsider *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009). On February 19, 2010, I denied Mr. Mazzola's petition to reconsider on the ground that Mr. Mazzola's petition to reconsider was untimely.

On February 24, 2010, Mr. Mazzola informed me, by telephone, that my January 6, 2010, Informal Order Extending Time To File Petition To Reconsider, which extends Mr. Mazzola's time for filing a petition to reconsider to January 22, 2010, does not reflect the extension I agreed to in my January 6, 2010, telephone conversation with him. Instead, Mr. Mazzola recalls that on January 6, 2010, he requested an extension to January 28, 2010, and that I had orally agreed to that extension. I give Mr. Mazzola the benefit of the doubt and hereby vacate my February 19, 2010, Order Denying Petition to Reconsider and Ruling Denying Motion for Oral Argument and find Mr. Mazzola's January 25, 2010, petition to reconsider timely. Accordingly, I will consider the

[1]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3860 8668.

[2]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

[3]See December 9, 2009, Informal Order Extending Time To File Petition To Reconsider in which I extend Mr. Mazzola's time for filing a petition to reconsider to January 8, 2010; and January 6, 2010, Informal Order Extending Time To File Petition To Reconsider in which I extend Mr. Mazzola's time for filing a petition to reconsider to January 22, 2010.

merits of Mr. Mazzola's petition to reconsider and issue an appropriate order in a future filing.

For the foregoing reason, the following Order is issued.

ORDER

1. Mr. Mazzola's January 25, 2010, petition to reconsider is deemed timely.

2. The Judicial Officer's February 19, 2010, Order Denying Petition to Reconsider and Ruling Denying Motion for Oral Argument is vacated.

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KATHY JO BAUCK d/b/a PUPPY'S ON WHEELS, a/k/a "PUPPIES ON WHEELS" AND "PICK OF THE LITTER."
AWA Docket No. D-09-0139.
Order Denying Motion to Lift Stay.
Filed March 17, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Zenas Bear & Associates, Hawley, MN, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

I issued *In re Kathy Jo Bauck* (Stay Order), 69 Agric. Dec. 528 (2010), in which I stayed the Order in *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), pending the outcome of proceedings for judicial review. On March 5, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed "Complainant's Motion to Lift Stay." On March 10, 2010, Kathy Jo Bauck filed "Respondent's Response to Secretary of Agriculture's Motion to Lift Stay" stating Ms. Bauck intends to seek re-hearing before the United States Court of Appeals for the Eighth Circuit pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure.

As proceedings for judicial review are not concluded, "Complainant's Motion to Lift Stay" is denied.

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SAM MAZZOLA d/b/a WORLD ANIMAL STUDIOS, INC. AND WILDLIFE ADVENTURES OF OHIO, INC.
AWA Docket No. 06-0010.
and
SAM MAZZOLA.
AWA Docket No. D-07-0064.
Order Denying Petition to Reconsider and Ruling Denying Motion for Oral Argument.
Filed March 29, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On November 24, 2009, I issued a Decision and Order in which I found that Sam Mazzola violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations].[1] On January 25, 2010, Mr. Mazzola filed a timely request that I reconsider my November 24, 2009, Decision and Order, and a motion for oral argument on his petition for reconsideration [hereinafter Petition for Reconsideration].[2] On February 17, 2010, the Administrator, Animal and Plant Health

[1]*In re Sam Mazzola*, 68 Agric. Dec. 822 (2009).

[2]See *In re Sam Mazzola* (Order Vacating Order Denying Pet. to Reconsider and Ruling Denying Mot. for Oral Argument), 69 Agric. Dec.532 (2010) (discussing the basis for my conclusion that Mr. Mazzola's January 25, 2010, Petition for Reconsideration was timely).

Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Opposition to Respondent's Petition for Reconsideration."

Petitions for reconsideration should be used sparingly. The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Mr. Mazzola in his Petition for Reconsideration, I find no error of fact or law necessitating modification of the November 24, 2009, Decision and Order. Moreover, Mr. Mazzola does not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of the November 24, 2009, Decision and Order. Therefore, I deny Mr. Mazzola's Petition for Reconsideration. I note that the rules of practice applicable to the instant proceeding[3] do not require a petition for reconsideration in order to exhaust administrative remedies. Therefore, review by the appropriate judicial forum is available without a party seeking reconsideration by the Judicial Officer. (7 C.F.R. § 1.145(i).)

DISCUSSION BY THE JUDICIAL OFFICER ON RECONSIDERATION

Mr. Mazzola raises eight issues in his Petition for Reconsideration. First, Mr. Mazzola contends he did not receive notice of the Animal and Plant Health Inspection Service's [hereinafter APHIS] denial of his October 12, 2006, application to renew Animal Welfare Act license number 31-C-0065 (Pet. for Recons. at first unnumbered page).

The record establishes that, by letter dated October 27, 2006, APHIS notified Mr. Mazzola that he could not transfer an Animal Welfare Act

[3]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

license from one person to another and returned the Animal Welfare Act license renewal application submitted by Mr. Mazzola on behalf of World Animal Studios (CX 1 at 11). After several conversations and correspondence between APHIS and Mr. Mazzola (Tr. 1779, 1787-92), in a letter dated November 15, 2006, APHIS notified Mr. Mazzola that Animal Welfare Act license number 31-C-0065 had expired and was no longer valid (CX 1 at 31). In addition to the written notices provided to Mr. Mazzola, APHIS animal care inspector Randall Coleman informed Mr. Mazzola in person on January 5, 2007, that APHIS had denied Mr. Mazzola's Animal Welfare Act license application and that APHIS had notified Mr. Mazzola of the license denial by mail (CX 54 at 12). Therefore, I reject Mr. Mazzola's contention that APHIS failed to notify Mr. Mazzola that his October 12, 2006, application for renewal of Animal Welfare Act license number 31-C-0065 had been denied.

Second, Mr. Mazzola asserts Dr. Goldentyer, Eastern Regional Director, Animal Care Division, APHIS, erroneously informed him that he could not transfer Animal Welfare Act license number 31-C-0065 from a corporation ("World Animal Studios Inc.") to an individual (World Animal Studios). (Pet. for Recons. at first unnumbered page.)

"World Animal Studios Inc." was the original holder of Animal Welfare Act license number 31-C-0065. Mr. Mazzola continued to renew Animal Welfare Act license number 31-C-0065 in the name of "World Animal Studios Inc." through 2005 (CX 1 at 1-8). On October 12, 2006, Mr. Mazzola submitted to APHIS a license renewal application for Animal Welfare Act license number 31-C-0065, in which Mr. Mazzola changed the licensee's name from "World Animals Studios Inc." to "World Animals Studios" and changed the type of organization from "corporation" to "individual" (CX 1 at 9). APHIS notified Mr. Mazzola that 9 C.F.R. § 2.5(d) prohibits transfer of Animal Welfare Act licenses from one person to another and returned the license renewal application to Mr. Mazzola (CX 1 at 11). Mr. Mazzola submitted additional information to support renewal of Animal Welfare Act license number 31-C-0065, including a statement that he had dissolved World Animal Studios, Inc. (CX 1 at 13-14). After considering Mr. Mazzola's supplemental information, APHIS notified Mr. Mazzola by letter dated November 15, 2006, that Animal Welfare Act license number 31-C-0065 had not been renewed and was no longer valid (CX 1 at 31).

The Regulations prohibit the transfer of an Animal Welfare Act license from one person to another, as follows:

§ 2.5 Duration of license and termination of license.

. . . .

(d) Licenses are issued to specific persons for specific premises and do not transfer upon change of ownership, nor are they valid at a different location.

9 C.F.R. § 2.5(d). Mr. Mazzola's October 12, 2006, application to renew Animal Welfare Act license number 31-C-0065 in the name of "World Animal Studios" was an attempt to transfer Animal Welfare Act license number 31-C-0065 from one person ("World Animal Studios Inc." - a corporation) to another ("World Animal Studios" - an individual); therefore, I reject Mr. Mazzola's contention that Dr. Goldentyer provided him erroneous information.

Third, Mr. Mazzola contends Animal Welfare Act license number 31-C-0065 was always issued to "Sam Mazzola d/b/a World Animal Studios Inc." (Pet. for Recons. at first and second unnumbered pages).

Copies of Animal Welfare Act license number 31-C-0065 included in the record establish the license was issued to "WORLD ANIMAL STUDIOS INC." (CX 1 at 6, 8). Similarly, each license renewal form indicates the licensee is "World Animal Studios Inc." (CX 1 at 1-5, 7, 9). Therefore, I reject Mr. Mazzola's contention that Animal Welfare Act license number 31-C-0065 was always issued to "Sam Mazzola d/b/a World Animal Studios Inc."

Fourth, Mr. Mazzola requests that I reconsider *In re Sam Mazzola*, 68 Agric. Dec.822 (2009), in its entirety and that I provide him an opportunity "to present oral arguments to each and every count in" *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009) (Pet. for Recons. at second unnumbered page).

Administrative Law Judge Jill S. Clifton conducted a 19-day hearing in the instant proceeding, received approximately 170 exhibits into evidence, and heard testimony from 19 witnesses. In addition, Mr.

Mazzola filed a post-hearing brief, an appeal petition, a response to the Administrator's cross-appeal, and a Petition for Reconsideration. Mr. Mazzola has had ample opportunity to present his position in the instant proceeding. Under the circumstances, I conclude oral argument would serve no useful purpose, and I deny Mr. Mazzola's request for oral argument.

Fifth, Mr. Mazzola contends, in order to revoke an Animal Welfare Act license, a valid license must exist. Mr. Mazzola asserts, since I revoked Animal Welfare Act license number 31-C-0065 in *In re Sam Mazzola*, 68 Agric. Dec. 822, 852 (2009), Animal Welfare Act license number 31-C-0065 must exist in some form. (Pet. for Recons. at second unnumbered page.)

The Secretary of Agriculture is authorized under 7 U.S.C. § 2149(a) to revoke a violator's Animal Welfare Act license, even if the license is cancelled prior to revocation. *In re Eric John Drogosch*, 63 Agric. Dec. 623, 648-49 (2004). Therefore, I reject Mr. Mazzola's argument that, in order to revoke an Animal Welfare Act license, a valid license must exist at the time of revocation.

Sixth, Mr. Mazzola contends my revocation of Animal Welfare Act license number 31-C-0065 and disqualification of Mr. Mazzola from obtaining an Animal Welfare Act license are imposed because he "wants a court to hear [his] case" (Pet. for Recons. at second unnumbered page.)

Mr. Mazzola's intention to seek judicial review of my Decision and Order is not a factor that I considered when determining revocation of Animal Welfare Act license number 31-C-0065 and disqualification of Mr. Mazzola from obtaining an Animal Welfare Act license are appropriate sanctions. Based on my review of the record, I conclude revocation of Animal Welfare Act license number 31-C-0065 and disqualification of Mr. Mazzola from obtaining an Animal Welfare Act license are warranted in law and justified by the facts.

Seventh, Mr. Mazzola contends *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), unfairly changes the lives of individuals other than himself and "animals that we all love" (Pet. for Recons. at second unnumbered page).

Mr. Mazzola does not indicate how *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), unfairly changes the lives of individuals, other than himself, or animals. Mr. Mazzola is the sole respondent and sole

petitioner in the instant proceeding. Therefore, I find no merit in Mr. Mazzola's contention that *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), unfairly changes the lives of individuals other than himself, and "animals that we all love."

Eighth, Mr. Mazzola contends *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), violates the purpose of the Animal Welfare Act and abandons animals the Animal Welfare Act is designed to protect (Pet. for Recons. at second unnumbered page).

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. I have carefully reviewed *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), and find the Decision and Order is consistent with the purposes of the Animal Welfare Act. Moreover, the Secretary of Agriculture is not the owner of the animals in question; therefore, I conclude the Secretary cannot "abandon" the animals. Further still, *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), does not require Mr. Mazzola to abandon his animals.

For the foregoing reasons and the reasons set forth in *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), Mr. Mazzola's Petition for Reconsideration is denied.

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration (7 C.F.R. § 1.146(b)). Mr. Mazzola's Petition for Reconsideration was timely filed and automatically stayed *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009). Therefore, since Mr. Mazzola's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration and Ruling Denying Motion for Oral Argument.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Mazzola, his agents, employees, successors, and assigns, directly or indirectly, through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

a. operating as an exhibitor without an Animal Welfare Act license;

b. operating as a dealer without an Animal Welfare Act license;

c. interfering with, threatening, abusing, or harassing any APHIS official in the course of carrying out his or her duties under the Animal Welfare Act;

d. filing any false charge with the United States Department of Agriculture, Office of the Inspector General, in an effort to interfere with

any APHIS official in the course of carrying out his or her duties under the Animal Welfare Act;

e. failing or refusing to make facilities, animals, and records available to an APHIS official for inspection;

f. failing to have a written program of veterinary care available for inspection;

g. allowing a member of the public to enter a primary enclosure containing an adult bear or an adult tiger without sufficient distance or barriers between the animals and the public so as to assure the safety of the animals and the public; and

h. housing any bear or tiger in an enclosure that lacks adequate structural integrity and height to contain the animal.

Paragraph 1 of this Order shall become effective 1 day after service of this Order on Mr. Mazzola.

2. Animal Welfare Act license number 31-C-0065 is revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Mr. Mazzola.

3. Mr. Mazzola is permanently disqualified from obtaining a license under the Animal Welfare Act and the Regulations.

Paragraph 3 of this Order shall become effective immediately upon service of this Order on Mr. Mazzola.

4. Mr. Mazzola is assessed a $21,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Babak Rastgoufard
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Babak Rastgoufard within 60 days after service of this Order on Mr. Mazzola.

Mr. Mazzola shall state on the certified check or money order that payment is in reference to AWA Docket No. 06-0010.

5. Mr. Mazzola's Petition opposing APHIS' denial of Mr. Mazzola's November 1, 2006, Animal Welfare Act license application, is denied.

Paragraph 5 of this Order shall become effective immediately upon service of this Order on Mr. Mazzola.

RIGHT TO JUDICIAL REVIEW

Mr. Mazzola has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Mazzola must seek judicial review within 60 days after entry of the Order in this Decision and Order.[4] The date of entry of the Order in this Decision and Order is March 29, 2010.

BRIAN KARL TURNER.
AWA Docket No. 09-0128.
Remand Order.
Filed April 7, 2010.

AWA.

Rastgoufard, for the Acting Administrator, APHIS.
Respondent, Pro se.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding on June 4, 2009, by filing an "Order to Show Cause Why Animal Welfare License 88-C-0158 Should Not Be Terminated" [hereinafter Order to Show Cause]. On December 22, 2009, after Brian Karl Turner filed a response to the Order to Show Cause, the Administrator filed a motion for summary

[4]7 U.S.C. § 2149(c).

judgment. Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] extended the time for Mr. Turner's filing a response to the Administrator's motion for summary judgment to February 2, 2010.[1]

On March 1, 2010, the ALJ issued a Decision and Order in which he found Mr. Turner had not filed a response to the Administrator's motion for summary judgment and granted the motion for summary judgment. Mr. Turner appealed the ALJ's Decision and Order stating he had filed a timely response to the Administrator's motion for summary judgment.

On April 7, 2010, the Hearing Clerk informed the Legal Technician employed by the Office of the Judicial Officer that, on January 21, 2010, Mr. Turner had filed a response to the Administrator's motion for summary judgment with the Hearing Clerk but that Mr. Turner's response had been mis-filed. The Hearing Clerk transmitted the original of Mr. Turner's response to the Administrator's motion for summary judgment to me and requested that I properly file Mr. Turner's response in the record, which I have done.

As the ALJ did not have an opportunity to consider Mr. Turner's timely response to the Administrator's motion for summary judgment, I vacate the ALJ's March 1, 2010, Decision and Order and remand the instant proceeding to the ALJ for consideration of Mr. Turner's response.

For the foregoing reasons, the following Remand Order is issued.

REMAND ORDER

1. The ALJ's March 1, 2010, Decision and Order is vacated.
2. The instant matter is remanded to the ALJ for further proceedings in accordance with the applicable rules of practice.[2]

———————

[1]See the ALJ's January 5, 2010, "Order and Notice to the Parties."

[2]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

BRIDGEPORT NATURE CENTER, INC., HEIDI M. BERRY RIGGS, and JAMES LEE RIGGS, d/b/a GREAT CATS OF THE WORLD.
AWA Docket No. 00-0032.
Decision on Remand.
Filed May 24, 2010.

AWA – Exhibition of exotic animals – Photo sessions – Direct contact – Juvenile tigers – General viewing public – Minimal risk.

Colleen A. Carroll, for the Administrator, APHIS.
S. (Stephen) Cass Weiland, Esq., and Shannon W. Conway, Esq., for Bridgeport Nature Center and Heidi M. Berry.
James Lee Riggs, Pro se.
Decision on Remand issued by Jill S. Clifton, Administrative Law Judge.

Decision Summary

1. This Decision is not applicable to other situations arising under the same handling regulations. A Consent Decision, entered just the summer before, in August 1998 (CX 3, attached), which guided the Respondents' exhibition of tigers in "photo shoots" during two months of the summer of 1999, makes this case unique. In the summer of 1999, the Respondents had no notice of policies that would later be broadcast to Animal Welfare Act licensees, policies that the Respondents heard for the first time at their hearing, in February 2002. The principal issue is whether the Respondents, who were exhibiting their exotic cats at fairs during July through September 1999, were ***safely*** exhibiting their tigers during "close encounter" photo opportunities. I decide that there were occasions at the Iowa State Fair on August 20, 1999, which are fully explained below, when the Respondents violated 9 C.F.R. § 2.131(b)(1)[1] and 9 C.F.R. § 2.131(c)(3),[2] as follows: (a) the Respondents permitted more than minimal risk of harm to the tiger and to the public, in violation of 9 C.F.R. § 2.131(b)(1); (b) the Respondents failed to

[1]now found at 9 C.F.R. § 2.131(c)(1); references herein are to regulation numbering in effect when the Complaint was drafted

[2]now found at 9 C.F.R. § 2.131(d)(3); references herein are to regulation numbering in effect when the Complaint was drafted

maintain sufficient distance and/or barriers between their animals and the general viewing public, in violation of 9 C.F.R. § 2.131(b)(1); and (c) the Respondents failed to keep their tigers under the direct control and supervision of a knowledgeable and experienced animal handler, in violation of 9 C.F.R. § 2.131(c)(3). Except for these specified occasions during the Iowa State Fair on August 20, 1999, I do not find violations of either 9 C.F.R. § 2.131(b)(1) or 9 C.F.R. § 2.131(c)(3). With regard to the Northern Wisconsin State Fair on July 10, 1999, (a) I decide that the risk of harm to Ms. Kristina ("Kris") Sniedze and the public and the tiger was minimal or less; and that the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public, including Ms. Sniedze, and I do not find violations of 9 C.F.R. § 2.131(b)(1); and (b) I decide that the Respondents kept their tiger under the direct control and supervision of a knowledgeable and experienced animal handler, and I do not find violations of 9 C.F.R. § 2.131(c)(3). With regard to the York Fair on September 10, 1999, (a) I decide that Mr. Kevin Johns was not a member of the public but was instead a volunteer who had trained all day (a trainee), and furthermore the risk of harm to Mr. Kevin Johns and the public and the tigers was minimal or less; and that the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public, including Mr. Johns, and I do not find violations of 9 C.F.R. § 2.131(b)(1); and (b) I decide that the Respondents kept their tigers under the direct control and supervision of a knowledgeable and experienced animal handler, and I do not find violations of 9 C.F.R. § 2.131(c)(3). I decide that there was no record-keeping violation at the Dutchess County Fair on August 28, 1999; and that consequently there was no violation of 9 C.F.R. § 2.75(b). The parties' submissions filed in June 2008 addressed the appropriate sanctions to be imposed. I decide that Respondent Bridgeport Nature Center, Inc. (dissolved in July 2004; frequently herein "Bridgeport") and Respondent Heidi M. Berry Riggs (frequently herein "Ms. Berry") shall be jointly and severally assessed a civil penalty of **$1,500.00**. I decide that Respondent James Lee ("Jay") Riggs (frequently herein "Mr. Riggs") shall be assessed a civil penalty of **$1,500.00**. The parties agree that consideration of Mr. Riggs'

Animal Welfare Act license application and denial is MOOT; *see* Mr. Riggs' June 3, 2008 filing; *see* Complainant's June 5, 2008 filing, p. 3.

2. Further, I decide that I erroneously interpreted the handling regulation 9 C.F.R. § 2.131(b)(1), in my partial Decision issued in 2006 (*In re Bridgeport Nature Center, Inc., et al.*, 65 Agric. Dec. 1039). I erroneously thought "the public" and "the general viewing public" mean two different things; I now know that the terms are used interchangeably in 9 C.F.R. § 2.131(b)(1). Below I explain my current understanding of that regulation's requirements, based in large part on subsequent testimony in subsequent hearing not involving the Respondents. Obviously, such information was not available to any of us during the hearing in 2002, and more importantly not available to the Respondents in the summer of 1999, and I conclude that the Respondents could not have discerned such fine points of the handling regulation requirements in the summer of 1999. The incidents complained of here happened more than 10 years ago - - the Respondents were not on notice of handling regulation requirements then, as licensees have since been made aware. Thus, this Decision has little applicability to more recent allegations of noncompliance with handling regulations requirements. *See* paragraphs 91 and 92.

Introduction

3. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or the "Complainant"). The Complaint and Order to Show Cause (frequently herein the "Complaint"), filed on May 5, 2000, alleged violations of the Animal Welfare Act, as amended, 7 U.S.C. § 2131 *et seq*. (frequently herein the "AWA" or the "Act"); the regulations, 9 C.F.R. § 1.1 *et seq*. (frequently herein the "Regulations"); and the standards, 9 C.F.R. § 3.1 *et seq*. (frequently herein the "Standards"). The three Respondents are Bridgeport, Ms. Berry, and Mr. Riggs. The "Respondents" refers to all three Respondents (Bridgeport, Ms. Berry, and Mr. Riggs), collectively. The Respondents' Answer timely filed on May 25, 2000, generally denied the allegations of the Complaint and asserted affirmative defenses.

4. The Respondents exhibited tigers and other exotic cats as Great Cats

of the World during the summer of 1999, at fairs, in a traveling exhibit. No one was hurt; there were no accidents or incidents. Still, APHIS did not trust the Respondents' exhibitions:

> (a) The Respondents appeared to be violating the terms of a Consent Decision[3] entered just the summer before, in August 1998 (CX 3, attached). The Consent Decision required, among other things,[4] that during photographic sessions with members of the public, Respondents' tigers were to be less than **six months** in age, **and** less than **seventy-five pounds** in weight, **and collared, and on a leash** no longer than 18 inches in length **at all times**. CX 3. The **general public** was to be kept away by a **barrier at least fifteen feet** from the exhibit. CX 3.
> (b) The Respondents' handler did not hold onto the tiger, or a leash attached to the tiger's collar, **at all times** during photo shoots. Such **direct contact**, according to APHIS,[5] was required in order to have "direct control" (*see* 9 C.F.R. §§ 2.100(a) and 2.131(c)(3)), in addition to all other safeguards.
> (c) In some situations the Respondents allowed small children to be in close proximity to a photo opportunity tiger; allowed a photo opportunity tiger to be draped across people's laps, including children's laps; allowed large numbers of people to be seated in the same enclosure with a photo opportunity tiger, within 10 to 20 feet from that tiger while waiting their turn; allowed a photo opportunity tiger to be draped across people's laps in the midst of the large number of people seated waiting their turn; and allowed their worker to be inside a tigers' enclosure that held multiple tigers, including tigers larger and

[3]Only two of the Respondents were parties to the Consent Decision, Heidi Berry Riggs and Bridgeport Nature Center, Inc.

[4]including compliance with the Animal Welfare Act and its regulations and standards,

[5]*See* especially the testimony of APHIS Animal Care Inspector Dr. Steven I. Bellin (Ph.D., D.V.M.). Tr. 371-461. *See also* the APHIS Brief, pp. 12-13.

older than the photo opportunity tigers, with no other worker watching to assist if needed.

(d) APHIS's concept of safety during photo shoots of human(s) with a tiger had evolved, to require more than had been delineated in the Consent Decision and more than had been required of the Respondents in the past. APHIS had come to prefer separating the tiger, by bullet-proof glass or plexiglas or another barrier, or distance, from the human(s) who would have their picture taken with the tiger.

5. The Respondents are alleged to have committed violations at four fairs, during the summer of 1999:

- Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999,
- Iowa State Fair, Des Moines - August 20, 1999,
- Dutchess County Fair, Rhinebeck, New York - August 28, 1999, and
- York Fair, York, Pennsylvania - September 10, 1999.

Special Issues

6. During the Respondents' photo shoots, when a tiger's actions and behavior were controlled by a number of factors including the tiger's fixation on a bottle, and the handler was in close proximity to the tiger's head and the bottle, and a human being photographed (or videoed) was the one holding the bottle - - was the tiger under "direct control and supervision" of the handler for purposes of 9 C.F.R. §§ 2.100(a) and 2.131(c)(3)?

7. During the Respondents' photo shoots, was direct contact (touching/holding) by the handler of a tiger or its leash required to keep a tiger under "direct control and supervision" for purposes of 9 C.F.R. §§ 2.100(a) and 2.131(c)(3)?

8. To comply with 9 C.F.R. §§ 2.100(a) and 2.131(b)(1)), were the Respondents required during their photo shoots to "have sufficient distance and/or barriers" between the photo shoot tiger and the human(s) posing with the tiger? Or between the photo shoot tiger and the large group of humans seated within the photo shoot tiger's enclosure, waiting

their turn to pose?
9. What is the meaning of the terms "the general viewing public" and "the public," as used in 9 C.F.R. §§ 2.100(a) and § 2.131(b)(1)?
10. When the animal being exhibited is a tiger, does the term "minimal risk" mean no risk at all, for purposes of 9 C.F.R. §§ 2.100(a) and § 2.131(b)(1)? Even if so with an adult tiger, would the term "minimal risk" mean no risk at all, no matter the age and weight of the tiger?
11. Was news reporter Kevin Johns a member of the public while he was promoting the York Fair, on location at the Respondents' traveling exhibit? 12. If there were no violations of the Animal Welfare Act or its Regulations and Standards, what consequences if any flow from violating the provisions of the Consent Decision described above in paragraph 1?
13. Were the Respondents "participating in State and county fairs" and thereby excluded from being an "exhibitor," under 7 U.S.C. § 2132(h) and 9 C.F.R. § 1.1?

Procedural History

14. For the six handling violations and one record-keeping violation alleged in the Complaint, APHIS sought license revocation, permanent disqualification from being licensed, civil penalties, and related remedies from the three Respondents, doing business as Great Cats of the World. By Remand Order filed January 18, 2008, *In re Bridgeport Nature Center, Inc.*, 67 Agric. Dec. 384 (2008), (*available on line*, AWA Docket No. 00-0032 http://www.nationalaglawcenter.org/decisions/#awa), the Judicial Officer directed me to issue a complete decision, particularly to address all issues in this proceeding. (I had deferred issues; *see* paragraph 24 in my partial Decision issued November 1, 2006, *In re Bridgeport Nature Center, Inc., et al.*, 65 Agric. Dec. 1039, 1044 (*available also on line,* http://www.dm.usda.gov/oaljdecisions/initdecisions-archive_pre2007.htm).
15. The hearing was held in Dallas, Texas on four days, February 25-28, 2002.

16. The transcript is referred to as "Tr." APHIS filed proposed corrections on October 21, 2002, all of which are accepted and the transcript is ordered corrected accordingly, except that Tr. 98:17, 227:16, and 329:12 shall remain unchanged. I have physically marked all changes on the transcript accordingly. On my own motion, I ordered the additional corrections listed on Appendix C of the partial Decision, and I have physically marked those changes on the transcript as well.

17. APHIS called ten witnesses: Ms. Jan Baltrush (Tr. 35-79); Mr. Charles Frank Willey (Tr. 79-92); Mr. William John Swartz (Tr. 94-169, 488-508); Mr. David Baird Green (Tr. 174-219, 461-488); Mr. Robert Gerard Markmann (Tr. 220-258, 538-571); Mr. Julius Olson ("Pinky") Lee (Tr. 264-278); Ms. Kristina ("Kris") Sniedze (Tr. 279-311); Mr. Gregory C. Houghton (Tr. 312-361); Ms. Patricia Martin Lesko (Tr. 362-370); and Dr. Steven I. Bellin (Ph.D., D.V.M.) (Tr. 371-461).

18. The Respondents called three witnesses: Ms. Heidi M. Berry Riggs (Tr. 573-685); Mr. Marcus Cook (Tr. 686-744); and Mr. James Lee ("Jay") Riggs (Tr. 745-916).

19. The following Complainant's or Government's (APHIS's) exhibits were admitted into evidence: CX 1 through CX 45 (except that CX 37 p. 15 was rejected). Tr. 537, 918. A chart referring to the transcript page(s) where each Complainant's exhibit was admitted is Appendix A to the partial Decision.

20. The following Respondents' exhibits were admitted into evidence: RX 4 (admitted Tr. 683-84); RX 5 (admitted Tr. 918); and RX 17, which was admitted for whatever limited purpose it might serve (Tr. 821).

21. One Administrative Law Judge exhibit was admitted into evidence: ALJX 1 (admitted Tr. 905).

22. The record also includes, in a sealed envelope, Mr. Swartz's report. Tr. 906. *See* Tr. 919, "responsive to Rule 1.141(h)," and Tr. 920. Over Complainant's objection, I ordered a two-page memo of Mr. Swartz's, plus attachments, released to the Respondents. *See* Tr. 514-26. Over the Respondents' objections, I did not order other materials disclosed. *See also* Tr. 526-36, 138-42.

23. When the hearing began, I pondered whether there were "evolving . . . requirements," "where things that are understood now to be dangerous were not so clearly understood in 1999." Tr. 25. As the hearing ended, I said that if the Government wants to begin to have a

"no contact with the public" policy (for tigers and other "great cats"), this is not a good case for such a beginning, because this case deals with what happened in 1999. Tr. 927. I mentioned that in 1999, the Judicial Officer's decision was not in existence in *The International Siberian Tiger Foundation, et al.*, 61 Agric. Dec. 53 (2002). Notice of requirements is, of course, an essential component of fairness.

24. This Decision on Remand now includes not only my decision on the issues related to whether any of the Respondents violated the regulations, that is, the "liability" portion of the hearing, but also consideration of the consequences, such as the appropriate sanction. Tr. 8-11, 21-25. Consideration of Mr. Riggs' license application and denial is MOOT.

25. The Complainant timely filed the Complainant's Proposed Findings of Fact and Conclusions of Law, and Brief in Support Thereof ("APHIS's Brief") on October 23, 2002. The Respondents timely filed the Respondents' Proposed Findings of Fact and Conclusions of Law and Brief in Support ("the Respondents' Brief") on February 5, 2003. The Complainant filed no Reply.

26. Colleen A. Carroll, Esq., Office of the General Counsel, Marketing Division, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250-1417, represents the Complainant (APHIS). Robert A. Ertman, Esq. (with the same office), represented the Complainant through the filing of the Complaint and until November 14, 2000.

27. S. (Stephen) Cass Weiland, Esq., and Shannon W. Conway, Esq., Patton Boggs, LLP, 2001 Ross Avenue, Suite 3000, Dallas, Texas 75201, now represent only Bridgeport and Ms. Berry.

28. Mr. Riggs represents himself (appears *pro se*).

29. This Decision on Remand is ready for review by the Judicial Officer, if either party appeals.

Analysis

30. The Respondents' violations allegedly occurred during two months of the summer of 1999 (July 10 through September 10), in their "Great

Cats of the World" exhibit. Dr. Christensen, APHIS Animal Care Regional Director, had seen a copy of the photograph of Ms. Sniedze with a tiger (CX 8), had a copy of the Consent Decision (CX 3, attached), and asked APHIS Senior Investigator David Green to look into it. Tr. 174-75, 188-89, 190-92.

Mr. Weiland: And in fact, the Consent Decision, was a - - as we say in Texas, was a burr under the saddle of the animal care people, wasn't it?

. . . .

(objections, overruled)

Mr. Green: I would not characterize the Consent Decision as a burr under their saddle. I'm - -

Dr. Christensen had the Consent, apparently had seen the photograph that was sent in and based on that information, requested that I look into it, which I did at that particular time.

Mr. Weiland: Was that consent agreement a burr under your saddle?

. . . .

(objection, overruled)

Mr. Green: From the standpoint I'm not sure what we mean here, I - - I think it was a step in the right direction as far as the agency was concerned to indicate what could be - - that you should not have large cats with people. Okay? And the Consent Decision, if anything, I would think, would give an indication that there's some parameters here we have to look at.

Mr. Weiland: Okay. Well, it was a step in the right direction, is the way you've characterized the Consent Decision. It was a step in the right direction to what? Putting these folks out of business or what?

Ms. Carroll: Objection.

Administrative Law Judge: I don't like the tone of voice either, but I'd like to hear the witness' response to that question, so you may answer.

Mr. Weiland: Excuse me for - - Your Honor and also Mr. Green, if my tone was offensive, I didn't mean it to be.

Mr. Green: From the Agency stand point, I think they (APHIS personnel) wanted to attempt to protect the animals and to protect the public.

Tr. 190-92.

31. The Respondents are alleged to have violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a),

2.131(b)(1)):

> During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

9 C.F.R. § 2.131(b)(1).

32. Tigers, the largest land-based predators, are quick and powerful and are recognized as "dangerous animals" by the Regulations and Standards. The Respondents are alleged to have violated sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)):

> During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. § 2.131(c)(3).

Direct Control

33. During public exhibition of a dangerous animal such as a tiger, Dr. Bellin testified and APHIS argues (APHIS Brief, pp. 12-16) that the "direct control and supervision" by the handler required by 9 C.F.R. §§ 2.100(a), 2.131(c)(3), means that the handler is holding onto the animal. Based upon the facts of this case only, I disagree. I'll begin by presenting Dr. Bellin's testimony, and then APHIS's argument.

34. Dr. Bellin testified that direct control requires direct contact. This excerpt is from Tr. 419-421.

Administrative Law Judge: And then, Dr. Bellin, before Mr. Weiland asks cross examination questions, I need clarification of a couple of

phrases that you have used. And the first one is direct contact. What do you believe that means?
Dr. Bellin: My use of it is somebody who has their physical being on the animal's physical being.
Administrative Law Judge: All right. Is that different from direct control?
Dr. Bellin: In my opinion, no.
Administrative Law Judge: You think they mean the same thing?
Dr. Bellin: Yes, under direct control of an animal means you have direct contact. If the animal starts moving, you can immediately pull them in another direction if you have to. I consider that the same.
Administrative Law Judge: Do you think the meaning is any different if the phrase is direct control and supervision?
Dr. Bellin: Not really, no.
Administrative Law Judge: So you think all three of those things require touching of the animal itself?
Dr. Bellin: I think that is the intent of Congress under the Animal Welfare Act, yes. That is my understanding of the intent of Congress is to have dangerous wild animals under direct control/contact, which make the supervision. I don't think they envision, this is my opinion, I don't believe Congress envisioned somebody standing 30 feet away and watching the animal as being a safety issue.
Administrative Law Judge: Well, how about standing three feet away and watching the animal?
Dr. Bellin: The same difference as far as I'm concerned with the large cat.
Administrative Law Judge: Even a young, large cat?
Dr. Bellin: Yes, ma'am.
Administrative Law Judge: Even a 40-pound cat?
Dr. Bellin: Yes, ma'am.
Administrative Law Judge: And to what extent does the distraction, whether it's the bottle or some other distraction, alleviate the requirement for physical contact, either with the animal's body or through a leash?
Dr. Bellin: None.
Administrative Law Judge: Okay. Mr. Weiland, you may cross examine.

Mr. Weiland: Doctor, is it your opinion that these tigers are dangerous from the day they're born?
Dr. Bellin: Could you be more specific?
Mr. Weiland: I was trying to follow up on the Judge's question. Do you believe that a tiger is dangerous to a human from the day it's born?
Dr. Bellin: Yes.
Tr. 419-21.

35. According to APHIS, Respondents failed to have the animals under their direct control and supervision. Instead (according to APHIS), "the respondents' customer handled the animal" (while the customer was holding the bottle), while "respondents and/or their employee observed the interaction." APHIS Brief, p. 12.

36. APHIS continues, "First, the Regulation requires that dangerous animals be under the handler's "direct control," not simply some form of remote control. Contrary to Mr. Riggs' belief, direct control entails some physical connection to the animal. 'Direct' means 'with nothing between.' Webster's New World Dictionary . . . ."

37. APHIS's Brief continues, after describing Complainant's evidence, "There is no restraint on the animal at all. The safety of the animal and the person depend entirely on the animal's own self-control." APHIS Brief, p. 13.

38. Unlike Dr. Bellin, and unlike APHIS, I do not conclude that the handler must have direct contact with the tiger, no matter what the age of the tiger, to exercise "direct control and supervision." Further, I find that the bottle as used by Respondents was an effective means of "direct control and supervision" but only under certain circumstances. The whole of Respondents' practices and methods must be considered to understand their use of the bottle.

39. The Respondents had control of the tigers' training from a young age, and the Respondents were able to choose those tigers whose dispositions were well-suited to the photo shoots. Although Ms. Berry was not at the shows that gave rise to the allegations, her management role from the Respondents' home site is important.

40. Ms. Berry has a bachelors degree in psychology and a masters degree in child psychology. Tr. 574. Ms. Berry had used small animals in

therapy with children, including "children that are schizophrenic, autistic, that don't make real good connections with humans," and had "had some wonderful breakthroughs with children and animals." Tr. 576. At the time of the hearing, the Respondents owned about 70 exotic cats (tigers, lions, leopards, and cougars) that Ms. Berry was responsible for. Tr. 580, 586. 41. The following excerpt is from Tr. 586.

Mr. Weiland: . . . . has the USDA ever suggested to you at all that your show is so inherently dangerous that you should shut down the entire photo shoot aspect to it?

Ms. Berry: Not until the last couple days in here.

Tr. 586.

42.Ms. Berry elaborated on the Respondents' use of the bottle as the principal means of control of the tigers used in the photo shoots, at Tr. 596-600.

Mr. Weiland: . . . . In your experience, describe to the Judge, just how the bottle is used and why it's a control mechanism for these small animals.

Ms. Berry: Because the tigers are mammals, they nurse their mother. We - - if the animals are born on our facility, we let them nurse for two weeks, if possible, if the mother takes care of them. They still need to be fed for a long period after that. We take a lot of time in bottle feeding and the care of the animals during that time period. They think of the human, the primary care giver, whoever is bottle feeding them, basically as their mother.

Mr. Weiland: Now during a show, would the personnel who are handling the photo shoot typically have several baby bottles full and ready for use?

Ms. Berry: Every show I have ever attended or put on or seen of Jay's, there was always bottles. There's always back-up bottles. Before your photo shoot begins, you fill your bottles and you have them ready.

Mr. Weiland: Now you heard Dr. Bellin testify yesterday, didn't you?

Ms. Berry: Uh-hum.

Mr. Weiland: I believe he testified somehow from his vantage he could tell the bottle was empty after a few minutes but the photo shoot continued. Do you recall that testimony?

Ms. Berry: Yes, I do.

Mr. Weiland: Now in your experience, let's just assume that the - - that

this - - a particular baby bottle runs out of milk. Will a baby cub continue to suck on the bottle?
Ms. Berry: Yes, sir. Now wait - - let me - - can I kind of - - box myself in here? They may not. But they - - most of the time, they will continue to suck the bottle. They like that pacifying action of sucking the bottle, even if it's empty. I have full grown tigers that will still drink a baby bottle. And you put it in their mouth and when they're done after they suck it for ten minutes there may be this much milk gone, so obviously, the whole time that they've got that bottle in their mouth, they're not drinking and not taking in anything. They are simply pacifying on the bottle. And so I - - it doesn't necessarily mean that they will get up and that's it, they're done, because they don't have any milk in the bottle. They can pacify. It just all depends. A tiger can be disinterested - - become disinterested in a full bottle as easy as they can become disinterested in an empty bottle.
Mr. Weiland: Okay. Have you ever...
Administrative Law Judge: Now I would like the record to reflect the size of the amount of milk that was gone that the witness showed us...
Ms. Berry: A half an inch?
Administrative Law Judge: About a half inch...
Ms. Berry: Let me rephrase - - a half an ounce. After ten minutes.
Administrative Law Judge: Gone out of the bottle?
Ms. Berry: Gone out of the bottle. With an adult cat. Baby cats won't let that happen. But adult cats just like to...
Mr. Weiland: Just so - - so in your experience with these animals, even adult cats will continue
- - at least some of them - - continue to have interest in this bottle.
Ms. Berry: Most of them will.
Mr. Weiland: Have you ever seen them sleep with a bottle?
Ms. Berry: Sleep with a bottle?
Mr. Weiland: Right. Continue like...
Ms. Berry: Oh, after they fall asleep?
Mr. Weiland: Right.
Ms. Berry: Oh yeah. Sure. Babies fall asleep all the time when you're feeding them.

Mr. Weiland: And they'll continue to have the bottle in their mouth like a human baby would?
Ms. Berry: Uh-hum.
Mr. Weiland: In your professional opinion, as a experienced handler of these animals, is the bottle a sufficient control device in order to prevent anything more than minimal risk to the public in exhibiting these animals?
Ms. Carroll: Object on foundation. Any -- all ages and sizes of tigers?
Mr. Weiland: I'm talking about...
Administrative Law Judge: Let's see. We've been talking about babies, which are less than six months[6] this whole time, I believe. Is that correct, Mr. Weiland?
Mr. Weiland: That's what I meant, Judge.
Administrative Law Judge: Okay.
Ms. Berry: Yes, it's the best, the absolute best thing that we can find. Tr. 596-600.

43. As Ms. Carroll brought out during her cross examination of Ms. Berry, Ms. Berry believes that using a bottle with a tiger is a way of having direct control over the animal only under certain circumstances. Tr. 623-29. Ms. Berry' testimony is persuasive: so long as the bottle is being controlled, the cat is being controlled, so long as the tiger has been reared and trained by the Respondents and selected by the Respondents for photo shoots, and an experienced handler is in close proximity, to read the cat, being alert for any signs of change, close enough to grab the bottle to make sure that it stays stable. Each cat is different, just as each person is different. Tr. 623-29. *See also* Tr. 631, 640-41.

44. The tiger's young age is essential. Ms. Berry testified on cross examination about the photo shoot tigers, who are less than six months of age. Tr. 646-47.
Ms. Berry: . . . . Their instinct is to love at that age. It's not attack.
Ms. Carroll: That's there for all - - that applies to all the tigers that you train and send on photo shoots?
Ms. Berry: I have never seen a cat under six months age try to kill someone.
Ms. Carroll: Okay. Have you seen a cat under six months of age try to play with someone?

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[6] *See* footnote 5.

Ms. Berry: Sure.
Ms. Carroll: Have you seen a cat under six months age try to scratch someone?
Ms. Berry: Yes.
Ms. Carroll: And have you seen a cat under six months of age try and bite someone?
Ms. Berry: Yes.
Ms. Carroll: And do you believe that tigers can outgrow their wildness or be trained out of their wildness?
Ms. Berry: Never.
Tr. 646-47.

45. Ms. Berry testified on cross examination that feeding on a platform begins at home, before the young tigers go on the road. Tr. 644.

Ms. Berry: . . . . they stay at home for awhile. And they are taught at that time to get on a platform, they are taught to drink their bottle, because they have to drink their bottle four times a day. They love their bottle. So it's good training to start them in putting the bottle in their mouth as soon as they start walking. If you don't do that pretty young and they get eight, ten weeks old and then you try to do it it's more difficult for the cat to do.
Tr. 644.

46. Ms. Berry testified on cross examination that the tigers the Respondents have trained and use in photo shoots that are less than six months old "are a minimal risk." "I do not believe they're likely to hurt anyone." Tr. 670.

47. Ms. Berry testified about the tigers used in Respondents' photo shoots. "The ones that we use in the show have - - that are either born in our facility or we've taken them from somebody that doesn't know what to do with them or needs to dump them or you know. When I say dump, that's their term, not mine." Tr. 588. Ms. Berry has had experience with exotic cats since 1988, first with other people's exotic cats, then her own. Tr. 587. Ms. Berry testified that taking the tigers on the road helps them adapt to being in captivity; that when they are adults, they will be better behaved.

48. This excerpt is from Tr. 588-91.

Mr. Weiland: Yeah. Do you know how to handle tigers who are six months of age or less?
Ms. Berry: Yes.
Mr. Weiland: Okay. And one of the things that you have done with your - - I'll call that group baby tigers[7] - - if you understand what I'm referring to if I say a baby tiger? I mean six months of age or less.
Ms. Berry: Okay.
Mr. Weiland: For the purpose of my questions.
Ms. Berry: Okay.
Mr. Weiland: Now when you're dealing with these baby tigers, has it been your experience that having them travel with the Bridgeport Nature Center show is beneficial to the tigers?
Ms. Berry: I believe it's very important in their development.
Mr. Weiland: Why do you say that? Tell the Judge - - explain why you believe that's true.
Ms. Berry: Because I've tried to take care of cubs just myself and keep them in my own little world, which I would love to do with each one of them and be selfish and keep them to myself. I know that animals that have contact with people and a lot of people, are much better adapted to life in captivity and we have nowhere to put them in the wild, so they are in captivity. We do have to keep them at the facility and as an adult tiger, which is dangerous, I do not want to have an adult cat at the facility, that is extremely aggressive and a greater risk than what they produce at, you know, just being a tiger in itself as an adult. So I would want to have cats that are better behaved and Jay (Mr. Riggs) does the best job of anybody that I know in taking care of animals and giving them the love and interacting with the public, too. Because the public's an important part. It's the whole interaction, it's the whole process of being around people, of being around - - being loved. Having the constant positive reinforcement. Having that bottle, which is positive reinforcement, that's their love. They love the bottle. They love to be

[7]This footnote is NOT part of the transcript and contains my observation: the characterization of all tigers aged six months or less as "baby tigers" is actually not helpful. The majority of the tigers involved in the allegations here are better characterized as "juvenile tigers." Dr. Bellin testified that, in his opinion, juvenile tigers include tigers beginning at about four or five months of age. Tr. 381. Mr. Markmann testified that, in his opinion, juvenile tigers include tigers beginning at about four months of age. Tr. 552-53.

held. They're like children in a lot of ways. They need all of those things.
Mr. Weiland: If a tiger - - a tiger cub loves to be held like a child loves to be held?
Ms. Berry: Of course it's on their terms. Yes, they do like that if they - - they're also a cat. They like to be off to themselves sometimes but when they do want love, yes they do want love. And 90 percent of the time -- 99 percent of the time, they are wanting love.
Mr. Weiland: Do they react to positive reinforcement?
Ms. Berry: Absolutely.
Mr. Weiland: Like a dog trainer might pat a dog, a puppy, on the head if it performs its sit or stand properly? I mean, a cat, a baby cat will also respond to positive reinforcement like that?
Ms. Berry: Yes.
Mr. Weiland: And it's your experience that having these baby cats on the road like that, where they're in constant proximity to people, is good for them?
Ms. Berry: Yes.
Mr. Weiland: Do you - - you mentioned the bottle and their attention to the bottle or whatever reference it was. Would you explain to Judge Clifton why the bottle - - well, first of all, if the bottle is a control device that you all use?
Ms. Berry: The bottle is a control device that we do use.
Mr. Weiland: Now how - - would you characterize the bottle as the primary control device during the course of public contact with the baby tigers?
Ms. Berry: Yes.
Tr. 588-591.

Minimal Risk of Harm to the Animal and to the Public

49. How risky were the Respondents' photo shoots of members of the public with tigers during the summer of 1999? During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers

between the animal and the general viewing public so as to assure the safety of animals and the public. 9 C.F.R. §§ 2.100(a), 2.131(b)(1).

50. Dr. Bellin testified and other APHIS employees testified and APHIS argues (APHIS Brief, pp. 6-9) that when tigers are involved, "minimal risk" means all risk must be eliminated. APHIS employees are aware of grave consequences of tiger bites or even scratches, of how powerful and quick tigers are.

51. The Respondents are likewise well aware that there are dangers of allowing tigers, even juvenile tigers and even cubs, to be in close proximity with humans, to be touched and held by humans, and the Respondents' practices and methods during the summer of 1999 were formulated to minimize the risk. Mr. Riggs and Ms. Berry had developed good practices and methods for preventing harm to the animals and to the public during their photo shoots and throughout their entire exhibition.

52. Both Dr. Bellin and Mr. Swartz acknowledged that Mr. Riggs was an expert in handling exotic cats:

Dr. Bellin: We have training opportunities at national conferences, regional conferences, where experts are brought in, experts such as Mr. Riggs, or a James Fowler[8] type of individual, if you will, people who have expertise with the type of animals that we're going to be covering, and these people have given us the benefit of their knowledge, their education, their training, writings. Tr. 396.

Dr. Bellin: I don't purport to be an expert in the care and handling of these animals because I don't do it on a full-time basis like Mr. Riggs may do. Tr. 396-97.

Mr. Swartz: I have experience in the knowledge of how to handle the animals for safety for the public. I would defer to Mr. Riggs as being the expert as to handling, on-hands handling, of the animal. Tr. 508.

53. Ms. Berry confirmed her husband's expertise: "Jay (Mr. Riggs) does the best job of anybody that I know in taking care of animals and giving them the love and interacting with the public, too." Tr. 590. *See also* Tr. 632-33, regarding limitations that include (but are not limited to) no plastic bags, no balloons, no screaming children, no intoxicated or inebriated people; and children are accompanied by an adult there that can hold a bottle.

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[8] *See* footnote 14.

54. When the Respondents' handler moved a photo opportunity (photo shoot) tiger from cage to feeding platform or back to cage, the Respondents' handler customarily used a leash (or carried the tiger, if it was small). Once the tiger was in place on the tiger's feeding platform, the Respondents' handler on some occasions removed the tiger's leash, so that there would be no leash showing in the photo. The Respondents' handler then stood at the head of the tiger just out of range of the camera.

55. The Respondents' handler was alert to the tiger's behavior. On cross examination, Mr. Riggs explained. Tr. 842-44.

Ms. Carroll: Let me ask you about what your procedures are in the event of an animal attack during a photo shoot.

. . . .

Mr. Riggs: Okay. First of all, I have never seen during any photo shoot any aggressive behavior ever, and that is ever in my years of doing this during the actual photo shoot. The . . .

Ms. Carroll: And that's when the photograph is being taken is what you're referring to?

Mr. Riggs: That ten, 12-second period in which the photo's taken, the public hops up, and moves on, and we take the next photo. What is my plan if things, if you will, go south? I, the handler, first thing I would do if, if the cat begins to show signs of losing interest, I would ask the public to hop up and try switching bottles. If that didn't work, I would end the photo set, put the cat up, and retrieve another cat. My job as a handler is to read this animal and anticipate and judge if he's focusing and staying focused on this bottle, and it's my contention I've done that and done that very well.

Tr. 842-44.

56. The Respondents' practices and methods required Mr. Riggs'[9] close attention to the exotic cat and the ability to remove the cat quickly from the vicinity of humans if the cat were to behave unexpectedly, such as could occur if the cat were startled or upset. Removing the cat would be accomplished via use of the bottle, or if that failed, the leash, or if that

[9](and anyone else the Respondents permitted to be in charge when exotic cats were in the vicinity of humans)

failed, the fire extinguisher.

57. There is no prophylactic regulation that requires licensees to separate the public[10] from a dangerous animal by a bullet-proof glass or plexiglas barrier, or other barrier, or distance, or to prevent the public from having a "close encounter" with a dangerous animal, or from being in close proximity to a dangerous animal, or from touching a dangerous animal. *But see* paragraphs 91 and 92.

58. So long as the Respondents adhered to their own practices and methods of preventing harm, I conclude that there was minimal risk of harm to the tiger and to the public during the Respondents' Great Cats of the World photographic sessions with members of the public during the summer of 1999. I reach this conclusion based in large part on the Respondents' extraordinary dedication to, and impressive knowledge of, their exotic cats, their "big" cats. I do, however, find exceptions to the Respondents' normally responsible photo opportunity methods and practices, situations which did increase the risk of harm to the tiger and to the public to more than minimal at the Iowa State Fair on August 20, 1999. The situations were documented in video footage (CX 41) and were described by Dr. Bellin.

59. There were other situations that are not alleged to be violations in the Complaint, which arguably involved failure to handle the tigers so there was minimal risk of harm to the tigers, when the Respondents allowed their employee to be inside a tiger enclosure with multiple big tigers and no responsible handler watching.

60. Mr. Markmann observed Respondents' employee Craig Rabideau inside the tigers' enclosure at the York Fair on September 10, 1999. Tr. 550-51.

Mr. Markmann: I observed some things when I was inspecting Mr. Riggs where like Craig, would go in, an employee that's been there four months - - he would go into the tiger enclosure with six cats, ranging in age from six months to ten months, weighing anywhere from 100 to 250 pounds and no one was actually watching him. Some people were busy doing other things. And I observed that around - - between eleven and twelve o'clock.

Tr. 550-51. *See also* Tr. 226.

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[10]The term "public" IS synonymous with the term "the general public," as it turns out. *See* paragraphs 91 and 92.

61. At a different time on September 10, Mr. Markmann observed Respondents' employee Eric Drogosch[11] inside that enclosure with the six juvenile tigers ranging from 100 pounds to 250 pounds, aged six months to ten months. Tr. 226, CX 25 (including notes on back), CX 26 (including notes on back), CX 28 (including notes on back), CX 31.
62. The situations described in paragraphs 60 and 61, involving Respondents' employees inside the tigers' enclosure that held multiple tigers, including tigers larger and older than the photo opportunity tigers, were not photo opportunities and caused no risk of harm to the public.
63. Mr. Markmann considered 9 C.F.R. § 2.131(c)(3) applicable, but the Complaint did not include such an allegation. The allegations in the Complaint all (all except the alleged record-keeping violation) specify "during public exhibition in photographic sessions with members of the public . . . "
64. Although the Respondents' employees should not have been in that tiger enclosure in that way, vulnerable, no violation is alleged in the Complaint, and neither 9 C.F.R. § 2.131(c)(3) nor 9 C.F.R. § 2.131(b)(1) was proved applicable. Both 9 C.F.R. § 2.131(c)(3) and 9 C.F.R. § 2.131(b)(1) require the occurrence to have been "during public exhibition," which appears not to have been applicable to the handling that was occurring: "cleaning up excreta," "taking photos with Shawnee," "playing in the enclosures with the same six tigers." CX 23.
65. Under the circumstances here, the employee was not a member of the public. Had the employee been harmed during public exhibition, the risk of resultant harm to the tigers is the focus of 9 C.F.R. § 2.131(b)(1). *See*, *The International Siberian Tiger Foundation, et al.*, 61 Agric. Dec. 53, 92 (2002).
66. There is no prophylactic regulation requiring licensees to maintain minimal risk of harm to the animals and the humans, without regard to whether the occasion is "during public exhibition," and without regard to whether the humans are the public, the general viewing public, the employees, the independent contractors, the volunteers, the trainers, the trainees, the handlers, the inspectors, or are classified in some other

[11] Mr. Markmann misspells Mr. Drogosch's name "Drayosh." Tr. 226-27, CX 25, 26, 28, 31.

manner.

The Four Fair Exhibitions

67. Every allegation arises out of the Respondents' exhibition of animals at State or county fairs during the summer of 1999:

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999,
Iowa State Fair, Des Moines - August 20, 1999,
Dutchess County Fair, Rhinebeck, New York - August 28, 1999, and
York Fair, York, Pennsylvania - September 10, 1999.

Each of those fair exhibitions led to one or two alleged violations of the Animal Welfare Act (with each photographic session with a member of the public alleged to constitute a separate violation).

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999

68. At the Northern Wisconsin State Fair on July 10, 1999, Ms. Kristina ("Kris") Sniedze got her picture taken with a tiger. The photograph (CX 8) is unusually fine, and Ms. Sniedze thought it was "cool" to have her picture taken with a tiger. Tr. 284, 289. The Respondents, who made the experience possible at their traveling exhibit, had no incidents at the Northern Wisconsin State Fair, no injuries of any kind. Tr. 768.

69. As the trier of fact, I love the picture, which shows a smiling, suntanned young lady (adult) sitting on the platform where the young tiger is being fed, sitting next to the tiger. The young lady, Ms. Kris Sniedze, has one hand holding the bottle that the tiger is nursing and the other hand near or touching the tiger's fur in the neck area just below the tiger's ear. CX 8. The picture shows most of the tiger from the whiskers to the vividly marked tail.

70. While I enjoy the beauty of that photo (CX 8), I anticipate the concern of the APHIS officials: the tiger's gorgeous face is striking, but so is the nearness of the tiger to Ms. Sniedze; what could happen if the tiger for any reason bit Ms. Sniedze or even scratched her?

71. What was the principal means of control? The juvenile tiger's age and size; the tiger being hungry; the handler's use of the bottle; the handler's attentiveness to any disinterest in the bottle on the part of the

tiger; the tiger's training with the bottle from the age of two weeks; the tiger's exposure to the atmosphere of the photo shoots from a very early age, as early as four weeks old; the "weeding out" of any tigers whose disposition was not compatible with photo shoots; the handler's methods and practices not only with the tiger, but also with the public, and the general viewing public; and the nature of the public, and the general viewing public, in these venues - - these, in combination, were the principal means of control. The issue of Ms. Sniedze's safety (and consequently the tiger's safety) will be addressed more completely, but here are some of the details that matter.

72. Ms. Kris Sniedze testified that she estimated the weight of the tiger in CX 8 to be between 120 and 180 pounds.[12] Tr. 291. Ms. Sniedze testified that her 178 pound dog, a St. Bernard/Great Dane mix, was about the same size. Tr. 289, 291. Ms. Sniedze had lived on a farm and grew up around animals. Tr. 294.

73. Mr. Riggs, the corporate Respondent's Vice President, who was in charge of the traveling exhibit, testified that the tiger depicted in CX 8 weighed 60 to 80 pounds. Tr. 911-12.

74. There is no leash visible and no handler visible in the photo. CX 8.

75. Mr. Riggs testified that he most often was the handler, and that the handler is always positioned at the head of the tiger, just out of range of the photo. Tr. 767, 913, 915.

76. Mr. Weiland examined Mr. Riggs about the photo and Mr. Riggs' customary practices at the time while at the Northern Wisconsin State Fair. The following excerpt is from Tr. 765-68:

Mr. Weiland: . . . . does it appear from the photograph (CX 8) that the tiger does have a collar around its neck?

Mr. Riggs: I can't really tell for sure.

Mr. Weiland: Okay. Do you see a leash anywhere?

Mr. Riggs: I don't see a leash.

Mr. Weiland: Okay. Do you know sitting here today whether there was or was not a leash on this tiger?

Mr. Riggs: I can't answer that for sure.

Mr. Weiland: Let's assume that there was no leash, for the sake of my

[12] Ms. Sniedze's Affidavit estimated 180 pounds. CX 10, p. 4.

question. Did you -- was that your practice at the Wisconsin State Fair to allow photographs to be taken with no leash?
Mr. Riggs: No, not at all.
Mr. Weiland: Do you understand the regulations -- which require control to be exerted over these animals, don't you?
Mr. Riggs: Yes.
Mr. Weiland: As you look at this photo, does the animal appear to be under control?
Mr. Riggs: Obviously.
Tr. 765-66.
. . . .
Mr. Weiland: (at Tr. 767) . . . . Do you recall generally the affidavit in which the affiant [ph] indicated that the nearest handler was within two and a half feet?
Mr. Riggs: Yes.
Mr. Weiland: And would that have been your practice at that time, to be within two and a half feet of any of the persons being photographed?
Mr. Riggs: I would say I was probably much closer than that. The photo was cut off, probably within six or eight inches of that bottle.
Mr. Weiland: All right, sir. And is that your customary practice?
Mr. Riggs: Is that my customary practice?
Mr. Weiland: To remain that close to the person who's being - - to the tiger and the bottle?
Mr. Riggs: My practice was to feed this tiger a bottle and to hold this bottle to put her hand under my hand until it was time to actually snap that photo. At that point I would let go of my hand and her hand, back up a little bit to get my hand out of this photo. Our photographer's job was to cut the photo off fairly close beside the bottle so my hand isn't reaching into the photo. But not to get any distance away.
Mr. Weiland: All right. And were there any incidents reported to you at the Wisconsin State Fair?
Mr. Riggs: None.
Mr. Weiland: No injuries of any kind?
Mr. Riggs: None.
Mr. Weiland: Did you have to discipline by some kind of physical means any of your cats at the Wisconsin State Fair?
Mr. Riggs: We don't even discipline these animals as - - in the

reprimand-type that you're perhaps referring to. These - - this is a positive enrichment in which this animal's put up on a happy note or else it would not come back out the next time.
Tr. 765-68.

77. Mr. Julius Olson ("Pinky") Lee, the Vice President and Secretary of the Northern Wisconsin State Fair, confirmed that there were no problems with the exhibit Great Cats of the World, run by Bridgeport and owner/supervisor Mr. Riggs, no reports to him of any incidents with the animals or the public. Tr. 265-75. Mr. Lee had determined to bring that exhibit back to the fair. Tr. 275.

78. Mr. Weiland's examination of Mr. Riggs continued, with an inquiry as to how Mr. Riggs ran Bridgeport's photo sessions. The following excerpt is from Tr. 768-70.

Mr. Weiland: Okay. I think with the photograph in view, it's probably appropriate for you to tell the Judge, just how you maintain one of these photo sessions. How you stage it, how you run it and how you operate it from beginning to end. Would you just take a minute to describe that?
Mr. Riggs: It might take more than a minute, but I would be happy to. Basically, this probably began with a show. The show lasted about 25 to 30 minutes. At one point, toward the end of the show, I'm calling volunteers out of the audience to come bottle feed a baby or something and while they're switching animals, I begin to talk about this photo set. What I do is say basically, following the show, we're going to have a limited photo opportunity. I would like to talk about this for a second, while they're getting the next animal, so I can answer everybody's question at once. Because I get this question, what happens? - - a thousands times a day. So, basically I begin to talk to the folks that basically what we do is we take the tigers out. They hop up on this platform on their own. We feed them with a bottle. The tiger has a very tiny belly and when this belly is full, this photo set is over. It doesn't matter if there's two people in this line or 40 people in this line. When the tiger's full, the tiger has to be put up, and the photo set is ended. Period. At that point, probably the next cat's brought out, I continue the show. At the end of the show, we get everything ready and probably start announcing our photo set will begin in about five minutes. At this

point, we're probably bringing the folks in and getting the folks in line. Once I've got the line full and these people in line, I make another announcement. I say, okay folks. We're fixing to get this tiger out. What's going to happen, is this tiger's going to hop up here and we're going to feed him with a bottle. Whoever in your group would like to feed the tiger, come sit over here by the head, everybody else will sit over here by the tail. If you have any small children in your group, please keep them by the tail. We don't want some infant trying to hold this bottle, nor would we let that happen. And I try to explain to these folks that - - exactly how this works, step for step. So when they get up to the front and it's their turn, I don't have to explain how this process is going to work. I have a limited amount of time for this cat. His attention span on that bottle might last five to eight minutes. Either way, I want this to facilitate very quickly. So I tell these people exactly what's required. I tell them that when they sit down with that tiger, whoever is holding the bottle, I want them to hold that bottle very tightly and that we're going to ask them to look up. We want them to look up and smile. They only have one shot at this photo and we'd really like them to have a nice photo. After they get that photo made, we tell them they can pet that tiger real quick and hop and run for their life. If they live through this process, we'll give them a stick on the way out that says, I touched a tiger. And that's my little spiel before each photo set. Tr. 768-70.

79. Training of the tigers from two weeks of age, training of Respondents' personnel, and other methods and practices of Respondents are important for this fair and each of the fairs.

80. Mr. Riggs testified that it was not his practice at the Northern Wisconsin State Fair to allow photographs to be taken with no leash (Tr. 765); nevertheless, the Respondents' handler used no leash while the photograph of Ms. Sniedze with the tiger was shot. Not only is no leash visible in the photo (CX 8), Ms. Sniedze credibly testified as follows:

Ms. Carroll: . . . . And how was the tiger led out to the platform where you were sitting?

Ms. Sniedze: It was on a leash when they brought it out but then they take it off for the picture.

Tr. 286.

81. Given the Respondents' practice of using the leash to move the tiger

to and from its feeding platform, it is more likely than not that the collar remained on the tiger during the photographing of Ms. Sniedze with the tiger, even though the collar was not visible in the photograph. CX 8.

82.The Respondents' handler held the bottle for the tiger until Ms. Sniedze had a good grasp on the bottle; then the handler stepped just out of view of the camera and stood 2-1/2 feet from the bottle and the tiger's head. Tr. 767. [The question and answer at Tr. 282 is misleading, where Ms. Carroll asked: "How long were you and the tiger in close proximity without any handler?" The knowledgeable and experienced animal handler was with Ms. Sniedze at all times, but momentarily he stood back, 2-1/2 feet from the bottle and the tiger's head, with no direct contact with the tiger.]

83.I disagree with the statement in APHIS's Brief, at pp. 10 and 13, that there was no handler; there was a handler; Ms. Sniedze credibly testified as follows:

Ms. Sniedze: There were three people that were standing in front of me when they took the picture. It was the handler who initially gave me the bottle and sat me next to the tiger. There was the person who took the picture, and then there was one other person there. Actually I thought it was a volunteer.

Tr. 306.

. . . .

Ms. Sniedze: And then they put it (the tiger) up on the platform and they put the bottle in his mouth and then they told me where to sit right behind it and then gave me the bottle, and then they stepped back and took the photograph.

Tr. 308.

. . . .

Mr. Weiland: Okay. Now during that time that the cat was on the platform the bottle was in its mouth the whole time?

Ms. Sniedze: Yes.

Tr. 309.

84.The tiger in CX 8 more likely than not was younger than six months of age. Mr. Riggs' testimony was credible that it had been his practice since 1998 to "absolutely" not use cats (tigers) over six months of age

for the photo part (photo shoots). Tr. 810. [*See* paragraphs 129. through 150. regarding the use of Shawnee at the York Fair; Shawnee was older than six months, but Mr. Riggs was not thinking of that situation as the "photo part," and he did not think of the Reporter doing the video promotion as a member of the public.] *See also* Tr. 840.

85. Ms. Berry testified on cross examination that some tigers younger than six months weigh more than 75 pounds. Tr. 651.

Ms. Carroll: Approximately how much does a six month tiger weigh?

Ms. Berry: It depends on the cat. There's a lot of diff - - a lot of different kinds of tiger. Some

- - a six month old tiger[13] can weigh anywhere from 50 - - this is my "guesstimate" - -50 to 150 pounds or 120 pounds.

Tr. 651.

86. Mr. Riggs estimated the weight of the tiger depicted in CX 8 to be 60 to 80 pounds. Tr. 911-12. I have respect for Mr. Riggs' estimate and find that he was better able to estimate the tiger's weight than Ms. Sniedze because of his constant handling of tigers, which obviously are built differently from a St. Bernard/Great Dane mix. Nevertheless, based on both Mr. Riggs' and Ms. Sniedze's testimony, taken together, I find that the tiger photographed with Ms. Sniedze at the Northern Wisconsin State Fair more likely than not weighed 75 pounds or more. When the Respondents' handler used a tiger that weighed 75 pounds or more in photographic sessions with members of the public, the Respondents' handler caused the Respondents to violate the Consent Decision, which orders that the tiger be "less than seventy five pounds in weight."

87. On July 10, 1999 at the Northern Wisconsin State Fair, the Respondents violated the Consent Decision: the Respondents' handler did not hold the tiger by a leash at all times during the photo shoot; and during the photo shoot the Respondents' handler used a tiger that weighed 75 pounds or more.

88. Even though I now understand that "the public" is not distinguished from "the general viewing public" in the regulation (9 C.F.R. § 2.131(b)(1)), it appears to me that "members of the public" are

[13] Likewise, Mr. Marcus Cook estimated that an average weight for a six month old tiger would be 130 pounds, 150 pounds. Tr. 719. *See also* Tr. 720-21.

distinguished from "the general public" in the pertinent Consent Decision provision.

89. The Consent Decision includes the following requirement:

> Respondents shall not exhibit any exotic cats or other animals in photographic sessions with members of the public unless the general public is kept away from the exhibit by a barrier at least fifteen feet from the exhibit.

CX 3, p. 5.

90. The Judicial Officer held in *The International Siberian Tiger Foundation, et al.*, 61 Agric. Dec. 53, 86-88 (2002), that the terms "the public" and "the general viewing public" do not include exhibitors and do not include the Respondents' trainees ("premium customers" who paid $2,500 and entered into training agreements, to obtain "close encounters" with and "exposure" to Respondents' animals). The Judicial Officer observed:

> The Regulations do not define the term "the public" or the term "the general viewing public." However, generally, the term "the public" does not mean all people, as the Chief ALJ suggests. Instead, the term "the public" is often used to distinguish a large group of people from a smaller group of people. For instance, if one were to say "the plumber treats the public fairly," this statement generally would not be interpreted to indicate how the plumber treats his or her employees, apprentices, or himself or herself. Similarly, the term "the general viewing public" is not always used to mean "all people who view an event or object." The term "the general viewing public" is often used in a way that excludes those who are presenting the event or object to an audience."

61 Agric. Dec. 53, 87 (2002).

91. Contrary to my partial Decision, and based on information I have obtained subsequent to issuing my partial Decision in 2006, this Decision on Remand finds that "the general viewing public" and "the public" are synonymous, as used in 9 C.F.R. § 2.131(b)(1). As applicable here, the people who were admitted inside the Respondents' enclosure that would contain one photo opportunity tiger were still part of the "the general viewing public" even though "the general viewing public" also included those kept outside by the four-foot high perimeter fence. The perimeter fence was a barrier, and there was distance between that barrier and each animal enclosure. The "general viewing public" outside the perimeter fence had not paid $10 for a photo opportunity. Ms. Sniedze remained a member of "the public" and a member of "the general viewing public" while she was inside the exhibition, both while she was waiting her turn and while she was on the platform with the tiger.

92. The regulation requiring "sufficient distance and/or barriers between the animal and the general viewing public" and the Consent Decision provision requiring that the general public be kept away from the exhibit by "a barrier at least fifteen feet from the exhibit" applied to the people outside the exhibit ("passers-by"). Sufficient distance and/or barriers between the photo opportunity tiger and Ms. Sniedze, once she had gained admittance to the photo opportunity enclosure, ALSO applied, as I now understand, but zero distance and zero barriers could suffice, depending on all the circumstances. I include this information NOT to hold the Respondents accountable to APHIS policy formulated AFTER the circumstances complained of here, because this information came subsequent to their alleged violations and their hearing and my partial Decision, but to illustrate what I now understand APHIS's position to be. Here I quote Robert Gibbens, DVM, from testimony he gave on March 4, 2008, in the Mazzola case (*In re Mazzola*, 68 Agric. Dec. 822 (2009),(available on line at:
http://www.nationalaglawcenter.org/assets/decisions/mazzola3.pdf). Dr. Gibbens is Regional Director for the Western Region, Animal Care, APHIS, as he has been since 1997. Tr. 964-65 in *Mazzola*. Dr. Gibbens testified that with regard to (9 C.F.R. § 2.131(b)(1), as numbered in this Decision), once a big cat, such as a tiger or a lion, gets around three months of age, APHIS looks very closely at all factors to determine

whether the big cat is too big for a member of the public to touch. Tr. 1052-53 in *Mazzola*. Dr. Gibbens testified that the regulation would be violated if the tiger is an adult; and that there is not in the Regulations "an engineering standard for a juvenile tiger, which is why we had to look at a number of factors to consider, such as the cat, the size of the cat, the members of the public that are present; all these factors that I mentioned earlier that I don't need to list again. Tr. 1190-91 in *Mazzola*. Dr Gibbens believes that "public" and "the general viewing public" are intended to be synonymous. Tr. 1206 in *Mazzola*. Dr. Gibbens testified that "the Secretary has determined that there is an inherent danger present whenever there is the opportunity for the public to come into contact with a juvenile or adult big cat, and therefore that is considered to be out of compliance with (9 C.F.R. § 2.131(b)(1), as numbered in this Decision), Tr. 1221 in *Mazzola*.

Dr. Gibbens testified as follows in *Mazzola*. Tr. 1321.

Judge Clifton: All right. I want to go back to one section of the Regulations with Dr. Gibbens just to make sure I understand APHIS' interpretation. And this is (2.131(b)(1), as numbered in this case). As I understand it, it is APHIS' interpretation of this regulation that the distance and/or barriers required in a photo shoot with a juvenile or adult tiger must be sufficient to prevent direct contact with the public, and that includes people paying to have their photos made.

Dr. Gibbens: That's correct.

Judge Clifton: All right. It's my understanding that APHIS' interpretation of this regulation with regard to tigers that are younger and smaller than juvenile or adult depends on all of the circumstances put together in order to determine what type of distance and/or barriers are adequate. Is that correct?

Dr. Gibbens: That's correct.

Tr. 1321 in *Mazzola*.

The "Commonly Asked Big Cat Questions" was posted on the APHIS Animal Care website in about 2004, following the Big Cat Symposia (Symposiums) in about 2003. Tr. 2177-78 in *Mazzola*. The Respondents, of course, had the benefit of none of that information. First, the Consent Decision which guided the Respondents during the

summer of 1999 suggests an interpretation of regulation requirements which can be misleading when compared to later agency policy demands; second, the Respondents were given no notice beforehand that their techniques in ensuring the safety of their animals and the public and the general viewing public would be regarded as inadequate; and third, the United States Department of Agriculture had not, in 1999, made clear the regulation's requirements (not clear, by the summer of 1999, through "symposia" and written guidance delivered to licensees by the Animal and Plant Health Inspection Service (APHIS); not clear, by the summer of 1999, in decisions by the Judicial Officer and Administrative Law Judges; not clear in the comments in the Federal Register, *see* the rule at 54 Fed. Reg. 36162, August 31, 1989, and the comments that preceded it at 54 Fed. Reg. 10880, March 15, 1989. The comments show that while "exhibitors do not have a right to allow contact between the public and dangerous animals", neither is contact between the public and dangerous animals altogether prohibited:

> One member of the general public commented that dangerous animals should not be allowed contact with the public. The regulations in proposed paragraphs (b) and (c) of § 2.131 do not create a right of exhibitors to allow contact between wild or dangerous animals and the public. Proposed § 2.131(c) would require that in order to publicly exhibit an animal, an exhibitor must handle animals so that there is minimal risk of harm to the public. Proposed § 2.131(b) sets forth the conditions that apply to public exhibition of an animal if, and only if, handling an animal so that there is minimal risk of harm to the public would allow public exhibition. We are reversing the order of proposed paragraphs (b) and (c) in the revised rule in order to make clear that exhibitors do not have a right to allow contact between the public and dangerous animals.

54 Fed. Reg. 10880, March 15, 1989.

Those comments fail to clarify the exhibitors' obligations under the handling regulations in cases involving big cats. Not until *Mazzola* (in 2008) did I clearly understand APHIS policy with regard to no direct contact, that means no touching, between the public and juvenile and

adult felines. I find this policy very clearly stated in CX-179 in *Mazzola* and I read it into the record as part of my oral decision from the bench on the last day of the hearing. "Public contact with certain dangerous animals may not be done safely under any conditions. In particular, direct public contact with juvenile and adult felines (e.g., lions, tigers, jaguars, leopards, cougars) does not conform to the handling regulations, because it cannot reasonably be conducted without a significant risk of harm to the animal or the public. The handling regulations do not appear to specifically prohibit direct public contact with infant animals, so long as it is not rough or excessive, and so long as there is minimal risk of harm to the animal and to the public. If you intend to exhibit juvenile or adult large felines" [and adult has a footnote that indicates basically that juvenile or adult refers to over 3 months of age] - - after the word "felines" "(e.g., lions, tigers, jaguars, leopards, cougars), and would like Animal Care to review your proposed exhibition to determine whether it will comply with the handling regulations, please include with your application a description of the intended exhibition, including the number, species, and age of animals involved and the expected public interaction."

This CX-179 in *Mazzola* is what I call the "Dear Applicant" letter and it was provided in packets for new applicants for Animal Welfare Act licenses beginning in approximately January 2003. During the following year, it was provided to licensees who already had their Animal Welfare Act licenses with their renewal packets which were sent to them roughly a month before their expiration dates. *See Mazzola* Initial Decision, online, at pages 4-7 at http://www.dm.usda.gov/oaljdecisions/080731_AWA_06-0010_doTrExcrpt.pdf

93. For purposes of the "Great Cats of the World" exhibit during the two months of the summer of 1999 at issue here, I initially agreed with Ms. Berry's understanding in my partial Decision. Ms. Berry thinks the general viewing public is the public not having their photo and the public is the people having their photo. Tr. 595-96.

Ms. Berry: From the way that I understand it general public is the public not having their photo and the other . . . . (t)he public is the

people having their photo.
Tr. 595-96.
Ms. Berry continued, "The general public is kept behind the four foot fence, which is in the foreground. You can see that a girl with the red shirt is behind that. Then you can see inside the exhibit whether they are volunteers or employees or people getting their photos, I really can't see. It's a dark photo. - - that I would consider public or employees but I don't know which it is at that time. Tr. 596. CX 9.

94. The Respondents' four foot high perimeter fence, plus the "inner perimeter" distance of five to six feet between the perimeter fence and the animals' enclosures, did provide an adequate barrier plus distance to separate the general viewing public that were not waiting their turn from the Respondents' exhibit. Tr. 788-90, ALJX 1.

95. Further, the public waiting their turn once inside the Respondents' exhibit were separated with barriers plus sufficient distance from Respondents' other animals in enclosures other than the one containing the photo opportunity tiger. APHIS seems to have confronted the Respondents for the first time at the hearing with a new requirement, the requirement that the public inside their exhibit, the public who came in for a photo opportunity after paying $10, also need to be separated from the animal with sufficient distance and/or barriers. Now that I understand that APHIS regards "the public" and "the general viewing public" are the same, and I realize that "sufficient distance and/or barriers" is also required between the animal and the person who came in for a photo opportunity, I need to re-examine the "close encounter" exhibitions of animals (*see* 61 Agric. Dec. 53 at 89). Such exhibitions are not necessarily eliminated, because zero distance and zero barriers will suffice under certain specified circumstances, even for dangerous animals such as tigers, as well as for all other animals regulated under the Act. I find that Ms. Sniedze, who was a member of the public and a member of the general viewing public, is permitted to sit next to the tiger, touching the tiger, only so long as the amount of distance and amount of barriers suffices under those circumstances. Thus, in the summer of 1999, the plexiglas or bullet proof glass solution or one like it was not the only means of providing a photo opportunity such as that of Ms. Sniedze. I conclude that the Respondents were required during their photo shoots to "have sufficient distance and/or barriers" between

a tiger and the human(s) posing with the tiger, to comply with 9 C.F.R. §§ 2.100(a) and 2.131(b)(1)), and that in Ms. Sniedze's case, given the notice the Respondents had, the Respondents were in compliance.

The terms of the Consent Decision show that the plexiglas or bullet proof solution or one like it was not expected, either by APHIS or by the Respondents, to become the Respondents' only means of providing a photo opportunity. APHIS may seek a regulation for tigers that requires the plexiglas or bullet proof solution or one like it, but there was no such requirement during the two months of the summer of 1999 in which the Respondents' violations allegedly occurred.

96. On July 10, 1999, at the Northern Wisconsin State Fair, the Respondents did fulfill their obligation to assure the safety of the photo opportunity tiger and the public through their control over that photo opportunity tiger. Even without holding the tiger by a leash at all times, and even though the tiger (a juvenile tiger) weighed 75 pounds or more, and even though Ms. Sniedze instead of the Respondents' handler held the bottle for the tiger momentarily, the Respondents handled their tiger during public exhibition so there was minimal risk of harm to the tiger and to the public, including but not limited to Ms. Sniedze. My conclusion is based on all of the Respondents' safeguards, including their dedication to their tigers and their exhibition, and their practices and procedures, and on the credible testimony of Ms. Sniedze.

Iowa State Fair, Des Moines - August 20, 1999

97. Little more than a month later, on August 20, 1999, Respondents' traveling exhibit was inspected by Steven I. Bellin, Ph.D., D.V.M., at the Iowa State Fair, Des Moines, Iowa. Dr. Bellin ("Dr. Dr.", or, as he put it, "pair o' docs"), is an APHIS Veterinary Medical Officer (VMO), field certified in felid and canid nutrition, whose responsibilities are to assure compliance with the Animal Welfare Act.

98. Mr. Riggs testified that Dr. Bellin had done a thorough inspection of records and every aspect of the Respondents' operation at the Iowa State Fair (Tr. 787), and that Dr. Bellin had told him that he was not using leashes and was not in compliance with the Consent Decision. Tr. 787,

792-93. CX 12. Mr. Riggs drew a layout of the Iowa show, in part to show Dr. Bellin's vantage point[14] when taking photos of Respondents' exhibit. ALJX 1. Tr. 787. Mr. Riggs testified that Dr. Bellin was 30 to 34 feet from the photo opportunity tiger when he took the photos.

99. Mr. Riggs testified that he told Dr. Bellin he was flabbergasted that Dr. Bellin did not see the leashes being used. Tr. 794. Mr. Riggs testified that Dr. Bellin said, "Don't worry. I'm saying I didn't see a leash. I am saying that this item was corrected." Tr. 794.

100. Dr. Bellin testified that the non-compliances of animal welfare regulations he observed were primarily in the area of handling of animals. Tr. 378. The animals, as well as the general public, were not being kept safe according to Section 2.131 of the Animal Welfare Act regulations, Dr. Bellin testified. Tr. 378. Dr. Bellin identified his inspection report, CX 12. Tr. 377. Dr. Bellin identified the photos he took, CX 16 through 21. Tr. 378-79.

101. Dr. Bellin's photos are of very poor quality,[15] in part because they were taken from such a distance, about 30 feet, through three sets of fence (Tr. 791-92, ALJX 1), and because the lighting is inadequate. The closest Dr. Bellin got was "maybe within 15 to 20 feet, something like that." Tr. 380. Dr. Bellin's view was not up-close and personal; on direct examination, Dr. Bellin stated he never goes into an enclosure with an exotic cat, if he can help it. Tr. 395-401.

Ms. Carroll: Let me ask you, Dr. Bellin, to describe the training and expertise you have acquired during your career with the U.S. Department of Agriculture in connection with great cats, large cats, and their behavior.

Dr. Bellin: We have training opportunities at national conferences, regional conferences, where experts are brought in, experts such as Mr.

[14]Passers-by ("the general viewing public"), such as Dr. Bellin, were separated from the exotic cats by four foot high chain link fence.

[15]Dr. Bellin's comments on the backs of the photos are informative. Also, the videotape, CX 41, which Dr. Bellin saw and obtained after he left the Respondents' exhibit, augments Dr. Bellin's photos.

Riggs, or a James Fowler[16] type of individual, if you will, people who have expertise with the type of animals that we're going to be covering, and these people have given us the benefit of their knowledge, their education, their training, writings. They've provided us with bibliographies that we can further research if we want to know even more. As an inspector, I would say between 1989 and 1991 or 1992, I actually was responsible for even more exhibitors and then the territory was decreased a bit because we had a third inspector going to Iowa but I had done inspections, I would say, since 1989 at locations numbering well over 500 exhibitors of people who have big cats, be they home exhibitors or traveling exhibitors or people coming into the state from other - - several of my licensees or exhibitors have themselves been mauled by their animals and I've seen the results of that. I have read reports of these incidents. I have seen them physically myself. I have been responsible for the confiscation of large cats that had not been taken care of, successful confiscations. The scope is wide and varied. I don't purport to be an expert in the care and handling of these animals because I don't do it on a full-time basis like Mr. Riggs may do. But I certainly know what a wild animal is. I certainly know what a dangerous animal is, and I certainly know the difference between an animal that is trained and an animal that is domesticated as well as being trained. There are differences. And a tiger and a lion will always be a wild animal and will always be, always be subject to unpredictability, always.

Ms. Carroll: Do you also have occasion to deal with zoo personnel?

Dr. Bellin: Yes.

Ms. Carroll: And they're also exhibitors - - zoos are also considered exhibitors?

Dr. Bellin: Yes. With my knowledge, I think the last thing I might add is I've been invited several times to partake and join in the fun of going into the cage with these tamed, trained pets that people have, and never on any occasion have I ever done it, and I think there's a reason for that and it's not because I hadn't heard what they had asked me to do.

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[16]Mr. Fowler is a well-known explorer personality appearing on "Wild Animal Kingdom," a television adventure series.

Administrative Law Judge: If you'd go back now, Ms. Carroll, you had asked about difference the clothing could make and the witness had begun to tell that. I still don't know how he knows those things. If you could go into his background about how he's learned some of these specifics. Perhaps it's in the biographies or bibliographies rather that were provided for reading. Perhaps it's personal experience. If you could just draw some of that out before you return to your questioning.

Ms. Carroll: Okay, because I was trying to go back and find what my question was.
Ms. Carroll: Dr. Bellin, I take it you've also had discussions and interactions with the exhibitors that you described including the 500 exhibitors of exotic animals including big cats, is that correct?
Dr. Bellin: Yes, I have.
Ms. Carroll: I guess have you obtained information in your training or in your work and in the dealings that you just described concerning the effect of clothing, perfume, age, and size of the person, et cetera -- strike the et cetera. Have you obtained information specifically concerning those factors and how they play into the risk?
Dr. Bellin: Yes.
Ms. Carroll: And what specifically or from what sources have you derived that information?
Dr. Bellin: From people who have been mauled by these animals, from people that feed and water them every day, from people that write books and make television documentaries on these animals, from people who report on these animals, from people that own these animals as pets, from people that get rid of these animals as pets. Just numerous sources. Things that I've read. Perhaps a lot of hearsay but my wife happens to be the head librarian for Science Cataloging at Iowa State University and usually if I don't know something, I usually ask her to look it up, and if anybody can find it, she can. So normally if I hear something that sounds weird, I try to find out if it's true or not. I'm not saying everything I've learned is true. What I'm saying is that the sources that I've been exposed to are numerous and varied.
Ms. Carroll: Has there been agreement generally speaking in connection with the, for example, the issue of perfume among the sources that you've consulted?

Dr. Bellin: Yes.
Ms. Carroll: And is that also true in connection with the clothing? I think you had started to answer that various different kinds of clothing can affect animal behavior.
Dr. Bellin: Yes. The bottom line is anything novel is an unpredictable trigger or can be an unpredictable trigger, anything novel to the cat.
Ms. Carroll: And let me just ask you about what difference, if any, it would make as far as the level of risk as to the age of the person coming into contact with the tiger - - with a tiger.
Dr. Bellin: I don't know at what age a tiger learns to hunt necessarily when it's bred and raised in captivity but I would imagine that a smaller child would be a more palatable target if the animal were hungry than say a 6'6", 280-pound man.
Ms. Carroll: In your experience, do tigers - - can tigers cause injury without, I don't want to say meaning to, but while playing?
Dr. Bellin: Absolutely, by way of their canine teeth and large claws, their general size, their quickness.
Ms. Carroll: And you mentioned perfume. In your experience, what is the effect of perfume or lack of perfume on tiger behavior or response?
Dr. Bellin: It's unpredictable. I couldn't tell you. I know that it's novel. I know two people that were wearing perfume, I know personally two people that have been attacked by a large cat that were wearing perfume, so I know that it's not a neutral thing that goes on in the tiger's mind. I mean there was a reason for the attack. It could have been the people doing something and it could have been the perfume. I don't know what the initiating factors were, but I personally know two people who were wearing perfume and had been attacked.
Ms. Carroll: Is it - - in your opinion, are things like type of clothing, perfume, and age of patrons something that should be considered in exhibiting animals like tigers?
Dr. Bellin: Federal law requires minimal risk to animals, and it doesn't really address that much to the public. Federal law and under the Animal Welfare Act when I hear minimal risk if anything poses a potential risk then obviously the exhibitor is not at the minimal level yet as far as I'm concerned. That's about as specific as I can get.

Tr. 395-401.

102. Dr. Bellin cemented his explanation for not being "up-close" and personal, on cross examination. Tr. 435-47.

Dr. Bellin: There's no way I will get in with a wild animal that belongs to somebody else ever, ever, ever, ever, ever, sir, nor will my wife. They are unpredictable. They're wild. They're dangerous. They carry disease. They can hurt, they can maim, they can kill. Minimize the risk. I get enough risk in my job. I would never think of it. My wife would never think of it. It never crossed our mind.

Mr. Weiland: So you have never had the thrill of touching a tiger in your whole life?

. . . .

Dr. Bellin: Sir, I find no thrill in touching a tiger.

Mr. Weiland: You never had the experience touching a tiger?

Dr. Bellin: That's not true.

Mr. Weiland: You have touched a tiger?

Dr. Bellin: Yes.

. . . .

Dr. Bellin: I was three years old. I have no idea what my thoughts were at that time.

Tr. 436.

. . . .

Mr. Weiland: In fact, the kind of exhibit that the Riggses had in 1999 had become quite unusual in your experience, would you agree with that?

Ms. Carroll: Objection. I think foundation on unusual.

Dr. Bellin: I don't even understand the question. I'm sorry.

Mr. Weiland: Well, you went out to this - - you tried to go to the state fair every year. Maybe I'm wrong. Is there an exhibit where people can come and have their picture taken with baby tigers out there every year?

Dr. Bellin: No.

Mr. Weiland: Had there ever been one in your experience?

Dr. Bellin: Yes.

Mr. Weiland: How frequently have you seen that type of exhibit?

Dr. Bellin: In the 12 years I've been a federal inspector, have I seen that type of exhibit at that state fair?

Mr. Weiland: Yes.

Dr. Bellin: Three times.
Mr. Weiland: Okay. And then the other - - at least two of those times were someone other than Mr. and Mrs. Riggs' show?
Dr. Bellin: Exactly two times, yes.
Mr. Weiland: Two times. Two other times?
Dr. Bellin: Yes.
. . . .
Mr. Weiland: You mentioned in your testimony that you thought the bottle was a distraction but the bottle is a distraction. It's not anything you think. It clearly is a distraction to the animal during the course of the exhibit, isn't that correct?
Dr. Bellin: Yes.
. . . .
Dr. Bellin: . . . . Because nobody is harmed or hurt during a particular exhibition doesn't mean that the risk is minimal at that point. It doesn't mean that precautions have been taken. It just means somebody is lucky maybe.
Tr. 446.
. . . .
Mr. Weiland: Well, let me ask you if - - let me ask you hypothetically.
Dr. Bellin: Certainly.
Mr. Weiland: If Mr. Riggs was at Iowa State Fair in August of 1999, and he took 1,000 photographs involving a total of say conservatively 2,000 people, and after that time there was no evidence that the animal or any human had been harmed, would you conclude that his exhibit presented a minimal risk of harm?
Dr. Bellin: No.
Mr. Weiland: Okay. Bear with me. What if Mr. Riggs at the Iowa State Fair had taken 10,000 photographs, and during that period of time no individual had reported any injury whatsoever and no animal had suffered any physical harm that any veterinarian or inspector could determine. At that point would you conclude that the exhibit posed a minimal risk of harm?
Dr. Bellin: No.
Mr. Weiland: What if Mr. Riggs during the course . . .

Dr. Bellin: Sir, you could go to infinity and the answer will be no. I'm just doing this to expedite, if you would. Give me a number, and the answer is no.
Tr. 435-47.

103. Dr. Bellin's inspection is the most significant of the four fairs. At the first fair at issue (Northern Wisconsin), there was no APHIS inspector, and the evidence addresses only one member of the public, Ms. Sniedze. Dr. Bellin's inspection was at the second fair at issue (Iowa), the first APHIS inspection to follow up on the Consent Decision issues raised by the photograph of Ms. Sniedze with the Respondents' tiger. The closest Dr. Bellin got during his observation of the Respondents' exhibition was "maybe within 15 to 20 feet, something like that." Tr. 380. The length of time Dr. Bellin observed the Respondents' exhibition was 1-1/2 to 1-3/4 hours (Tr. 380), plus he watched the videotape (CX 41). The day of Dr. Bellin's inspection, hundreds of members of the public had photo opportunities with one of Respondents' tigers, perhaps 60-70 people each session, sitting for perhaps 40 photographs each session (one photo would include one or more people, up to as many as seven people). Tr. 382-84. Quite significant is Dr. Bellin's first write-up, CX 12, his Inspection Report. Dr. Bellin wrote one paragraph, and the noncompliance he identified was essentially "Animals are not on a leash and are not under direct control of a handler." CX 12. Dr. Bellin identified Order 1(c) and Order 4 of the Consent Decision. CX 12, CX 3.

104. Dr. Bellin's Affidavit (CX 13) was prepared after he had viewed the videotape (CX 41),[17] and the noncompliance Dr. Bellin identifies from the videotape is " . . . . photo session, with Mr. Riggs in control of the session, posing individuals with his tigers and the absence of any direct control by an experienced handler, or even in direct control of a leash 18 inches or shorter." CX 13, p. 4.

105. Dr. Bellin's Affidavit conclusion states, "In my inspection

[17]The videotape (CX 41) from the PBS station in Iowa, IPTV, shows Respondents' exhibit, Great Cats of the World, much better than Dr. Bellin's photos. The videotape was obtained by APHIS investigator Ms. Patricia Martin Lesko. Tr. 362-64. Dr. Bellin had watched the segment when it aired, and had videotaped it with his VCR. Tr. 413, 416.

report,[18] I chose not to reference 9 CFR, Sections 2.131(b)(1) and 2.131(c)(3) under the handling statutes because the AWA Docket #98-34 addressed in it's (sic) orders specifically the issues of "direct control" and leash requirements to be employed by the Bridgeport Nature Center during photo sessions with the public. This[19] is a true statement." CX 13, p. 4.

106. By not holding the tiger by the leash at all times during the photographic sessions with members of the public, the Respondents' handler caused the Respondents to violate the Consent Decision, which orders that the tiger be "collared and on a leash no longer than 18 inches in length at all times." CX 3 pp. 4-5. That the leash will be held by a handler is understood, even though the foregoing Consent Decision provision does not specifically state that the leash shall be "held by a handler." The Consent Decision's clear meaning was that the tiger was to be collared and on a leash held by a handler at all times, the leash to be no longer than 18 inches.

107. The consequences of violating a Consent Decision were addressed by Ms. Carroll at the hearing. *See* APHIS's position, Tr. 169-73. The collar and leash requirement is contained in the Order portion of the Consent Decision, but not in the "cease and desist" portion of the Order, paragraph 1, which forbids future violations of "the Act and the regulations and standards issued thereunder." CX 3, pp. 2-4. Under the Consent Decision, paragraph 7, the Respondents' 30-day license suspension that began on September 19, 1998, would not end until the Respondents demonstrated compliance with the Act, the Regulations, the Standards, and the Order portion of the Consent Decision. CX 3, p. 5. The Consent Decision fails to specify any other consequences of violating the collar and leash requirement. Consequently, the Respondents' violation of the collar and leash requirement will have consequences here only if "the Act and the regulations and standards issued thereunder" are violated. If so, the civil penalties provisions of 7 U.S.C. § 2149(b) apply.

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[18]CX 12

[19]referring to the entire four-page Affidavit

108. Not only APHIS was concerned with the safety of the animals and the humans; the Respondents were also concerned with the safety of the animals and the humans. The Respondents proved themselves very capable in handling their tigers so there was minimal risk of harm to the animal and to the public. The Respondents' practices and methods included in pertinent part, bottle feeding a young hungry tiger on the tiger's feeding platform during the photo opportunities for the public. The young tiger had been fed that way from the age of weeks old.

109. *Handling* means petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working and moving, or any similar activity with respect to any animal. 9 C.F.R. § 1.1, Definitions.

110. During a "Great Cats of the World" photo opportunity, the customer holding the bottle for one of the Respondents' tigers was, by definition, handling that tiger - - by feeding the tiger and perhaps by petting the tiger. The Respondents' employee (Mr. Riggs or someone trained by Mr. Riggs and Ms. Berry) who was supervising the customer's handling of that tiger was also handling that tiger - - feeding and perhaps petting the tiger through the action of the customer, and also working/training/moving/transferring/manipulating that tiger.

111. I disagree with Dr. Bellin on the "direct control" issue; during the Respondents' photo shoots, I conclude that direct contact (touching) of a tiger or its leash by the handler was not required to keep a tiger under "direct control and supervision," for the purposes of 9 C.F.R. §§ 2.100(a) and 2.131(c)(3). I conclude that on August 20, 1999, at the Iowa State Fair, the Respondents' dangerous animals that the Respondents exhibited (photo opportunity tigers) were under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the photo, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger.

112. The Respondents' dedication, experience, know-how, practices and methods are essential to my conclusion that, **for the most part**, there was minimal risk of harm to members of the public who participated in the Great Cats of the World exhibit during the two months of the summer of 1999 in which the Respondents' violations allegedly occurred. Other exhibitors may not be able to put together

such a safe and effective presentation, and the Respondents under other circumstances may not. But if exhibitors are to be regulated more tightly, the rules have to be announced in advance. As indicated, I also found violations on certain occasions at the Iowa State Fair on August 20, 1999

113. Part of the allure of an exhibit of exotic cats is that, besides being wondrous and gorgeous, they are dangerous. Even so, members of the public no doubt believe that an exhibit in a fair has been cleared by the authorities as safe. The public do not know not to go into a close encounter exhibit - - look at all the young parents who took their elementary school aged children in, and even pre-schoolers. CX 41. Dr. Bellin estimated that the youngest person he saw having a picture taken with a tiger was two years of age. Tr. 385. There were several instances on August 20, 1999, when the Respondents departed from their practices and methods and thereby escalated the risk of harm to more than minimal.

114. During public exhibition in photographic sessions with members of the public at the Iowa State Fair on August 20, 1999, when the Respondents allowed their bottle-feeding young hungry tiger, instead of being on the tiger's feeding platform, to be draped over the laps of people seated in the crowd while waiting their turn for their photo opportunity, the Respondents escalated the risk of harm to more than minimal. When the laps were the laps of children, or close to children, the risk of harm was even worse. Dr. Bellin testified, and CX 41 confirms, that children under the age of 18 had their pictures taken without any adults, and that tigers were on the laps of children, being held only by children. Tr. 386-87, 401-02. These situations included more than minimal risk of harm to the tiger and to the public, in violation of 9 C.F.R. § 2.131(b)(1); failure to maintain sufficient distance and/or barriers between their animals and the general viewing public, in violation of 9 C.F.R. § 2.131(b)(1); and failure to keep the tiger under the direct control and supervision of a knowledgeable and experienced animal handler, in violation of 9 C.F.R. § 2.131(c)(3).

Dutchess County Fair, Rhinebeck, New York - August 28, 1999

115. Eight days after Dr. Bellin's inspection, Respondents' traveling exhibit was again inspected by an APHIS Animal Care Inspector, at Rhinebeck, New York, on August 28, 1999. Again, the APHIS Animal Care Inspector did a complete and thorough inspection. Tr. 39, 53, 57-58, 65.

116. The APHIS Inspector's report, prepared at the Dutchess County Fair in Rhinebeck, New York on August 28, 1999, is CX 22. Tr. 40. The Inspector's name is Ms. Jan Baltrush.

117. The Respondents had leashes on the tigers during photo sessions; there is no allegation related to handling on August 28, 1999, Tr. 49, 54, 56, 64.

118. Ms. Baltrush testified that the Respondents had 18 cats that day (she took a census); the specific documents Ms. Baltrush wanted were readily available for all but four; those four were three tigers and one lion cub. Tr. 40-41, 77. The four were on a health certificate given immediately to Ms. Baltrush; Ms. Baltrush remembered that there was something for the four on the health certificate, but "there was no documentation of when and where they originated, i.e., "when they were born or where they were born, whether they were brought or whether they were born on the premises." Tr. 40, 59, 77.

119. Ms. Baltrush didn't recall whether the health certificate stated how old the animals were. Tr. 78. She testified that APHIS did not need the health certificate; it is required by the state. Tr. 67-68.

120. Ms. Baltrush testified that the information she was looking for did not have to be on a specific form (Tr. 62) (although a "transfer form" is commonly used), but that the record needed to show where the animals originated (Tr. 59), to include the place of birth in addition to the date of birth. Tr. 62-64. Ms. Baltrush testified that that is what she interprets 9 C.F.R. § 2.75(b) to require.

121. In contrast, Mr. Riggs testified that a transfer form does not require the exact age of the animals, but "just says young or old." Tr. 809.

122. Ms. Baltrush testified that Mr. Jay Riggs told her the animals were born on his property, and they were just brought into his traveling group recently. Tr. 42. Ms. Baltrush testified that she wrote up a records violation, but before she left that day, Jay Riggs supplied her with the specific documentation she was looking for. Tr. 43.

123. Ms. Baltrush had gone to her car, typed up the one-page document to show a records violation, and then went back to Mr. Riggs; Mr. Riggs said he found the documentation for those three tigers and one lion cub (Tr. 71), and he gave it to her. Tr. 71, 798. Ms. Baltrush determined that the documentation met APHIS requirements. Tr. 71.

124. Ms. Baltrush explained that there was a violation "because when I first started the inspection and first asked for the information, it was not available to me." Tr. 72.

125. Ms. Baltrush had arrived at about 11:00 in the morning and stayed about 4-1/2 hours. She did not call in advance (Tr. 64), and Mr. Riggs did not know she was coming. The length of time between the completion of her initial inspection and her return after writing up the violation in her car, was "an hour or two," according to Mr. Riggs, during which, Mr. Riggs found the specific documentation that Ms. Baltrush was looking for. Tr. 798.

126. Mr. Riggs testified that the health certificate for Iowa did not have the four new cubs on it; "we had a health certificate generated strictly for Rhinebeck, New York that had all these cats on one page." Tr. 797. Mr. Riggs testified that Ms. Baltrush asked where these animals came from. "And basically she was asking me for the record of acquisition or the transfer form for these cats indicating their origination, where they're from." Tr. 797. "I could not find the papers in the first instance that accompanied the cats that I had just shown Dr. Bellin in Iowa. I couldn't find the transfer form or that, even that original health certificate. Those two pieces, documents, had not been placed in the permit book at that point and weren't a part of that, and we could not find that upon our initial inspection." Tr. 797-98.

127. Mr. Riggs continued, "Once she (Ms. Baltrush) left, I began to go through the tour bus and everything inside that, and I found both those documents, the original health certificate and the record of transfer that accompanied them from Texas to Iowa. And when she came back, I presented her with those to verify, really just verify the information on the health certificate. But I presented her with those, and she did write that we had found the document she was looking for." Tr. 798.

128. Mr. Riggs testified that Ms. Baltrush also told him that it was a

violation for Eric (Drogosch) to be handling the animals, when Heidi and Jay Riggs are the only ones listed that can actually handle the animals. Mr. Riggs testified that "she gave us basically on that inspection report 30 days to send in for pre-approval for all of our employees so that . . . I have never heard of that at all. Tr. 800. So I was shocked. Tr. 801. [No violation is alleged here concerning handling by a person other than Mr. or Ms. Riggs.].

York Fair, York, Pennsylvania - September 10, 1999

129. Two weeks following inspection by Ms. Baltrush, the Respondents' traveling exhibit opened at the York Fair, York, Pennsylvania, on September 10, 1999. Tr. 803. That night, opening night, Fox 43 News at 10:00 featured Respondents' traveling exhibit, Great Cats of the World, in a promotional video of the York Fair. A videotape of the newscast, with news reporter Mr. Kevin Johns, is in evidence. CX 33. Tr. 231.

130. APHIS Animal Care Inspector Robert Markmann inspected the Respondents' traveling exhibit at the York Fair on opening day, September 10, 1999. Mr. Markmann testified that the reporter, Kevin Johns, from Fox 43 News, was inside the cub enclosure, handling some of the cubs, while Mr. Markmann was doing the exit interview with Mr. Riggs. Tr. 230.

131. That night on the news Mr. Markmann saw the Fox 43 News reporter with one of the big, white tigers. Tr. 231. Mr. Markmann's memorandum to Dr. Ellen Magid about the Fox 43 News segment is CX 40. Tr. 231.

132. The reporter Kevin Johns is promoting the York Fair, with opening day video. CX 33. The news clip states that the York Fair is the nation's oldest fair, in 1999 having begun its 234th edition. The news clip states that the unusual new educational exhibit Great Cats of the World is part of the Fair's success. The reporter, Mr. Johns, says that the cute and cuddly cats are stealing the show - - 19 cats altogether, 7 rare species. CX 33.

133. The Kevin Johns segment of CX 33[20] begins with the baby cat Simbala, a four-week old white lion, adorable and very vocal (and rare; the story reports that there were only 20 white lions in existence). The news clip is excellent and makes me, the trier of fact, break out in a big grin every time I watch it. CX 33.

134. The news clip includes lots of spectator reaction and statements of both Mr. Riggs and Mr. Drogosch. Mr. Riggs tells that the cats are endangered and that they are wild, not meant to be pets. Mr. Drogosch tells that one danger is that they'll steal your heart away, that he used to be in law enforcement working with dogs and then fell in love with the exotic cats. CX 33.

135. Near the end of the news clip, the reporter, Mr. Johns, is feeding a bottle to a royal white tiger, Shawnee. The story reports that there were only 200 royal white tigers in the world. Mr. Johns is seated next to Shawnee on Shawnee's feeding platform, much as Ms. Kris Sniedze is seated next to a tiger in CX 8. Mr. Johns is holding Shawnee's bottle with one hand, and with his other hand, he is tousling Shawnee's head. Shawnee clearly is intent on the bottle.

136. I feel no tension watching Mr. Johns with Shawnee, even though Shawnee was bigger than Ms. Sniedze's tiger. CX 33, CX 8. Shawnee weighed 120 to 140 pounds. Tr. 854. Shawnee was at least 8-1/2 months old, born on or about December 31, 1998. Tr. 148-49. Allowing Mr. Johns to interact directly with Shawnee, to sit next to Shawnee with no barrier and to touch Shawnee and to hold the bottle for her, got Respondents into trouble with both APHIS and the Commonwealth of Pennsylvania.

137. Mr. Riggs paid a $500 fine (plus costs, total of $535) to the Commonwealth of Pennsylvania on September 15, 1999, the day he was given the Pennsylvania citation by Mr. Gregory C. Houghton. CX 42 is a copy of citation. Tr. 333. Mr. Houghton worked for the Pennsylvania Game Commission. At the time of the hearing was Mr.

[20]CX 33 is the whole newscast, Fox 43 News at 10:00. The tape is cued to the Express Weather segment. The story on the Fair immediately follows Express Weather, which mentions that Floyd is now a hurricane, and immediately precedes coverage of the best spam cook-off competition.

Houghton was Chief of Technical Services, Division for the Bureau of Law Enforcement. He formerly was a District Wildlife Officer in Northern York County, Pennsylvania.

138. Mr. Houghton testified that there were no reports of injuries to any humans or to any animals during the time the Respondents' show was at the York Fair. Tr. 360-61. When Mr. Houghton was at the York Fair on September 13, 1999, he did not observe any violations at Respondents' show. Tr. 328-29, CX 39.

139. But Mr. Houghton issued a Citation to James Lee Riggs for the contact that reporter Kevin Johns had with two different cats. The evidence was the Fox 43 videotape obtained through the Governor's office. Tr. 330, 333, 335. The reporter had contact with Simbala, the four-week old white lion, and with Shawnee, the royal white tiger. CX 33. Tr. 343. The white tiger Shawnee was 8-1/2 months or 9 months old.[21]

140. Mr. Riggs regarded news reporter Kevin Johns as being someone he was working with, not as a member of the public, and not as involved in the "photo part" or photo shoot with the accompanying restrictions. Mr. Riggs did not use Shawnee for the photo shoots with members of the public, as he understood the public. Tr. 831, 839-41. I agree with Mr. Riggs, that news reporter Kevin Johns was not a member of the public while he was promoting the York Fair, on location at the Respondents' traveling exhibit.

141. Mr. Riggs had a temporary menagerie permit for the York Fair. Tr. 318. The reporter's contact with the two cats was alleged to be in violation of his menagerie permit. The Pennsylvania Game and Wildlife Code requires the exercise of "due care in safeguarding the public from

[21]Shawnee may have been born on December 31, 1998, as Mr. Riggs testified. Tr. 831, and *see* CX 37, p. 1, the Rabies Certificate. Shawnee would then have been 8-1/2 months old at the York Fair. I find it more likely, based on CX 37, p. 11, that Shawnee was born about two weeks earlier, on or about December 15, 1998. If Shawnee was 8 weeks old on February 9, 1999, as shown by CX 37, p. 11, she would have been nearly 9 months old at the York Fair. The Respondents prepared CX 37, p. 11, with emphasis on Shawnee's birth group: "The 4 little babies need their first round of shots." Those 4 little babies, including Shawnee, are shown to be 8 weeks old on February 9, 1999. If CX 37, p. 10, a form prepared in the Veterinarian's office, were entirely accurate, Shawnee would be a month older; but based on a careful reading of CX 37 p. 11 and p. 10, I find that the date (1-09-99) on that form is wrong and should have been 02/09/99. *See also*, Tr. 119-121.

attack by exotic wildlife." CX 43. Tr. 337-38. The Pennsylvania Game Commission interprets the Code to prohibit members of the public from having any contact.

142. Mr. Riggs did use plexiglas for all his photo shoots at the York Fair, to prevent the public from having any contact, but Mr. Riggs did not regard the reporter as a member of the public.

143. The videotape (CX 33) that includes Mr. Johns' contact with Simbala and Shawnee was played numerous times at the hearing. Tr. 128-29, Tr. 342-43. (APHIS investigator William John Swartz, with Investigative and Enforcement Services, followed up Mr. Markmann's inspection, accompanied by Mr. Houghton. Tr. 93, 96.)

144. Mr. Riggs testified that at the York Fair he did not know in advance that a reporter was coming. Tr. 804. The reporter said he wanted to shoot some film and do an ongoing story, and create a one to three-minute video that actually Mr. Riggs could use as a promo tape.

145. Mr. Riggs testified that the video was being shot all day, that the reporter was there for several, several hours, daylight and nighttime. Mr. Riggs testified the reporter did not pay admission or any kind of fee, and that the reporter was never in any kind of jeopardy. Mr. Riggs testified that he actually assigned Eric (Drogosch) to stay with the reporter. Mr. Riggs testified that he began working with the reporter, until Inspector Markmann made his appearance.

146. Mr. Riggs testified that he told Eric, stay with him, teach him, and help him develop this video. Tr. 805. About the shot in the video with the bottle, Mr. Riggs testified that Kevin Johns, the reporter, didn't feel he could remember all his lines and pull off his part of this video sitting down with this cat, holding this bottle, and remember everything. Tr. 806. Mr. Riggs continued, "So we have several dry runs to familiarize him with this cat, with this process of holding the bottle, and it was only during the live shot, the final shot, when this thing aired live, is what we see here on the video." Tr. 806.

147. When Mr. Riggs was asked how close he and Eric were to the reporter during the video, Mr. Riggs testified, "We were very close, and he felt much more at ease with that, and I would suggest the camera operator wouldn't have been a very good camera operator if it did show

either one of us in that. Tr. 807.

148. When Mr. Riggs was asked if he felt like (he and Eric) were in direct control of that animal (the white tiger in the video) throughout that entire time, Mr. Riggs testified, "If you watch the video, it's obvious that we were in direct control." Tr. 807.

149. When Mr. Riggs was asked if he felt that assisting in that news show put Mr. Johns or the animal at any risk whatsoever, Mr. Riggs testified, "No. Not at all." Tr. 807. Watching the news clip on CX 33, I have to agree. *See also* Tr. 627-29.

150. There is no evidence that Mr. Kevin Johns or Simbala or Shawnee was ever at more risk than is evident from the news clip, which I find to be minimal risk or less. In addition, I find that Mr. Johns was not a member of the public but was instead a volunteer and trainee who had trained all day.

151. Evidence of the methods and practices of Las Vegas, Nevada exhibitors, such as Siegfried and Roy (Tr. 563-566), and the MGM Grand Hotel (Tr. 697-99, 717), did not impact my Decision. Evidence of the much larger number of injuries and fatalities to children caused by dogs (Tr. 704), compared to evidence of human injuries and fatalities caused by great cats (Tr. 705), did not impact my Decision. *See also* Tr. 705-07.

152. APHIS asks me to conclude that each of the Respondents operated as an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*.), and the Regulations (9 C.F.R. § 1.1 *et seq*.).

Exhibitor

153. The Act defines "exhibitor":

> "The term 'exhibitor' means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons

> participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary;"

7 U.S.C. § 2132(h).

154. The "Laboratory Animal Welfare Act" of 1966 (P.L. 89-544) was amended in 1970. The pertinent legislative history of the proposed "Animal Welfare Act of 1970" (P.L. 91-579), which added "exhibitors" to those being regulated, shows that:

> "country fairs" may have been meant to say "**county** fairs"[22]; and "exhibitor" **excludes** "organizations sponsoring and **all persons participating in State and county fairs**," as follows,
>
> > (8) A new section 2(h) would be added to the Act defining the term 'exhibitor' which would extend the requirements of the Act to persons who acquire animals for purposes of exhibition. The term excludes retail pet stores, and organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.
> >
> > The term specifically includes carnivals, circuses and zoos exhibiting animals, whether operated for profit or not.

Legislative History of P.L. 91-579, referring to the "**Annual** Welfare

[22]But *see* Senator Robert Dole's explanation of the exclusions in the proposed 1970 amendments, referring to "country and State fair livestock shows and such exhibitions as are sponsored by the 4-H clubs which are intended to advance the science of agriculture." (*emphasis added*) Complainant's Response to Excerpt . . ., filed September 6, 2006, page 3.

Act of 1970" but intending the Animal Welfare Act of 1970, House Report No. 91-1651 at 5103, 5106-5109.

155. The Regulations likewise define "exhibitor":

9 C.F.R.:

Title 9—Animals and Animal Products

CHAPTER I—Animal and Plant Health Inspection Service, Department of Agriculture

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

. . . .

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

. . . .

9 C.F.R. § 1.1.

156. Ms. Berry holds a class "C' license as an "exhibitor." CX 2. *Class "C" licensee* (exhibitor) means a person subject to the licensing requirements under part 2 and meeting the definition of an "exhibitor" (§ 1.1), and whose business involves the showing or displaying of animals to the public. A class "C" licensee may buy and sell animals as a minor part of the business in order to maintain or add to his animal collection. 9 C.F.R. § 1.1.

157. In their Answer, the Respondents admitted paragraph I.C. of the Complaint, which reads, "At all times material hereto the Respondents were licensed and operating as an exhibitor as defined in the Act and regulations."

158. By letter filed August 18, 2006, the Respondents confirmed that they were "licensed and operating as exhibitor" ***in general*** during the time frame of the Complaint. The Respondents confirmed that the response "Admitted" to paragraph I.C. of the Complaint, is "literally correct."

159. The Respondents' letter filed August 18, 2006, continued in part, "However, since the statute did not require Heidi (Ms. Berry) to be operating as a 'licensed exhibitor' at the county fairs for which evidence was adduced at the hearing, the USDA failed to prove a violation."

160. The Respondents' letter filed August 18, 2006, responded to a request I communicated to counsel, regarding whether the Respondents were "participants in State or county fairs" within the meaning of the Act and the Regulations and consequently were not operating as an exhibitor.

161. The Complainant's Response to Excerpt . . . , filed September 6, 2006, persuades me to agree with much of the Complainant's Response; specifically, I agree with the following, found on p. 2:

. . . . First, a fair's midway (in contrast to its agricultural exhibits

> and competitions) is a carnival.[23] Second, it is undisputed that respondents were not the "sponsoring organization" of any of the fairs at which they displayed their animals. Third, respondents were not "persons participating" in any of the fairs, as that term is used in the Act, and intended by Congress. They were concessionaires. The respondents did not display their animals "to advance agricultural arts and sciences;" rather, they contracted with the fairs' sponsoring organizations, were required to obtain insurance, and were paid by the fairs to put on their animal display on the fair's midway as an attraction. [footnote omitted, footnote 3] This is not what "persons participating" in the enumerated events do. The word "participate" itself implies a group of persons engaging in the same activity (such as competing in events). [footnote omitted, footnote 4 contains a dictionary definition of participate, including to take or have a part or share, as with others; partake; share (usually fol. by *in*): *to participate in profits; to participate in a play*]
>
> . . . .
>
> To hold that an exhibitor can suddenly cease to be an exhibitor subject to regulation if he sets up shop at a fairgrounds would be to eviscerate the Act.

162. Particularly persuasive to me is page 3 of the Complainant's Response to Excerpt . . . , filed September 6, 2006, including the quote from Senator Robert Dole, one of the bill's sponsors:

> It extends humane treatment of animals to wholesale pet dealers, zoos, road shows, circuses, carnivals and auction markets . . . The bill quite properly excludes from its provisions country and State fair livestock shows and such exhibitions as are sponsored by the 4-H clubs which are intended to advance the science of agriculture.

Further, I now agree that the intent of the Animal Welfare Act was "to

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[23] *See* definition of *carnival* as "a traveling enterprise offering amusements; an organized program of entertainment or exhibition." Webster's Seventh New Collegiate Dictionary, 1969.

regulate non-agricultural animal displays; and not to distinguish among animal exhibitors based solely on the venue." Complainant's Response to Excerpt . . . , filed September 6, 2006, p. 3.

163. Considering the evidence as a whole, I now conclude:

(a) that one of the Respondents was licensed, Ms. Berry; and that Ms. Berry did business as Bridgeport;
(b) that Bridgeport and Mr. Riggs were operating under Ms. Riggs' license; and
(c) that, because their display of non-agricultural animals (the Great Cats of the World) was more like a carnival, a road show, than like a livestock show or 4-H club exhibition, the Respondents were operating as an exhibitor, even while appearing at State and county fairs.

164. The Respondents were not "participating in State and county fairs" and therefore were not thereby excluded from being an "exhibitor" under 7 U.S.C. § 2132(h) and 9 C.F.R. § 1.1.

Findings of Fact and Conclusions

165. The Secretary of Agriculture has jurisdiction.

166. Respondent Bridgeport Nature Center, Inc., was a Texas corporation, incorporated on February 29, 1996, with a business address of Route 1, Box 192, Bridgeport, Texas 76426. The registered agent for service of process for Bridgeport Nature Center, Inc., according to the Texas Secretary of State, was Heidi Marie Berry Riggs. Respondent Bridgeport Nature Center, Inc., was at all times material herein an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*., particularly 7 U.S.C. § 2132(h)), and the Regulations (9 C.F.R. § 1.1 *et seq*., particularly the Definitions in 9 C.F.R. § 1.1). At all times material herein, Respondent Bridgeport Nature Center, Inc., exhibited animals regulated under the Act under the names Bridgeport Nature Center, Bridgeport Nature Center, Inc., and "Great Cats of the World." CX 15.

167. Respondent Heidi M. Berry Riggs, also known as Heidi Marie Berry Riggs, is an individual whose address at the time of the hearing was 245 CR 3422, Bridgeport, Texas 76426. At all times material herein, Respondent Heidi M. Berry Riggs was an owner of, principal in, and an officer (President) of Respondent Bridgeport Nature Center, Inc. At all times material herein, Respondent Heidi M. Berry Riggs was licensed as an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*., particularly 7 U.S.C. § 2132(h)), and the Regulations (9 C.F.R. § 1.1 *et seq*., particularly the Definitions in 9 C.F.R. § 1.1), and she operated under AWA license number 74-C-0337. At all times material herein, Respondent Heidi M. Berry Riggs exhibited animals regulated under the Act under the names Bridgeport Nature Center, Bridgeport Nature Center, Inc., and "Great Cats of the World." CX 15.

168. Respondent James Lee Riggs, also known as Jay Riggs, is an individual whose address at the time of the hearing was 245 CR 3422, Bridgeport, Texas 76426. At all times material herein, Respondent James Lee Riggs was an owner of, principal in, and an officer (Vice President) of Respondent Bridgeport Nature Center, Inc. At all times material herein, Respondent James Lee Riggs was employed (though unpaid) by Respondent Bridgeport Nature Center, Inc., and he operated as an "exhibitor" as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq*., particularly 7 U.S.C. § 2132(h)), and the Regulations (9 C.F.R. § 1.1 *et seq*., particularly the Definitions in 9 C.F.R. § 1.1), and he operated under his wife's AWA license, number 74-C-0337. At all times material herein, Respondent James Lee Riggs exhibited animals regulated under the Act under the names Bridgeport Nature Center, Bridgeport Nature Center, Inc., and "Great Cats of the World." CX 15.

169. The testimony of each witness but Marcus Cook was credible and impressive. In weighing the differing opinions on safety issues (judgment calls), I found most persuasive the opinions of Mr. Riggs and Ms. Berry, each of whom was a long-term and conscientious participant in the methods and practices the Respondents utilized for their photo opportunity tigers. The testimony of Ms. Sniedze, who likewise was a participant, was persuasive. Based upon APHIS's filing June 5, 2008, I no longer find the testimony of Marcus Cook to be persuasive, except

where I have specifically relied on it in this Decision. The APHIS inspectors who observed the Respondents' exhibitions were highly qualified and valuable witnesses. The Respondents' noncompliance with the Consent Decision was their initial concern; my Decision focuses on whether the Respondents complied with the Act, Regulations, and Standards. Dr. Bellin interprets the two handler regulations (9 C.F.R. § 2.131(b)(1), and 9 C.F.R. § 2.131(c)(2)) differently from my interpretation, and that causes me to disagree with some of Dr. Bellin's opinions. Dr. Bellin opined that "minimal risk of harm" meant that all potential for harm must be eliminated (Tr. 401), requiring more of the Respondents than is required by the Act, Regulations, and Standards. Dr. Bellin opined that "direct control and supervision" meant direct contact, requiring more of the Respondents than is required by the Act, Regulations, and Standards. Mr. Green opined, based on his observations of the evidence presented at the hearing prior to his testimony, "With the number of the size of the cats that I saw, I don't think that's a minimal risk" (Tr. 473). Whether Mr. Green is including situations that are not alleged in the Complaint is not clear. *See* paragraphs 59 through 66. Mr. Green opined that there would not be sufficient distance or barriers between the animals and the public, because that's the question he was asked (Tr. 473). I understand now that 9 C.F.R. § 2.131(b)(1) utilizes "the public" and the "general viewing public" interchangeably, so I realize now that sufficient distance and/or barriers between the animals and the person being photographed is required. To determine what is sufficient, all circumstances have to be taken into account. There can be circumstances, even with dangerous animals such as lions, tigers, wolves, bears, or elephants, where zero distance and zero barriers may suffice, depending on the animal including its age, size, disposition, nurturing, and all other factors, depending on the animal handler, depending on the person being photographed, depending on the surroundings, depending on the techniques utilized, depending on all relevant factors. Mr. Green opined that the animals in direct contact with the subjects having the photographs made were not under the direct control and supervision of experienced animal handlers (Tr. 473-74); Mr. Green opined that when

people and animals have direct contact with each other, "it is my opinion that you will always have the opportunity for injury to either the animal or the human. Any time you'd have direct contact between that person and that animal, you're going to have the opportunity for an injury to occur." Tr. 465, *see also* Tr. 466, 469. The Act, Regulations, and Standards do not require elimination of all direct contact, even with a dangerous animal such as a tiger. *See* paragraphs 91 and 92.

170. The videotapes, CX 41 and CX 33, weighed heavily in my evaluation: CX 41 persuaded me, together with Dr. Bellin's testimony, to find violations (based on several instances of the risk of harm being escalated to more than minimal); and CX 33 persuaded me, together with the testimony of Mr. Riggs, contrary to the testimony of APHIS officials, to find no violation.

171. APHIS's evidence of other situations where a tiger killed or injured a human proved that even a juvenile tiger can seriously injure a human and even a tiger cub can injure a human, but those situations were different and distinguishable from the situations at issue here, "during (the Respondents') public exhibition in photographic sessions with members of the public." The Respondents' adherence to their own practices and methods of preventing harm in situations involving the Respondents' photo opportunity tigers was essential to maintaining minimal risk of harm to the animals and to the public. I agree with the Respondents that holding the tiger by the leash at all times was not essential to maintaining minimal risk of harm,[24] so long as all their other safeguards were utilized. The Respondents used a bullet-proof glass or Plexiglas board as a barrier[25] between the tiger and the member of the public in the states that required it (including Pennsylvania), but I agree with the Respondents that such a barrier was not essential to maintaining minimal risk of harm, taking into account all the other circumstances of the Respondents' photo opportunities at issue here.

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[24]Holding the tiger by the leash at all times was, of course, essential to maintaining compliance with the Consent Decision. *See* paragraph 107.

[25]"Mr. Riggs had a way of photographing the juvenile cats with the board - - with the bullet-proof, Plexiglas board. And having a professional handler bring the animal to the glass, looking like it's in the photo, but the person is actually on the other side. I think that's a safe way." Mr. Robert Gerard Markmann, Tr. 554. *See also* Tr. 149, 244-46, 495-96.

Northern Wisconsin State Fair, Chippewa Falls - July 10, 1999

172. On July 10, 1999, at the Northern Wisconsin State Fair, the Respondents' tiger depicted with Ms. Sniedze in CX 8 was handled so that there was minimal risk of harm to the tiger and to Ms. Sniedze and to the public. Minimal risk of harm was maintained by the Respondents through their methods and practices, even though the tiger's leash was removed after the tiger was on the feeding platform while the photo was taken; even though the tiger (a juvenile tiger younger than six months old) weighed 75 pounds or more; and even though Ms. Sniedze instead of the Respondents' handler held the bottle for the tiger momentarily (long enough to pose for the photo and to be presented with the photo). Additionally, the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public, including Ms. Sniedze, who was touching the tiger, considering all the circumstances. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public at the Northern Wisconsin State Fair at Chippewa Falls on July 10, 1999, was **not proved** by a preponderance of the evidence.

173. On July 10, 1999, at the Northern Wisconsin State Fair, the Respondents' tiger depicted with Ms. Sniedze (CX 8) was under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the photo, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger. Consequently, the allegation was **not proved** by a preponderance of the evidence, that the Respondents violated sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)) during public exhibition in photographic sessions with members of the public at the Northern Wisconsin State Fair at Chippewa Falls on July 10, 1999.

Iowa State Fair, Des Moines - August 20, 1999

174. On August 20, 1999, at the Iowa State Fair, for the most part, minimal risk of harm was maintained by the Respondents even when a tiger's leash was removed[26] after the tiger was on the feeding platform while the photo was taken, even though the Respondents' handler stepped back momentarily to be out of the photo, and even though the Respondents' handler allowed the customer (so long as the customer was 18 years of age or older) to hold the bottle for the tiger momentarily. Dr. Bellin estimated the weight of the tiger he observed to be "approximately 60 pounds, between 45 and 75." Tr. 390. So long as the Respondents employed their methods and practices and kept the tiger on the feeding platform, so long as the tiger was not draped over the laps of people seated in the crowd while waiting their turn for their photo opportunity, so long as the tiger was not draped over children's laps, so long as the person positioned at the head of the tiger holding the bottle for the tiger was an adult 18 years of age or older, there was minimal risk of harm to the tigers and to the public, and the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public so as to assure the safety of animals and the public, and thus, for the most part, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public was **not proved** by a preponderance of the evidence. However, the Respondents failed to employ such methods and practices in several instances, so that there was **more than minimal risk of harm** to the tigers and to the public, where the tiger was not on the feeding platform, the tiger was draped over the laps of people seated in the crowd, the tiger was draped over the laps of children, or there was no adult 18 years of age or older at the head of the tiger holding the bottle for the tiger; for these several instances, the Respondents failed to handle tigers during public exhibition so there was minimal risk of harm to the tiger and to the public, and failed to maintain sufficient distance and/or barriers between their animals and the general viewing public so as to assure the safety of animals and the public, in violation of sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)).

175. On August 20, 1999, at the Iowa State Fair, the Respondents'

[26] *See* footnote 22.

dangerous animals that the Respondents exhibited (photo opportunity tigers) were under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the photo, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)) during public exhibition in photographic sessions with members of the public at the Iowa State Fair on August 20, 1999, was **not proved** by a preponderance of the evidence, **except** in those several instances where the tiger was not on the feeding platform, the tiger was draped over the laps of people seated in the crowd, the tiger was draped over the laps of children, or there was no adult 18 years of age or older at the head of the tiger holding the bottle for the tiger; for these several instances, the Respondents' dangerous animals that the Respondents exhibited (photo opportunity tigers) were **not** under the direct control and supervision of a knowledgeable and experienced animal handler, in violation of sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)).

Dutchess County Fair, Rhinebeck, New York - August 28, 1999

176. The preponderance of the evidence proves that on **August 28, 1999**, the Respondents did maintain the records of animals required of an exhibitor that included any offspring born of any animal while in Respondents' possession or under Respondents' control. The "hour or two" (Tr. 798) required for Mr. Riggs to find the transfer form and the original health certificate was a reasonable amount of time to respond completely to the APHIS Inspector Ms. Baltrush's record request. This is particularly so since (a) the transfer form and the original health certificate were consistent with other records including health certificates that Mr. Riggs immediately supplied to APHIS inspector Ms. Baltrush regarding the three tiger cubs and one lion cub; (b) Dr. Bellin in Iowa (also an APHIS inspector) had been shown the transfer form and

the original health certificate by Mr. Riggs eight days earlier; and (c) APHIS inspector Ms. Baltrush had arrived unannounced. Further, even if the health certificates that Mr. Riggs immediately supplied did not specify birth date or birthplace, neither did 9 C.F.R. § 2.75(b) specifically require birth date or birthplace. Tr. 61, 64. Consequently, I conclude that the allegation that Respondents violated section 10 of the Act (7 U.S.C. § 2140), and section 2.75(b) of the Regulations (9 C.F.R. § 2.75(b), was **not proved** by a preponderance of the evidence.

York Fair, York, Pennsylvania - September 10, 1999

177. On September 10, 1999, at the York Fair, York, Pennsylvania, Mr. Kevin Johns, the reporter who had contact with tiger cub Simbala and juvenile tiger Shawnee as shown in the video, was **not a member of the public** but was instead a volunteer who had trained all day (a trainee) with Bridgeport employees Mr. Drogosch and Mr. Riggs, both of whom were knowledgeable and experienced animal handlers. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with **members of the public** at the York Fair on September 10, 1999, was **not proved** by a preponderance of the evidence.

178. On September 10, 1999, at the York Fair, York, Pennsylvania, minimal risk of harm to the tigers and to the public was maintained by the Respondents even though the Respondents' handler did not hold tiger cub Simbala by a leash at all times and even though the Respondents' handler did not hold juvenile tiger Shawnee by a leash at all times when they were exhibited for a videotape, CX 33, which aired that night on television news, and the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public so as to assure the safety of animals and the public. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public was **not proved** by a preponderance of the evidence.

179. On September 10, 1999, at the York Fair, York, Pennsylvania,

minimal risk of harm to the tigers and to the public was maintained by the Respondents even though juvenile tiger Shawnee was 8-1/2 months or 9 months of age and weighed 120 to 140 pounds when she was exhibited for a videotape, CX 33, which aired that night on television news, and the Respondents maintained sufficient distance and/or barriers between their animals and the general viewing public so as to assure the safety of animals and the public. Consequently, the allegation that the Respondents violated sections 2.100(a) and 2.131(b)(1) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(b)(1)) during public exhibition in photographic sessions with members of the public at the York Fair on September 10, 1999, was **not proved** by a preponderance of the evidence.

180. On September 10, 1999, at the York Fair, the Respondents' dangerous animals tiger cub Simbala and juvenile tiger Shawnee, that the Respondents exhibited for a videotape (CX 33) which aired that night on television news, were under the direct control and supervision of a knowledgeable and experienced animal handler, even though that handler had stepped back to be out of the video, and even though the direct control was achieved through methods and practices, rather than holding onto the tiger. Consequently, the allegation that the Respondents exhibited dangerous animals (tigers) that were not under the direct control and supervision of a knowledgeable and experienced animal handler, in violation of sections 2.100(a) and 2.131(c)(3) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 2.131(c)(3)) during public exhibition in photographic sessions with members of the public at the York Fair on September 10, 1999, was **not proved** by a preponderance of the evidence.

181. Consideration of Mr. Riggs' Animal Welfare Act license application and denial is MOOT. *See* Mr. Riggs' June 3, 2008 filing; *see* Complainant's June 5, 2008 filing, p. 3.

Order

182. The Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease

and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder.

183. Respondent Bridgeport Nature Center, Inc. (dissolved in July 2004) and Respondent Heidi M. Berry Riggs are jointly and severally assessed a civil penalty of **$1,500.00**, which they shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**," within 60 days after this Decision becomes final as to them.

184. Respondent James Lee ("Jay") Riggs is assessed a civil penalty of **$1,500.00**, 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**," within 60 days after this Decision becomes final as to him.

185. Respondents shall reference **AWA Docket No. 00-0032** on their certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties **shall be sent by a commercial delivery service, such as FedEx or UPS**, to, and received by, Colleen A. Carroll, Esq., at the following address:

United States Department of Agriculture
Office of the General Counsel, Marketing Division
Attn.: Colleen A. Carroll, Esq.
South Building, Room 2325B, Stop 1417
1400 Independence Avenue, S.W.
Washington, D.C. 20250-1417

Finality

186. This Decision shall be final and effective thirty five (35) days after service, unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix A to this Decision). Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral

argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by

the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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SAM MAZZOLA d/b/a WORLD ANIMAL STUDIOS, INC. AND WILDLIFE ADVENTURES OF OHIO, INC.
AWA Docket No. 06-0010.
and
SAM MAZZOLA.
AWA Docket No. D-07-0064
Stay Order.
Filed June 1, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

I issued *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), in which I found that Sam Mazzola violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142). Mr. Mazzola filed a request that I reconsider the November 24, 2009, Decision and Order, and I subsequently issued an order denying Mr. Mazzola's request, *In re Sam Mazzola* (Order Denying Petition for Reconsideration and Ruling Denying Motion for Oral Argument), 69 Agric. Dec. 535 (2010).

On May 27, 2010, Mr. Mazzola filed a request that I stay the Orders in *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), and *In re Sam Mazzola* (Order Denying Petition for Reconsideration and Ruling

Denying Motion for Oral Argument), 69 Agric. Dec. 535 (2010), pending the outcome of proceedings for judicial review. On June 1, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to Petition for Stay" in which the Administrator states he neither supports nor opposes Mr. Mazzola's request. On June 1, 2010, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Mazzola's request for stay.

In accordance with 5 U.S.C. § 705, Mr. Mazzola's request for stay is granted.

For the foregoing reasons, the following Order is issued.

ORDER

The Orders in *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009), and *In re Sam Mazzola* (Order Denying Petition for Reconsideration and Ruling Denying Motion for Oral Argument), 69 Agric. Dec. 535 (2010), are stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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KATHY JO BAUCK d/b/a PUPPY'S ON WHEELS, a/k/a "PUPPIES ON WHEELS" AND "PICK OF THE LITTER".
AWA Docket No. D-09-0139.
Order Lifting Stay.
Filed June 7, 2010.

AWA.

Babak A. Rastgoufard, for the Administrator, APHIS.
Zenas Bear & Associates, Hawley, MN, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

I issued *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), in which I terminated Ms. Bauck's Animal Welfare Act license and disqualified Ms. Bauck from becoming licensed under the Animal Welfare Act for 2 years. On January 21, 2010, Ms. Bauck filed a "Motion for Stay Pending Appeal Pursuant to 5 U.S.C. § 705," which I granted. *In re Kathy Jo Bauck* (Stay Order), 69 Agric. Dec. 528 (2010).

On May 18, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Motion to Lift Stay" stating proceedings for judicial review are concluded; therefore, the February 16, 2010, Stay Order should be lifted. On June 2, 2010, Ms. Bauck filed "Opposition to Complainant's Motion to Lift Stay" in which she sets forth a number of reasons for her opposition to the Administrator's motion to lift stay; however, Ms. Bauck does not contest the Administrator's assertion that proceedings for judicial review of the instant proceeding are concluded. I stayed the Order in *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), pending the outcome of proceedings for judicial review. As proceedings for judicial review are concluded, the February 16, 2010, Stay Order is lifted, and the Order issued in *In re Kathy Jo Bauck*, 68 Agric. Dec. 853 (2009), is effective as follows:

ORDER

1. Ms. Bauck's Animal Welfare Act license number 41-B-0159 is terminated.

2. Ms. Bauck 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 Ms. Bauck.

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SUSAN BIERY SERGOJAN.
AWA Docket No. 07-0119.
Order Denying Late Appeal.
Filed June 30, 2010.

AWA.

Colleen A. Carroll, for the Administrator, APHIS.
Respondent, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this administrative proceeding by filing a Complaint on May 23, 2007. The Administrator alleges that Susan Biery Sergojan committed violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]. On July 16, 2007, Ms. Sergojan filed a timely answer denying the allegations in the Complaint.

On April 15-18, 2008, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Olympia, Washington. The Administrator filed a post-hearing brief on February 19, 2009. Ms. Sergojan did not file a post-hearing brief, and on March 18, 2010, after the time for filing post-hearing briefs had expired, the ALJ issued a Decision and Order in which she: (1) found Ms. Sergojan committed violations of the Animal Welfare Act and the Regulations; (2) ordered Ms. Sergojan to cease and desist from violations of the Animal Welfare Act and the Regulations; and (3) assessed Ms. Sergojan a $10,000 civil penalty.

The Hearing Clerk served Ms. Sergojan with the ALJ's Decision and

Order on March 23, 2010.[1] On April 20, 2010, Ms. Sergojan requested, and I granted, an extension to May 20, 2010, within which to file Ms. Sergojan's appeal petition.[2] On May 20, 2010, Ms. Sergojan requested an extension to June 21, 2010, within which to file an appeal petition, which I also granted.[3] On June 22, 2010, Ms. Sergojan filed "Respondent's Notice of Appeal and Declaration in Support Thereof" [hereinafter Appeal Petition]. On June 28, 2010, the Administrator filed "Complainant's Response to Respondent's Notice of Appeal and Declaration in Support Thereof." On June 30, 2010, the Hearing Clerk transmitted the record to me for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

The rules of practice applicable to the instant proceeding[4] provide that a party must appeal an administrative law judge's written decision to the Judicial Officer within 30 days after that party receives service of the written 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, . . . 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.

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[1]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3860 9115.

[2]Order Extending Time To File Respondent's Appeal Petition filed April 20, 2010.

[3]Order Extending Time To File Respondent's Appeal Petition And Ruling Denying Respondent's Request To Extend Time To File Petition To Reconsider filed May 21, 2010.

[4]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

7 C.F.R. § 1.145(a). The Hearing Clerk served Ms. Sergojan with the ALJ's written decision on March 23, 2010;[5] therefore, Ms. Sergojan was originally required to file her Appeal Petition with the Hearing Clerk no later than April 22, 2010. I granted Ms. Sergojan extensions of time to June 21, 2010, within which to file her Appeal Petition. Ms. Sergojan filed the Appeal Petition 1 day late, on June 22, 2010; therefore, Ms. Sergojan's Appeal Petition is denied as untimely.

For the foregoing reasons, the following Order is issued.

ORDER

1. Ms. Sergojan's Appeal Petition, filed June 22, 2010, is denied.
2. The ALJ's Decision, filed March 18, 2010, is the final decision in the instant proceeding.

JOSE ORITZ.
AWG-Docket 10-0010.
Miscellaneous Order.
January 8, 2010.

AWG.

Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by James Hurt, Hearing Officer.

LYNETTE RENE SWONKE.
AWG Docket 10-0057.
Miscellaneous order.
January 8, 2010.

AWG.

[5]See note 1.

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

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JUDE E. CRABB.
AWG Docket No. 10-0091.
Miscellaneous Order.
Filed February 17, 2010.

AWG.

Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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JAMES R. GUTIERREZ.
AWG Docket No. 10-0094.
Miscellaneous Order.
Filed February 17, 2010.

AWG.

Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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DIANA SAVILLE.
AWG Docket No. 10-0104.
Miscellaneous Order.
Filed February 17, 2010.

AWG.

Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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WILLIAM O. SONNER.
AWG Docket No. 10-0105.
Miscellaneous Order.
Filed February 17, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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MICHELLE L. RAMSEY a/k/a MICHELLE ROGERS.
AWG Docket No. 10-0103.
Miscellaneous Order.
Filed February 17, 2010.

AWG.

Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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ANGELIQUE M. STRAUSBAUGH a/k/a ANGELIQUE MOHLER.
AWG Docket No. 10-0107.
Miscellaneous Order.
Filed February 17, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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RONNIE HUTCHINSON.
AWG Docket No. 10-0044.
Dismissal Order.
Filed March 3, 2010.

AWG.

Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by James P. Hurt, Hearing Official.

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CHERYL A. MIETUS.
AWG Docket No. 10-0099.
Dismissal Order.
Filed March 3, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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SHARON L. VANCE.
AWG Docket No. 10-0119.
Dismissal Order.
Filed March 3, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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DANIEL MATHIEU.
AWG Docket No. 10-0183.
Dismissal Order.
Filed March 3, 2010.

AWG.

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

———————

TIMOTHY LAMBERT
AWG Docket No. 10-0075.
Dismissal Order.
Filed March 16, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by James P. Hurt, Hearing Official.

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ANNALISA MATHIEU
AWG Docket No. 10-0181.
Dismissal Order.
Filed April 2, 2010.

AWG.

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

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DANIEL MATHIEU
AWG Docket No. 10-0183
Dismissal order
Filed April 2, 2010.

AWG.

Petitioner, pro se.
Mary Kimball for RD
Dismissal order by Victor W. Palmer, Administrative law Judge

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ANITA GUBB.
AWG Docket No. 10-0178.
Dismissal Order
Filed April 6, 2010.

AWG.

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

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DENNIS A. ZIMMERMAN.
AWG Docket No. 10-0164.
Dismissal Order.
Filed April 12, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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MICHAEL MELLE.
AWG Docket No. 10-0025.
Dismissal Order.
Filed April 13, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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ERIC ROSE.
AWG Docket No. 10-0078.
Dismissal Order.
Filed April 13 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by James P. Hurt, Hearing Officer.

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BETTY M. OWENS.
AWG Docket No. 10-0168.
Dismissal Order.
Filed April 14, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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NOREEN P. KLITTNER.
AWG Docket No. 10-0096.
Dismissal Order.
Filed May 13, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

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SARAH SCHMIDT.
AWG Docket No. 10-0143.
Dismissal Order.
Filed May 18, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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MONA RILEY.
AWG Docket No. 10-0147.
Dismissal Order.
Filed May 18, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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ANGELA MERCHANT.
AWG Docket No. 10-0281.
Dismissal Order.
Filed May 19, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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DONNA CLINE.
AWG Docket No. 10-0169.
Dismissal Order.
Filed May 24, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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PATRICIA MONAHAN.
AWG Docket No. 10-0148.
Dismissal Order.
Filed June 17, 2010.

AWG.

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

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VICKIE S. HASLAG.
AWG Docket No. 10-0188.
Dismissal Order.
Filed June 28, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

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GREGORY L. KLOSS.
AWG Docket No. 10-0202.
Dismissal Order.
Filed June 29, 2010.

AWG.

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

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DEANNA J. KORNMILLER.
AWG Docket No. 10-0246.
Dismissal Order.
Filed June 30, 2010.

AWG.

Mary Kimball for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Chief Administrative Law Judge.

REZA KALANTARI.
FCIA Docket No. 09-0169.
and
FICUS FARM, INC.
FCIA Docket No. 09-0170.
Dismissal Without Prejudice.
Filed January 21, 2010.

FCIA.

Mark R. Simpson, for Complainant.
Respondents, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

TIMOTHY MAYS, d/b/a CT FARMS.
FCIA Docket No. 08-0153.
Order Denying Late Appeal.
Filed February 5, 2010.

FCIA.

Mark Simpson, for Complainant.
Terry Kilgore, Gate City, VA, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eldon Gould, Manager, Federal Crop Insurance Corporation [hereinafter the Manager], instituted this administrative proceeding by filing a Complaint on June 30, 2008. The Manager instituted the proceeding under the Federal Crop Insurance Act, as amended (7 U.S.C. §§ 1501-1524) [hereinafter the Federal Crop Insurance Act]; regulations promulgated under the Federal Crop Insurance Act (7 C.F.R. pt. 400) [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 Manager alleged that Timothy Mays violated the Federal Crop Insurance Act and the Regulations. On August 1, 2008, Mr. Mays filed a response in which he denied the allegations of the Complaint.

Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a 2-day hearing on March 24, 2009, in Roanoke, Virginia, and on August 13, 2009, in Abingdon, Virginia. Mark R. Simpson, Office of the General Counsel, United States Department of Agriculture, Atlanta, Georgia, represented the Manager. Terry G. Kilgore, Gate City, Virginia, represented Mr. Mays. On October 8, 2009, Mr. Mays filed a post-hearing brief, and on October 9, 2009, the Manager filed a post-hearing brief.

On November 13, 2009, the ALJ issued a Decision and Order: (1) concluding Mr. Mays violated the Federal Crop Insurance Act and the Regulations; (2) disqualifying Mr. Mays individually and as controlling partner of CT Farms for 5 years from receiving any monetary or non-monetary benefit under seven specific statutory provisions and 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; and (3) assessing Mr. Mays a $24,421 civil fine (Decision and Order at 9-11). On November 17, 2009, the ALJ issued a Supplemental Order amending the identity of the entity to which Mr. Mays was required to pay the civil fine and the address to which Mr. Mays was required to send the payment of the civil fine. The Hearing Clerk served Mr. Mays with the ALJ's Decision and Order and Supplemental Order on November 23, 2009.[1]

On December 23, 2009, Mr. Mays mailed an appeal of the ALJ's Decision and Order, as amended by the ALJ's Supplemental Order, to the Hearing Clerk.[2] On January 4, 2010, Mr. Mays' appeal to the Judicial Officer was filed with the Hearing Clerk. On January 25, 2010,

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[1]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3860 8644 and United States Postal Service Track & Confirm for article number 7004 1160 0004 4087 9061.

[2]Mr. Mays' appeal petition is dated December 23, 2009, and the United States Postal Service mailing envelope which contained Mr. Mays' appeal petition indicates Mr. Mays mailed the appeal petition at Lebanon, Virginia, on December 23, 2009.

the Manager filed a Response to Appeal. On January 28, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

Section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service; therefore, Mr. Mays was required to file his appeal petition with the Hearing Clerk no later than December 23, 2009. Instead, Mr. Mays mailed the appeal petition to the Hearing Clerk on December 23, 2009. 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 Office of the Hearing Clerk stamped Mr. Mays' appeal petition as having been received at 3:43 p.m., January 4, 2010. 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.[3] Therefore, I find Mr. Mays filed the appeal petition 12 days late.

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[3] *In re Lion Raisins* (Decision as to Lion Raisins, Inc; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion) 68 Agric. Dec. 244, 286-87 (2009); *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).

The Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[4] The ALJ's Decision and Order, as amended by the ALJ's Supplemental Order, became final on December 28, 2009.[5] Mr. Mays filed his appeal petition on January 4, 2010, 1 week after the ALJ's Decision and Order, as amended by the ALJ's Supplemental Order, became final. Therefore, I have no jurisdiction to hear Mr. Mays' appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Mr. Mays' filing an appeal petition after the ALJ's Decision and Order, as amended by the ALJ's Supplemental Order, became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with

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[4]*See, e.g., In re David L. Noble*, 68 Agric. Dec. 1060 (2009) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Michael Claude Edwards*, 66 Agric. Dec. 1362 (2007) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); *In re Tung Wan Co.*, 66 Agric. Dec. 939 (2007) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *In re Tim Gray*, 64 Agric. Dec. 1699 (2005) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); *In re Jozset Mokos*, 64 Agric. Dec. 1647 (2005) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *In re Ross Blackstock*, 63 Agric. Dec. 818 (2004) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); *In re David Gilbert*, 63 Agric. Dec. 807 (2004) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); *In re Vega Nunez*, 63 Agric. Dec. 766 (2004) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[5]See 7 C.F.R. § 1.142(c)(4).

the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

> The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within sixty days of the entry of the order. 28 U.S.C. § 2344 (1976). This sixty-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.[6]

Accordingly, Mr. Mays' appeal petition must be denied. For the foregoing reasons, the following Order is issued.

ORDER

1. Timothy Mays' appeal petition, filed January 4, 2010, is denied.
2. Administrative Law Judge Peter M. Davenport's Decision and Order, dated November 13, 2009, as amended by Administrative Law Judge Peter M. Davenport's Supplemental Order, dated November 17, 2009, is the final decision in this proceeding.

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[6] *Accord Brazoria County v. EEOC*, 391 F.3d 685, 688 (5th Cir. 2004) (stating the 60-day period to file a petition for review of an agency order in 28 U.S.C. § 2344 is jurisdictional and cannot be judicially altered or expanded); *Jem Broad. Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (stating the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (stating the time limit in 28 U.S.C. § 2344 is jurisdictional), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).

CRYSTAL PORTER REESLY, f/n/a CRYSTAL PORTER.
FCIA Docket No. 09-0121.
Miscellaneous Order.
Filed February 25, 2010.

FCIA.

Mark Simpson, Esquire, for FCIC.
Terry G. Kilgore, Esquire, for Respondent.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

ORDER

This action was previously consolidated with an action brought against the Respondent's mother Mildred Porter.[7] Prior to the hearing in what would have been a consolidated hearing of the two cases, the Respondent indicated that she no longer wished to pursue a defense of the action and the related case proceeded to trial without participation by the Respondent. Time was extended to the parties to enter into a Consent Decision; however, the parties could not agree upon the terms of a Consent Decision. A Consent Decision was tendered to the Respondent; however, she made a handwritten addition to that document which was inconsistent with the typed portion of the Decision and her addition was unacceptable to the Complainant.

Sufficient time having elapsed and after more than one reminder that some resolution was needed, I entered a Decision and Order in this action on February 18, 2010 in which I deemed the Respondent's failure to defend the action as an admission of the facts alleged in the Complaint and a waiver of her right to a hearing on the merits. Although the Complainant filed a Motion for Default on February 12, 2010, that Motion was served on opposing counsel and was not presented to me for appropriate action. Subsequently, Counsel for the Respondent has filed an Objection to Motion for Summary Judgment.

As I consider both the Motion for Default and the Objection to Motion for Summary Judgment to have been rendered moot by the Decision and Order of February 18, 2010, no action is required at this time. Any appeal of the Decision should be directed to the Judicial

[7]*In re: Mildred Porter,* FCIA Docket No. 09-0120 (February 4, 2010).

Officer.

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

UNADILLA VALLEY PACKERS, MARTIN NIGHTINGALE, AND KENNETH E. BARROWS.
FMIA Docket No. 10-0037.
Dismissal Order.
Filed January 27, 2010.

FMIA.

Tracey Manoff, for Complainant.
Respondent, Pro se.
Order issued by Acting Chief Administrative Law Judge, Peter M. Davenport.

FRANK PERRETTA.
FMIA Docket No. 10-0056.
Dismissal of Frank Perretta.
Filed March 22, 2010.

FMIA.

Carlynne Cockrum, for the Administrator, FSIS.
Respondent, Pro se.*Order issued by Jill S. Clifton, Administrative Law Judge.*

MARIE N. HILIGH.
FNS Docket No. 10-0028.
Miscellaneous Order.
Filed January 28, 2010.

FNS.

John B. Koch, for FNS.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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AMY ELLIS.
FNS Docket No. 10-0040.
Dismissal Order.
Filed January 28, 2010.

FNS.

John B. Koch, for FNS.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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STEVEN C. MARTIN.
FNS Docket No. 09-0101.
Dismissal Order.
Filed March 4, 2010.

FNS.

John B. Koch, Esquire, for FNS.
Carl W. Roop, Esquire, for Petitioner.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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CHARITY A. FREEMAN, n/k/a CHARITY A. SCHAEFER.
FNS Docket No. 10-0016.
Dismissal Order.
Filed June 22, 2010.

FNS.

Petitioner, Pro se.
John B. Kock for FNS.

Dissmal order issued by Jill S. Clifton, Administrative Law Judge

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JOHN S. MARTIN
FSA-09-0184
Dismissal Order
Filed April 2, 2010

FSA.

Petitioner, Pro se.
for FSA.
Dismissal order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

LION RAISINS, INC., LION RAISIN COMPANY, LION PACKING COMPANY, ALFRED LION, JR., DANIEL LION, JEFFREY LION, BRUCE LION, LARRY LION, AND ISABEL LION.
I & G Docket No. 04-0001.
Ruling Striking Supplemental Authority in Support of Petition for Reconsideration.
Filed January 6, 2010.

I&G.

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.
Ruling issued by William G. Jenson, Judicial Officer.

On July 27, 2009, Lion Raisins, Inc., Alfred Lion, Jr., Daniel Lion, Jeffrey Lion, and Bruce Lion [hereinafter the Lions] filed a timely Petition for Reconsideration. On September 4, 2009, the Lions filed supplemental authority in support of the Petition for Reconsideration [hereinafter Supplemental Authority]. On September 14, 2009, the

Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed a "Motion to Strike 'Supplemental Authority in Support of Petition for Reconsideration'" [hereinafter Motion to Strike], and on October 5, 2009, the Lions filed "Respondents' Reply to Motion to Strike 'Supplemental Authority in Support of Petition for Reconsideration.'" On October 7, 2009, the Hearing Clerk transmitted the record to me for a ruling on the Administrator's Motion to Strike.

The rules of practice applicable to the instant proceeding[1] provide a time limit within which a party may file a petition to reconsider the decision of the Judicial Officer, 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*—(1) *Filing; service; ruling*. A petition for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the decision of the Judicial Officer, must be made by petition filed with the Hearing Clerk. Every such petition must state specifically the grounds relied upon. Any such petition filed prior to the filing of an appeal of the Judge's decision pursuant to § 1.145 shall be ruled upon by the Judge, and any such petition filed thereafter shall be ruled upon by the Judicial Officer.
>
> . . . .
>
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

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[1]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

7 C.F.R. § 1.146(a)(1), (a)(3). The Hearing Clerk served the Lions with *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), on April 27, 2009.[2] Therefore, the Lions were originally required to file a petition to reconsider no later than May 7, 2009. I granted the Lions five extensions of time within which to file a petition to reconsider. The last extension of time extended the time for the Lions' filing a petition to reconsider to July 27, 2009.[3] The Lions' Supplemental Authority was filed 1 month 6 days after the extended deadline for filing a petition to reconsider. Therefore, the Lions' Supplemental Authority is stricken from the record.

LION RAISINS, INC. LION RAISIN COMPANY, LION PACKING COMPANY, ALFRED LION, JR., DANIEL LION, JEFFREY LION, BRUCE LION, LARRY LION, AND ISABEL LION.
I & G Docket No. 04-0001.
Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.
Filed January 6, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, for Respondents Lion Raisins, Inc.; Alfred Lion, Jr.;

[2]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3862 9618.

[3]April 29, 2009, Order Extending Time For The Lions To File A Petition To Reconsider; May 15, 2009, Order Extending Time For The Lions To File A Petition To Reconsider; June 12, 2009, Order Extending Time For The Lions To File A Petition To Reconsider; July 17, 2009, Order Extending Time For The Lions To File A Petition To Reconsider And Denying Extension Of Time For The Lions To File Petition For Rehearing; and July 24, 2009, Order Extending Time For The Lions To File A Petition To Reconsider.

Daniel Lion; Jeffrey Lion; and Bruce Lion.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

I issued *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), in which I: (1) concluded Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion [hereinafter the Lions], on 33 occasions, during the period November 11, 1998, through May 11, 2000, willfully violated the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act], and the regulations governing inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations] by engaging in misrepresentation or deceptive or fraudulent practices or acts; and (2) debarred the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 5 years. On July 27, 2009, the Lions filed a timely "Petition for Reconsideration" [hereinafter Petition to Reconsider], and on August 5, 2009, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Reply to Petition for Reconsideration." On August 10, 2009, the Hearing Clerk transmitted the record to me to consider and rule on the Lions' Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

The Lions raise 10 issues in the Petition to Reconsider. First, the Lions request that I promote settlement of the instant proceeding by dismissing the Second Amended Complaint or amending *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009) (Pet. to Reconsider at 1-2).

Section 1.143(b)(1) of the rules of practice applicable to the instant

proceeding[1] (7 C.F.R. § 1.143(b)(1)) provides that any motion will be entertained other than a motion to dismiss on the pleading;[2] therefore, to the extent that the Lions' request that I dismiss the Second Amended Complaint is a motion to dismiss on the pleading, I deny the Lions' request. Moreover, while litigants are generally encouraged to settle, I find *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), supported by the record before me and I decline to amend *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), merely to promote settlement of the instant proceeding.

Second, the Lions contend the weight of the evidence demonstrates the Lions did not misrepresent United States Department of Agriculture [hereinafter USDA] inspection results (Pet. to Reconsider at 2-11).

I have carefully reviewed the record in the instant proceeding and find that the weight of the evidence supports my conclusion that, on 33 occasions, during the period November 11, 1998, through May 11, 2000, the Lions willfully violated the Agricultural Marketing Act and the Regulations. *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion),

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[1]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

[2]*See In re Judie Hansen*, 57 Agric. Dec. 1072, 1074-75 (1998) (dismissing a motion to dismiss on the pleading), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re Lindsay Foods, Inc.* (Remand Order), 56 Agric. Dec. 1643, 1650 (1997) (stating 7 C.F.R. § 1.143(b)(1) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.* (Remand Order), 50 Agric. Dec. 412, 414 (1991) (holding the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.* (Ruling on Certified Question), 48 Agric. Dec. 434 (1989) (stating the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading).

68 Agric. Dec. 244 (2009), describes each of the 33 instances in which the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts and provides citations to the evidence that support my findings.

Third, the Lions contend I should distinguish more precisely between debarment from non-marketing order voluntary inspections and debarment from marketing order inspections. Specifically, the Lions assert the Secretary of Agriculture conducts inspections under the Agricultural Marketing Act and inspections under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the Agricultural Marketing Agreement Act], and I failed to clearly state that the instant debarment proceeding relates to the Agricultural Marketing Act. (Pet. to Reconsider at 11-19.)

As stated in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 288 (2009), "[t]he instant proceeding concerns only debarment from receiving USDA inspection services under the Agricultural Marketing Act." The Order issued both in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 309 (2009), and this Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion debars the Lions for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.

Fourth, the Lions contend the Agricultural Marketing Act does not authorize the Secretary of Agriculture to debar the Lions from receipt of inspection services (Pet. to Reconsider at 19-46).

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.[3] 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

[3]7 U.S.C. § 1622(c).

the Agricultural Marketing Act.[4] 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:

> 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.

[4] 7 U.S.C. §§ 1622(h), 1624(b).

> 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.[5] The Lions have again thoroughly addressed the issue of the Secretary of Agriculture's debarment authority in the Petition to Reconsider; however, the Lions' arguments fail to convince me that the Secretary of Agriculture lacks authority to debar the Lions from receiving inspection services from USDA under the Agricultural Marketing Act.

Fifth, the Lions contend the right to receive inspection services is a "license" as that term is defined in the Administrative Procedure Act; thus, the Administrator was required to provide the Lions with notice of the conduct that may warrant debarment from receiving USDA inspection services and an opportunity to demonstrate or achieve compliance with lawful requirements (Pet. to Reconsider at 46-59).

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,

[5] *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. Therefore, I reject the Lions' claims that the debarment Order in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), constitutes withdrawal of a license and that 5 U.S.C. § 558(c) is applicable to the instant proceeding.

Sixth, the Lions contend USDA's issuance of nonprocurement debarment and suspension regulations (7 C.F.R. pt. 3017) repealed the debarment authority in 7 C.F.R. § 52.54 (Pet. to Reconsider at 59-61).

The Lions raise the argument that 7 C.F.R. § 52.54 has been repealed for the first time in the Petition to Reconsider. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer;[6] therefore, I reject the Lions' argument as not timely raised.

Moreover, even if the Lions had raised the argument before the administrative law judge, I would reject it. The nonprocurement debarment and suspension regulations cited by the Lions do not apply to 16 types of nonprocurement transactions, including the inspection services from which the Lions are debarred in the instant proceeding:

> **§ 3017.215 Which nonprocurement transactions are not covered transactions?**
>
> The following types of nonprocurement transactions are not covered transactions:

---

[6] *In re ZooCats, Inc.* (Order Denying Respondents' Pet. To Reconsider And Administrator's Pet. To Reconsider), 68 Agric. Dec.1073-74 (2009); *In re Jerome Schmidt* (Order Denying Pet. to Reconsider), 66 Agric. Dec. 596, 599 (2007); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 289 (2005); *In re William J. Reinhart* (Order Denying William J. Reinhart's Pet. for Recons.), 60 Agric. Dec. 241, 257 (2001); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers* (Order Denying Pet. for Recons.), 58 Agric. Dec. 861, 866 (1999); *In re Anna Mae Noell* (Order Denying the Chimp Farm, Inc.'s Motion to Vacate), 58 Agric. Dec. 855, 859-60 (1999).

> . . . .
>
> (m) The receipt of official grading and inspection services, animal damage control services, public health and safety inspection services, and animal and plant health inspection services.

7 C.F.R. § 3017.215(m).

The Lions argue 7 C.F.R. 3017.215(m) does not specifically reference 7 C.F.R. § 52.54; therefore, while 7 C.F.R. pt. 3017 does not explicitly repeal 7 C.F.R. § 52.54, the Lions should be allowed to rely on 7 C.F.R. pt. 3017 as having excluded inspection services under the Agricultural Marketing Act from the risk of debarment pursuant to 7 C.F.R. § 52.54 (Pet. to Reconsider at 60). The plain language of 7 C.F.R. § 3017.215(m) removes inspection services such as those performed pursuant to the Agricultural Marketing Act from the purview of the nonprocurement debarment and suspension regulations in 7 C.F.R. pt. 3017; therefore, I reject the Lions' argument that USDA's issuance of nonprocurement debarment and suspension regulations (7 C.F.R. pt. 3017) repealed (or in any other way affected) the Secretary of Agriculture's debarment authority in 7 C.F.R. § 52.54.

Seventh, the Lions contend any remedy imposed by the Secretary of Agriculture must affirmatively protect the Lions' right "to do business" (Pet. to Reconsider at 61-65).

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 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. Debarment does not deprive the Lions of the right "to do business"; it merely debars the Lions from receiving inspection services from USDA under the Agricultural Marketing Act and the Regulations.

Eighth, the Lions contend any debarment must be narrowly tailored and allow Lion Raisins, Inc., an alternative to inspection by USDA under the Agricultural Marketing Agreement Act and the marketing

order applicable to raisins produced from grapes grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order] (Pet. to Reconsider at 65-68).

The instant proceeding is not brought pursuant to the Agricultural Marketing Agreement Act or the Raisin Order. The Lions' disagreement with the inspection provisions in the Raisin Order is irrelevant to the instant proceeding.

Ninth, the Lions contend their participation in the Raisin Administrative Committee export subsidy program is irrelevant (Pet. to Reconsider at 68).

The record establishes that, under a program operated by the Raisin Administrative Committee, packers who sold raisins for export could apply for, and receive, "cash back" for raisin sales by filing Raisin Administrative Committee Form 100C. The amount of "cash back" was based on 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 Raisin Administrative Committee in virtually all of the transactions.[7] Therefore, I reject the Lions' contention that my descriptions of the transactions, including the Lions' request for, and receipt of, "cash back" from the Raisin Administrative Committee, are error.

Tenth, the Lions contend I erroneously found the Lions advised customers that Lion certificates and USDA certificates were the same and contained the same information (Pet. to Reconsider at 68-69).

I found the Lions advised their customers that Lion certificates contained the same information as USDA certificates, as follows:

> 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.

[7] CX 126A reflects the Lions' receipt of "cash back" from the Raisin Administrative Committee in all but six transactions. The Administrator's exhibits are designated "CX."

(See CX 73 at 44 ("Please note that the Lion certificate and the USDA certificate for each order is the same.")).

In re Lion Raisins, Inc. (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244, 254 (2009). I relied for this finding on 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 find the Lions' own letter a reliable reflection of the advice the Lions provided to their customers; therefore, I reject the Lions' contention that my finding the Lions advised customers that Lion certificates and USDA certificates contained the same information, is error.

For the foregoing reasons and the reasons set forth in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), the Lions' Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. The Lions' Petition to Reconsider was timely filed and

automatically stayed *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009). Therefore, since the Lions' Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

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.

LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS, LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
AND
BRUCE LION, ALFRED LION, JR., DANIEL LION, JEFFREY LION, LARRY LION, ISABEL LION, LION RAISINS, INC., LION RAISIN COMPANY, AND LION PACKING COMPANY.
I & G Docket No. 03-0001.

Order Severing Cases and Remanding I & G Docket No. 03-0001. Filed January 19, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On May 4, 2009, Administrative Law Judge Jill S. Clifton [hereinafter ALJ Clifton] issued a Decision and Order in which she consolidated *In re Lion Raisins, Inc.*, I & G Docket No. 01-0001, and *In re Bruce Lion,* I & G Docket No. 03-0001 (May 4, 2009, Decision and Order at 6 ¶ 10). ALJ Clifton states she commenced the hearing in *In re Bruce Lion,* I & G Docket No. 03-0001, on June 9, 2008, but never concluded the hearing (May 4, 2009, Decision and Order at 5 ¶ 9).

The parties in *In re Lion Raisins, Inc.,* I & G Docket No. 01-0001, and *In re Bruce Lion,* I & G Docket No. 03-0001, agree with ALJ Clifton that the proceeding in *In re Bruce Lion,* I & G Docket No. 03-0001, was truncated. The Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], states "[a] hearing in [*In re Bruce Lion,* I & G Docket No. 03-0001,] was held before Administrative Law [Judge] Jill S. Clifton on June 9 and 10, 2008, but Judge Clifton adjourned the hearing before the complainant's presentation of evidence was concluded, pending the resolution of certified questions to the Judicial Officer, and the hearing was never concluded." (Memorandum of Points and Authorities at 2-3 (footnote omitted).)[1] Respondents in *In re Lion Raisins, Inc.,* I & G Docket No. 01-0001, and *In re Bruce Lion,* I & G Docket No. 03-0001, state "[t]he Judge should not have consolidated the '01' and '03' cases without giving Lion an opportunity to defend itself against the allegations in the '03'" and further state "[t]he Judge's Decision with respect to the I&G 03-01 case is inadequate as a matter of law because Lion was never afforded the rights under the

[1]Currently, there are no certified questions relating to *In re Lion Raisins, Inc.,* I & G Docket No. 01-0001, or *In re Bruce Lion,* I & G Docket No. 03-0001, pending before the Judicial Officer.

APA[2] . . . and Rules of Practice[3] . . . to present its defense, introduce evidence on its behalf, and cross-examine witnesses." (Respondents' Appeal Pet. from the Decision of the Judge on May 4, 2009 at ¶¶ 13, 49.)

I agree with ALJ Clifton, the Administrator, and Respondents that the proceeding before ALJ Clifton in *In re Bruce Lion,* I & G Docket No. 03-0001, has not been concluded. Therefore, I sever *In re Lion Raisins, Inc.,* I & G Docket No. 01-0001, from *In re Bruce Lion,* I & G Docket No. 03-0001, and remand *In re Bruce Lion,* I & G Docket No. 03-0001, to Acting Chief Administrative Law Judge Peter M. Davenport [hereinafter the Acting Chief ALJ] for assignment of *In re Bruce Lion,* I & G Docket No. 03-0001, to an administrative law judge to conduct *In re Bruce Lion,* I & G Docket No. 03-0001, in accordance with the Administrative Procedure Act and the Rules of Practice.

Under the vast majority of circumstances, I would remand *In re Bruce Lion,* I & G Docket No. 03-0001, to the administrative law judge who initially conducted the proceeding. However, ALJ Clifton states "[m]ore proceedings will not provide 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." (May 4, 2009, Decision and Order at 6 ¶ 11.) Therefore, the Acting Chief ALJ may wish to assign *In re Bruce Lion,* I & G Docket No. 03-0001, to an administrative law judge other than ALJ Clifton to avoid any argument that *In re Bruce Lion,* I & G Docket No. 03-0001, has been prejudged.

For the foregoing reasons, the following Order is issued.

ORDER

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[2]Respondents' reference to the "APA" is an abbreviation for the Administrative Procedure Act.

[3]Respondents' reference to the "Rules of Practice" is to the rules of practice applicable to *In re Lion Raisins, Inc.,* I & G Docket No. 01-0001, and *In re Bruce Lion,* I & G Docket No. 03-0001, those being 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].

1. *In re Lion Raisins, Inc.,* I & G Docket No. 01-0001, and *In re Bruce Lion,* I & G Docket No. 03-0001, are severed.

2. *In re Bruce Lion,* I & G Docket No. 03-0001, is remanded to the Acting Chief ALJ for assignment of the proceeding to an administrative law judge to conduct a proceeding in accordance with the Administrative Procedure Act and the Rules of Practice.

3. All motions pending before me in *In re Bruce Lion*, I & G Docket No. 03-0001, are moot.

_____

LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
Ruling Denying Motion to Hold Proceeding in Abeyance.
Filed January 22, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

Mr. Wesley Green, counsel for Respondents, by telephone, requested that I hold my decision in the instant proceeding in abeyance pending the conclusion of proceedings before an administrative law judge in *In re Bruce Lion*, I & G Docket No. 03-0001. On January 19, 2010, I conducted a conference call during which Mr. Green and Mr. James A. Moody, represented Respondents, and Ms. Colleen Carroll, represented the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator]. Ms. Carroll opposed Respondents' motion to hold the instant proceeding in abeyance.

Based on the arguments posed by counsel for Respondents and counsel for the Administrator and a brief review of the record, I deny Respondents' motion that I hold the instant proceeding in abeyance.

However, the parties should note that my review of the instant proceeding will be delayed because I returned the record to the Hearing Clerk to make extensive corrections to the transcript, as ordered by Administrative Law Judge Jill S. Clifton [hereinafter the ALJ]. (See the ALJ's May 4, 2009, Decision and Order at 5 ¶ 9.)

———————

LION RAISINS, INC., LION RAISIN COMPANY, LION PACKING COMPANY, ALFRED LION, JR., DANIEL LION, JEFFREY LION, BRUCE LION, LARRY LION, AND ISABEL LION.
I & G Docket No. 04-0001.
Ruling Denying Motion To Modify Order.
Filed February 16, 2010.

I&G.

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.
Ruling issued by William G. Jenson, Judicial Officer.

I issued *In re Lion Raisins, Inc.* (Order Denying Pet. to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 69 Agric. Dec. 639 (2010), in which I debarred Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion [hereinafter the Lions] from receiving inspection services under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632), and the regulations governing inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52). By its terms, the January 6, 2010, Order was to become effective 30 days after service of the Order on the Lions. The Hearing Clerk served the Order on the Lions on January 11, 2010;[1] therefore, the January 6, 2010, Order

[1]United States Postal Service Domestic Return Receipt for article number 7005 1160 0001 3559 7484.

became effective February 10, 2010.

On February 16, 2010, the Lions filed a "Motion to Modify Effective Date of Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion; Daniel Lion; Jeffrey Lion; and Bruce Lion (January 6, 2010)" [hereinafter Motion to Modify Order] requesting that I modify the January 6, 2010, Order to make it effective March 12, 2010. On February 16, 2010, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Opposition to 'Motion to Modify Effective Date of Order Denying Petition to Reconsider.'" On February 16, 2010, the Hearing Clerk transmitted the record to me for a ruling on the Lions' Motion to Modify Order.

As grounds for the Motion to Modify Order, the Lions argue they need additional time in which to prepare a complaint for judicial review. However, on February 16, 2010, the Lions also filed "Respondents' Motion to Stay Any Further Action by USDA re the Judicial Officer's Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion" [hereinafter Motion for Stay] in which the Lions state they filed a complaint for judicial review on February 9, 2010 (Motion for Stay at 2). Attached to the Lions' Motion for Stay is a copy of the Lions' February 9, 2010, "Complaint for Judicial Review of Final Agency Action; Violation of the Administrative Procedure Act; Declaratory Relief." Therefore, I find no basis for the modification of the January 6, 2010, Order to provide the Lions additional time to prepare a complaint for judicial review.

For the foregoing reason, the following ruling is issued.

RULING

The Lions' February 16, 2010, Motion to Modify Order is denied.

———————

LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION,AND BRUCE LION.
I & G Docket No. 01-0001.
Rulings Denying the Lions' July 27, 2009, Motion for Consolidation and Petition to Reopen or, in the Alternative, Petition for Rehearing.
Filed March 5, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

The Lions' Motion for Consolidation

Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter the Lions] requested that I consolidate the instant proceeding with *In re Bruce Lion*, I & G Docket No. 03-0001, and *In re Lion Raisins, Inc.*, I & G Docket No. 04-0001.

As an initial matter, administrative proceedings with respect to the merits of *In re Lion Raisins, Inc.*, I & G Docket No. 04-0001, are concluded, and my final decision in that proceeding has been appealed to the United States District Court for the Eastern District of California.[1] All that is pending before me with respect to *In re Lion Raisins, Inc.*, I & G Docket No. 04-0001, is "Respondents' Motion to Stay Any Further Action by USDA Re the Judicial Officer's Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion." Therefore, I have no jurisdiction to consolidate *In re Lion Raisins, Inc.*, I & G Docket No. 04-0001, with the instant proceeding.

In re Bruce Lion, I & G Docket 03-0001, is in a much different

[1] *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, No. 1:10-CV-00217-AWI-DLB (E.D. Cal. Feb. 10, 2010).

procedural posture than the instant proceeding[2] and consolidation with the instant proceeding would delay, rather than expedite, this proceeding and would not result in any administrative economy. Therefore, the Lions' July 27, 2009, motion for consolidation is denied.

The Lions' Petition to Reopen to Take Further Evidence

The 72-day hearing in the instant proceeding concluded on March 31, 2006. During the hearing, the Lions introduced hundreds of pages of exhibits and presented the testimony of 12 witnesses. The Lions had ample opportunity to obtain and present their evidence during the 72-day hearing. Moreover, the purpose of the Lions' petition to reopen to take further evidence appears to be to present evidence that is merely cumulative. Therefore, the Lions' July 27, 2009, petition to reopen to take further evidence is denied.

The Lions' Petition for Rehearing

The rules of practice applicable to the instant proceeding[3] provide that a petition for rehearing must be filed after the Judicial Officer issues a decision, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*—. . . .
> . . . .
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or

[2]For a brief recitation of the procedural posture of *In re Lion Raisins, Inc.*, I & G Docket No. 01-0001, and *In re Bruce Lion*, I & G Docket No. 03-0001, see the January 19, 2010, "Order Severing Cases and Remanding I & G Docket No. 03-0001."

[3]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50).

> reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). I have not yet issued a decision in the instant proceeding; therefore, the Lions' July 27, 2009, petition to rehear is denied as premature.

LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
Ruling Granting the Administrator's Motion to Strike Supplemental Authority.
Filed March 9, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On September 4, 2009, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter the Lions] filed supplemental authority in support of "Respondents' Appeal Petition from the Decision of the Judge on May 4, 2009." On September 14, 2009, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Motion to Strike 'Supplemental Authority in Support of Appeal'" [hereinafter Motion to Strike]. On October 5, 2009, the Lions filed "Respondents' Reply to Motion to Strike Supplemental

Authority in Support of Appeal." On October 7, 2009, the Hearing Clerk transmitted the record to me for a ruling on the Administrator's Motion to Strike.

The rules of practice applicable to the instant proceeding[1] provide a time limit within which a party may file an appeal petition, 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 . . . 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 with the Hearing Clerk.

7 C.F.R. § 1.145(a). No later than May 11, 2009, the Hearing Clerk served the Lions with Administrative Law Judge Jill S. Clifton's May 4, 2009, Decision and Order.[2] Therefore, the Lions were originally required to file an appeal petition no later than June 10, 2009. I granted the Lions three extensions of time within which to file an appeal petition. The last extension of time extended the time for the Lions' filing an appeal petition to July 27, 2009.[3] The Lions' supplemental authority was filed 1 month 8 days after the extended deadline for filing an appeal petition. Therefore, I grant the Administrator's Motion to Strike and the Lions' supplemental authority is stricken from the record.

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[1]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

[2]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3862 9656 (indicating the Hearing Clerk served the Lions' counsel, Mr. Moody, on May 7, 2009) and article number 7007 0710 0001 3862 9663 (indicating the Hearing Clerk served the Lions' counsel, Mr. Green, on May 11, 2009).

[3]May 28, 2009, Informal Order; July 7, 2009, Order Extending Time For Complainant And Respondents To File Appeals; and July 24, 2009, Order Extending Time For Respondents To File Appeal.

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LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
Stay Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; **Jeffrey Lion; and Bruce Lion.**
Filed March 10, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

I issued *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), in which I debarred Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion [hereinafter the Lions] from receiving inspection services under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632), and the regulations governing inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52). On July 27, 2009, the Lions filed a petition to reconsider the April 17, 2009, Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion. Subsequently, I issued *In re Lion Raisins, Inc.* (Order Denying Pet. to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 69 Agric. Dec. 639 (2010).

On February 16, 2010, the Lions filed "Respondents' Motion to Stay Any Further Action by USDA Re the Judicial Officer's Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion" [hereinafter Motion for Stay] requesting that I stay my April 17, 2009, and January 6, 2010, Orders pending the

outcome of proceedings for judicial review.[4]

On March 9, 2010, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to 'Respondents' Motion to Stay Any Further Action by USDA Re the Judicial Officer's Decision and Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion'" in which the Administrator opposed the Lions' Motion for Stay.

In accordance with 5 U.S.C. § 705, the Lions' Motion for Stay is granted.

For the foregoing reasons, the following Order is issued.

ORDER

The Orders in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 68 Agric. Dec. 244 (2009), and *In re Lion Raisins, Inc.* (Order Denying Pet. to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), 69 Agric. Dec. 639 (2010), are stayed pending the outcome of proceedings for judicial review. This Stay Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

———————

LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
Rulings Denying the Lions' January 15, 2010, Motion to Supplement Brief and Petition to Reopen.

[4]The Lions' Motion for Stay also states the Lions request a stay of "any further proceedings or decisions" pending the outcome of proceedings for judicial review and the caption of the Lions' Motion for Stay indicates that the Lions seek a stay of "any further action by USDA" pending the outcome of proceedings for review. To the extent that the Lions' Motion for Stay requests a stay of something other than the April 17, 2009, and January 6, 2010, Orders, the Lions' Motion for Stay is denied.

Filed March 10, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

Rulings Denying the Lions' January 15, 2010, Motion to Supplement Brief and Petition to Reopen

On January 15, 2010, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter the Lions] filed a motion requesting that I grant the Lions leave to supplement their July 27, 2009, Brief in Support of Respondents' Appeal and a petition requesting that I reopen the instant proceeding to take further evidence. On February 12, 2010, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, filed "Complainant's Response to 'Motion for Leave to File a Supplement' to Appeal Petition and Reply to Petition to Reopen." On February 19, 2010, the Hearing Clerk transmitted the record to me for a ruling on the Lions' January 15, 2010, requests.

The Lions' Motion to Supplement Brief

The rules of practice applicable to the instant proceeding[1] provide a time limit within which a party may file an appeal petition, 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 . . . a

[1]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50).

> 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 with the Hearing Clerk.

7 C.F.R. § 1.145(a). No later than May 11, 2009, the Hearing Clerk served the Lions with Administrative Law Judge Jill S. Clifton's May 4, 2009, Decision and Order.[2] Therefore, the Lions were originally required to file an appeal petition no later than June 10, 2009. I granted the Lions three extensions of time within which to file an appeal petition. The last extension extended the time for the Lions' filing an appeal petition to July 27, 2009.[3] The Lions' motion requesting that I grant the Lions leave to supplement their July 27, 2009, Brief in Support of Respondents' Appeal was filed 5 months 19 days after the extended deadline for filing an appeal petition. Therefore, I deny the Lions' January 15, 2010, motion requesting that I grant the Lions leave to supplement their July 27, 2009, Brief in Support of Respondents' Appeal.

The Lions' Petition to Reopen to Take Further Evidence

The 72-day hearing in the instant proceeding concluded on March 31, 2006. During the hearing, the Lions introduced hundreds of pages of exhibits and presented the testimony of 12 witnesses. The Lions had ample opportunity to obtain and present their evidence during the 72-day hearing. Therefore, I deny the Lions' January 15, 2010, petition to reopen to take further evidence.

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[2]United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3862 9656 (indicating the Hearing Clerk served the Lions' counsel, Mr. Moody, on May 7, 2009) and article number 7007 0710 0001 3862 9663 (indicating the Hearing Clerk served the Lions' counsel, Mr. Green, on May 11, 2009).

[3]May 28, 2009, Informal Order; July 7, 2009, Order Extending Time For Complainant And Respondents To File Appeals; and July 24, 2009, Order Extending Time For Respondents To File Appeal.

LION RAISINS, INC., LION PACKING COMPANY, ALFRED LION, JR., DANIEL LION, JEFFREY LION, BRUCE LION, LARRY LION, AND ISABEL LION.
I & G Docket No. 04-0001.
Ruling Dismissing Isabel Lion's Petition to Suspend Balance of the Period of Debarment.
Filed April 12, 2010.

I&G.

Colleen Carroll, for the Administrator, AMS.
Wesley T. Green, Selma, CA, for Respondents.
Ruling issued by William G. Jenson, Judicial Officer.

On June 9, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order debarring Isabel 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, Isabel Lion may petition the Secretary of Agriculture or the Secretary's designee to suspend the balance of the period of debarment.[1] Isabel Lion failed to file a timely appeal of the ALJ's Decision and Order, Isabel Lion's 5-year period of debarment began on July 20, 2006, and Isabel Lion became eligible to file a petition to suspend the balance of the 5-year period of debarment on July 20, 2007.

On April 9, 2010, Isabel Lion filed "Petition to the Judicial Officer to Suspend the Balance of the Period of Debarment; and Request for Expedited Ruling." I have not been designated by the Secretary of Agriculture to consider Isabel Lion's petition to suspend the balance of the 5-year period of debarment ordered by the ALJ. Therefore, I have no jurisdiction to consider Isabel Lion's April 9, 2010, "Petition to the Judicial Officer to Suspend the Balance of the Period of Debarment; and Request for Expedited Ruling."

[1] *In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 233 (2006).

LION RAISINS, INC., f/k/a LION ENTERPRISES, INC., AND LION RAISINS; LION RAISIN COMPANY, LION PACKING COMPANY, AL LION, JR., DAN LION, JEFF LION, AND BRUCE LION.
I & G Docket No. 01-0001.
Order Vacating the May 12, 2010, Decision and Order and Dismissing the Second Amended Complaint.
Filed May 18, 2010.

I&G.

Marketing Division, OGC, for the Administrator, AMS.
Wesley T. Green, Selma, CA, and James A. Moody, Washington, DC, for Respondents.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I issued *In re Lion Raisins, Inc.*, 69 Agric. Dec. 468 (2010). On May 17, 2010, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter the Lions] and the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed a "Joint Motion to Vacate the Judicial Officer's May 12, 2010 Decision and Order and to Dismiss the Complaint with Prejudice" [hereinafter Joint Motion]. The Lions and the Administrator state they have satisfactorily resolved their differences and a "global" settlement is contingent upon my vacating *In re Lion Raisins, Inc.*, 69 Agric. Dec. 468 (2010), and dismissing with prejudice the operative pleading in the instant proceeding. The Second Amended Complaint filed by the Administrator on July 2, 2002, as amended by Administrative Law Judge Jill S. Clifton's March 9, 2004, "Order Granting Complainant's Motion to Amend Second Amended Complaint to Conform to Proof, and Changing Caption" is the operative pleading in the instant proceeding.

For good reason shown in the Lions and the Administrator's Joint Motion, the following Order is issued.

ORDER

1. *In re Lion Raisins, Inc.*, 69 Agric. Dec. 468 (2010), is vacated.
2. The Second Amended Complaint, as amended by Administrative Law Judge Jill S. Clifton's March 9, 2004, "Order Granting Complainant's Motion to Amend Second Amended Complaint to Conform to Proof, and Changing Caption" is dismissed with prejudice.

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MINH CANH MARKET.
P.Q. Docket No. 10-0059.
Dismissal Order.
Filed April 14, 2010.

PQ.

Lisa Jabaily for APHIS.
Respondent, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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ANIMAL QUARANTINE ACT

DEFAULT DECISIONS

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: http://www.dm.usda.gov/oaljdecisions/aljdefdecisions.htm.

NIKOLE CATHERINE TEREBAYZA a/k/a NICOLE C. BURKE d/b/a BURKE'S HORSES.
A.Q. Docket No. 09-0131.
Default Decision.
Filed March 23, 2010.

AQ – Default.

Thomas N. Bolick, for the Administrator, APHIS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

ADRIAN OJEDA.
A.Q. Docket No. 09-0071.
Default Decision.
Filed March 29, 2010.

AQ – Default.

Krishna G. Ramaraju, for APHIS.
Respondent, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

ANIMAL WELFARE ACT

DEFAULT DECISIONS

DEBRA SANDMEIER, d/b/a SUTLEY KENNEL.
AWA Docket No. 10-0086.
Default Decision and Order.
Filed June 2, 2010.

AWA – Default.

Brian T. Hill, for APHIS.
Respondent, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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GARY FELTS, d/b/a BLACK DIAMOND KENNEL.
AWA Docket No. 10-0068.
Default Decision and Order.
Filed June 3, 2010.

AWA – Default.

Brian T. Hill, for APHIS.
Respondent, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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FEDERAL MEAT INSPECTION ACT

DEFAULT DECISION

UNADILLA VALLEY PACKERS AND KENNETH E. BARROWS.
FMIA Docket No. 10-0038.
PPIA Docket No. 10-0038.
Default Decision and Order.
Filed April 12, 2010.

FMIA – PPIA – Default.

Tracey Manoff for FSIS.
Respondents, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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PLANT QUARANTINE ACT

DEFAULT DECISION

ATLANTICA FOOD IMPORTS, INC.
P.Q. Docket No. 09-0195.
Default Decision and Order.
Filed January 6, 2010.

PQ.

Tracey Manoff, for the Administrator, APHIS.
Respondent, Pro se.
Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

NICHINGHSIANG FISH FARM, d/b/a NI CHING FISH FARM, d/b/a NI CHING HSIANG FISH FARM.
P.Q. Docket No. 09-0141.
Default Decision and Order.
Filed May 25, 2010.

PQ – Default.

Lauren C. Axley, for APHIS.
Respondent, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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Consent Decisions

ANIMAL QUARANTINE ACT

Transcon Trading Company, Inc., AQ-D-10-0022, 10/02/01.
Francis E. Willis d/b/a WW Boer Goats, Inc., AQ-09-0194, 10/03/10.
Edward Ressler d/b/a Triple R Trucking, Travis Ressler Trucking, LLC, and Troy Reesler, AQ-09-0028, 10/03/12.
Berdell Olsen d/b/a Olsen Livestock, AQ-10-0084, 10/05/03.
Dennis R. Smebakken d/b/a Rushmore Livestock, Inc., Randal C. Brumbaugh d/b/a Randal's Transportation and Robert Paulson AQ-09-0026, 10/05/06.

ANIMAL WELFARE ACT

Breck F. Wakefield and Dereck J. Werner d/b/a Branson West Reptile Gardens and Predator World Zoo & Aquarium; Guantlet Amusement & Holdings, Inc., and Branson West Entertainment, Inc., AWA-08-0031, 10/02/16.
Cliff and Linda Watts, d/b/a Hillside Kennel, AWA-09-0122, 10/03/12.
James R. Wise and Janet M. Wise, d/b/a Wise Acres Ranch, AWA-10-0009, 10/04/16.
Wilbur D. Davenport, an individual; and Maximtjs "Tons of Fun" LLC, AWA-09-0200, 10/04/16.

FEDERAL MEAT INSPECTION ACT

Specialty Brands, L.P., FMIA/PPIA 10-0018, 10/02/16.

Bushway Packing, Inc.,Terry Rooney, John McCracken, FMIA-10-0056, 10/03/22.

Brown Packing Company, FMIA-10-0219, 10/04/14.

Englehart Gourmet Foods, Inc., FMIA/PPIA-10-0080, 10/05/21.

PLANT QUARANTINE ACT

McLaren Industries, PQ-10-0039, 10/01/08.

Erickson Farm, Inc., PQ-09-0073, 10/03/24.

Sky Chefs, Inc. d/b/a LSG Skychefs, PQ/AQ-09-0057, 10/04/12.

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AGRICULTURE DECISIONS

Volume 69

January - June 2010
Part Two (P & S)
Pages 676 - 701

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*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

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 texts of Consent Decisions are 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 decisions from 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.dm.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 reverse chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Selected individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available until current supplies are exhausted.

Direct all inquiries regarding this publication to: Editor, Agriculture Decisions, Office of Administrative Law Judges, U.S. Department of Agriculture, Room 1057 South Building, Washington, D.C. 20250-9200, Telephone: (202) 720-6645, Fax (202) 690-0790, and e-mail address of Editor.OALJ@usda.gov.

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PACKERS AND STOCKYARDS ACT

JANUARY - JUNE 2010

COURT DECISION

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDER

DEFAULT DECISIONS

PACKERS AND STOCKYARDS ACT

COURT DECISION

TODD SYVERSON, d/b/a SYVERSON LIVESTOCK BROKERS v. USDA.
No 08-3245.
Court Decision.
Filed April 9, 2010.

[Cite as: 601 F.3d 793].

PS – Deceptive trade – Market agent – Dealer – Self dealing.

Court concurred with Judicial officer (JO) that Syverson was acting as a market agency rahter than a dealer which requires a higher standard than a dealer. Amarket agency requires a fiduciary duty to his principal.

United States Court of Appeals,
Eighth Circuit.

Before RILEY,[1] Chief Judge, WOLLMAN, and SHEPHERD, Circuit Judges.

WOLLMAN, Circuit Judge.

In this Packers and Stockyards Act case, see 7 U.S.C. §§ 181-229, Todd Syverson appeals from the judgment of the judicial officer of the United States Department of Agriculture. The judicial officer determined that Syverson had engaged in unfair and deceptive trade practices, in violation of 7 U.S.C. § 213(a), and failed to keep sufficient accounts, records and memorandum of his business, in violation of 7 U.S.C. § 221. The judicial officer determined that Syverson unfairly and deceptively overcharged a customer in a series of transactions in which he acted as a market agency and that he failed to produce documentation of his transactions in a timely

[1]The Honorable William Jay Riley became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 1, 2010.

manner. The judicial officer issued a cease and desist order to Syverson and suspended his registration under the Act for five years. We affirm the judicial officer's judgment in part, reverse in part, and remand to the judicial officer for reconsideration of the sanction.

I.

Syverson has bought and sold livestock since 1989, doing business as Syverson Livestock Brokers in Wanamingo, Minnesota. He is registered under the Packers and Stockyards Act (PSA) as both a market agency and a dealer. This dual registration means that he can traffic in livestock either as a market agency working on a commission basis, gleaning profit from the fees charged for arranging transactions, or as a dealer, deriving profit from the difference between his cost basis and sale price. In 2001, Syverson was ordered to cease and desist from "[i]ssuing accounts of purchase or sale which fail to show the true and correct nature of the livestock transaction accounted for therein" and "causing false records to be prepared." *In re: Todd Syverson,* P & S Docket No. D-99-0011, 2-3 (June 12, 2001).

In the spring of 2002, Syverson entered into an arrangement with Lance Quam, in which Quam sought to purchase approximately sixty cows during the coming summer.[2] Quam intended to breed the cows. Syverson agreed to provide the cows at his purchase price, plus a commission of $15, and additional expenses, including trucking.[3]

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[2]In his reply brief, Syverson disputes this, stating that there was no testimony or evidence to this effect. Quam, however, testified that he told Syverson that he sought "approximately fifty or sixty" cattle "by late summer."

[3]Beyond these facts, Syverson and Quam gave conflicting testimony concerning the agreement they reached. The administrative law judge and the judicial officer found both Syverson and Quam lacking in credibility. The judicial officer, therefore, relied upon the testimony of unbiased witnesses, relevant exhibits, and the other filings in the record. Our review is limited to the evidence upon which the judicial officer relied. *See Corona Livestock Auction, Inc., v. U.S. Dep't of Agric.,* 607 F.2d 811, 814 n. 8 (9th Cir.1979). Review for substantial evidence neither includes the revisiting of credibility determinations, nor the re-weighing of evidence and the inferences to be drawn therefrom. *Id.; Aikins v.*
(continued...)

During the summer of 2002, Syverson purchased cattle at the Zumbrota Livestock Auction in Zumbrota, Minnesota. The auction sold different types of cattle on different days of the week. The Monday auction included a variety of cattle, including open (not pregnant) cows, feeder cattle, calves, market cattle, fat cattle, and dairy cows being sold for slaughter. Typically, although not always, cattle sold at the Monday auction were sold for slaughter and priced by the pound. The Monday auction is colloquially known as the slaughter or cull auction, and most cattle sold at this auction are slaughtered shortly thereafter. Cattle sold at the Monday auction are given a four-digit identification tag, commonly known as a slaughter tag.

On Tuesdays, dairy cows are auctioned. Cows sold at the dairy auction are generally bound for dairy farms and priced by the head rather than by weight. Compared to the cattle sold at the Monday slaughter auction, cows sold on Tuesday tend to be of higher quality and are typically more expensive. In order to be sold at the Tuesday auction, a cow must have received a veterinary inspection that evaluates the overall health of the cow and the state of the udders. The cow must also be tested for brucellosis and tuberculosis. A cow that passes the veterinary inspection can be given a three-digit identification tag, marking it as suitable for the Tuesday dairy auction. Importantly, a cow that has already received a four-digit slaughter tag can have its slaughter tag replaced with a three-digit dairy auction tag if it passes a veterinary inspection.

At both auctions, an individual that puts cattle up for sale is known as the consigner, as they have consigned their cattle to the auction for sale. The consigner remains the owner of the cattle during the auction and bears the risk that the cattle may die while at auction. Ownership is transferred when a successful bid is made for the cattle. If the consigner does not feel the bidding is at a fair price, then he may either (1) stop the bidding and withdraw his cattle from the auction at no charge (known as a "no-sale") or (2) repurchase the cattle from his own consignment, incurring auction fees.

On at least eight occasions during the summer of 2002, Syverson bought

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[3](...continued)
United States, 282 F.2d 53, 57 (10th Cir.1960).

cattle at the Monday slaughter auction, had the cattle inspected by a veterinarian, re-tagged for the dairy auction, and then consigned for sale the next day in the Tuesday dairy auction. Syverson repurchased the cows from his own consignment and paid auctioneering fees of approximately twenty to twenty-five dollars per head. Syverson then delivered some of these repurchased cows to Quam, accompanied by an invoice that showed the Tuesday dairy auction price, a commission of $15, a veterinary fee, and the cost of trucking.[4]

To understand these transactions, it is useful to consider an example. At the Monday slaughter auction on August 19, 2002, Syverson bought a cow weighing 790 pounds, at a price of $30 per hundredweight, for a total purchase price of $237. The cow's four digit slaughter tag was # T4827. After passing a veterinarian examination that evening, the cow was re-tagged # 565 for the Tuesday dairy auction.

At the Tuesday dairy cow auction the following day, Syverson consigned cow # 565 to the auction and then repurchased the same cow from his own consignment for $475. Syverson had the auction segregate the cow into its own pen and invoice the cow as "Order 2" for Quam. The cow was then taken to a veterinarian for various shots and delivered to Quam later that day. For this cow, Syverson invoiced Quam $515.50, which included $475 for Syverson's purchase price, a $15 commission, a $15.50 veterinary fee, and $10 for trucking. With the invoice, Syverson included his Tuesday dairy auction receipt, representing that he had paid $475 for the cow. Syverson did not disclose that he had repurchased the cow from his own consignment or that the cow had been initially purchased at the Monday slaughter auction. As a result, the total amount invoiced to Quam was $278.50 greater than the amount Syverson paid for the cow at the

[4]Of the sixty-two cows that Quam purchased in the summer of 2002, at least forty-four were repurchased from Syverson's own consignment. Only twenty-four cows are the subject of this case. These twenty-four traceable cows were all separately penned and invoiced to "Order 2" for Quam at the Tuesday auction. William Arce, a senior marketing specialist for the Grain Inspection, Packers and Stockyards Administration, testified that Syverson's failure to produce complete records prevented tracing the history of the rest of the cows.

Monday slaughter auction.

In February 2003, Quam received eight cows from Syverson. The trucker making the delivery, Jim Klecker, said to Quam, "Oh, you're the one," and then related rumors circulating at the Zumbrota auction, "that Todd [Syverson] was buying these cattle on Monday and turning around and running them up on Tuesday and selling them to somebody and they didn't know who." Klecker reported that he had spoken to Syverson about this rumor and that Syverson had responded, "Well, just keep it quiet about who we tell about where we got cattle there. Nobody else needs to know."

Acting on this information, Quam acquired veterinary records from the Zumbrota auction. The records showed that Syverson had been repurchasing dairy cows from the Tuesday dairy auction that he had initially purchased at the Monday slaughter auction, confirming what Klecker had said. On May 8, 2003, Quam complained to the Grain Inspection, Packers and Stockyard Administration (GIPSA) about his dealings with Syverson. Robert Merritt, the Minnesota resident agent for GIPSA, commenced an investigation. GIPSA requested that Syverson produce for inspection his business records for 2002. Syverson did not turn over records of his business with Quam, stating that he had lost the records during a move. Although Syverson turned over other records, the records of transactions with Quam were missing. After speaking with his lawyer, Syverson produced some records of his business with Quam, claiming that they had been misfiled. These records, however, did not include the initial price or source of the cows that were supplied to Quam.

On December 14, 2004, GIPSA filed a formal complaint against Syverson, alleging that his self-dealing violated 7 U.S.C. § 213(a) as an unfair or deceptive practice and that his failure to keep proper business records violated 7 U.S.C. § 221. GIPSA's complaint sought a cease and desist order, a fine, and suspension of Syverson's registration under the PSA.

An administrative law judge (ALJ) held a two-day hearing on April 4-5, 2006. The ALJ issued her decision on August 31, 2007, concluding that Syverson, acting as a dealer under the PSA, had violated 7 U.S.C. § 213(a)

by engaging in a deceptive and unfair practice, and had violated 7 U.S.C. § 221 for his failure to produce his business records for inspection. *In re: Todd Syverson,* P & S Docket No. D-05-0005, 2007 WL 3170335 (Aug. 31, 2007) (*Syverson I*). The ALJ found that Syverson had intentionally withheld the invoices that he had sent to Quam. The ALJ assessed a civil penalty of $5,000 and ordered Syverson to cease and desist from similar violations of the PSA.

On September 27, 2007, GIPSA appealed the ALJ's decision to the judicial officer. GIPSA argued that Syverson had acted as a market agency, not as a dealer, and that his violations were serious violations of the PSA. GIPSA emphasized that Syverson had been ordered in 2001 to cease and desist from misrepresenting important facts about livestock purchases and sales to his customers. According to GIPSA, a five-year suspension was warranted. Syverson denied that he had violated the PSA and argued that no sanction should be imposed.

The judicial officer issued his final decision on August 27, 2008. *In re: Todd Syverson,* P & S Docket No. D-05-0005, 2008 WL 4105809 (Aug. 27, 2008) (*Syverson II*). He concluded that Syverson had acted as a market agency. In reaching this conclusion, the judicial officer considered a number of factors: (1) Syverson had charged Quam what appeared to be a "commission" of $15 per head; (2) there was a pre-existing agreement between Syverson and Quam for the purchase of cattle; (3) Syverson listed each expense that he incurred on his invoice (i.e. veterinary and trucking fees), rather than providing a comprehensive price; (4) Syverson communicated his cost basis to Quam, a practice that dealers tend to avoid; (5) Syverson presented an invoice to Quam that not only showed his cost basis, but also showed from whom Syverson had purchased the cattle, a practice required of market agencies, not dealers; (6) and on at least one occasion, Syverson segregated the cattle that he repurchased at the Tuesday dairy auction into an order lot for Quam, suggesting that Syverson had repurchased the cattle specifically for Quam, rather than merely to fill his own inventory. The judicial officer stated that although none of these factors alone was dispositive, the great weight of the evidence led him to

conclude that Syverson was acting as a market agency.

Accordingly, the judicial officer determined that Syverson had violated 7 U.S.C. § 213(a) by engaging in unfair and deceptive practices and that his violations were "most serious." The judicial officer ordered Syverson to cease and desist from similar practices and from failing to produce his records for inspection. Beginning his discussion of whether a suspension was appropriate, the judicial officer recited the Secretary of Agriculture's sanction policy:

> [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.

In re: S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (1991). Applying this policy, the judicial officer stated that the administrators of the PSA had recommended a five-year suspension. He noted that the purpose of an administrative sanction is to deter future violations, that the case involved serious violations of the PSA, and that Syverson had not been deterred by a prior cease and desist order. The judicial officer then concluded that a five-year suspension was warranted. On September 26, 2008, Syverson timely filed this appeal, and the judicial officer stayed his order pending our review of his decision. The Secretary of the Department of Agriculture argues for affirmation of the judicial officer's decision.

II.

We review *de novo* the judicial officer's conclusions of law. 5 U.S.C. § 706; *Rice v. Wilcox,* 630 F.2d 586, 589 (8th Cir.1980). Great deference, however, is accorded to the judicial officer's construction of the PSA, given that he is charged with enforcing it. *Van Wyk v. Bergland,* 570 F.2d 701, 705 (8th Cir.1978) (citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

The factual findings of the judicial officer will be sustained if they are supported by substantial evidence. 5 U.S.C. § 706(2)(E); *W. States Cattle Co. v. U.S. Dep't of Agric.,* 880 F.2d 88, 89 (8th Cir.1989). Substantial evidence is a deferential review standard, requiring only the presence of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *W. States Cattle Co.,* 880 F.2d at 89 (quoting *Consol. Edison Co. of New York v. NLRB,* 305 U.S. 197, 217, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). Evidence may be substantial even when two inconsistent conclusions might have been drawn from it. *W. Iowa Farms Co. v. United States,* 629 F.2d 502, 505 (8th Cir.1980). This standard applies with equal force when the judicial officer has reached a conclusion different from that reached by the administrative law judge. *Farrow v. U.S. Dep't of Agric.,* 760 F.2d 211, 213 (8th Cir.1985). We may not substitute our judgment for that of the judicial officer's as to what may be inferred from the evidence. *Lewis v. Butz,* 512 F.2d 681, 683 (8th Cir.1975).

We review the judicial officer's imposition of sanctions for abuse of discretion. *Ferguson v. U.S. Dep't of Agric.,* 911 F.2d 1273, 1278 (8th Cir.1990) (quoting *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 188, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)). The judicial officer abuses his discretion when the sanction imposed is unwarranted in law or without justification in fact. *Id.; Conforti v. United States,* 74 F.3d 838, 842 (8th Cir.1996).

A.

Syverson argues that the judicial officer erred in concluding that he was acting as a market agency when selling cattle to Quam. The PSA defines a market agency as "any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services." 7 U.S.C. § 201(c). Under the Act, a dealer is "any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser." 7 U.S.C. § 201(d). The distinction between a market agency and a dealer is critical to the administration of the

PSA: a market agency owes a fiduciary duty to his customer and is held to a higher standard of conduct than a dealer. *United States v. Donahue Bros.,* 59 F.2d 1019, 1022 (8th Cir.1932). *See generally Stafford v. Wallace,* 258 U.S. 495, 513-17, 42 S.Ct. 397, 66 L.Ed. 735 (1921) (explaining the construction and purposes of the PSA).

The appearance of the word "commission" on an invoice is not dispositive. *Ferguson,* 911 F.2d at 1278. Rather, the nature of the business relationship is determinative of whether a registrant acted as a market agency or a dealer. *Id.* at 1279. To flesh out the nature of the relationship, we have found relevant: (1) whether the invoices of the registrant led customers to believe they consisted of the actual purchase price plus transactional fees; (2) whether the registrant made representations to customers that his only profit was the transactional fees; (3) whether the registrant told customers that he was acting as a market agency; (4) whether the registrant purchased cattle with a specific customer in mind; (5) whether the registrant made adjustments to the price of cattle in light of quality concerns. *Id.* at 1279-82. While all of these factors are relevant, none are conclusive. *Id.* at 1282.

The question before us is whether there was substantial evidence supporting the judicial officer's determination that Syverson was acting as a market agency, that is selling on a "commission basis." 7 U.S.C. § 201(c); *W. States Cattle Co.,* 880 F.2d at 89. Review for substantial evidence does not require that we agree with the judicial officer, but merely that we find his determination to be a reasonable one. *W. States Cattle Co.,* 880 F.2d at 89. Given the totality of the evidence, we conclude that it was.

Syverson provided Quam with invoices that included a commission of $15 per head, and those invoices made it seem as though the price was Syverson's cost plus transactional fees. Syverson's words and actions represented that his profit was gleaned from the transactional fees, not from the difference in his cost basis and the sale price. The invoicing system that Syverson used was typical of a market agency: dealers tend to refrain from displaying their cost basis; and market agencies, unlike dealers, are required to attach invoices showing their cost basis and the origin of the animal. Syverson conformed to the invoicing requirements of a market agency,

displayed his cost basis, and itemized his expenses as a market agency typically would. There was evidence that Syverson segregated cattle at the auction into specific order lots for Quam. While none of these factors alone would be sufficient, the totality is substantial evidence that Syverson was acting as a market agency.

Syverson disagrees and contends that the record is virtually devoid of evidence that he was acting as a market agency. First, he argues that the judicial officer did not give proper deference to the administrative law judge's contrary finding that he was acting as a dealer. We do not agree, for as we have previously said, the judicial officer may substitute his judgment for that of the administrative law judge. *Farrow,* 760 F.2d at 213.

Second, Syverson states the following factors weigh against a finding of market agency: (1) he claims that the $15 per head "commission" was not in fact a commission, but rather a "flat fee" (Syverson testified that the word "commission" on his invoices was inadvertent, and a remnant of another invoice that he had copied); (2) he emphasizes that he took title to the cattle before transferring them to Quam, shouldering the risk of loss until delivery; (3) Syverson claims that Quam did not have to buy and take delivery of any of the cattle; and (4) he argues that conversations he had with Quam lacked specificity as to time-frame and quantity and thus could not have constituted an agreement between a market agency and a buyer.

The word "commission" on an invoice is not dispositive of status as a market agency, but it is relevant to determining whether a registrant acted as a market agency. *Ferguson,* 911 F.2d at 1273. The commission charged in this case, $15 per head, was not extraordinary. *See, e.g., H-W-H Cattle Co. v. Schroeder,* 767 F.2d 437, 440 (8th Cir.1985) (commission of $.35 per hundredweight); *In re: Mark V. Porter,* 47 Agric. Dec. 656, 660-63 (1988) (commission of $2 or $3 per head, or $.50 per hundredweight). We see no reason to consider it anything but a commission, as it was labeled on the invoice.

It is true that Syverson took title to the cattle before selling them to

Quam, instead of brokering a transaction between another seller and Quam. This fact, however, is not particularly helpful to Syverson. The nature of the scheme required Syverson to take title to the cattle, repurchase them from his own consignment, and deliver them to Quam. A registrant cannot defeat a finding of market agency by taking title at some point in the transaction. See *In re: Sterling Colo. Beef Co.,* 39 Agric. Dec. 184, 221 (1980) ("Who pays for the livestock is immaterial under the definitions of dealer and market agency in the Act."). The importance of taking title depends on whether title was taken for legitimate purposes, that is, whether the registrant purchased cattle for himself as a dealer and then separately sought buyers for this cattle. *See Ferguson,* 911 F.2d at 1281. When taking title is part and parcel of a deceptive scheme, it does not dispose of the question whether the registrant was acting as a market agency. Although Syverson and Quam may not have had an ironclad agreement that specified the quantity of cattle to be delivered at a certain point in time, this fact is not dispositive. Nor is it conclusive that Quam could have, according to Syverson, backed out of the transactions.

Third, Syverson contends that the judicial officer's determination was in error in light of *In re: Embry Livestock, Co.,* 48 Agric. Dec. 972 (1989), a case involving an extended discussion of whether a company was acting as a market agency or as a dealer. Syverson argues that under *Embry* the dispositive factor in determining status as a market agency or dealer is whether the registrant was working as an agent of the buyer. The statute defines a dealer as someone buying or selling "on his own account or as the employee or agent of the vendor or purchaser." 7 U.S.C. § 201(d). The statute defines a market agency as "any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services." 7 U.S.C. § 201(c). As the statute instructs, the central question is whether Syverson was working on a commission basis, that is, purporting to garner profit from the fee he charged for arranging the transactions. Moreover, in *Embry,* the company in question "took numerous steps" to insure that its customers knew that it was acting as a dealer, including changing its billing procedures, business sign, and specifically notifying customers of this change. *Embry,* 48 Agric. Dec. at 981. Syverson took no such steps, and thus *Embry* is inapposite.

There was substantial evidence that Syverson was acting as a market agency. Although we consider a variety of facts to shed light on the nature of the business relationship, the question to be answered remains whether Syverson was, in fact, selling to Quam on a commission basis. 7 U.S.C. 201(c)(1); *Ferguson,* 911 F.2d at 1278. Selling on a commission basis means purporting to profit from facilitating the transaction-not from the difference between cost and sales price. This is precisely what Syverson appeared to do. Accordingly, the judicial officer's determination that Syverson acted as a market agency was well supported by substantial evidence, and we will not disturb it.

B.

Because Syverson acted as a market agency, he owed a fiduciary duty to Quam. *Donahue Bros.,* 59 F.2d at 1022. Syverson's failure to disclose that he had repurchased cattle from his own consignment was a conflict of interest, an unfair and deceptive practice, and a violation of 7 U.S.C. § 213(a). *Donahue Bros.,* 59 F.2d at 1022-23 ("The act specifically forbids unfair, unjust, unreasonable, or deceptive practices or devices by market agencies in connection with the marketing of live stock or the performance of stockyard services."); *Embry,* 48 Agric. Dec. at 973; *In re: Mark V. Porter,* 47 Agric. Dec. at 668-69; *In re: Harry Vealey, Jr.,* 39 Agric. Dec. 8, 13 (1979).[5]

Without conceding that he violated the Act, Syverson argues that the Administrative Procedures Act (APA), 5 U.S.C. § 558(c), precludes his suspension as a registrant because § 558(c) prohibits administrative suspension without prior notice by the agency or willful violation. He contends that he neither had notice that his conduct was unlawful, nor did he willfully violate the PSA. Syverson also argues that a five-year suspension is unwarranted in law and in fact and contends that it will put

[5]The judicial officer determined that, as a matter of law, Syverson's deceptive and unfair practices violated § 213(a) even if he was acting as a dealer. Giving deference to the judicial officer's construction of the PSA, *Van Wyk,* 570 F.2d at 705, we would most likely agree.

him out of business and force him into bankruptcy. The Secretary argues that Syverson's APA argument was waived and is without merit. The Secretary argues that a five-year suspension is warranted because of the severity of Syverson's violations and because he had been previously ordered to cease and desist from violating the PSA.

1.

Syverson's contention that his suspension would violate the APA, 5 U.S.C. § 558(c), is raised for the first time on appeal. Generally, we will not consider claims that are first raised on appeal. *Cole v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.,* 533 F.3d 932, 936 (8th Cir.2008); see *Excel Corp. v. U.S. Dep't of Agric.,* 397 F.3d 1285, 1297 (10th Cir.2005). There is a narrow exception to this general rule for questions of law that must be addressed if "injustice might otherwise result." *Hormel v. Helvering,* 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941) (describing an exceptional case when review is warranted); *Cleland v. United States,* 874 F.2d 517, 522 n. 6 (8th Cir.1989).

GIPSA argued to the judicial officer that a five-year suspension was appropriate in this case. Syverson had ample opportunity to argue that a suspension would violate the APA. Instead, he argued that a five year-suspension would be too severe given his supposed ignorance of the law. He neither cited § 558(c) nor made an argument similar to the one he makes here. Consequently, the judicial officer did not discuss whether a suspension would violate the APA, and thus we have no decision in that regard to review. Syverson's violations were serious and a suspension in this case would not be a miscarriage of justice.[6] *See United States v. South*

[6]We reject Syverson's argument that he could not have known that his practices were illegal. "[T]he act does not specify forbidden practices in detail," *Donahue Bros.,* 59 F.2d at 1023, and prior disciplinary cases for price manipulation were sufficient to put Syverson on notice that his actions were unlawful. *Coosemans Specialties, Inc., v. Dep't of Agric.,* 482 F.3d 560, 568 (D.C.Cir.2007) (holding that prior disciplinary cases put registrant on notice); *In re: Marvin J. Dinner & Kenneth S. Ross,* 41 Agric. Dec. 2201 (1982) (disciplinary case involving similar scheme of price manipulation via repurchasing from own consignment). Syverson had already been subject to a cease and desist order for price manipulation. *In re:*

(continued...)

Dakota, 665 F.2d 837, 842 (8th Cir.1981). Accordingly, Syverson's claim that a suspension would violate the APA, 5 U.S.C. § 558(c), is waived.

2.

Syverson argues that the judicial officer's sanction of a five-year suspension was an abuse of discretion.[7] He maintains that he did not intentionally violate the PSA and that a five-year suspension will bankrupt him and visit extreme hardship upon his family. The Secretary argues that a five-year suspension is warranted given that Syverson's violations were serious, his actions were deliberate and effective, and that he was previously ordered to cease and desist from deceptive business practices in violation of the PSA.[8]

We at times have taken a critical view of the judicial officer's sanctions, vacating much shorter suspensions as too severe. *Ferguson,* 911 F.2d at 1279 (six months' suspension); *W. States Cattle Co.,* 880 F.2d at 91 (same); *Farrow,* 760 F.2d at 216 (forty-five day suspension). A sanction that is too severe, given the nature of the conduct involved and the likely effect on the registrant, may be unwarranted in law and without justification in fact. *Ferguson,* 911 F.2d at 1282. A sanction may be without factual justification

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[6](...continued)
Todd Syverson, P & S Docket No. D-99-0011 (June 12, 2001) (enjoining further issuance of "accounts of purchase or sale which fail to show the true and correct nature of the livestock transaction accounted for therein"). Moreover, his initial refusal to produce complete records of his dealings with Quam, which in and of itself was a willful violation, belies his claim that he did not know there was anything wrong with what he had done. We also reject Syverson's cursory argument that a suspension would deprive him of "due process."

[7]The judicial officer ordered that after suspension for one year Syverson could apply to the Packers and Stockyards Program to be the salaried employee of another registrant or packer.

[8]The ALJ determined that Syverson had not violated the prior cease and desist order from his previous disciplinary case for price manipulation. *Syverson I,* at *15.

when the judicial officer fails to consider relevant facts, including, but not limited to, whether the conduct at issue undermined the governing statute, the entire context of the violation, the effect the sanction will have on the registrant, whether the sanction will put the registrant out of business, and mitigating circumstances. *Conforti,* 74 F.3d at 842; *ABL Produce Inc., v. U.S. Dep't of Agric.,* 25 F.3d 641, 646-47 (8th Cir.1994); *Ferguson,* 911 F.2d at 1282-83. We have emphasized that the nature of the conduct in question is crucially important, as well as the effect of the proposed sanction on the registrant. *Ferguson,* 911 F.2d at 1282.

Following the Secretary's sanction policy, as set forth in *S.S. Farms Linn County,* the judicial officer was required (1) to examine the nature of the violations in relation to the remedial purposes of the PSA, (2) to consider all relevant circumstances, and (3) to give appropriate weight to the recommendations of the administrators of the PSA. 50 Agric. Dec. at 497. The judicial officer adequately dealt with the last factor, but did not address the first two.

The judicial officer was required, by his own rule, to consider the nature of the violations in relation to the remedial purposes of the PSA. *Id.* The PSA is not a criminal statute, but rather a regulatory scheme designed to protect those involved in the industry. *See Donahue Bros.,* 59 F.2d at 1023. The goal of the statute is compliance, not retribution. The nature of Syverson's violations were that they involved price manipulation resulting in ill-gotten gain for him and economic harm to his customer. The remedial purposes of the PSA would be achieved by Syverson's continuing to do business in a fair and honest manner and complying with the PSA's record keeping requirements. A five-year suspension, if it permanently forces Syverson from the industry, appears to bear no relation to the remedial purposes of the PSA. The judicial officer did not address this relationship, and, without more, we are left only to speculate how Syverson's violations relate to the remedial purposes of the PSA.

Second, the judicial officer, again by his own rule, was required to consider all relevant circumstances. *S.S. Farms Linn County,* 50 Agric. Dec. at 497. Although we do not mean to blink at Syverson's violations, they were limited to one customer and involved a relatively small number of livestock. A five-year suspension would likely bankrupt Syverson and

deprive him of his livelihood.[9] By not addressing these issues, the judicial officer did not consider all relevant circumstances.

The PSA authorizes the judicial officer to suspend a registrant "for a reasonable specified period." 7 U.S.C. § 204. Congress intended a "broad grant" of discretion to the judicial officer, and uniformity in sanctions is not required by the statute. *Butz,* 411 U.S. at 186-88, 93 S.Ct. 1455. We, however, take note that other disciplinary cases for similar conduct resulted in significantly lesser suspensions. *In re: Stanley Gildersleeve & William Eberle,* P & S Docket No. 6848 (Apr. 28, 1988) (twenty-one day suspension for Gildersleeve and six months' suspension for Eberle); *In re: Marvin J. Dinner & Kenneth S. Ross,* 41 Agric. Dec. at 2203 (ninety-day suspension for Dinner); *In re: Marvin J. Dinner & Kenneth S. Ross,* 41 Agric. Dec. 2196, 2197 (1982) (ninety-day suspension for Ross). Although there are aggravating factors present here and uniformity in sanctions is not required, the extreme variance in suspensions is troubling.

We agree with the judicial officer that a suspension is appropriate because this case involves a serious violation of 7 U.S.C. § 213(a), as well as a violation of 7 U.S.C. § 221 that hindered the investigation. These serious offenses are deserving of a significant sanction, especially in light of the prior cease and desist order for price manipulation that had been imposed upon Syverson. A five-year suspension, however, is not a "reasonable specified period," given the judicial officer's deviation from the requirements of his own sanction policy and the facts of this case. It is unwarranted in law and without justification in fact. As such, it constituted an abuse of discretion and must be reconsidered.

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[9]The judicial officer took note of the size of Syverson's business and did not find "that the assessment of a reasonable civil penalty would affect his ability to continue in business." *Syverson II,* at *9. This statement was in the context of determining whether a fine was appropriate in accordance with the requirements of 7 U.S.C. § 213(b) (mandating consideration of the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business). It appears to have had no bearing on the judicial officer's determination of whether a suspension was justified, and if so, what length of suspension was appropriate.

III.

The judicial officer's determinations that Syverson acted as a market agency under the PSA and that he violated the PSA are affirmed. The sanction is vacated and the case is remanded to the judicial officer for reconsideration of the sanction.

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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

McLAUGHLIN LIVESTOCK, INC.
P&S Docket No. D-09-0185.
Decision and Order as to McLaughlin Livestock, Inc.
Filed May 5, 2010.

P&S – Admissions in response – Laches not applicable – Willful – Insolvency during dealings.

Leah Battaglioli, for GIPSA.
James Simko, for Respondent McLaughlin Livestock, Inc.
Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Preliminary Statement

This disciplinary proceeding was initiated by the filing of a complaint on August 27, 2009 by the Deputy Administrator, Grain Inspection, Packers and Stockyards Program pursuant to the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 et seq.; hereinafter "Act") and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted By the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 - 1.151; hereinafter "Rules of Practice") against Respondents McLaughlin Livestock, Inc., Mitchell Livestock Auction, Inc. and Watertown Sales Barn, Inc. On August 28, 2009, prior to the Respondents filing an Answer, the Complainant moved to amend the Complaint. Pursuant to 7 C.F.R. §1.137, that amendment was effective upon filing.

After being granted two extensions of time in which to file an answer, Respondents filed an Answer to the Amended Complaint on October 16, 2009. Since the filing of the Amended Complaint, upon the motion of Complainant, Mitchell Livestock Auction, Inc., and Watertown Sales Barn, Inc., have been dismissed due to the markets having sold their assets and ceased business operations. In response to Respondent McLaughlin's Answer, Complainant moved for a Decision Without Hearing By Reason of Admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R.

§ 1.139) as a result of admissions of fact that Respondent McLaughlin made in its Answer to the Amended Complaint.

Discussion

Respondent McLaughlin filed an Answer admitting that during the time periods alleged in the Amended Complaint, Respondent McLaughlin was operating pursuant to the Act while its current liabilities exceeded its current assets. In its defense, Respondent McLaughlin claimed the equitable doctrines of waiver, estoppel, and laches.

The Judicial Officer has consistently held that the USDA is not subject to estoppel when it is acting in its sovereign capacity. *E.g., In re Contorti*, 54 Agric. Dec. 649, 671 (1995); *In re DiCarlo Distribs., Inc.*, 53 Agric. Dec. 1680, 1713 (1994); *In re Finger Lakes Livestock Ex., Inc.*, 48 Agric. Dec. 385, 400 (1989). Filing disciplinary complaints against registered entities for violation of a federal statute is within Complainant's sovereign capacity. The Judicial Officer has also repeatedly held that the doctrine of laches does not apply to the USDA when it is acting in its sovereign capacity. *E.g., In re Midland Banana & Tomato Co.,* 54 Agric. Dec. 1239, 1316 (1995); *In re Samuel S. Napolitano Produce, Inc.,* 52 Agric. Dec. 1605, 1613 (1993); *In re Catanzaro,* 35 Agric. Dec. 26, 34 (1976), aff'd, 556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agric. Dec. 467 (1977).

Regarding waiver, at no time did Complainant inform Respondent McLaughlin, either by express or implied word or deed, that it would not file a disciplinary complaint against Respondent McLaughlin for insolvency. Absent any specific act on the part of Complainant demonstrating its intent to forgo pursuing administrative action against Respondent McLaughlin for its insolvency, this argument fails. Accordingly, because Respondent McLaughlin cannot claim these equitable doctrines against the USDA, the asserted defenses are without merit.

As a second defense, Respondent McLaughlin denies that it committed any willful violations of the Act. This defense is also without merit. 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 a careless disregard of statutory requirements." *In re Marysville Enters., Inc.,* 59 Agric. Dec. 299, 309 & n.5 (2000). In other

words, "a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts." *In re Hines and Thurn Feedlot, Inc.,* 57 Agric. Dec. 1408, 1414 (1998). Here, willfulness is established because Respondent McLaughlin intentionally continued to operate subject to the Act for a period of approximately two years while insolvent.

Even applying the more stringent standard of willfulness used by the Fourth and Tenth Circuits, namely that willfulness requires "such gross neglect of a known duty as to be the equivalent" of an intentional misdeed, the conduct of Respondent McLaughlin was still willful. *Capital Produce Co. v. USDA*, 930 F.2d 1077, 1079-80 (4th Cir. 1991); *Capitol Packing Co. v. USDA,* 350 F.2d 67, 78-79 (10th Cir. 1965). Respondent McLaughlin clearly knew or should have known that it was insolvent during the period December 31, 2006, through December 31, 2008, because of the fact that Complainant informed Respondent McLaughlin in two letters dated May 31, 2007, and September 25, 2007, that it was operating while its current liabilities exceeded its current assets and because Complainant repeatedly required Respondent McLaughlin to submit Supplemental Balance Sheet Special Reports, which special reports showed Respondent McLaughlin to be operating while its current liabilities exceeded its current assets. Because Respondent McLaughlin was insolvent on December 31, 2006, June 30, 2007, September 30, 2007, December 31, 2007, and December 31, 2008, and operated while insolvent through these dates, in neglect of a known duty and despite being notified of its insolvency, its actions can only be described as willful, both as intentional acts or as acts performed with careless disregard of statutory requirements.

As the Respondent's Answer presents no bona fide dispute as to the material facts, no hearing is warranted in this matter and the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent McLaughlin is a corporation organized and existing under the laws of the State of South Dakota, with a mailing address in McLaughlin, South Dakota.

2. At all times material to the Amended Complaint, Respondent

McLaughlin was:

(a) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

3. As of December 31, 2006, Respondent McLaughlin had current assets of $311,669.96 and current liabilities of $356,159.05, resulting in an excess of current liabilities over current assets in the amount of $44,489.09.

4. As of June 30, 2007, Respondent McLaughlin had current assets of $890.24 and current liabilities of $23,092.69, resulting in an excess of current liabilities over current assets in the amount of $22,202.45.

5. As of September 30, 2007, Respondent McLaughlin had current assets of $6,167.17 and current liabilities of $41,596.91, resulting in an excess of current liabilities over current assets in the amount of $35,429.74.

6. As of December 31, 2007, Respondent McLaughlin had current assets of $428,132.07 and current liabilities of $451,673.42, resulting in an excess of current liabilities over current assets in the amount of $23,541.35.

7. As of December 31, 2008, Respondent McLaughlin had current assets of $7,591.00 and current liabilities of $123,473.00, resulting in an excess of current liabilities over current assets in the amount of $115,882.00.

8. During the period December 31, 2006, through December 31, 2008, and to the present, Respondent McLaughlin engaged in the business of a market agency selling livestock in commerce on a commission basis, notwithstanding that its current liabilities exceeded its current assets.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts found in Findings of Fact 3 through 8 above, Respondent McLaughlin's financial condition does not meet the requirements of the Act pursuant to 7 U.S.C. § 204 and Respondent McLaughlin has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)).

Order

Respondent McLaughlin, 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 operating while its current liabilities exceed its current assets, a financial condition which does not comply with the requirements of the Act.

Pursuant to 7 U.S.C. § 204, Respondent McLaughlin is hereby suspended as a registrant under the Act for a period of 30 days and thereafter until Respondent McLaughlin has demonstrated solvency. When Respondent McLaughlin demonstrates that its current liabilities no longer exceed its current assets, a supplemental order will be issued terminating the suspension after the expiration of the 30 day period of suspension.

The provisions of this Order shall become effective on the sixth day after service of this Decision and Order on Respondent McLaughlin.

This Decision and Order shall become final without further proceedings thirty-five (35) days after service on Respondent McLaughlin, 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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PACKERS AND STOCKYARDS ACT

MISCELLANEOUS ORDER

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at:
http://www.dm.usda.gov/oaljdecisions/aljmisdecisions.htm.

JEFF DUTTON, d/b/a JEFF DUTTON CATTLE CO. AND d/b/a BAR 7 CATTLE CO.
P. & S. Docket No. D-10-0053.
Miscellaneous Order.
Filed April 2, 2010.

PS.

Leah Battagioili for GIPSA.
Respondent, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

ORDER

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PACKERS AND STOCKYARDS ACT

DEFAULT DECISIONS

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at:
http://www.dm.usda.gov/oaljdecisions/aljdefdecisions.htm.]

TRACY CARTER.
P.&S. Docket No. D-09-0088.
Default Decision and Order.
Filed January 7, 2010.

PS – Default.

Ciarra A. Toomey for GIPSA
Respondent Pro se.
Default Decision by Peter M. Davenport, Acting Chief Administrative law Judge .

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JAMES BAILEY, d/b/a B & B FARMS, LLC.
P. & S. Docket No. D-09-0165.
Default Decision and Order.
Filed February 25, 2010.

PS – Default.

Ciarra A. Toomey, for GIPSA.
Respondent, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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TIM REECE, d/b/a TIM REECE CATTLE COMPANY.
P. & S. Docket No. D-09-0137.
Default Decision and Order.
Filed March 1, 2010.

PS – Default.

Christopher Young-Morales, for GIPSA.
Respondent, Pro se.
Default Decision and Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

PACKERS AND STOCKYARDS ACT

Thomas H. McElwee d/b/a/ Shippensburg Cownet, PS D-08-0127, 10/01/27.

David DeStafino d/b/a D&D Stockhauling, PS D-10-0002, 10/01/27.

Randy Freeman, PS D-10-0013, 10/02/17.

Townsend Farms of Arkansas, Inc., PS-09-0135, 10/03/05.

Noah's Ark Processors Corp. a.k.a. Noah's Ark Processors, LLC, PS-10-0051, 10/03/09.

Efren Saavedra, Jr., d/b/a Ft. Worth & Company PS-D-0033, 10/05/05

Ruben S. Saavedra, Jr, PS-D-10-0034, 10/05/15.

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AGRICULTURE DECISIONS

Volume 69

January - June 2010
Part Three (PACA)
Pages 702 - 981

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISIONS

REPARATIONS

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDER

DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISION

WESPAK DISTRIBUTORS, INC. v. RED HAWK FARMING & COOLING LLC, JACK LEWIS DIXON, LEWIS DIXON, JR. AND JESSIE DIXON.
Civil No. 09–743–KI.
Filed January 5, 2010.

[Cite as: 2010 WL 56104 (D.Or.)]

PACA-R – Responsibly connected – PACA trust – Personal liability, when not.

Although controlling owner may be determined to be responsibly connected person - that does not automatically result in personal liability.

United States District Court,
D. Oregon.

Cited CasesA distributor was entitled to default judgment against a controlling owner of a purchaser for its failure to pay for watermelons under their contract. The controlling owner was the signatory for the purchaser's company checks and was responsible for deciding whether to pay the distributor. Further, the owner repeatedly told the distributor that the purchaser did not have the funds available to pay the distributor and his choice not to appear to defend this suit was not indicative of a valid explanation for the dissipation of the purchaser's trust assets. Perishable Agricultural Commodities Act, 1930, § 1, 7 U.S.C.A. § 499a.Renee R.

OPINION AND ORDER

KING, District Judge:

Plaintiff Wespak Distributors, Inc. (“Wespak”) filed this lawsuit

under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499a *et seq*. The suit seeks to recover payment for agricultural commodities that Wespak delivered to defendant Red Hawk Farming and Cooling, LLC ("Red Hawk") and its member/manager, defendant Jack Dixon, neither of whom have appeared to defend this action.On December 3, 2009, I ruled from the bench that Wespak is entitled to a default judgment against Red Hawk, but deferred ruling on whether Wespak is entitled to a default judgment against Dixon. I now hold that under PACA, Wespak is entitled to a default judgment against Dixon as well.

ALLEGED FACTS

Wespak is an Oregon corporation. Red Hawk is an Arizona limited liability company. Defendant Jack Dixon is a member and co-manager of Red Hawk. Wespak entered into a number of contracts to sell Red Hawk perishable agricultural commodities, namely, watermelons. Between August 22, 2007 and September 12, 2008, Red Hawk ordered and received agricultural commodities from Wespak. Wespak invoiced Red Hawk for the commodities but, despite repeated demand for payment, Red Hawk did not pay. The unpaid amounts due and owing Wespak total $612,187.78, plus interest and fees. The amount owed is lessened by $469,034.63, the total that Wespak garnished from Red Hawk's accounts receivable. Nevertheless, a sizeable deficiency of at least $143,153.15 remains.According to Wespak, Dixon is responsible for the day-to-day operations of Red Hawk. Dixon is the official registered agent of Red Hawk and is its co-manager. He is also a member of Red Hawk and owns at least ten percent of the limited liability company; the other two owners are two members of Dixon's family. Dixon has signature authority for checks issued on behalf of Red Hawk. When Wespak's accountant called Red Hawk to demand payment on several occasions, the accountant was always referred to Dixon. The accountant believes Dixon is Red Hawk's decision-maker about whether to pay Wespak. According to the accountant, "[d]uring multiple

telephone conversations between Dixon and [him]self, Dixon repeatedly admitted that Red Hawk did not have the funds available to pay [Wespak]." Decl. Gary Wood at ¶ 6.

STANDARD

After entering an order of default, a district court has discretion to issue a default judgment. *See* Fed.R.Civ.P. 55; *DIRECTV, Inc. v. Hoa Huynh,* 503 F.3d 847, 852 (9th Cir.2007), *cert. denied,* 555 U.S.937, 129 S.Ct. 40, 172 L.Ed.2d 240 (2008). In exercising its discretion, the court may consider:(1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.*Eitel v. McCool,* 782 F.2d 1470, 1471–72 (9th Cir.1986) (citation omitted).

The court has "considerable leeway as to what it may require as a prerequisite to the entry of a default judgment." *Televideo Sys., Inc. v. Heidenthal,* 826 F.2d 915, 917 (9th Cir.1987) (per curiam) (footnote omitted). The court may take the complaint's well-pleaded factual allegations as true, other than the amount of damages. *Id.* at 917–18 (citation omitted); *DIRECTV,* 503 F.3d at 854 (citations omitted). On the other hand, a " 'defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law.'" *Id.* (quoting *Nishimatsu Constr. Co. v. Houston Nat'l Bank,* 515 F.2d 1200, 1206 (5th Cir.1975)).

DISCUSSION

Congress enacted PACA in 1930 to prevent unfair business practices and promote financial responsibility in the fresh fruit and produce industry. *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transp. Factoring, Inc.,* 251 F.3d 1268, 1270 (9th Cir.2001). In 1984, Congress amended PACA to ensure that growers of agricultural commodities have priority over lenders in all financing arrangements. *Id.* PACA creates a trust for this purpose:

Perishable agricultural commodities received by a commission

> merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, *shall be held* by such commission merchant, dealer, or broker *in trust* for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

Id. (quoting 7 U.S.C. § 499e(c)(2)) (emphasis added).

The PACA trust comes into existence upon delivery of the commodities, and applies to all of the purchaser's produce-related inventory and proceeds. *See In re Southland Keystone,* 132 B.R. 632, 638–39 (B .A.P. 9th Cir.1991). The trust remains in effect until full payment of sums due has been received. *Sunkist Growers, Inc. v. Fisher,* 104 F.3d 280, 281 (9th Cir.1997).

The party holding trust assets must maintain them so they are freely available to satisfy outstanding obligations to the sellers of perishable agricultural commodities. *Id.* Under Ninth Circuit precedent, this party—the PACA trustee—owes a fiduciary duty to the beneficiary fruit and vegetable suppliers. *Id.* at 283. If the PACA trustee fails to create and protect a trust for the beneficiary, the PACA trustee commits a breach of trust and shall be liable to the beneficiary suppliers. *See* 7 U.S.C. § 499e(a). The Ninth Circuit has held that the PACA trust provisions impose these duties, and the resulting liability, on both the purchaser *and* its controlling person who use the assets for a purpose other than payment of suppliers. *Sunkist Growers, Inc.,* 104 F.3d at 283.

There is, however, some confusion amongst courts, and indeed, the litigants in this case, about the proper test to apply when determining if an individual person can be personally liable for the PACA buyer's failure to pay a supplier.

Wespak argues that PACA's definition of a "responsibly connected person" sets out the proper test to determine who can be personally

liable for the purchaser's failure to create and protect a trust for the PACA supplier. PACA defines "responsibly connected person" as,

> 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).

According to Wespak, since Dixon is a member of the LLC, and owns at least ten percent of Red Hawk, he fits the definition of "responsibly connected person," and is, therefore, personally liable under PACA.

According to the statute, however, the significance of being "responsibly connected" to a company that has violated PACA has nothing to do with personal liability for corporate debts. Indeed, "[n]owhere in the legislative history is the issue of individual liability of persons under PACA discussed." *Farm–Wey Produce, Inc. v. Wayne L. Bowman Co., Inc.,* 973 F.Supp. 778, 783 (E.D.Tenn.1997). Rather, a person "responsibly connected" to a PACA violator may not be employed by a PACA licensee except by approval of the Secretary of Agriculture. 7 U.S.C. § 499h(b); *see also Farley and Calfee, Inc. v. U.S. Dept. of Agric.,* 941 F.2d 964, 968 (9th Cir.1991) (discussing the "strict employment bar imposed on individuals responsibly connected with violators of the PACA"). There is no other mention in the statute about being "responsibly connected." Recovery, therefore, may not be had of Dixon merely because he is "responsibly connected" to Red Hawk.

The Ninth Circuit, however, imposes personal liability on a PACA violator's "controlling person" who uses trust assets for a purpose other than payment of suppliers. *Sunkist Growers, Inc.,* 104 F.3d at 283. A controlling person is a person who is in the position to control the trust assets. *See id.* A controlling person who does not preserve trust assets

for the trust beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act. *Id.* A court considering the liability of an alleged controlling person may look at the closely-held nature of the corporation, the person's active management role, and any evidence of the person acting for the corporation. *Id.* If a court determines that someone qualifies as a controlling person, PACA liability attaches first to the licensed seller of perishable agricultural commodities. *Id.* If the seller's assets are insufficient to satisfy the liability, the controlling person may be found secondarily liable if he had some role in causing the corporate trustee to commit the breach of trust. *Id.*

Dixon qualifies as a controlling person. Red Hawk is owned exclusively by three members of the Dixon family and is, therefore, akin to a closely-held corporation. Dixon was the signatory for company checks, and was responsible for deciding whether to pay Wespak. He co-managed Red Hawk and its daily operations, and was the company's registered agent.

Although Dixon's absence from this case makes it difficult to know for certain whether he used trust assets for a purpose other than payment of suppliers, the available facts make it sufficiently probable that he did. Dixon repeatedly told Wespak's accountant that "Red Hawk did not have the funds available to pay [Wespak]." Wood Decl. at ¶ 6. Dixon gave no reason why the funds were unavailable. Dixon's lack of explanation and his choice not to appear to defend this suit are not indicative of a valid explanation for the dissipation of trust assets. On the contrary, I am convinced that Dixon used the trust assets for a purpose other than payment of Wespak. The merits of Wespak's substantive claim, therefore, warrant a deficiency judgment against Mr. Dixon. He will be personally, although secondarily, liable to Wespak.

Whether an LLC member is personally liable as a controlling person is not a novel issue in the District of Oregon. In *F.C. Bloxom Co. v. Rojo Produce Imp. and Exp., LLC,* a produce seller delivered an order of fruits and vegetables to Rojo Produce. No. CV 04–1687, 2006 WL 2021697 at *1 (D.Or. Jul.16, 2006). Rojo Produce failed to pay the seller. *Id.* Following an administrative procedure, Rojo Produce partially

paid its debt to the seller, but a deficiency remained. *Id.* The seller subsequently brought suit against Garcia Rojo, the founder and owner of Rojo Produce. *Id.* Garcia Rojo had authority and control over the company's assets, and check signing authority. *Id.* He was also responsible for the LLC's day-to-day operations. *Id.* at *3. Judge Aiken found that he had control over the company's assets, "as demonstrated by his ability to authorize wire transfers and to sign checks for the company." *Id.* Judge Aiken held that Garcia Rojo "had a direct fiduciary obligation to preserve and maintain assets subject to the PACA trust and to ensure that those assets were sufficient and freely available for the payment of trust beneficiaries." *Id.* She held Garcia Rojo personally liable for the outstanding debt. *Id.*

Accordingly, I will issue a default judgment against Dixon.

CONCLUSION

Wespak's Motion for Default Judgment and Money Award Against Defendant Jack Dixon (# 65) is granted.
IT IS SO ORDERED.

KINGSBURG APPLE PACKERS INC. d/b/a KINGSBURG ORCHARDS, et al., v.BALLANTINE PRODUCE CO., INC., et al.
No. 1:09-CV-901-AWI-JLT.
Filed February 9, 2010.

[Cite as: 2011 WL 587355].

PACA-R – Trust claims, failure to preserve – Premature PACA trust notice ineffective.

A premature notice of a PACA trust claim is ineffective. The notice must be timely and must in sufficient detail to identify the transaction subject to the claim.

United States District Court,
E.D. California.

ORDER ON WAGON WHEEL'S MOTION TO DETERMINE THE VALIDITY OF PACA CLAIMS

ANTHONY W. ISHII, Chief Judge.

On October 28, 2009, this court issued an order that directed Wagon Wheel Farms, Inc. ("Wagon Wheel") to file a motion with the court to determine the validity of its Perishable and Agricultural and Commodities Act ("PACA") claims. *See* Doc. No. 116. Wagon Wheel complied and filed its motion the same day. Kingsburg Group and Bank of the West oppose the motion and assert that Wagon Wheel's claims are invalid because Wagon Wheel's Notice of Intent to Preserve Trust Benefits ("Notice of Intent") was prematurely served before any trust rights had been created and because the Notice of Intent did not contain certain information that is required by applicable federal regulations. For the reasons described below, the court finds that Wagon Wheel failed to preserve its PACA trust claims.

FACTUAL BACKGROUND

Wagon Wheel alleges that it sold and/or delivered to Ballantine Produce Co. ("Ballantine"), a packer and commission merchant, perishable agricultural commodities. *See* Wagon Wheel Proof of Claim dated July 24, 2009. Wagon Wheel alleges that it was not licensed by the United States Department of Agriculture ("USDA") as a PACA licensee during the period applicable to the transactions. Wagon Wheel alleges that Ballantine acted as a grower's agent for Wagon Wheel. Wagon Wheel alleges that it delivered harvested tree fruit to Ballantine, who would then sell the fruit on behalf of Wagon Wheel (as its commission merchant). Wagon Wheel shipped produce to Ballantine between October 16 and December 3, 2008. *See* Kingsburg Opposition at page 5. Wagon Wheel alleges that Ballantine received and accepted the produce. Wagon Wheel appears to have received an accounting from Ballantine for those shipments on or about April 13, 2009. *See* Kingsburg Opposition at page 5. The accounting reflected commodities sold and the amount outstanding. *See* Kingsburg Opposition at page 5.

Wagon Wheel contends that a May 1, 2008 letter ("May 1, 2008 Letter") from Craig Sorensen, President for Wagon Wheel, addressed to Ballantine and David Albertson, served as a Notice of Intent, preserving its PACA trust interest pursuant to 7 U.S.C. § 499e(c)(3). The May 1, 2008 Letter, provides, in pertinent part:

> You have asked my family to deliver our 2008 Tree Fruit crop to Ballantine Produce Co ... My family (Wagon Wheel Farms) now gives you, David Albertson and Ballantine Produce, this written notice to preserve Wagon Wheel Farms' P.A.C.A. trust benefits for the 2008 harvest. Please inform your staff and banking institutions about Wagon Wheel Farms' high priority P.A.C.A. lien to proceeds from the sale of Wagon Wheel Farms' fruit. This lien will exist indefinitely until Wagon Wheel Farms is paid in full.

See Exhibit A to Wagon Wheel Motion to Determine Validity of PACA Claims. Wagon Wheel alleges that the total amount past due and unpaid from Ballantine totals $1,018,306.22, all of which qualifies for PACA trust protection.

1. Discussion

*PACA*Congress enacted PACA in 1930 with the intent of "preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry." *Sunkist Growers, Inc. v. Fisher,* 104 F.3d 280, 282 (9th Cir.1997). Under PACA, a statutory trust is created in favor of all unpaid suppliers or sellers of perishable agricultural commodities upon receipt of such goods by a "commission merchant, dealer, or broker." [1]The PACA trust "was established by Congress to protect sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received." *In re Southland + Keystone,* 132 B.R. 632, 639 (9th Cir.BAP1991), (quoting *In re Milton Poulos, Inc.,* 94 B.R. 648, 650 (Bankr.C.D.Cal.1988)). The statute

[1] The term "received" means at "the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities." *See* 7 C.F.R. § 46.36(a) (1).

provides, in relevant part:

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2).

The PACA trust is a "nonsegregated floating trust" that applies to the perishable "commodities, products derived therefrom, and any receivables or proceeds from their sale in the hands of the commission merchant, dealer, o[r] broker." H.R. REP. NO. 98-98-543, at 2 (1983), reprinted in 1984 U .S.C.C.A.N. 405, 406.

Any supplier or seller of agricultural commodities who gives proper notice of its interest in the PACA trust has a claim against the trust. *In re Southland,* 132 B.R. at 639. PACA requires the beneficiary to preserve its trust right by providing written notice of its intent to preserve the trust within thirty days after the time payment is due. The PACA trust preservation provision provides:

> The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received such notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the

> commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.7 U.S.C. § 499e(c)(3).

If a beneficiary does not comply with the notice requirements, it loses the benefits of the PACA trust. *See In re Marvin Properties, Inc.,* 854 F.2d 1183, 1186 (9th Cir.1988) ("The language of section 499e(c)(3) is unambiguous on its face. It clearly states that the seller shall lose the trust benefits unless 'such person has given written notice of intent to preserve benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary ....' "); *see also In re Fresh Approach, Inc.,* 51 B.R. 412, 423 (Bankr.N.D.Tex.1985) ("Use of the words 'shall lose' and 'preserve' plainly refer to rights or interests existing prior to perfection. The clear meaning of the preservation provisions is that a beneficiary's pre-existing beneficial interest would evaporate absent affirmative steps by such a beneficiary to protect such interests. In short, the beneficial interest arises, by operation of law, upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the claim is satisfied or the beneficiary fails to take the necessary steps to perfect.").

Thus, under the statutory language, a PACA trust is created, in favor of unpaid suppliers, sellers, or their agents at the time the perishable commodities are received by a commission merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further required to provide written notice to the commission merchant, dealer, or broker in receipt of those commodities within a specified time period. *See* 7 U.S.C. §§ 499e(c)(2), (c)(3). If the beneficiary, however, is a licensee, then it may perfect its PACA trust rights by including certain statutory language on its invoices. *See* 7 U.S.C. §§ 499e(c)(4). Under the plain language of the statute, it does not appear that a beneficiary that is not also a licensee can rely on invoices to preserve its trust rights. *See In*

re Enoch Packing Company, Inc. v. Joe Flores, 2007 WL 1589537, *4 (E.D.Cal. June 1, 2007).

II. *Wagon Wheel's Arguments*

Wagon Wheel contends that it perfected its PACA trust rights when it sent the May 1, 2008 letter to Ballantine. Wagon Wheel argues that the letter complied with PACA's statutory timing requirements under 7 U.S.C. § 499e(c)(3) and regulations under 7 C.F.R. § 46.46(f)(1)[2] Wagon Wheel asserts that the requirements of 7 U .S.C. § 499e(c)(3) that the trust notice be issued within thirty days after expiration of when payment from buyer is due merely establishes the last day when such notice may be given, and that there is no requirement that a seller must wait until payment default by the buyer before issuing its Notice of Intent. *See* Wagon Wheel Reply at page 2.

Wagon Wheel also argues that Kingsburg Group's interpretation of the PACA statute and regulations means that a grower's trust rights would depend on arbitrary elements of timing. Wagon Wheel contends that this interpretation would create a situation "where a grower using the 'invoice' method of preserving his PACA trust rights (under 499e(c)(4) could have its rights vitiated simply because the invoice he provided (with the requisite PACA trust language) arrived at the commission merchant hours, or even moments, before the commission merchant actually took possession or control of the fruit itself." *See* Wagon Wheel Reply at page 3.

Lastly, Wagon Wheel argues that nothing in the PACA statute

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[2] 7 C.F.R. § 46.46(f)(1) provides that a Notice of Intent must include information, which establishes for each shipment:

(i) the names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,

(ii) the date of the transaction, commodity, invoice price, and terms of payment (if appropriate),

(iii) the date of receipt of notice that a payment instrument has been dishonored (if appropriate), and

(iv) the amount past due and unpaid.

requires that the Notice of Intent contain all the information set forth in the regulations and that the purpose of the notice requirement was served because Ballantine was on notice that all of its transactions with Wagon Wheel would be subject to PACA trust protection.

III. *Resolution*

The court finds that Wagon Wheel failed to properly preserve its prospective trust rights because their Notice of Intent/May 1, 2008 letter was sent five months before the creation of its beneficial interests in the PACA trust assets.[U]nder the statutory language, a PACA trust is created in favor of unpaid suppliers, sellers, or their agents at the time the perishable commodities are received by a commission merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further required to provide written notice to the commission merchant, dealer or broker in receipt of those commodities within a specified time period.*See In re Enoch Packing Company,* 2007 WL 1589537 at *4 (citing to 7 U.S.C. § 499e(c)(2), (c)(3)).

Wagon Wheel's letter did not comply with 7 U.S.C. § 499e(c) because it was prematurely sent to Ballantine before a PACA trust interest had arisen given that Wagon Wheel had not delivered the fruit, and Ballantine had not received the produce, at the time the letter was sent. Simply put, Wagon Wheel could not preserve an interest in a trust claim that did not exist. Additionally, Wagon Wheel did not preserve its trust assets after they delivered the produce to Ballantine, because they did not serve a Notice of Intent within 30 days of the relevant payment term as required by 7 U.S.C. § 499e(c)(3). Because Wagon Wheel did not send any Notice of Intent after the creation of its trust interest, Wagon Wheel lost the benefit of the PACA trust. *See In re Enoch Packing Company,* 2007 WL 1589537 at *4; *see also In re Fresh Approach,* 51 B.R. at 423.
Wagon Wheel cites to *In re Richmond Produce,* 112 B.R. 364, 369-370 (Bankr.N.D.Cal.1990) and *In re W.L. Bradley Company, Inc.,* 75 B.R. 505, 511-512 (Bankr.E.D.Pa.1987) for the proposition that trust notices issued prior to any delinquent payments by the buyer are not premature and are valid. *See* Wagon Wheel Reply at page 2. *In re Richmond* and

In re W.L. Bradley are distinguishable from the facts of this case because in both of those cases, the supplier issued their trust notices after the delivery of their produce, but before the deadline for payment by the buyer. Both courts found that a supplier's beneficial interest in the PACA trust was created upon delivery of the produce to the buyer, not when payment was due. *See In re Richmond,* 112 B.R. at 369-370; *In re W.L. Bradley,* 75 B.R. at 511, 512. Once the suppliers' interests were created in the PACA trust assets (i.e. the delivery of the produce), they had 30 days from the applicable payment term to issue a Notice of Intent to preserve their PACA trust rights. *Id.* Because both suppliers served their Notices of Intent after the delivery of produce, their claims were ruled valid PACA trust claims despite the fact that their Notices of Intent were served before the applicable payment term expired. *Id.*

In contrast, it is undisputed that Wagon Wheel served its Notice of Intent around five months before Ballantine actually received the produce. Wagon Wheel could not preserve trust rights that did not exist. Thus, Wagon Wheel failed to properly perfect its trust rights pursuant to the applicable PACA statutes and regulations.[3]

Wagon Wheel argues that to interpret 7 U.S.C. § 499e to mean that a grower's rights do not arise until the buyer takes possession of the produce means that a grower's trust rights would depend on arbitrary elements of timing. Wagon Wheel contends that this interpretation would create a situation "where a grower using the "invoice" method of preserving his PACA trust rights could have its rights vitiated simply because the invoice he provided (with the requisite PACA trust language) arrived at the commission merchant hours, or even moments, before the commission merchant actually took possession or control of the fruit itself." *See* Wagon Wheel Reply at page 3.

The court is not persuaded by Wagon Wheel's argument. Wagon Wheel's example is irrelevant because it does not address circumstances under which a non-licensed PACA grower seeks to perfect its trust

[3] The court notes that Wagon Wheel has not cited, and this Court's research did not uncover, any case law that holds that a grower can preserve its trust rights before the rights are created.

rights. Rather, Wagon Wheel is citing to 7 U.S.C. § 499e(c)(4), which provides for an alternate method of preserving PACA trust rights for licensees. Licensees are entities that hold a valid license issued under PACA. *See* 7 U.S.C. § 499c(a). Essentially, licensees may preserve their trust benefits by using ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust, which include certain PACA trust language.[4] *See* 7 U.S.C. § 499e(c)(4). Here, Wagon Wheel has admitted that it was not a PACA licensee, at the time in question. Therefore, Wagon Wheel's argument is inapplicable to the facts of this case.

IV. ***Insufficient Information Argument***

Because the court has found that Wagon Wheel did not timely serve a Notice of Intent and failed to preserve their trust benefits, it is unnecessary for the court to address Bank of the West's and Kingsburg Group's objections that Wagon Wheel's Notice of Intent contained insufficient information regarding the transactions subject to PACA.

ORDER

The Court finds that the notice provided and filed by Wagon Wheel was inadequate to preserve the trust benefits created by PACA and the court determines that Wagon Wheel does not have a valid PACA claim. IT IS SO ORDERED.

_____

KINGSBURG APPLE PACKERS INC. d/b/a KINGSBURG ORCHARDS, et al. v. BALLANTINE PRODUCE CO., INC., et al.
No. 1:09-CV-901-AWI-JLT.
Filed February 18, 2010.

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[4] The court notes that under the plain language of 7 U.S.C. § 499e(c)(4), it does not appear that a beneficiary that is not also a licensee can rely on invoices to preserve its trust rights. *See In re Enoch Packing Company, Inc. v. Joe Flores,* 2007 WL 1589537 (E.D.Cal. June 1, 2007).

[Cite as: 2010 WL 653549].

PACA-R – PACA trust – Equitable tolling not effective.

Notice of intent to preserve PACA trust rights were untimely and reliance on repeated assurance of buyer's principal is not an excuse for late filing of PACA trust claim.

United States District Court,
E.D. California.

ORDER ON DIBUDUO'S MOTION TO DETERMINE THE VALIDITY OF PACA CLAIMS

ANTHONY W. ISHII, Chief Judge.

On October 28, 2009, this court issued an order that directed DiBuduo Land Management Company ("DiBuduo") to file a motion with the court to determine the validity of its Perishable and Agricultural and Commodities Act ("PACA") claims. *See* Doc. No. 116. DiBuduo complied and filed its motion the same day. Kingsburg Group and Bank of the West oppose the motion and assert that DiBuduo's claims are invalid because DiBuduo's Notice of Intent to Preserve Trust Benefits ("Notice of Intent") was served late. For the reasons described below, the court finds that DiBuduo failed to preserve its PACA trust claims.

FACTUAL BACKGROUND[1]

DiBuduo sold and delivered to Ballantine Produce Co. ("Ballantine") perishable agricultural commodities on credit. *See* DiBuduo Proof of Claim dated July 29, 2009. DiBuduo was not licensed by the United States Department of Agriculture ("USDA") as a PACA licensee during the period applicable to the transactions. DiBuduo shipped produce to

[1] The factual history is provided for background only and does not form the basis of the court's decision; the assertions contained herein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

Ballantine between November and December 2008, and delivered shipments in January 2009. Ballantine received and accepted the produce. DiBuduo received accountings from Ballantine in December 2008, and January 2009. DiBuduo alleges that there is no evidence that it entered into a post-default written agreement for different terms.

On June 19, 2009, DiBuduo served a Notice of Intent upon Ballantine. The June 19, 2009 Notice of Intent provides, in pertinent part:

> DiBuduo ... expressly states its intent to preserve trust benefits relating to the commodities described in this notice ... The dates of the transactions between the parties to which this notice applies are open and unpaid invoices for deliveries of 2008 commodities (described below) dated January 2, January 8, and January 15, 2009.

See Exhibit A to DiBuduos Motion to Determine Validity of PACA Claims.

According to DiBuduo, it did not send its Notice of Intent prior to June 19, 2009 because Jerry DiBuduo (DiBuduo's president) relied on the representations of principals and managing agents of Ballantine that DiBuduo would be promptly paid for the fruit deliveries. DiBuduo contends that it reasonably relied upon those representations, especially since Jerry DiBuduo personally knew David Albertson ("Albertson"), the treasurer and principal of Ballantine. The Notice of Intent addressed the representations of Albertson as follows:

> Trust claimant through its principal, Jerry DiBuduo was repeatedly advised by Ballantine's principal, David Albertson, that "it was not a question of whether but when" claimant would be paid. Over a two and one half year period, Jerry DiBuduo was negotiating the sale of a property co-owned with Ballantine and later in February 2009 Mr. DiBuduo negotiated the purchase of a Ballantine owned property and as part of those negotiations, was assured that trust claimant's account would be brought current so that sufficient cash would be available for closing the transactions. The first transaction was concluded and trust claimant's grower account partially paid as a result of trust claimant's continued diligence.

The second transaction never materialized but representations were made to Jerry DiBuduo which he reasonably relied on in delaying trust claimant's assertion of this claim. Ballantine at least partially paid when in connection with the first escrow.

Throughout February and March 2009 after trust claimant's repeated requests, some payments were made on the account albeit late payments. These delays interrupted claimant's cash flow and caused claimant to borrow substantial advances on a personal line of credit to pay ordinary operating expenses. From the weeks of March 6, through the week of March 23, 2009, trust claimant received $25,000 per week to reduce the outstanding claim along with further assurances of full payment.

In April 2009, trust claimant was informed by John Pelton, then acting as Ballantine's CEO, that a dispute arose concerning the settlement of the first property transaction and payments were going to be suspended. After trust clamant [sic] promptly provided requested evidence, Mr. Pelton submitted the error and on April 20, 2009, assured trust claimant that he would be paid in full by the first week of May 2009. No payments have been received as of the date of presentation of this claim, less than 45 days after the date by which trust claimant was assured by the then acting CEO of Ballantine that trust claimant would be paid.

Trust claimant has repeatedly pursued payment but was assured payment was forthcoming. Trust claimant received some payments and therefore reasonably relied on the statements. Neither Mr. Albertson nor Mr. Pelton ever denied Ballantine's liability for trust claimant's claim. *See* Exhibit A to DiBuduos Motion to Determine Validity of PACA Claims.

DiBuduo alleges that the total amount past due and unpaid from Ballantine totals $100,498.00, all of which qualifies for PACA trust protection.

DISCUSSION

I. *PACA* Congress enacted PACA in 1930 with the intent of "preventing unfair business practices and promoting financial

responsibility in the fresh fruit and produce industry." *Sunkist Growers, Inc. v. Fisher,* 104 F.3d 280, 282 (9th Cir.1997). Under PACA, a statutory trust is created in favor of all unpaid suppliers or sellers of perishable agricultural commodities upon receipt of such goods by a "commission merchant, dealer, or broker."[2] The PACA trust "was established by Congress to protect sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received." *In re Southland + Keystone,* 132 B.R. 632, 639 (9th Cir.BAP1991), (quoting *In re Milton Poulos, Inc.,* 94 B.R. 648, 650 (Bankr.C.D.Cal.1988)). The statute provides, in relevant part:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2).

The PACA trust is a "nonsegregated floating trust" that applies to the perishable "commodities, products derived therefrom, and any receivables or proceeds from their sale in the hands of the commission merchant, dealer, or broker." H.R. REP. NO. 98-98-543, at 2 (1983), reprinted in 1984 U .S.C.C.A.N. 405, 406.Any supplier or seller of agricultural commodities who gives proper notice of its interest in the PACA trust has a claim against the trust. *In re Southland,132* B.R. at 639. PACA requires the beneficiary to preserve its trust right by providing written notice of its intent to preserve the trust within thirty days after the time payment is due. The PACA trust preservation provision provides:

> The unpaid supplier, seller, or agent shall lose the benefits of

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[2] The term "received" means at "the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities." *See* 7 C.F.R. § 46.36(a) (1).

> such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received such notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.
>
> 7 U.S.C. § 499e(c)(3).

If a beneficiary does not comply with the notice requirements, it loses the benefits of the PACA trust. *See In re Marvin Properties, Inc.,* 854 F.2d 1183, 1186 (9th Cir.1988) ("The language of section 499e(c)(3) is unambiguous on its face. It clearly states that the seller shall lose the trust benefits unless 'such person has given written notice of intent to preserve benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary ....' "); *see also In re Fresh Approach, Inc.,* 51 B.R. 412, 423 (Bankr.N.D.Tex.1985) ("Use of the words 'shall lose' and 'preserve' plainly refer to rights or interests existing prior to perfection. The clear meaning of the preservation provisions is that a beneficiary's pre-existing beneficial interest would evaporate absent affirmative steps by such a beneficiary to protect such interests. In short, the beneficial interest arises, by operation of law, upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the claim is satisfied or the beneficiary fails to take the necessary steps to

perfect.").

Thus, under the statutory language, a PACA trust is created, in favor of unpaid suppliers, sellers, or their agents at the time the perishable commodities are received by a commission merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further required to provide written notice to the commission merchant, dealer, or broker in receipt of those commodities within a specified time period. *See* 7 U.S.C. §§ 499e(c)(2), (c)(3). If the beneficiary is a licensee, however, then it may perfect its PACA trust rights by including certain statutory language on its invoices. *See* 7 U.S.C. §§ 499e(c)(4). Under the plain language of the statute, a beneficiary that is not also a licensee cannot rely on invoices to preserve its trust rights. *See In re Enoch Packing Company, Inc. v. Joe Flores,* 2007 WL 1589537 (E.D.Cal. June 1, 2007).

II. *DiBuduo's Arguments*

DiBuduo contends that it perfected its PACA trust rights for the following reasons: (1) DiBuduo's June 19, 2009 Notice of Intent complied with PACA's statutory timing requirements under 7 U.S.C. § 499e(c)(3); (2) DiBuduo preserved its trust rights because it served its Notice of Intent after Ballantine stopped making payments; (3) PACA's timing requirements do not apply to disputed transactions and that a disputed transaction existed between DiBuduo and Ballantine; (4) DiBuduo did not waive its PACA rights because DiBuduo did not enter into a post-default written agreement, oral agreement, or course of dealing, which altered the terms of PACA; and (5) Even if this court determines that the claim was not timely, the objecting parties are estopped from asserting timeliness objections to DiBuduo's claim because Albertson's representations equitably tolled PACA's statute of limitation periods.

III. *Resolution*

First, the court finds that DiBuduo failed to properly preserve its trust rights because its Notice of Intent was delivered late in violation of 7 U.S.C. § 499e(c)(3). In order to comply with PACA regulations,

DiBuduo needed to issue its Notice of Intent within thirty days of receiving an accounting from Ballantine. *See* 7 C .F.R. § 46.2(aa)(9). Dibuduo alleges in its Proof of Claim that Ballantine submitted accountings between December 6, 2008 and January 16, 2009. Thus, DiBuduo should have served its Notice of Intent between January 5 and February 15, 2009. However, it is undisputed that DiBuduo served its Notice of Intent on June 19, 2009. Because DiBuduo sent its Notice of Intent several months after the applicable statutory deadline, DiBuduo lost the benefit of the PACA trust. *See In re Marvin,* 854 F.2d at 1186; *In re Fresh Approach,* 51 B.R. at 423. Therefore, DiBuduo did not timely preserve its trust rights under PACA.

Second, the court is not convinced by DiBuduo's argument that it preserved its trust rights because it served its Notice of Intent after Ballantine stopped making payments as opposed to the deadlines provided by PACA. DiBuduo relies on *In re Marvin Properties* and *In re Richmond Produce,* 112 B.R. 364 (Bankr.N.D.Cal.1990) to support its argument. *In re Marvin* and *In re Richmond* are not helpful to DiBuduo's position because neither case involved a grower who submitted a late notice and neither case held that PACA deadlines are tolled until the grower realizes that the buyer can no longer make payment. *In re Marvin* merely held that a grower's failure to give notice to the buyer resulted in a forfeiture of trust benefits. *In re Richmond* is distinguishable because the suppliers there served their Notice of Intent before the applicable PACA payment term had expired. *Id.* In contrast, it is undisputed that DiBuduo served its Notice of Intent several months after the applicable PACA deadline had expired.

Third, with respect to DiBuduo's "disputed transaction" argument, the court does not find merit to this argument. DiBuduo correctly states that PACA's prompt payment deadlines only apply to undisputed amounts.[3] DiBuduo, however, fails to allege that there was a disputed amount that related to the delivery of fruit. Instead, DiBuduo represented

[3] 7 C.F.R. § 46.2(aa) provides in part: "If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount."

in its June 29, 2009 Proof of Claim filed with this Court that:

> In April 2009, trust claimant was informed by John Pelton, then acting as Ballantine's CEO, that a dispute arose concerning the settlement of the first property transaction and payments were going to be suspended. After the trust clamant [sic] promptly provided requested evidence, Mr. Pelton admitted the error and on April 20, 2009, assured trust claimant that he would be paid in full by the first week of May 2009.

See Exhibit A to DiBuduos Motion to Determine Validity of PACA Claims. Based on DiBuduo's admissions in its Proof of Claim, the dispute between DiBuduo and Ballantine relates to a property transaction and does not relate to fruit delivery. Furthermore, DiBuduo does not allege that it ever disputed the accuracy of the accountings that it received from Ballantine in December 6, 2008, and January 16, 2009.

Fourth, the court is not persuaded by DiBuduo's argument that it did not waive its trust rights because it did not enter into any post-default agreements (i.e. a written agreement or oral agreement, or course of dealings) that extended the payment terms provided by PACA. In the instant matter, the presence or absence of a post-default agreement is irrelevant because DiBuduo did not timely file a Notice of Intent. DiBuduo relies on *Hull Company v. Hauser's Foods, Inc.,* 924 F.2d 777 (8th Cir.1991) and *Patterson Frozen Food v. Crown Foods International,* 307 F.3d 666 (7th Cir.2002) to establish that it did not waive its rights. DiBuduo argues that these cases establish that PACA is to be construed liberally in favor of sellers and that oral agreements or "course of dealing" will not abrogate PACA trust rights. While the court accepts the general principle that PACA is to be construed liberally, these cases do not aid DiBuduo's position. Neither *Patterson* nor *Hull* dealt with a Notice of Intent that was served outside of the PACA deadlines.

The *Hull* court held that an oral agreement had no effect on a seller's rights to trust protection. *Hull,* 924 F.2d at 783. Importantly, the *Hull* court specifically stated that it was not expressing an opinion on the validity of the district court's determination that the grower's Notice of Intent was valid. Thus, *Hull* is not applicable to the facts of this case.
Patterson is distinguishable from the facts of this case because the

Patterson court focused on whether a post-default written agreement between the parties nullified the grower's PACA trust rights where a seller had preserved its rights by including the required PACA statutory language in its invoices. *See Patterson,* 307 F.3d at 668. Here, it is undisputed that DiBuduo was not a PACA licensee and needed to preserve its rights by timely filing a Notice of Intent. Therefore, even assuming that DiBuduo did not enter into any post-default agreements, it does not change the fact that DiBuduo did not comply with PACA and timely file a Notice of Intent.

Accordingly, DiBuduo failed to properly perfect its trust rights pursuant to the applicable PACA statutes and regulations because it did not timely serve its Notice of Intent.

IV. *Equitable Tolling Argument*

The facts of this case do not support an extension of the PACA deadlines. DiBuduo argues that it diligently pursued collection for the outstanding balance from Ballantine. The relevant question, however, is whether DiBuduo diligently preserved its trust rights. After reviewing DiBuduo's efforts to preserve its trust rights, the court finds that DiBuduo did not exercise diligence in protecting its trust rights, namely, because DiBuduo did not timely file a Notice of Intent. Furthermore, DiBuduo does not explain in its briefs why it was not able to timely file a Notice of Intent.

DiBuduo relies on *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1178 (9th Cir.2000) and asserts that: "equitable tolling focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant." DiBuduo, however, does not present any facts to the court that would excuse it from not complying with PACA's limitations period. DiBuduo seems to be arguing that because it received verbal promises of full payment from Ballantine, that the PACA's deadlines should not be enforced. The court does not find that assurances of payment from Ballantine excuses DiBuduo from complying with PACA in light of the fact that DiBuduo was aware of the PACA deadlines, and was aware that Ballantine was late in paying

the fruit invoices. *See* DiBuduo's Notice of Intent ("In February and March 2009 after [DiBuduo's] repeated requests, some payments were made on the account albeit *late* payments") (emphasis added).

Additionally, DiBuduo alleges in its Notice of Intent that the last payment from Ballantine was received on March 23, 2009. Therefore, even if the court could look past PACA's prompt payment terms and allow DiBuduo to submit a Notice of Intent from the date of last payment received as opposed to when the invoices were due as required by PACA, Dibuduo's Notice of Intent was still late because it was not served until June 19, 2009.

Accordingly, for the reasons listed above, the court finds that DiBuduo has not met its burden to establish excusable ignorance of the PACA limitations period.

ORDER

The Court finds that the notice filed by DiBuduo was untimely and failed to preserve the trust benefits created by PACA. Thus, the court determines that DiBuduo does not have a valid PACA claim.
IT IS SO ORDERED.

SUNRISE ORCHARDS, INC. v. PETS CALVERT CO. AND MICHAEL F. O'NEILL AND BORZYNSKI BROS. DISTRIBUTING, INC. v. PETS CALVERT CO. AND MICHAEL F. O'NEILL.
No. 08-cv-6684.
Filed March 23, 2010.

[Cite as: 2010 WL 1194203].

PACA-R. – Stipulation of PACA debt – Sales subsequent to Stipulation – Res judicata.

Seller brought suit for PACA claims and eventually entered into a court approved stipulation. Sales of produce made contemporaneous with stipulation again resulted in new PACA claims. Res judicata did not apply since the invoices for the subsequent sales were not in existence at the time of the court approved stipulation.

United States District Court,
N.D. Illinois, Eastern Division.

MEMORANDUM OPINION AND ORDER

ROBERT M. DOW, JR., District Judge.

On November 21, 2008, Plaintiff Sunrise Orchards, Inc. filed suit against Defendants Pets Calvert Co. and Michael F. O'Neill to enforce its rights pursuant to the Perishable Agricultural Commodities Act ("PACA") and to recover for common-law breach of contract. On December 18, 2008, Plaintiff Borzynski Bros. Distributing, Inc. intervened in this action, also to enforce its PACA rights. On June 3, 2009, Defendant O'Neill moved for partial summary judgment [56] against Sunrise and Borzynski, which corporate Defendant Pets Calvert Co. joined on August 3, 2009. Defendants seek to dismiss all PACA claims in the complaints filed by Sunrise and Borzynski. Also on August 3, 2009, Borzynski moved for summary judgment [72] against Defendants. For the following reasons, the Court grants Borzynski's motion for summary judgment [72], and grants in part and denies in part Defendants' motion for partial summary judgment [56].

I. Background

A. Procedural History

On November 21, 2008, Plaintiff Sunrise Orchards, Inc. ("Sunrise") filed its complaint against Defendants Pets Calvert Co. and Michael F. O'Neill, alleging the following causes of action: Failure to Maintain Trust (Count I), Dissipation of Trust Assets (Count II), Failure to Pay Trust Funds/Unfair Conduct (Count III), Breach of Fiduciary Duty/Non-Dischargeability (Count IV), and Breach of Contract (Count V). On December 9, 2008, Borzynski Bros. Distributing, Inc. ("Borzynski") filed a motion to intervene, which the Court granted on December 12, 2008, and on December 18, 2008, Borzynski filed its

complaint against Defendants Pets Calvert Co. and Michael F. O'Neill, alleging the following causes of action: Declaratory Relief Validating PACA Trust Claim (Count I), Enforcement of Payment from PACA Trust Assets (Count II), Violation of PACA-Failure to Maintain PACA Trust Assets and Creation of Common Fund (Count III), Violation of PACA-Failure to Pay Promptly (Count IV), Breach of Contract (Coun V), Breach of Fiduciary Duty to PACA Trust Beneficiaries (Count VI), Conversion and Unlawful Retention of PACA Trust Assets (Count VII), and Constructive Trust (Count VIII).[1]

Defendants initially did not respond to Sunrise's complaint, and on January 22, 2009, the Court entered a default against both Defendants. Sunrise then moved for default judgment, which the Court denied, and Defendants filed answers to both complaints. At a status hearing on February 5, 2009, Defendant O'Neill, appearing *pro se,* acknowledged on the record that he owed a debt to Sunrise and that he had no dispute with the amount Sunrise claimed he owed. Then, on June 3, 2009, Defendant O'Neill filed a motion for partial summary judgment on all PACA claims asserted by Sunrise and Borzynski, which Defendant Pets Calvert was permitted to join on August 3, 2009. Sunrise responded to Defendants' summary judgment motion, but Borzynski did not. However, on August 3, Borzynski moved for summary judgment against Defendant Pets Calvert on Counts IV and V. Sunrise has not moved for summary judgment.

In order to clarify issues raised by the summary judgment motions, the Court held a telephonic oral argument on February 16, 2010. During the argument, the Court specifically asked the parties to clarify the relationship between this litigation and prior litigation in the Western District of Wisconsin between Sunrise and Pets Calvert, to which the parties referred in their briefs. The Court also requested that the parties clarify the nature of the PACA claims at issue. After the oral argument, the Court allowed supplemental briefing.

B. Factual History

1. Litigation between Sunrise Orchards and Defendants

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[1] Borzynski's Constructive Trust count was inadvertently numbered as "Count IX."

Plaintiff Sunrise, a Wisconsin corporation that grows, harvests, and sells fresh apples ("produce"), sold produce to Defendant Pets Calvert Co. between November 2004 and January 2007. Pets Calvert, an Illinois corporation solely owned by Defendant Michael O'Neill, is a licensed "dealer" of perishable agricultural commodities within the meaning of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. 499 *et seq*. Pets Calvert buys and resells fruits and vegetables. Between November 2004 and January 2007, Defendants ordered, received, and accepted $116,669.00 worth of fresh apples on credit. The principal amount of $89,169.00 remains unpaid.

As of October 31, 2005, there was principal in the amount of $83,668.00 and accrued interest in the amount of $12,843.42 owed by Pets Calvert to Sunrise, with interest continuing to accrue at 1.5% month. After Defendants failed to timely pay for the produce delivered by Sunrise, Sunrise filed suit in the United States District Court for the Western District of Wisconsin, Case No. 3:05-cv-651-bbc ("Wisconsin lawsuit"). The lawsuit sought payment for fresh apples ordered, received, and accepted by Defendants from the period of November 19, 2004, through February 26, 2005. On December 21, 2005, an agreement to repay the debt was reached and memorialized by a stipulation filed in the Wisconsin lawsuit. Pursuant to the stipulation, Pets Calvert and O'Neill agreed to pay a principal amount of $83,668.00 and accrued interest of $12,843.42, plus attorneys fees and interest at 1.5% per month on the unpaid principal balance. The stipulation was approved by District Court Judge Barbara Crabb.

Defendants began making payments pursuant to the court order, but eventually stopped. On June 5, 2007, Sunrise filed a motion to reopen the Wisconsin litigation and for entry of judgment. On July 13, 2007, Judge Crabb entered judgment against Pets Calvert and O'Neill and in favor of Sunrise in the amount of $95,409.46, with interest at a rate of $41.26/day from June 2, 2007 through the date of judgment.[2]

Between October 2006 and January 2007, Sunrise continued to sell

[2] Intervenor Plaintiff Borzynski was not a party to the Wisconsin lawsuit.

produce to Pets Calvert. According to the evidence submitted by the parties-which the parties confirmed during the February 16, 2010 oral argument-the remaining balance on the produce sold outside of the Wisconsin litigation that remains unpaid amounts to $33,001.00.

2. Litigation between Borzynski Bros. and Defendants

Intervenor Plaintiff Borzynski, a Wisconsin corporation, also supplied produce to Defendants. Between May 20 and June 17, 2008, Borzynski sold seven loads of produce, worth $19,563.00, to Defendants. Borzynski and Defendants negotiated the price for each shipment, and Defendants accepted the produce delivered by Borzynski. The invoices provided for payment in ten days. Defendants failed to pay for the produce.According to Defendants,[3] Borzynski and Defendants entered into an agreement in which Defendants would pay Borzynski $500/week for forty weeks to satisfy the outstanding debt. In an e-mail to Defendants on September 26, 2008, Borzynski stated, "Mike, Did you forget something? I think you are behind on our agreed upon schedule of $500/week. Let me know. (Nothing last week and nothing this week)." Despite this agreement extending the payment terms, Defendants failed to satisfy their debt to Borzynski.

II. Summary Judgment Standard

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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[3] Because Borzynski failed to submit responses to Defendants' statement of facts, the Court deems admitted Defendants' factual allegations that are properly supported by admissible record evidence. See *Malec v. Sanford,* 191 F.R.D. 581, 583 (N.D.Ill.2000) ("Factual allegations not properly supported by citation to the record are nullities."). In turn, because Defendants failed to respond to several of Borzynski's statements of fact with admissible evidence, the Court deems admitted those factual allegations submitted by Borzynski that are properly supported by admissible record evidence. See *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (to avoid summary judgment, the opposing party must go *beyond the pleadings*).

law." Fed.R.Civ.P. 56(c). In determining whether there is a genuine issue of fact, the Court "must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party." *Foley v. City of Lafayette, Ind.,* 359 F.3d 925, 928 (7th Cir.2004). To avoid summary judgment, the opposing party must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks and citation omitted). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is proper against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 252.

III. Analysis

A. PACA Background

The Perishable Agricultural Commodities Act of 1930 imposes various duties on commercial buyers and sellers of produce. In addition to PACA's comprehensive regulatory scheme, the Act allows buyers and sellers to seek redress in the courts for certain statutory violations. See 7 U.S.C. §§ 499e(b)(2), (c)(5) (conferring jurisdiction for the alleged PACA violations in Plaintiff's complaint).

Two provisions are important for the instant motion and for this case. The first, 7 U.S.C. § 499b(4), pertains to prompt payment; it makes it unlawful for any dealer or broker "to fail or refuse truly and correctly to account and make full payment promptly" for a shipment of produce. The terms "dealer" and "broker"-the people who have a duty to make prompt payment[4] are defined broadly. A "dealer" basically is one who buys or sells produce. Under the Act, and subject to a handful of statutory exceptions, the term means "any person engaged in the business of buying or selling [in quantities defined by the Secretary of Agriculture] any perishable agricultural commodity in interstate * * * commerce." *Id.* at § 499a(b)(6). And a "broker" is basically an agent who buys produce. The term, likewise subject to limited exceptions, includes "any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate * * * commerce for or on behalf of the vendor or purchaser." *Id.* at § 499a(b)(7). A dealer or broker who fails to tender prompt payment "shall be liable to the person or persons injured thereby for the full amount of damages * * * sustained in consequence of such violation." *Id.* at 499e(a).

The second important provision is a statutory trust provision. In 1984, PACA was amended to create a statutory trust in favor of sellers in produce sold to buyers (*e.g.,* grocery stores and certain agents), under which the buyer holds the produce and any proceeds and receivables from the produce in trust for the benefit of the seller. 7 U.S.C. § 499e(c)(2). This floating trust is automatically created when the dealer accepts the goods so long as the supplier complies with the specific notice requirements set out in 7 U.S.C. § 499e(c) and 7 C.F.R. § 46.46(f).[5] *Greg Orchards & Produce, Inc. v. Roncone,* 180 F.3d 888, 890-91 (7th Cir.1999). PACA trust rights take priority over the interests of all other creditors, including secured creditors. *C.H. Robinson Co. v.*

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[4] The Act also imposes duties on "commission merchants." A commission merchant is "any person engaged in the business of receiving in interstate * * * commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another." 7 U.S.C. § 499a(b)(5).

[5] That notice can take the form of "ordinary and usual billing or invoice statements" so long as the invoices recite statutorily required language. 7 U.S.C. § 499e(c)(4).

Trust Co. Bank, N.A., 952 F.2d 1311, 1315 (11th Cir.1992). Thus, PACA gives sellers of perishable goods a superior secured interest, just as a seller of durable goods may perfect an interest in its property.

A trust beneficiary can initiate an action in federal court "to enforce payment from the trust." 7 U.S.C. § 499e(c)(5)(i). This remedy permits recovery against both the corporation and its controlling officers. *Golman-Hayden Co. v. Fresh Source Produce, Inc.,* 217 F.3d 348, 351 (5th Cir.2000). The principal justifications Congress has given for granting such generous protection for sellers of produce are (1) the need to protect small dealers who require prompt payment to survive and (2) the importance of ensuring the financial stability of the entire produce industry. *In re Magic Rests., Inc.,* 205 F.3d 108, 111 (3d Cir.2000). In return for its protections, PACA establishes strict eligibility requirements. A PACA supplier must be selling produce on a cash or short-term credit basis. *Greg Orchards,* 180 F.3d at 891. The Secretary of Agriculture has determined that "the maximum time for payment for a shipment to which [parties] can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance." 7 C.F.R. § 46.46(e)(2). If a produce supplier enters a written post-default agreement with a dealer that extends the dealer's time for payment beyond thirty days, the supplier becomes ineligible to assert its trust rights. See *Patterson Frozen Foods, Inc. v. Crown Foods Intern., Inc.,* 307 F.3d 666, 669-70 (7th Cir.2002); *Greg Orchards,* 180 F.3d at 892; *In re Lombardo Fruit and Produce Co.,* 12 F.3d 806, 809 (8th Cir.1993). On the other hand, an oral agreement for an extension or a course of dealing allowing more than thirty days for payment will not abrogate a PACA trust. See *Patterson,* 307 F.3d at 670.

B. Litigation between Sunrise Orchards and Defendants

1. Res Judicata

Under the doctrine of *res judicata* (or claim preclusion), a final judgment on the merits in a case precludes the parties from relitigating claims that were or could have been raised in that case. See *Highway J*

Citizens Group v. U.S. Dep't of Transp., 456 F.3d 734, 741 (7th Cir.2006). For claim preclusion to apply, there must be (i) a final judgment on the merits in an earlier action; (ii) an identity of the causes of action in the earlier and later action; and (iii) an identity of the parties. See, *e.g., Highway J* at 741; *Doe v. Allied-Signal, Inc.,* 985 F.3d 908, 913 (7th Cir.1993). In the present case, there was a final judgment entered by Judge Crabb in the Wisconsin lawsuit on July 13, 2007, and the parties to this suit and the Wisconsin lawsuit (other than Intervenor Plaintiff Borzynski, whose claims are separate from Plaintiff Sunrise's claims) are the same.

An identity of causes of action occurs if a later claim "emerges from the same core of operative facts as [the] earlier action." *Highway J,* 456 F.3d at 741. Claims are considered the same for purposes of claim preclusion if they are "based on the same, or nearly the same, factual allegations." *Cole v. Bd. of Trustees of Univ. of Ill.,* 497 F.3d 770, 772-73 (7th Cir.2007) (internal quotation marks and citation omitted). In other words, "a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula as a prior suit that had gone to final judgment." *Okoro v. Bohman,* 164 F.3d 1059, 1062 (7th Cir.1999).

The judgment entered by Judge Crabb in the Wisconsin lawsuit in the principal amount of $83,668.00 cannot be collaterally attacked in this lawsuit. The factual predicate for the portion of Sunrise's claims in this lawsuit that are related to the $83,668.00 due on the unpaid produce delivered to Defendants between November 19, 2004, and February 26, 2005, is identical to the factual allegations in the Wisconsin lawsuit. See *Cole,* 497 F.3d at 772. Indeed, during the telephonic conference on February 16, the parties conceded this point. Thus, any claims that Sunrise has with respect to this amount, as well as any defenses asserted by Defendants, are barred by *res judicata.* However, the produce sold outside of the Wisconsin litigation that remains unpaid, which totals $33,001.00, is not subject to claim preclusion and is properly before this Court for consideration.

Defendants contend for the first time in their surreply that Plaintiff's entire claim in this case, including the $33,001.00, should be barred by *res judicata.* Defendants rely on *In Car Carriers, Inc. v. Ford Motor Co.,* 789 F.2d 589, 593 (7th Cir.1986), in support of their position that

Plaintiff should have incorporated into the Wisconsin case the produce sold (and not paid for) between October 2006 and January 2007. In *Car Carriers,* the Seventh Circuit upheld a district court's dismissal on *res judicata* grounds of a complaint filed in 1983 that was based on different theories, but the same transactions, as a complaint filed in 1982.

Car Carriers is readily distinguishable from this case. In *Car Carriers,* the additional claims were based on facts which were "admittedly in existence prior to the 1982 complaint," although unknown to the parties until after judgment on that complaint. In the present case, not only were the 2006 and 2007 invoices not in existence when Sunrise filed its complaint in the Wisconsin litigation in November 2005, the 2006 and 2007 invoices were not in existence when the court-approved settlement was entered into in December 2005. Because the unpaid sales transactions encompassed in the 2006 and 2007 invoices accrued subsequent to (i) the filing of the complaint, (ii) the settlement agreement between the parties, and (iii) the court order approving the settlement agreement, those claims did not "emerge[ ] from the same core of operative facts as [the] earlier action." *Highway J,* 456 F.3d at 741. Furthermore, the July 2007 judgment entered by Judge Crabb was premised entirely on Defendants' breach of the court-approved settlement, which did not encompass the unpaid sales transaction from 2006 and 2007.[6] Thus, the prior litigation-which ended first in settlement between the parties and was reopened only because Defendants did not honor that settlement-will not act as a bar on the $33,001.00 at issue in this litigation because claims over that amount were not, and did not need to be, raised in the Wisconsin litigation. See, *e.g., Ross v. International Bd. of Elec. Workers,* 634 F.2d 453, 458-59 (9th Cir.1980) (*"res judicata* should not be applied so rigidly as to defeat the ends of justice").

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[6] Plaintiff was not required to seek leave of court, after a settlement had already been reached and the case dismissed, to amend its complaint to include these new unpaid transactions from 2006 and 2007.

2. Merits

The principal dispute remaining between Sunrise Orchards and Defendants is not whether Defendants owe the money to Sunrise; indeed, Defendant O'Neill acknowledged on the record in court both the existence of the debt to Sunrise and the amount owed. Instead, the issue is whether the post-default dealings between the parties nullified Sunrise's PACA trust rights. If Sunrise and Pets Calvert entered into a written post-default agreement giving Pets Calvert more than thirty days to pay for the produce, there is no enforceable PACA trust. See *Patterson,* 307 F.3d at 669-70. If that were the case, Defendant O'Neill would not be subject to any fiduciary duty derived from PACA (which is the only source of such a duty alleged here). On the other hand, if the parties had no agreement to extend the time for payment, or if any such agreement was merely oral, then PACA remains in force and O'Neill can be personally liable for any breach committed by Pets Calvert.As set forth above, the only unpaid sales transactions at issue between Sunrise and Defendants concern the produce sold outside of the Wisconsin litigation, between October 2006 and January 2007, which amounts to $33,001.00. Thus, the Court need not consider Defendants' argument that the Wisconsin court settlement-in which Plaintiff and Defendants entered into an agreement by which Defendants would pay $500/week for fifty-two weeks to satisfy the outstanding balance from the 2004 and 2005 sales-removed the claims in the Wisconsin litigation from PACA trust protection.

After the settlement was reached, Sunrise continued selling produce to Defendants. And again, Defendants did not pay. Between October 13, 2006 and January 11, 2007, Plaintiff sent produce and eight invoices to Defendants. Those invoices obviously did not exist at the time of the December 2005 settlement, and Defendants have not presented any evidence that the new invoices were subject to the $500/week payment plan. Defendants contend that the new invoices were subject to a "Second Agreement" in which Defendants "agreed to re-amortize this new PACA debt into another obligation for weekly $500 payments to Sunrise." Def. Reply at 10. According to Defendants, this "$500/week payment was now extended to cover not just the first [eleven] invoices, but also the new eight invoices that arose after the date of the First Agreement." *Id.*

The problem with Defendants argument is that they have not presented a shred of evidence demonstrating the existence of a new "Second Agreement" between the parties. Plaintiff readily admitted that an agreement was reached, within the context of the Wisconsin litigation, for repayment of the debt owed to Plaintiff through 2005. Of course, Plaintiff disputes the effect of that agreement, but that issue is no longer before this Court. The only issue before this Court is whether the remaining $33,001.00 is subject to a PACA trust. The e-mails to which Defendants point in support of their position-sent on January 22, 2007 and June 26, 2007-merely reiterate, as with the many other e-mails that Sunrise sent to Defendant O'Neill, that Defendants were behind on their $500/week payments that they promised to make in the court-approved settlement. None of those e-mails suggests that a new "Second Agreement" was negotiated.

Defendants have failed to meet their burden at summary judgment to point to any post-default dealings between the parties that nullified Sunrise's PACA trust rights. Thus, Defendants' motion for summary judgment as to Sunrise's claims is denied and all of Sunrise's claims with respect to the $33,001.00 at issue in this lawsuit, including its PACA trust claims, remain pending.

C. Litigation between Borzynski and Defendants

1. Jurisdiction

Defendants do not contest, with admissible evidence, that Borzynski sold seven loads of produce to Pets Calvert totaling $19,563.00. Nor do Defendants contest, with admissible evidence, that Pets Calvert failed to pay for the produce that it received from Borzynski. However, rather than paying this undisputed debt, Defendants challenge the Court's jurisdiction to render a judgment in favor of Borzynski on the non-PACA trust claims (Count IV and V). Defendants assert that the PACA trust claims (Counts I-III, VI-VII, and IX) served as the "real" basis for this Court's jurisdiction and that the non-PACA trust claims are

only before this Court pursuant to supplemental jurisdiction.

Even if the Court granted summary judgment as to all the PACA claims over which it has original jurisdiction (see 28 U.S.C. § 1367(c)(3))-including Count IV, which states a non-trust PACA claim and alleges that Pets Calvert violated the "prompt payment" provision of § 499b(4)-the Court still may retain jurisdiction over Borzynski's state law contract claim. Although "it is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial," (see *Groce v. Eli Lilly & Co.,* 193 F.3d 496, 501 (7th Cir.1999)), the Seventh Circuit has recognized that there occasionally are "cases in which the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point to a federal decision of the state-law claims on the merits." *Wright v. Associated Ins. Cos.,* 29 F.3d 1244, 1251-53 (7th Cir.1994).

Departure from the usual practice is appropriate here. The Court has devoted substantial judicial resources to learning the record in this case, and the state law breach of contract claim is straightforward and largely uncontested. Defendants have engaged in various tactics to delay a decision on the merits in this case-first by ignoring service of process, then failing to appear as ordered, then by insisting on proceeding *pro se* and shortly thereafter hiring and firing counsel. Eventually, the Court was forced to impose this circuit's policy of "graduated sanctions for recalcitrant defendants" in order to advance this case along. Simply put, Defendants' tactics have served to delay this case, waste judicial resources, and add to Defendants' own indebtedness through the accrual of additional contractual interest. Therefore, even if all of Borzynski's PACA claims-including the non-trust claim-were dismissed, considerations of judicial economy, convenience, and fairness to the parties all counsel in favor of resolving the merits of Count V at this time. See also *Chicago United Industries, Ltd. v. City of Chicago,* 2010 WL 234994, at *30 (N.D.Ill. Jan.15, 2010).

Additionally, Count IV of Borzynski's complaint alleges that Pets Calvert violated the prompt payment section of § 499b(4). See, *e.g., Baiardi Food Chain v. United States,* 482 F.3d 238, 243-44 (3d Cir.2007) (discussing whether a merchant has satisfied its obligation

under § 499b(4) to "make full payment promptly" even if a creditor agrees to accept partial or deferred payment as a settlement). Count IV therefore arises under federal law (see 7 U.S.C. § 499b(4)) and presents a federal question. Defendants did not move for summary judgment on Count IV, but Borzynski did. Defendants only moved for summary judgment on PACA trust claims.[7] Thus, this Court has federal question jurisdiction over Borzynski's claim under § 499b(4) and supplemental jurisdiction over Borzynski's breach of contract claim. See 28 U.S.C. § 1367(a).

2. Merits

Defendants have not produced any evidence that Pets Calvert paid the money that it owes Borzynski, promptly or otherwise. Instead, they argue that the invoices were superseded by a subsequent agreement that allowed Pets Calvert to pay the outstanding balance with weekly payments. When Pets Calvert failed to make the promised payments, Defendants insist that Borzynski's only recourse was to enforce the subsequent agreement, not the invoices at issue. Notably, Defendants do not include a single citation to legal authority in their response to Borzynski's motion for summary judgment. Additionally, Defendants' argument confuses the remedy for failure to "make full payment promptly" under 7 U.S.C. § 499b(4) with the trust protection afforded under 7 U.S.C. § 499e(c).Defendants point to an e-mail allegedly extending the original payment terms on the invoices as evidence that Borzynski voided its PACA trust rights. Assuming that the e-mail did extend the payment terms on the invoices, that fact only would undermine Borzynski's PACA trust claims against Defendants. As set

[7] Borzynski has abandoned the following PACA trust claims: Declaratory Relief Validating PACA Trust Claim (Count I), Enforcement of Payment from PACA Trust Assets (Count II), Violation of PACA-Failure to Maintain PACA Trust Assets and Creation of Common Fund (Count III), Breach of Fiduciary Duty to PACA Trust Beneficiaries (Count VI), Conversion and Unlawful Retention of PACA Trust Assets (Count VII), and Constructive Trust (Count VIII). Thus, summary judgment is appropriate for Defendants with respect to these claims.

forth earlier, this Circuit has found that if a produce supplier enters into a post-default agreement with a dealer that extends the time for payment beyond thirty days, the supplier becomes ineligible to assert its PACA trust rights. See *Patterson Frozen Foods, Inc. v. Crown Foods Intern., Inc.,* 307 F.3d 666, 669-70 (7th Cir.2002). However, Borzynski is not attempting to enforce its PACA trust claims against Defendants.[8] Rather, Borzynski seeks a judgment against Pets Calvert for its failure to tender prompt payment under § 499b(4). The e-mails that Defendants submitted as evidence of a post-default agreement do not aid Defendants on Count IV.

Actions to enforce payment from a PACA trust (Section 499e(c)(5)(i)) and for failure to pay promptly (Sections 499b(4) and 499e(a)) are purely statutory creatures, and Plaintiff need not look outside the four-corners of the statute in its prayer for relief.[9] With respect to Count IV (Failure to Pay Promptly), Section 499b(4) of Title VII of the United States Code makes it unlawful for any "dealer[ ] or broker" * * * to fail or refuse * * * [to] make full payment promptly" in connection with a produce transaction under PACA. And Section 499e(a) states that brokers or dealers who violate Section 499b "shall be liable to the person or persons injured thereby for the full amount of damages * * * sustained in consequence of such violation." Payment terms under PACA are set forth in the regulations promulgated by the Secretary of the U.S. Department of Agriculture ("Secretary"). 7 C.F.R. § 46.1 *et seq*. The term "full payment promptly" is used to identify the period of time

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[8] Several circuits have held that the PACA statutory trust provision allows a plaintiff to recover against both a corporation and its controlling officers for breach of fiduciary duty. See, *e.g., Weis-Buy Svcs., Inc. v. Paglia,* 411 F.3d 415, 421-22 (3d Cir.2005); *Golman-Hayden Co., Inc. v. Fresh Source Produce,* 217 F.3d 348, 351 (5th Cir.2000). The Seventh Circuit has likewise indicated, albeit in dicta, that such an action may be maintained. *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.,* 307 F.3d 666, 669 (7th Cir.2002) (citing *Golman-Hayden,* 217 F.3d at 351). In the present action, as indicated in the previous footnote, Borzynski has abandoned its fiduciary claims against Defendant O'Neill.

[9] Where Congress has explicitly created a cause of action, the task of courts is limited. See *United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (invalidating a congressionally-created cause of action but "only upon a plain showing that Congress * * * exceeded its constitutional bounds").

during which payment must be made by the buyer. 7 C.F.R. § 46.2(aa) defines these payment terms as:

> (5) Payment for produce 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 * * * 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.

Based upon this regulatory scheme, payment is due within ten days after delivery, unless different terms have been agreed to in writing by the parties before the transaction. In this case, any agreement extending the time for payment came after the produce already had been delivered. Therefore, 7 C.F.R. § 46.2(aa)(11) does not apply and the invoices and the ten-day payment period specified therein control.

Defendants (i) fall within the definition of a dealer or broker, (ii) received produce from Borzynski, and (iii) failed to pay Borzynski, despite repeated requests, in violation of the parties' agreement. Therefore, Defendants failed or "refuse[d] * * * [to] make full payment promptly" in connection with a produce transaction under PACA, and Defendant Pets Calvert is liable to Borzynski for the "full amount of damages * * * sustained in consequence of such violation."[10] The Court

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[10] The parties have not presented, nor has the Court discovered, any cases in which a court has determined that a produce supplier loses all PACA rights, in addition to PACA *trust* rights, when it enters into a post-default agreement with a dealer that extends the time for payment beyond thirty days. However, the cases that the Court has found addressing the failure-to-promptly-pay provision (once trust rights have been lost) primarily have dealt with the Secretary of Agriculture's enforcement of this provision. See, *e.g., Baiardi Food Chain v. U.S.,* 482 F.3d 238, (3d Cir.2007) (holding that (continued...)

will not allow Defendants to "utilize [their] breach as a shield against an action on the underlying claim." See *F.C. Bloxom Co. v. Rojo Produce Import and Export, LLC,* 2006 WL 2021697, at *3 (D.Or. July 16, 2006) (refusing to allow defendant, who settled a claim under PACA based on a settlement agreement but then defaulted on the settlement agreement, to use its breach as a shield against liability on the original claim).

As set forth below, because the Court finds in the alternative that Defendant Pets Calvert breached its contract with Borzynski, Borzynski is entitled to the full amount of damages requested under both federal (PACA) and state law.

Finally, even if this transaction-as with the PACA trust claims-fell out of PACA entirely by virtue of Borzynski agreeing to an extended payment plan, Borzynski also has sued Defendants for breach of contract. In order to establish a cause of action for breach of contract under Illinois law, a plaintiff must prove "(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff." *Henderson-Smith & Assocs. v. Nahamani Family Serv. Ctr., Inc.,* 323 Ill.App.3d 15, 256 Ill.Dec. 488, 752 N.E.2d 33, 43 (Ill.App.Ct.2001). Between May 20 and June 17, 2008, Borzynski sold seven loads of produce, worth $19,563.00, to Defendants. Borzynski and Defendants negotiated the price for each shipment, and Defendants accepted the produce delivered by Borzynski. The invoices identified the commodity sold, the quantity, the price, the date of the sale, and the payment terms. Defendants did not object to any of the invoice terms, and Defendants then failed to pay for the produce. In responding to Borzynski's motion for summary judgment, Defendants do not argue that Pets Calvert did not breach its contract with Borzynski; rather, they limit their arguments

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[10](...continued)
post-default agreements between company and its suppliers did not bar the Secretary's enforcement of PACA); *Finer Food Sales Co., Inc. v. Block,* 708 F.2d 774, 782 (D.C.Cir.1983) ("Such a belated payment of a small portion of a licensee's obligation does not constitute the making of the 'full payment promptly' that section 2(4) requires"); *Marvin Tragash Co., Inc. v. United States Dep't of Agriculture,* 524 F.2d 1255, 1258 (5th Cir.1975) ("This partial payment under the plan entered into some months after the purchases cannot be characterized as either full or prompt payment as required by the Act * * * * ").

to the PACA trust claims and supplemental jurisdiction. The breach of contract claim is not a PACA trust claim, and the Court already has determined that it has jurisdiction to decide the state law claim. Borzynski has demonstrated that Pets Calvert breached its agreement to pay for the produce delivered by Borzynski and accepted by Pets Calvert. Accordingly, summary judgment is granted in favor of Borzynski and against Defendant Pets Calvert on Counts IV and V of Borzynski's Intervenor Complaint. Borzynski's PACA trust claims (Counts I-III, VI-VII, and IX) are dismissed.

3. Pre-judgment interest

The final issue before the Court is pre-judgment interest, which Borzynski has requested and Defendants have not addressed. In cases involving breach of contract, prejudgment interest can be awarded if the damages are "fixed or easily computed" prior to judgment. See 815 ILCS 205/2; *Medcom Holding Co. v. Baxter Travenol Laboratories,* 200 F.3d 518, 519 (7th Cir.1999). In this case, the damages ($19,563.00) are "easily ascertainable." Therefore, the Court awards prejudgment interest at the rate of five percent per annum. See 815 ILCS 205/2.

III. Conclusion

For these reasons, the Court denies Defendants' motion for partial summary judgment [56] as to Plaintiff Sunrise and grants Defendants' motion for partial summary judgment [56] as to Intervenor Plaintiff Borzynski on the PACA trust claims. Plaintiff Sunrise's claims against Defendants remain pending. The Court grants Intervenor Plaintiff Borzynski's motion for summary judgment [72] on the remaining PACA claim (Count IV) and on the state law breach of contract claim (Count V). Judgment is entered in favor of Intervenor Plaintiff Borzynski and against Defendant Pets Calvert on Counts IV and V in the amount of $19,563.00 plus pre-judgment interest at a rate of 5% per annum. Borzynski's remaining claims are dismissed.

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MOVSOVITZ & SONS OF FLORIDA, INC., et al. v. DORAL BANK, et al.
Civil No. 08–1898 (SEC).
Filed May 17, 2010.

[Cite as: 2010 WL 1978958].

PACA-R –

United States District Court,
D. Puerto Rico.

OPINION & ORDER

SALVADOR E. CASELLAS, Senior District Judge.

Pending before this Court is Plaintiffs, Movsovitz & Sons of Florida, Inc. ("Movsovitz"), Puerto Nuevo Cold Storage, Inc. ("Puerto Nuevo"), Frank Garguilo & Son, Inc. ("Garguilo"), F.C. Bloxom Company ("Bloxom"), and New York Export Company, Inc.'s ("NY Export")(collectively "Plaintiffs") Motion for Summary Judgment (Docket # 48). Defendant, Doral Bank ("Doral" or "Defendant") has filed an opposition thereto (Docket # 53) to which Plaintiffs have replied (Docket # 53). Upon reviewing the filings, and the applicable law, Plaintiffs' motion is **GRANTED in part and DENIED in part.**

Undisputed Facts

This case involves the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a–499t, which creates a trust over assets connected to receivables and proceeds of certain agricultural commodities products until suppliers, sellers, and agents have been fully repaid.Dee Produce Corporation ("Dee") was a Puerto Rico corporation engaged in the business of buying and selling wholesale quantities of produce in interstate commerce. The company was also a dealer subject

to and licensed under the provisions of PACA.[1] Plaintiffs' Statement of Undisputed Facts (S.U.F.) # 6, Docket # 48–2. Dee funded its operations and business from the proceeds of the purchase and sale of fresh fruits and vegetables.[2]

Plaintiffs are all engaged in the business of buying and selling wholesale quantities of produce in interstate commerce. S.U.F.1–5. During the period relevant to this suit, they have all been dealers or producers subject and licensed under PACA, § 499e(c).[3] *Id.* Between March and August 2004, Plaintiffs collectively sold and delivered to Dee, wholesale quantities of produce worth $539,574.60, of which $360,082.81 remains unpaid.[4] *Id.* at # 11–14. Plaintiffs delivered the produce to Dee, which Dee accepted. *Id.* Plaintiffs did not notify the Secretary of Agriculture of the United States of Dee Produce's default in payment. However, the invoices sent by Plaintiffs to Dee also contained the contracted terms that Dee was required to pay Plaintiffs interest on all outstanding invoices and all collection costs, including reasonable attorneys' fees, incurred by Plaintiffs in collecting any debt

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[1] Dee was licensed under PACA in 1991 (License No. 19911097).

[2] This is contested in as much as Doral asserts that Dee also obtained funding from capital loans originating from various local banks. Docket # 52–2 at 24.

[3] Movsovitz (License No. 2001153); Puerto Nuevo (License No. 20040327); Gargiulo (License No. 19762004); Bloxom (License No. 19207275); NY Export (License No. 19790637).

[4]

	Dates of Sale	Amount Due
Movsovitz & Sons of Florida, Inc.	7/23/2004 - 9/4/2004	$113,068. 07
Puerto Nuevo Cold Storage, Inc.	7/15/2004 -10/6/2004	$69,705.80
Frank Gargiulo & Sons, Inc.	8/26/04 -10/4/2004	$15,627.71
F.C. Bloxom Company	6/2/2004 -8/4/2004	$120,206.24
New York Export Co., Inc.		

owed to them by Dee.[5] *Id.* at # 15.

Doral, was, and is, a secured creditor of Dee's. *Id.* at # 7. On March 24, 2003, Doral granted commercial loan number 3002001103 to Dee in the principal amount of $55,000. This loan is secured by personal guarantees. *Id.* at # 19. On October 11, 2003, Doral also granted a commercial line of credit number, 3002001286 to Dee in the principal amount of $100,000.[6] *Id.* at # 20. Said loan was secured by mortgage note for the principal amount of $110,000 over the property identified as "la Nave 14,"[7] locale number 14 in the "Centro de Acopio y Carnicerías de Caguas" in Caguas, Puerto Rico (hereafter "Nave 14"). A final relevant credit relationship existed with Doral's loan number 7580008062, granted on November 26, 2003, to Dee in the principal amount of $103,337.00, secured by a pledge of Doral Bank certificate of deposit number 657109, account number 0860024231 (the "CD").[8] The CD on deposit with Doral originated from Dee.[9] *Id.* at21–23. As of December 31, 2005, Doral was holding account number 840004410 in Dee's name with a balance of $78,025.44. These funds included the $60,000 transferred to the account as mentioned above, and deposits

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[5] This Court finds that Plaintiffs therefore complied with the language and requirements under PACA § 499e(c)(4). Accordingly, they preserved the benefits of the trust under PACA § 499e. Doral argues that notice of to the Secretary of Agriculture was necessary, under PACA § 499e(c)(4), but this argument is spurious given the statute's clear language. *See, e.g., In re Bartlett,* 367 B.R. 21, 32 (Bkrtcy.D.Mass.2007).

[6] In 2004, Doral increased commercial line of credit number 3002001286 to the principal amount of $210,000.

[7] Dee acquired Nave 14 on September 18, 2001.

[8] The CD was liquidated on October 22, 2008 and applied to Dee's debt with Doral. At the time of liquidation, the CD had a balance of $124,793.98.

[9] Doral argues that these funds came from Arnaldo Detres, and not from Dee's PACA related activities. Docket # 52–2 at 4, # 5. However, this Court agrees with Plaintiffs that Doral has not proffered admissible evidence sufficiently controverting the PACA nature of the funds, or asserting their non-PACA trust origins. Doral's fact # 5 will therefore not be considered.

made by Dee Produce from October 1, 2004 to October 29, 2004.[10] *Id.* at # 29.

Before entering into the credit relationship, Doral requested and received from Dee accounts receivable reports, profit and loss statements, and audited financial statements from Dee before approving and executing the aforementioned transactions. Within this process, Doral requested and examined Dee's financial condition and conducted a due diligence investigation of Dee. This due diligence investigation included reviewing Dee's accounts payable reports, accounts receivable reports, profit and loss statements, and the financial condition of Dee's shareholders. *Id.* at # 23. Therefore, Doral knew that Dee was in the business of buying and selling fresh fruits and vegetables. *Id.* at # 24.

At some point Dee appears to have entered into financial difficulties, because on October 4, 2004, Plaintiffs Bloxom, N.Y. Export, and other creditors filed an action in U.S. District Court for the District of Puerto Rico against Dee and its principals under the trust provisions of the PACA, 7 U.S.C. § 499e(c), in the aggregate amount of $290,152.56. *F.C. Bloxom Company, et al. v. Dee Produce Corporation, et al.,* Civ. No. 04–02043 (D.P.R. filed October 4, 2004). A Temporary Restraining Order enjoining the transfer and dissipation of Dee's assets, including real property, was entered on October 5, 2004. *Id.* at # 8. Additionally, on October 8, 2004, Movsovitz filed an action in U.S. District Court for the District of Puerto Rico against Dee and its principals under the trust provisions of PACA, 7 U.S.C. § 499e(c), in the amount of $169,359.65. *Movsovitz & Sons of Florida, Inc. v. Dee Produce Corp.,* Civ No. 04–02079 (D.P.R. filed October 8, 2004). However, these efforts to recover the amounts owed were interrupted when Dee Produce Corporation filed for relief under Chapter 11 of the United States Bankruptcy Code on October 12, 2004. In re Dee Produce Corp., Case No. 04–10488 (Br.P.R.2004); Docket # 53–2 at 3. This stay was lifted

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[10] In summary, Dee Produce owed Doral Bank:
(a) The $87,842.65 detailed in Paragraph 5, loan # 3002001288;
(b) $86,387.29, loan # 7580006802;
(c) $29,336.27, loan # 3002001103.
Docket # 52–2.

in 2006 with respect to assets in which Doral asserts a security interest, subject to the claims of Dee's PACA trust creditors.

In Dee's bankruptcy action, Plaintiffs, along with other sellers of produce, and Dee, filed a Stipulation and Agreed Order for PACA Claims Procedure ("PACA Claims Procedure"). S.U.F. # 16. The purpose of the PACA Claims Procedure was to facilitate collection and distribution of PACA trust assets to qualified beneficiaries of the PACA trust by establishing which entities had properly preserved their status as PACA trust beneficiaries and, thus, held valid PACA trust claims, and also to establish the principal amount of such PACA claims. *Id.* The Order approving the PACA Claims Procedure was entered on March 17, 2005. *Id.* at # 17.

Plaintiffs in the abovementioned action timely filed their PACA declarations and were found to be qualified PACA beneficiaries in the aggregate amount of $539,574.60. *Id.;* see Notice of Filing of Amended PACA Trust Chart (Br.Doc. # 177). The Order approving the Amended PACA Trust Chart and the related distribution motion (Br.Doc.# 182) was entered at BK Doc. 221. As qualified PACA beneficiaries, Plaintiffs received $179,491.79 through the distributions of PACA assets leaving a total principal amount due to Plaintiffs of $360,082.81, as discussed above. Additionally, Plaintiffs N.Y. Export and Bloxom obtained a judgment against Dee's principals under PACA, and Banco Popular de Puerto Rico and BBVA Puerto Rico have also filed claims in Dee's bankruptcy claims for various lines of credit issued to the company. *Id.* at # 18.

Standard of Review

FED.R.CIV.P. 56

The Court may grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202(1986); *Ramírez Rodríguez v. Boehringer Ingelheim,* 425 F.3d 67, 77 (1 st Cir.2005). In reaching such a determination, the Court may not

weigh the evidence. *Casas Office Machs., Inc. v. Mita Copystar Am., Inc.,* 42 F.3d 668 (1st Cir.1994). At this stage, the court examines the record in the "light most favorable to the nonmovant," and indulges all "reasonable inferences in that party's favor." *Maldonado–Denis v. Castillo–Rodríguez,* 23 F.3d 576, 581 (1st Cir.1994).

Once the movant has averred that there is an absence of evidence to support the nonmoving party's case, the burden shifts to the nonmovant to establish the existence of at least one fact in issue that is both genuine and material. *Garside v. Osco Drug, Inc.,* 895 F.2d 46, 48 (1st Cir.1990) (citations omitted). "A factual issue is 'genuine' if 'it may reasonably be resolved in favor of either party and, therefore, requires the finder of fact to make 'a choice between the parties' differing versions of the truth at trial.'" *DePoutout v. Raffaelly,* 424 F.3d 112, 116 (1st Cir.2005)(quoting *Garside,* 895 F.2d at 48 (1st Cir.1990)); *see also SEC v. Ficken,* 546 F.3d 45, 51 (1st Cir.2008).

Applicable Law & Analysis

The purpose of PACA is to aid agricultural traders recover payment for goods delivered to produce dealers and retailers. The statute recognizes that because farmers and agricultural distributors must quickly move their perishable inventory, they often have to sell their products to companies whose creditworthiness is unverifiable in such a short time-frame. *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.,* 67 F.3d 1063, 1067 (2nd Cir.1995). PACA was first passed in 1930, but expanded in 1984 to give greater priority vis a vis secured creditors. The amendment sought to protect PACA sellers, who "... as unsecured creditors, the sellers recover[ed], if at all, only after banks and other lenders who have obtained security interests in the defaulting purchaser's inventories, proceeds, and receivables." *Id.; see also* H.R.Rep. No. 543, 98th Cong., 2d Sess. 3 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406–407. Accordingly, Congress created Section 499e(c) creating a trust in favor of the sellers of agricultural products. The PACA trust "... applies to all of the buyer's produce in inventory and all proceeds from the sale of produce until full payment is made." *Movosovitz & Sons of Florida, Inc. v. Axel Gonzalez, Inc.,* 367 F.Supp.2d 207, 212

(D.P.R.2005)("*Movosovitz I*"). Here, this Court must decide if the assets in question are part of the PACA trust. Essentially, the trust comprises: "(1) produce purchased from suppliers, (2) all inventories of foods or other products derived from the produce, and (3) receivables or proceeds from the sale of said produce." *Movosovitz & Sons of Florida, Inc. v. Scotiabank,* 447 F.Supp.3d 156, 163 (D.P.R.2006)("*Movosovitz II* "). Furthermore, "[t]he law is clear that a 'PACA beneficiary has priority over any secured creditor on the purchaser's commodity-related assets to the extent of the amount of his claim.'" *Id.* (citing *Hiller Cranberry Prods. v. Koplovsky,* 165 F.3d 1, 8–9 (1st Cir.1999)); *see also In re Kornblum & Co., Inc.,* 81 F.3d 280, 284 (2d. Cir.1996).

As already stated, the case in hand turns on the existence of a PACA trust covering the particular funds in controversy, or if, on the contrary, Doral can prove that the monies are exempt from PACA, or co-mingled with PACA funds. To do this, Doral has the burden of establishing:
(1) no PACA trust existed when the property was transferred;
(2) even though a PACA trust existed at that time, the transfer of property did not include trust assets; or
(3) although a PACA trust existed when the property was transferred and the property included trust assets, all unpaid sellers were paid in full prior to the transaction.
Movsovitz II, 447 F.Supp.2d at 163–164 (summarizing the *Kornblum* exclusion factors).

However, this Court must be able to determine that the funds in questions were trust monies in order to be able to enter summary judgment in favor of Plaintiffs. *Id.* at 166. The existence of a PACA trust, "... does not necessarily mean that the funds used to purchase those properties were proceeds from [Dee's dealings in perishable agricultural goods] ." *Id.*

In *Kornblum,* which has been cited and endorsed by the First Circuit, the Second Circuit concluded, when analyzing the statutory intent of the trust provision in 7 U.S.C. Sec. 499e(c)(2), that "all of the emphasized language [in PACA] points to a single, undifferentiated trust for the benefit of all sellers or suppliers of Produce except the phrase 'involved in the transaction,' which we do not read as countermanding the clear import of the balance of the statutory language." *Id.* at 286. This Court will follow said ruling, that there is "... a single, undifferentiated trust for

the benefit of all sellers and suppliers." *Id.*

The acquisition of assets before a particular transaction or business relationship is started with a particular creditor does not preclude an action if a PACA trust was already in existence, because it must continue "until all of the outstanding beneficiaries have been paid in full." *Kornblum,* 81 F.3d at 286. Accordingly, Defendants are wrong on the main points of law they argue. These are, the existence and date of creation of the PACA trust, and whether the acquisition of an asset prior to a transaction with a creditor impedes a PACA claim. Furthermore, the burden of establishing the non-existence of the PACA trust falls on the non-beneficiary, in this case Doral. *Id.* at 287. Given the aforementioned framework, this Court will rule on the motion for summary judgment as to the following assets.

Nave 14

As to Nave 14 particularly, the undisputed facts of this case establish that Dee acquired Nave 14 in 2001, and that a PACA trust existed at said moment. Doral alleges that all three (3) *Kornblum* exclusion exceptions apply to this property. However, the first (1 st) and third (3rd) are obviously not applicable. As stated above, a PACA trust does not apply only to an individual supplier, rather it constitutes a " 'non-segregated floating trust' that applies to all of the buyer's produce in inventory and all proceeds from the sale of produce until full payment is made." *Movosovitz II,* 447 F.Supp.2d at 162. Therefore, given that Dee engaged in PACA related activities between 1991 and 2004, its assets were presumably subject to PACA in 2001 when it acquired Nave 14. Doral has done nothing to controvert this contention, and thus fails to assert *Kornblum* assertion number one (1), nor has it proffered any evidence that all unpaid sellers of produce were paid either when Nave 14 was acquired, or in 2004 when Plaintiffs engaged in business with Dee, so it fails to argue exclusion number three (3) as well. As to *Kornblum* exclusion number two (2), Doral has not proffered admissible evidence that Nave 14 was acquired with Dominic D'Abate's ("D'abate"), a Dee shareholder, non-trust personal assets. All that

has been submitted is a pleading to the Bankruptcy Court, which is clearly insufficient to controvert the presumption that a PACA trust existed over the funds.On the other hand, Plaintiffs have submitted evidence, in the form of a title search (Docket # 48–17, Exh. 13), that Dee acquired the property on September 18, 2001. At said time, a PACA trust existed, and given that Dee funded its operations with proceeds from the purchase and sale of fresh fruits and vegetables, and Doral has not proffered any admissible evidence that a *Kornblum* exclusion factor should apply, this Court must conclude that Nave 14 is part of the PACA trust. Accordingly, summary judgment as to Nave 14 shall be **GRANTED.** Doral shall account for and disgorge any funds received from the sale of Nave 14, or return said property to Plaintiffs.

The CD

A similar analysis applies to the CD. Clearly, a PACA trust existed in 2003, and no evidence has been given to suggest that all unpaid sellers were paid in full prior to the transaction. Accordingly, Doral would have to prove that the CD was not connected to trust assets, which it has not done. The Bankruptcy pleading alleges that the CD was acquired with funds from Arnaldo Detres ("Detres"), who was a Dee principal, but is insufficient to controvert Plaintiffs' well pled facts, as a pleading does not constitute testimonial evidence of a particular fact. Nevertheless, as in *Movsovitz II,* Plaintiffs have not provided sufficient evidence as to the origin of the CD to, "... put the Court in a position to evaluate the evidence and be able to draw reasonable conclusions therefrom." *Movosovitz II,* 447 F.Supp.2d at 166. In fact, the very admissions Plaintiffs refer to (S.U.F.# 26) to substantiate that the CD came from trust funds, also allude to, "... personal funds transferred from Detres' personal accounts." Docket # 48 at 15. Accordingly, summary judgment as to the CD must be **DENIED.***Doral Bank Account # 840004410*

These funds were loaned to Dee by Doral on October 11, 2004. This fact is uncontroverted, and therefore shows that these

monies originated from a bank loan, and not from PACA trust assets. Accordingly, this Court is satisfied that Doral has met *Kornblum* exception two (2) could apply to these monies. Therefore, as to Doral Account # 840004410, summary judgment must be **DENIED.**

CONCLUSION

In light of the above, Plaintiffs' motion for summary judgment is **GRANTED** in part and **DENIED** in part. Furthermore, pursuant to Local Rule 83.10(b)(1), the Court refers this case to mediation. Under Local Rule 83.10(c)(4)(A), the parties are hereby granted **10 days,** until **May 31, 2010,** to notify the name of the person selected as mediator from the approved list maintained by the Court, and file a written agreement with the selected mediator. If the parties cannot agree to a mediator within the 10–day period, they may submit up to two names each for the Court to take into account when selecting the mediator. Local Rule 83.10(c)(4)(B). If the parties fail to notify the Court about their selection within the 10–day period, the Court will select a mediator from the approved list maintained by the Court. *Id.*On a final note, this Court finds that Plaintiffs do have a right to collect costs and attorney's fees. Nevertheless, these are limited to the assets of the PACA trust, and cannot be levied against Doral's other assets.

IT IS SO ORDERED.

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PROCACCI BROS. SALES CORP. v. FOUR RIVERS PACKING CO., INC.
Civil Action No. 09-cv-04067-JF.
Filed May 18, 2010.

[Cite as: 2010 WL 2038008].

PACA-R – Reasonable attorney fees, award of, for litigation.

Court determined post trial that multiple witnesses and high airfare were in excess of "reasonable costs."

United States District Court,
E.D. Pennsylvania.

MEMORANDUM

FULLAM, Senior District Judge.

Procacci Bros. Sales Corp. filed an appeal from an order of the Secretary of Agriculture entered in a reparation proceeding pursuant to the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* After a non-jury trial *de novo* in this Court, the decision of the Secretary was affirmed. The appellee, Four Rivers Packing Co., Inc., has filed an application for counsel fees and costs pursuant to the PACA, which provides that "if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs." 7 U.S.C. § 499g(c). Four Rivers has submitted sufficiently detailed time records, and the hourly rate appears to be reasonable for cases of this sort. However, counsel performed certain tasks that could have been handled by a secretary or paralegal, and I am not persuaded that all of the time expended was necessary, given the development of the record at the administrative level.Four Rivers also seeks the costs associated with three witnesses attending the trial from Idaho. Although Procacci Bros. does not dispute that these costs are recoverable, it disputes the need for multiple witnesses to attend the trial, and the high airfare for one of those witnesses. I agree, and will adjust the costs accordingly.

An order will be entered.

ORDER

AND NOW, this 18th day of May 2010, upon consideration of the application for counsel fees and costs and the response thereto,
IT IS ORDERED:

That the appellee, Four Rivers Packing Co., Inc. is awarded $25,000 in counsel fees, $463.09 in counsel's costs, and $3,500 in witness costs.

CORONA FRUITS & VEGGIES, INC. v. CLASS PRODUCE GROUP, LLC,
Civil Action No. RDB–09–967.
May 25, 2010.

[Cite as: 2010 WL 2132652].

PACA-R – Suitable shipping, warranty of.

Court affirmed the Judicial Officer's (JO) decision which found that Seller of perishable commodities failed to carry burden that the warranty of suitable shipping conditions were void due to abnormal shipping conditions. In motion to re-open, sellers failed to make a prima facie showing of a genuine issue for trial**.**

United States District Court,
D. Maryland.

MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.

Petitioner Corona Fruits & Veggies, Inc. ("Corona") brought suit against Respondent Class Produce Group, LLC ("Class") seeking reparations under the Perishable Agricultural Commodities Act of 1930

("PACA"), 7 U.S.C. § 499a *et seq*. Corona has appealed the ruling of the Secretary of the United States Department of Agriculture ("USDA") rendered in favor of Class in an administrative reparation proceeding.[1] Currently pending before this Court is Corona's Motion to Remand Case to State Court (Paper No. 20) and Class' Motion for Summary Judgment (Paper No. 25). The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D.Md.2009). For the reasons stated below, Petitioner's motion to remand is DENIED and Respondent's motion for summary judgment is GRANTED.

BACKGROUND

Corona Fruits & Veggies, Inc. ("Corona") and Class Produce Group, LLC ("Class") are produce companies licensed under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499a *et seq*.[2] On June 1, 2007, Corona entered into a contract with Class' broker, J.J. & Son Marketing, Inc., for the sale of 3,360 flats of strawberries at the contract price of $24,076. Under this agreement, Corona was required to load a shipment of strawberries at its place of operations in Santa Maria, California, for shipment on a Free–On–Board ("FOP") basis to The Kroger Co. ("Kroger") in Roanoke, Virginia, and to Class, in Jessup, Maryland.

On June 2, 2007, the strawberries were shipped from the loading point in California. The product was wrapped in Tectrol pallet bags and cardboard was placed on the top and bottom of each pallet of strawberries. The bill of landing informed L & M Transportation Services, Inc., the carrier responsible for shipment, to keep the load of strawberries in an environment cooled to a temperature of 32 degrees Fahrenheit.

On June 4, 2007, Kroger rejected the strawberries upon arrival at the

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[1] Under section 499g(c) of the Perishable Agricultural Commodities Act of 1930, the order and decision issued by the Secretary in an administrative reparation proceeding may be appealed to federal district court.

[2] The background facts are culled from the Secretary's Decision and Order of March 17, 2009, and from Petitioner's Counter–Statement of Disputed and Undisputed Facts. *See* Ex. 1 to Resp't Mot. Summ. J.; Ex. 1 to Pet.'s Opp'n to Mot. Summ. J.

company's Roanoke Division. The load was then sent to Class' place of business in Jessup, Maryland, where it arrived on June 5, 2007—three and a half days after shipment. Upon arrival, a USDA inspection was performed on the strawberries while they remained on the truck. The report concluded that the strawberries had pulp temperatures of 40–42 Fahrenheit and that 24 percent of the strawberries were in a defective condition. Specifically, the inspection disclosed that 15 percent of the product was bruised, 8 percent was overripe, and 1 percent was decayed. After inspection, a representative of Class wrote "Reject" on the inspection certificate, a copy of which was faxed to Corona. Soon thereafter, Corona faxed the certificate back to Class with the handwritten note: "TOO–HOT YOU HAVE A TRUCK CLAIM." After Class' rejection the strawberries were delivered to Frank Leone/B.R.S. Produce in Philadelphia, Pennsylvania. B.R.S. Produce ultimately sold the strawberries for gross proceeds of $15,594. Class never paid for any of the strawberries at issue, nor did it ever receive any of the sale proceeds collected by B.R.S. Produce.

On August 1, 2007, L & M Transportation Services filed suit against Corona in the Superior Court of the State of California, County of Santa Barbara, Cook Division, for failure to pay the transportation costs for the delivery of strawberries. On August 13, 2007, Corona timely filed an informal complaint with the USDA seeking reparations of $24,676 for the rejected strawberries. On February 25, 2008, during the pendency of the suit before the Secretary, Corona filed a Cross–Complaint against Class in the state court case for failure to pay for the strawberries. On February 9, 2009, L & M Transportation Services dismissed its lawsuit against Corona.

On March 17, 2009, the Secretary issued a Decision and Order in which it determined that Class was not liable to Corona because Corona had failed to ship strawberries in suitable shipping condition. On April 16, 2009, Corona filed an appeal in this Court under 7 U.S.C. § 499g(c). The state court proceeding was stayed on June 8, 2009, pending a final ruling in the instant matter.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue over a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence exists on a claimed factual dispute to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249.In undertaking this inquiry, a court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). After the moving party has established the absence of a genuine issue of material fact, the nonmoving party must present evidence in the record demonstrating an issue of fact to be resolved at trial. *Pension Ben. Guar. Corp. v. Beverley,* 404 F.3d 243, 246–47 (4th Cir.2005) (citing *Pine Ridge Coal Co. v. Local 8377, UMW,* 187 F.3d 415, 422 (4th Cir.1999)). Summary judgment will be granted if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The instant action is also governed by section 499g(c) of PACA, which provides that in an appeal of a reparation order:

> Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated ....

7 U.S.C. § 499g(c).

Accordingly, in an appeal of the Secretary's adverse ruling, a petitioner must bear the initial burden of production at trial. *Lee Loi Industries, Inc. v. Impact Brokerage Corp.,* 473 F.Supp.2d 566, 568

(S.D.N.Y.2007) ("Generally, the party petitioning for an appeal has the burden of production of evidence that rebuts the findings of fact by the Secretary."). "It follows that a court must enter summary judgment against a nonmovant who will bear an initial burden of production at trial and who fails to make a showing sufficient to meet that burden." *Frito–Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1032 (D.C.Cir.1988). On the other hand, the movant in this context can satisfy its burden "by showing that there is an absence of evidence to rebut the *prima facie* case presented by the Secretary's order." *Id.* In sum, courts interpret section 499g(c) of PACA as "making the Secretary's findings conclusive unless effectively rebutted. Once rebutted, the Court is then able to reweigh the evidence, thus giving effect to the provision for *de novo* review ." *Id.* at 1033.

ANALYSIS

I. Motion to Remand Case to State Court On October 21, 2009, Corona filed a Motion to Remand Case to State Court (Paper No. 20). Corona contends that this Court should, pursuant to its inherent prudential authority and "the abstention doctrine,"[3] remand this matter so that it may be consolidated with the case currently pending before the Santa Barbara Superior Court. Alternatively, Corona argues that if remand is denied, this Court should adopt the discovery conducted and certain evidentiary sanctions that were imposed against Class in the state

[3] Pursuant to the abstention doctrines, "federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest ... [such as] considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (internal citations and quotations omitted). An abstention doctrine provides "an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id.* (internal quotations omitted). The Fourth Circuit has recently emphasized that "the Supreme Court has *never* allowed abstention to be a license for free-from *ad hoc* judicial balancing of the totality of state and federal interests in a case. The Court has instead defined specific doctrines that apply in particular classes of cases." *Martin v. Stewart,* 499 F.3d 360, 364 (4th Cir.2007) (emphasis in original). In this case, Corona has not specified any particular abstention doctrine, nor has it cited any applicable Supreme Court precedent.

court case.[4] Pursuant to the abstention doctrines, "federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest ... [such as] considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (internal citations and quotations omitted). An abstention doctrine provides "an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *Id.* (internal quotations omitted). The Fourth Circuit has recently emphasized that "the Supreme Court has *never* allowed abstention to be a license for free-from *ad hoc* judicial balancing of the totality of state and federal interests in a case. The Court has instead defined specific doctrines that apply in particular classes of cases ." *Martin v. Stewart,* 499 F.3d 360, 364 (4th Cir.2007) (emphasis in original). In this case, Corona has not specified any particular abstention doctrine, nor has it cited any applicable Supreme Court precedent.

This Court finds no basis or justification for the remedy sought in Corona's Motion for Remand. The present matter cannot be "remanded" to the Santa Barbara County Superior Court, because it did not originate in that court, and this Court is not authorized to order the state court to adjudicate its case. Additionally, there are no exceptional circumstances in this case that would cause this Court to decline to exercise its jurisdiction pursuant to any abstention doctrine. Finally, there is no convincing reason for this Court to adopt the discovery rulings issued in the separate state court action.

The instant matter is properly before this Court on appeal of the Secretary's administrative ruling. Pursuant to 7 U.S.C. § 499e(b), a party may seek redress under PACA either by pursuing a USDA administrative proceeding or by instituting a civil action in either state or federal court. Through its appeal of the Secretary's Decision and Order, Corona has elected to pursue redress against Class through the administrative channel, rather than through completion of the state court

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[4] During the discovery process, the state court issued monetary and evidentiary sanctions against Class for its failure to respond to Corona's deposition requests.

proceeding. Therefore, the Secretary's decision is *res judicata* as to the state court action. *See In re Ruma Fruit & Produce Co., Inc.,* 55 Agric. Dec. 642, 656 (1996).

Consequently, Corona's Motion to Remand Case to State Court (Paper No. 20) is DENIED.

II. Motion for Summary Judgment

In the reparation proceeding before the Secretary, the parties disputed the causes of the strawberries' defective condition. Corona argued that it satisfied its contractual obligations by ensuring that the strawberries were in suitable shipping condition at the time they were loaded for transportation. It maintained that the carrier must be held liable because temperature fluctuations during the product's transit resulted in the strawberries' defective condition. Class, on the other hand, contended that Corona was the responsible party because the strawberries were in a poor condition at the time they were loaded on the truck. It argued that many of the strawberries were overripe prior to shipment or were otherwise damaged during harvesting and packing.In its reparation decision of March 17, 2009, the Secretary noted that with respect to the issue of whether Class' rejection was warranted, Corona bore the burden of showing both that the strawberries were in a suitable shipping condition at the time they were loaded and that the transportation conditions were abnormal. *See* Ex. 1 to Resp't Mot. Summ. J. at 6. It was noted that strawberries are "an extremely perishable commodity that should be transported at or as near as possible to 32 degrees Fahrenheit." *Id.* at 9. The Secretary analyzed a series of temperature reports generated from two portable temperature recorders that were placed with the load of strawberries at both ends of the truck. The recorders reported that temperatures at the nose of the truck primarily ranged from 31 to 34 degrees, while the temperatures at the tail end generally ranged between 34 and 37 degrees. The data revealed that the truck's temperatures fluctuated during the transit period, and the Secretary noted that such fluctuations are normal due to certain environmental factors experienced during shipping. *Id.* at 12. The Secretary concluded that because the temperatures did not reach or exceed 37 degrees for any substantial

period of time, the temperatures should not have adversely impacted the strawberries. *Id.* While the temperatures occasionally dipped to around the freezing point for strawberries of 30.6 degrees, the Secretary noted that because the product was wrapped in Tectrol bags and surrounded by cardboard, it was insulated from the direct effect of the cold temperatures. *Id.* at 13. The Secretary also found that the insulating effect of the Tectrol bags trapped in the natural respiratory heat of the strawberries, resulting in their elevated pulp temperatures. *Id.* at 14. Based on its thorough analysis of the temperature recordings, the Secretary concluded that Corona "failed to sustain its burden to prove that the warranty of suitable shipping condition is void due to abnormal transit conditions." *Id.*

On April 16, 2009, Corona filed a Petition for Appeal of the Secretary's decision in this Court. (Paper No. 1.) Corona contends that Class' rejection of the product was wrongful, and that it is liable for the strawberries because they were loaded in a suitable shipping condition. In addition, Corona claims that Class arranged for the resale of the strawberries and failed to forward the resale proceeds it received. *See* Corrected Opinion (Paper No. 6).

On January 11, 2010, Class filed the pending motion for summary judgment in which it claims that because there is no issue of material fact in this case, the Secretary's decision should be affirmed and judgment should be entered in its favor. (Paper No. 25 .) In support of its motion, Class relies upon the findings of fact in the Secretary's decision and the declaration and report of its expert, Dr. Patrick E. Brecht. *See* Ex 1(A) to Resp't Mot. Summ. J. In opposing Class' dispositive motion, Corona claims that there is a genuine issue of material fact as to whether the strawberries were in a suitable condition at the time they were loaded for transportation.[5] Corona argues—as it

[5] In its reparation decision, the Secretary also determined that (1) Class' rejection was procedurally valid; (2) the USDA inspection results established that the strawberry load was defective; and (3) after Class' rejection of the strawberries, Corona did not give Class any instructions as to the disposition of the load and Corona did not make any effort to have the strawberries shipped elsewhere. Corona does not contest these findings of Secretary, therefore they are deemed conclusive. *See Frito–Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1033 (D.C.Cir.1988).

did before the Secretary—that the temperature fluctuations during transit caused the strawberries' defective condition and their elevated pulp temperatures. In support of its Opposition, Corona has proffered declarations from its President, Jose Corona, and from its Vice President, Gerry Corona. *See* Declaration of Jose Corona; Declaration of Gerry Corona. In addition, Corona has filed several articles and publications that address the handling and shipping of strawberries. *See* Exs. A–D to Pet.'s Opp'n to Mot. Summ. J.

This Court finds that Class has discharged its duty as the party moving for summary judgment, as section 499g(c) of PACA assigns *prima facie* status to findings of fact contained in the Secretary's reparation order. *See Frito–Lay,* 863 F.2d at 1032–33. Corona, on the other hand, has not satisfied its corresponding burden as the non-moving party in this case. *Id.* at 1033–34 (holding that the moving party may obtain entry of summary judgment by relying upon the *prima facie* value of the Secretary's decision unless the non-moving party makes an affirmative showing that there is a genuine issue for trial). The declarations submitted by Corona's principals do not establish that a genuine dispute exists regarding the Secretary's factual findings; instead they merely restate the arguments that are set forth in the Petitioner's brief. The declarations cite the truck's temperature reports in support of the argument that the strawberries' defective condition was due to improper transportation conditions. However, in its Decision, the Secretary reached the opposite conclusion after thoroughly analyzing the same undisputed facts, namely, the truck's temperature reports. Corona could have satisfied its burden of production if it had proffered pre-shipment, handling, or cold storage records indicating that the strawberries at issue were properly handled before shipment. However, Corona failed to produce any evidence concerning the condition of the strawberries prior to loading.[6] Indeed, there is no indication that the declarants ever personally observed the subject strawberries. Finally, Corona's evidentiary deficiency is not remedied by its submission of

[6] Respondent's expert witness, Dr. Patrick E. Brecht, noted in his expert report that he did not receive any pre-shipment quality, handling, pre-cooling, or cold storage records from Petitioner. *See* Declaration of Dr. Patrick E. Brecht, at 6, 7.

secondary materials and publications that present general advisory information on strawberry delivery, shipping, and handling practices. Such information does not create an issue of material fact with respect to the particular strawberries at issue in this case.

In sum, Corona has failed to demonstrate a material issue of fact regarding the causes of the strawberries' defective condition.[7] With regard to the transportation of the strawberries, Corona's submissions merely rehash its arguments that are based upon the undisputed temperature reports. Similarly, with respect to the pre-loading treatment and condition of the strawberries, Corona merely provides conclusory assertions and generalized statements that do not shed light upon the treatment of the particular strawberries at issue in this case. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts ... the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' " (citations and emphasis omitted)). Accordingly, the Secretary's findings are deemed conclusive, and Class is entitled to entry of summary judgment in its favor.

CONCLUSION

For the aforementioned reasons, Petitioner's motion to remand is DENIED and Respondent's motion for summary judgment is GRANTED. A separate Order follows.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 25th day of May, 2010, ORDERED and ADJUDGED, that:
1. Petitioner Corona Fruits & Veggies, Inc.'s Motion to Remand Case to State Court (Paper No. 20) is DENIED;

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[7] Corona's opposition brief and submissions do not address—let alone support—the separate contention set forth in its Petition for Appeal that Class improperly withheld proceeds obtained from the resale of the product in Philadelphia.

2. Respondent Class Produce Group, LLC's Motion for Summary Judgment (Paper No. 25) is GRANTED;
3. That judgment BE, and it hereby IS, entered in favor of the Respondent and against the Petitioner;
4. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to the parties; and
5. The Clerk of Court CLOSE this case.
D.Md.,2010.

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FRESH DIRECT, INC., et al. v. HARVIN FOODS, INC., et al.
C.A. No. 10–040–GMS.
Filed June 22, 2010.

[Cite as: 2010 WL 2541925].

PACA-R – Apparent authority – Reliance, reasonable.

The court granted a temporary restraining order (TRO) where the moving party has shown (1) likelihood of success, (2) irreparable harm, (3) no greater harm to non-moving party, (4) TRO is in the public interest. The PACA licensee set in motion circumstances in which a reasonable person would believe that the agents temporarily operating out of licensee's office and making purchases therefrom were agents acting on behalf of licensee even though licensee later accused the agents (now gone) with fraud.

United States District Court,
D. Delaware.

MEMORANDUM

GREGORY M. SLEET, Chief Judge.

I. INTRODUCTION

On January 15, 2010, Fresh Direct, Inc. ("Fresh Direct") filed suit against Harvin Foods, Inc. and its principal officer (collectively, "Harvin

Foods").[1] In its initial complaint, Fresh Direct sought a temporary restraining order ("TRO") and preliminary injunction to freeze Harvin Foods' assets, based on that company's alleged violation of Section 5(c) of the Perishable Agricultural Commodities Act (the "PACA"), 7 U.S.C. § 499e(c). Specifically, Fresh Direct alleged that Harvin Foods failed to compensate it for produce received and accepted by Harvin Foods and, in so doing, violated the statutory trust ensured by the PACA. (D.I. 1 at 3.) On January 20, 2010, this court denied Fresh Direct's motion, because it had failed to show that it would be "irreparably harmed" if this court did not grant the injunction. (D.I. 11 at 1.) In response, Fresh Direct filed an amended complaint, on February 1, 2010, which included Whitmore Distributing Co. ("Whitmore") as a co-plaintiff. On that same date, Fresh Direct also filed a motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(b). (D.I. 16 at 1.) On February 15, 2010, Harvin Foods filed an answering brief (D.I.33) and proposed order asking this court to deny Fresh Direct's request for a preliminary injunction (D .I. 34). Presently before the court, is Fresh Direct and Whitmore's (collectively, the "plaintiffs") Rule 65(b) preliminary injunction motion to freeze the entirety of Harvin Foods' assets until resolution of this dispute in order to prevent dissipation of the PACA statutory trust.[2] (D.I.16.) For the reasons that follow, the court will grant the plaintiffs' motion in part by freezing Harvin Foods' assets in the amount allegedly owed the plaintiffs.

II. BACKGROUND

[1] Fresh Direct's original complaint was filed against Harvin Foods, Keith Harvin, and Grady Harvin. (D.I. 1 at 1.) At the time Fresh Direct filed its complaint, it believed that Keith Harvin and Grady Harvin served as officers and directors of Harvin Foods. (D.I. 8 at 2.) In its reply brief to the preliminary injunction motion, Harvin Foods notes that its principal officer's name is Grady Keith Harvin and refers to Mr. Harvin as "Keith Harvin." (D.I. 26 at 1.)

[2] According to Fresh Direct and Whitmore, the total amount Harvin Foods owes to both parties is $170,720.57. (D.I. 16 at 2.) Specifically, Fresh Direct alleges that Harvin Foods owes it $113,358.97, and Whitmore claims that Harvin Foods owes it $57,361.60. (D.I. 15 at 3.) Harvin Foods contests the validity of this amount and contends that the amount owed should be determined based upon the price of the produce at delivery rather than the contract price.

The plaintiffs are produce dealers licensed under the PACA. (D.I. 17 at 4.) Harvin Foods is a produce wholesale business that purchases produce from dealers. The produce is then stored in Harvin Foods' warehouse before it is sold and delivered to restaurants and other customers of Harvin Foods. (D.I. 20 at 5–6.) The plaintiffs claim that they collectively delivered $170,720.57 worth of produce to Harvin Foods, which it accepted. Harvin Foods, however, failed to pay the amount it owed to either party. (D.I. 17 at 5.) The produce delivered is subject to the PACA and the plaintiffs note that they preserved their rights in the statutory trust as required under PACA, 7 U.S.C. § 499(e)(c), and the relevant accompanying regulations.[3] The plaintiffs allege that Harvin Foods has refused to pay them, because of an internal dispute with former Harvin Foods' employees. (D.I. 17 at 3–4; D.I. 20 at 2–4.)

Harvin Foods does not contest that its refusal to pay the plaintiffs results from a dispute with former employees. (D.I. 20 at 6–7.) Instead, Harvin Foods explains that it has refused to pay the plaintiffs because it did not purchase the produce in question. (*Id.*) Specifically, Harvin Foods states that the produce purchased from the plaintiffs was ordered by two individuals, Raymond Maragni, Jr. ("Maragni") and Vincenzo Giuffrida ("Giuffrida"), with whom Harvin Foods briefly entered into a food brokerage business. (*Id.* at 6.) Harvin Foods notes that in or around July 2009, it agreed to enter into a limited affiliation brokerage business with Maragni and Giuffrida, wherein the brokerage business would buy product from vendors that would then be transported by a trucking company from the vendor to the customer. (*Id.* at 2.) Harvin Foods indicates that the brokerage business initially went well, and Maragni and Giuffrida worked from Harvin Foods' office. (*Id.*) Maragni and Giuffrida later stopped working from the Harvin Foods' office, however, and became unresponsive when business began to "pick up." (*Id.*) Soon after, Harvin Foods began receiving complaints from the

[3] The plaintiffs preserved their rights in the statutory trust pursuant to 7 U.S.C. § 499(e)(c), 7 C.F.R. Part 46, 49 Fed.Reg. 45735 (Nov. 20, 1984), through the invoices it sent with the produce. (D.I. 17 at 2.)

brokerage business vendors that had not been paid for produce they shipped to Harvin Foods. (*Id.*) Harvin Food notes that it had not done business with many of these vendors in past. (*Id.*) Upon investigating the complaints, Harvin Foods learned that Maragni and Giuffrida were fraudulently ordering produce from growers and/or vendors on Harvin Foods' credit, but having brokerage business customers send their payment checks directly to them. (*Id.*) Harvin Foods then terminated its affiliation with Maragni and Giuffrida and filed a criminal complaint with the Wilmington Police Department to alert them of the fraudulent scheme. (*Id.* at 3.)

Harvin Foods contends that Maragni and Giuffrida—rather than the company itself—purchased produce from Fresh Direct and Whitmore. Therefore, the plaintiffs are not entitled to payment from Harvin Foods. (*Id.* at 5.) Conversely, the plaintiffs argue that they are entitled to such payment and seek a preliminary injunction to preserve the PACA statutory trust by freezing Harvin Foods' assets. (D.I. 16; D.I. 17 at 1–2.)

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 65(b) permits a party to seek a preliminary injunction prior to the resolution of trial proceedings. Fed.R.Civ.P. 65. A preliminary injunction is "an extraordinary remedy, which should be granted only in limited circumstances." *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.,* 847 F.2d 100, 102 (3d Cir.1988) (citation omitted). Specifically, such injunctive relief should only be granted if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the preliminary relief will not result in even greater harm to the nonmoving party; and (4) granting the injunction is in the public interest. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.,* 222 F.3d 132 (3d Cir.2000) (citing *Council for Alternative Political Parties v. Hooks,* 121 F.3d 876, 879 (3d Cir.1997)). A court should balance these factors in determining whether to grant a preliminary injunction, and should deny such relief where the plaintiff has failed to establish each element. *See NutraSweet Co. v. Vit–Mar Enterprises, Inc.,* 176 F.3d 151, 153 (3d Cir.1999); *In re Arthur Treacher's Franchisee Litig.,* 689 F.2d 1137, 1143 (3d Cir.1982).

IV. DISCUSSION

In deciding whether to issue a preliminary injunction under the PACA, the Third Circuit has required courts to consider the four elements defined in the Standard of Review. The court considers each of these elements in turn below.

A. Likelihood of Success on the Merits

To prove likelihood of success on the merits of a PACA claim, a plaintiff must demonstrate that it is a PACA trust beneficiary with a perfected interest, and that it is entitled to payment. *Chiquita Brands Co. N.A., Inc. v. Del Monte Fresh Produce, N.A., et al.,* No. Civ. A. 03CV05283, 2004 WL 2536860, at *8 (E.D.Pa. Nov.8, 2004) (citing *Tanimura,* 222 F.3d at 140). While Harvin Foods does not challenge the plaintiffs' status as PACA trust beneficiaries, it contends that the plaintiffs cannot prove they are entitled to payment from Harvin Foods itself. (D.I. 20 at 5.) Specifically, Harvin Foods argues that the produce orders in question were the result of a scheme to defraud Harvin Foods and its customers, and that the plaintiffs failed to request verification from the officers or owners of Harvin Foods as to whether Maragni and/or Giuffrida were authorized users of Harvin Foods' credit. (*Id.*) Moreover, Harvin Foods argues that the plaintiffs cannot prove that Harvin Foods actually received the produce in question. In response to Harvin Foods' contention that they are not entitled to payment because of Maragni and Giuffrida's scheme to defraud the company, the plaintiffs argue that Maragni and Giuffrida were acting in an actual or apparent authority capacity as agents of Harvin Foods. (D.I. 38 at 2–3.) An agency relationship is created when "one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." *Fisher v. Townsends, Inc.,* 695 A.2d 53, 57–58 (Del.1997). Harvin Foods does not contest that Maragni and Giuffrida were agents of the company, but asserts instead that Maragni and Giuffrida did not have actual or apparent authority to purchase produce from the plaintiffs. (D.I. 43 at 4.)

Actual authority is created when the principal's words or conduct

would "reasonably cause the agent to determine that the principal wishes the agent to act on the principal's behalf." *Creedon Controls, Inc. v. Banc One Bldg. Corp.,* 470 F.Supp.2d 457, 460 (D.Del.2007). Apparent authority is established when the principal, by words or conduct, would cause a third party—here, the plaintiffs—to believe that the agent is acting on the principal's behalf. *Id.* at 460; *Edwards v. Born, Inc.,* 792 F.2d 387, 389–90 (3d Cir.1986). That is, "[a]pparent authority [is] ... that authority which, though not actually granted, the principal knowingly or negligently permits the 'agent' to exercise or which he holds him out as possessing." *Old Guard Ins. Co. v. Jimmy's Grille, Inc.,* No. 542, 2004 Del. LEXIS 417, at *10, 2004 WL 2154286 (Del.Super.Sept. 21, 2004) (quoting *Finnegan Constr. Co. v. Robino–Ladd Co.,* 354 A.2d 142 (Del.Super.Ct.1976)). If a third party relies on the agent's apparent authority in good faith and does so reasonably in view of the surrounding circumstances, the principal is liable. *Old Guard Ins. Co.,* 2004 Del. LEXIS 417, at *10, 2004 WL 2154286.

In support of their agency argument, the plaintiffs state that when the orders at issue were placed, Harvin Foods' Blue Book[4] information did not list an Exclusive Buyer, which would have alerted the plaintiffs that Maragni and Giuffrida could not act as buyers.[5] (D.I. 43 at 5.) Moreover, the plaintiffs note that Maragni and Guiffrida worked from Harvin Foods' offices and operated under the Harvin Foods' name when the orders were placed. (*Id.* at 5.) In addition, as evidence of Maragni's agency status, the plaintiffs include in their exhibits a Note issued by the United States Department of Agriculture, Agricultural Marketing Service, on December 8, 2009, which shows that Harvin Foods posted a $40,000 bond to hire Maragni as an employee, as well as a December 2, 2009 facsimile from Harvin Foods' President, Keith Harvin, to Fresh Direct indicating that Maragni was authorized to purchase on the

[4] Blue Book Services, Inc. is a credit and marketing information service that provides information and ratings on companies in the international wholesale produce industry.

[5] Keith Harvin was not listed in the Blue Book as Harvin Foods' "Exclusive Buyer" until December 10, 2009, which is after the plaintiffs made the produce purchases at issue in the present case. (D.I. 38 at 9.)

company's behalf.[6] (D.I. 39 at 10, Exhibit 3.) Whitmore also has produced evidence of a similar communication with Harvin Foods, wherein Keith Harvin emailed it, on December 1, 2009, to indicate that Giuffrida had not collected payment from Harvin Foods' customers for the produce purchased, but that Whitmore would be paid when the money was received. (D.I. 38 at 10.) The plaintiffs further note that Harvin Foods did not contest any of the invoices sent by the plaintiffs to Harvin Foods' business address prior to identifying Maragni and Giuffrida's fraudulent scheme, and did not terminate its relationship with the two individuals until after the orders at issue were placed. (*Id.* at 11.)

Given these facts, governing authority would seem to suggest that Maragni and Giuffrida were, indeed, acting as agents of Harvin Foods, that the plaintiffs relied in good faith on the belief that these two individuals were authorized Harvin Foods buyers, and that the plaintiffs preserved their interest in the PACA trust pursuant to the relevant statute and regulations. Thus, the court concludes that Fresh Direct and Whitmore have shown a likelihood of success on the merits of their claim.

B. Irreparable Harm

In order for the court to grant a preliminary injunction for a PACA claim, the plaintiff must show that it will be irreparably harmed by the denial of such relief. *See Tanimura,* 222 F.3d at 140. The Third Circuit has recognized that PACA trust dissipation can constitute irreparable harm, and further that such "dissipation ... can render money damages inadequate, thereby necessitating equitable relief, especially when the

[6] Keith Harvin sent a separate facsimile to Fresh Direct, on December 8, 2009, indicating that Maragni's authority was no longer valid. (D.I. 39 at 12, Exhibit 4.) Harvin Foods alleges that because Keith Harvin's communication with Fresh Direct authorizing Maragni to purchase on the company's behalf was sent after the produce orders at issue were placed, Fresh Direct had no reason to believe that Maragni was an authorized buyer at the time of the purchases. (D.I. 43 at 5–6.) In light of the surrounding circumstances detailed, however, the court concludes that the plaintiffs' belief that Maragni and Giuffrida were agents of Harvin Foods at the time of the purchases was not unreasonable.

dissipation will clearly result in the debtor's inability to make payment." *Id.* at 139–40. Trust dissipation is defined as "any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with a produce transaction." 7 C.F.R. § 46.46(a)(2).In their preliminary injunction motion, the plaintiffs contend that they meet the irreparable harm requirement because Harvin Foods has failed to pay either company in direct violation of the PACA, and has not provided evidence of the availability of sufficient funds to pay the plaintiffs or similarly situated creditors. (D.I. 17 at 9.) Moreover, the declaration of Angel Ruiz, president of Fresh Direct, which the plaintiffs offer in support of their motion, has attached as an exhibit a Blue Book Services report which shows that Harvin Foods' credit rating has declined since December 2009, and that its rating is under investigation because it has been categorized as a "reported slow payer." (D.I. 18 at 24.)

Harvin Foods counters that a preliminary injunction is unwarranted, because money damages would provide an adequate remedy should the plaintiffs ultimately succeed on the merits. (D.I. 43 at 7.) To support this assertion, Harvin Foods presents an affidavit by Keith Harvin, stating that Harvin Foods has "substantial current assets in excess of $200,000, and is not insolvent or in danger of filing bankruptcy." (*Id.* at Exhibit 4.) The Third Circuit in *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.,* however, established that trust dissipation can warrant a preliminary injunction even where money damages are the appropriate relief. *See Tanimura,* 222 F.3d at 140.

The record before the court contains evidence that the plaintiffs could be prejudiced or impaired in their ability to "recover money owed in connection with [the] produce transaction." *See* 7 C.F.R. § 46.46(a)(2). In addition, Harvin Foods' has refused to pay the plaintiffs for produce ordered by those seemingly acting as its agents, and the plaintiffs have adduced evidence of Harvin Foods' decreasing credit rating. Under these circumstances, the plaintiffs have demonstrated the potential that they may suffer irreparable harm.

C. Greater Harm to the Non–Moving Party

Harvin Foods further argues that the court should deny the plaintiffs' preliminary injunction motion, because granting the motion would result in harm to Harvin Foods that significantly outweighs any harm to the plaintiffs that would result from the denial. (D.I. 33 at 11.) Specifically, Harvin Foods notes that if the court grants a preliminary injunction freezing the entirety of its assets, the company will be unable to conduct its business and pay its employees and creditors. (*Id.*) According to the Third Circuit, injunctive relief should not be granted where such relief would result in a greater harm to the non-moving party. *Tanimura,* 222 F.3d at 140 (citing *Hooks,* 121 F.3d at 879). In light of this standard and Harvin Foods' argument, the court will only freeze the assets of Harvin Foods in the amount allegedly owed to Fresh Direct and Whitmore, pending the final outcome of this action.

D. Public Interest

Finally, in determining whether to grant a preliminary injunction, the Third Circuit directs that courts should consider if doing so would be in the public interest. *See Tanimura,* 222 F.3d at 140. With respect to this element, Harvin Foods argues that the public interest here favors protecting the company as a victim of fraud, rather than punishing it by freezing its assets. (D.I. 33 at 12.) In support of this contention, Harvin Foods provides two quotations from 49 Federal Regulation 45737, indicating that the PACA was enacted to "suppress unfair and fraudulent practices" and to "aid traders in enforcing contracts." 49 Fed.Reg. 45735.Conversely, the plaintiffs maintain that the Third Circuit has held that Congress passed the PACA to protect "small suppliers who could not withstand a significant loss or delay in receipt of monies owed," and that the public interest, therefore, favors granting a preliminary injunction. (D.I. 17 at 9–11.); *Tanimura,* 222 F.3d at 135. Indeed, the Federal Regulation that Harvin Foods cites supports the plaintiffs' position. Specifically, the Regulation states that Congress enacted the PACA trust provision in recognition of "changes in the [produce] industry's financial picture [that have] added an abnormal marketing risk burden against which sellers are unable to protect themselves," such as the "marked increase in delayed payments for produce." 49 Fed.Reg.

45735. In view of the Third Circuit precedent in this area and Congress' intent in enacting the PACA, it is clear that the public interest supports preserving the trust from possible dissipation to protect the produce seller, or Fresh Direct and Whitmore, in this case.

VI. CONCLUSION

Because the court concludes that the plaintiffs have demonstrated a likelihood of success on the merits and irreparable harm, and because the remaining factors weigh in favor of a preliminary injunction, the court will grant the plaintiffs' request. In view of the fact that freezing the entirety of Harvin Foods' assets will not permit it to conduct its business or pay its employees and creditors, however, the court will freeze Harvin Foods' assets only in the amount allegedly owed to the plaintiffs, or $170,720.57. Accordingly, the court will grant in part and deny in part the plaintiffs' motion for a preliminary injunction pursuant to Rule 65(b).

ORDER

For the reasons stated in the court's Memorandum of this same date, IT IS HEREBY ORDERED that:

1. Fresh Direct, Inc. and Whitmore Distributing, Co.'s motion for a preliminary injunction (D.I.16) is GRANTED in part and DENIED in part. The court will freeze Harvin Foods' assets in the amount allegedly owed to the plaintiffs, or $170,720.57.

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ONIONS ETC, INC. AND DUDA FARM FRESH FOODS, INC. v. Z & S FRESH, INC., et al. AND RELATED CROSS ACTIONS.
No. 1:09–CV–00906–OWW–SMS.
Filed June 25, 2010.

[Cite as: 2010 WL 2598392].

PACA-R – Standing, brokers do not have –

A broker who contracted with a PACA buyer to sell under buyer's name and who never took possession nor had an equitable interest of/in the produce is not one of the parties the PACA is designed to protect. Broker (who rendered brokerage services) has no interest in the PACA trust.

United States District Court,
E.D. California.

MEMORANDUM DECISION RE MOTION TO DETERMINE VALIDITY OF AND OBJECTIONS TO PROOF OF CLAIM (Doc. 259.)

OLIVER W. WANGER, District Judge.

I. *INTRODUCTION*

Before the Court for decision is Intervening Plaintiff I.G. Fruit, Inc.'s "Motion To Determine Validity of and Objections to Proofs of Claim." The motion pertains to the $198,467.34 PACA trust claim filed by I.G. on July 13, 2009. Defendant Z & S Fresh, Inc. objected to the claim on July 23, 2009, arguing that I.G. rendered "brokerage services," which are not PACA-protected.[1]

II. *FACTUAL BACKGROUND*

This case arises out of the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499a *et seq.,* which was enacted to protect sellers of perishable agricultural commodities from unfair conduct by buyers of such commodities, including failure to pay promptly and fully for produce ordered. PACA creates a statutory trust in favor of sellers of produce to buyers (e.g., grocery stores and certain agents), under which the buyer holds the produce and any proceeds and

[1] Many of Z & S trade partners (i.e., sellers) filed PACA trust claims based on produce provided by them to Z & S. Defendant Z & S objected to a number of these trust claims. However, the parties resolved nearly all of these objections on December 3, 2009. (See Doc. 381, "Notice of Settlement of Specific Parties.")

receivables from the produce in trust for the benefit of the seller. 7 U.S.C. § 499e (c)(2).Defendant Z & S Fresh, Inc. ("Z & S"), a California corporation, is a licensed "dealer" of perishable agricultural commodities within the meaning of PACA. Z & S buys and resells fruits and vegetables. In 2004, Z & S entered into an agreement with Ira Greenstein, doing business as I.G. Fruit, granting I.G. the right to sell fresh fruits and vegetables under the Z & S trade name.[2] (Doc. 398, M. Zaninovich Dec., ¶ 5.) In exchange, I.G. acknowledged that all marketing efforts were done for Z & S' benefit, all fruit/vegetable sales were made through Z & S, and all invoicing and administrative functions were performed by Z & S. (*Id.* ¶ 8.) Ira Greenstein was also identified as an East Coast sales representative on Z & S' website. (*Id.* ¶ 11.) However, he never held an equity interest in Z & S and never took title or control of any produce. (*Id.* ¶ 13.) According to Z & S, I.G. never acted on behalf of growers or suppliers and the "Agreement specifically required all of Greenstein's efforts and activities to be performed on behalf of Z & S Fresh, Inc." (*Id.* ¶ 15.)

Between January 5 and June 1, 2009, I.G. brokered the sale of $198,467.34 worth of perishable agricultural commodities on behalf of Z & S. For each arranged sale, Z & S delivered the produce to the buyer, who accepted the items on credit and without adjustment. The entire amount remains unpaid.

According to I.G., it preserved its PACA trust interest against Z & S by including the statutorily required language on each invoice. The invoices provide, in relevant part:

> The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received. (Doc. 99, pgs. 4 through 143.)

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[2] I & G Fruit was permitted to use Z & S' trademarks, service markers, and trade dress to represent itself as a sales agent for Z & S. (*Id.* ¶ 6.)

III. *PROCEDURAL BACKGROUND.*

On May 22, 2009, two sellers of perishable agricultural commodities, Intervening Plaintiffs Onions Etc., Inc. and Dude Farm Fresh Foods, Inc., commenced this action against Defendant Z & S to recover money owed to them for the sale of produce to Z & S. Also named as Defendants were the officers of Z & S: Martin J. Zaninovich, Loren Schoenburg, and Margaret Schoenburg. Intervening Plaintiffs claim that 7 U.S.C. § 499e(c)(2) created a trust for their benefit over the proceeds of their produce and that Defendants owed money to Intervening Plaintiffs as beneficiaries of the trust. Intervening Plaintiffs also alleged that the officers breached their fiduciary duties as trustees of the trust. On June 3, 2009, the Court entered a temporary restraining order against Defendants and set a preliminary injunction hearing. (Doc. 15.) On June 24, 2009, the parties agreed to entry of a preliminary injunction, and the Court entered an order setting forth the PACA claims procedure (the "PACA Claims Order"). (Doc. 48.) The PACA Claims Order established a PACA trust account, appointed Terence J. Long as Trustee of the PACA Trust, and created a PACA claims procedure. (*Id.*) Potential PACA creditors were required to file complaints in intervention and proofs of claim by July 13, 2009. Objections were to be filed by July 23, 2009 and responses to the objections were due on August 3, 2009. The parties were allowed to file motions to rule on objections by August 10, 2009.

On July 13, 2009, I.G. Fruit filed a complaint in intervention and proof of claim based on brokerage sales it performed on behalf of Z & S Fresh. (Docs. 99 & 100.) Defendant Z & S Fresh, Inc. objected to the claim on July 23, 2009. (Doc. 168.) I.G. Fruit filed this motion on August 24, 2009. (Doc. 259.)

Oral argument on I.G. Fruit's motion was held on December 4, 2009, at which time the parties were requested to submit supplemental briefing on the issue of whether I.G. Fruit qualifies as a PACA trust beneficiary based on the brokerage services it provided to Z & S. The parties filed supplemental briefing on December 9 and December 11, 2009. (Docs.395, 397.)

IV. *DISCUSSION*

The motion presents a question of law unique to the Perishable Agricultural Commodity Act: Was it Congress' intent to provide PACA trust protections to brokers of PACA sellers, to protect their rights to the same extent as the clearly preferred PACA claimant-the grower/supplier? I.G. advances three arguments to support its position that "sell-side brokers" are beneficiaries under PACA. First, I.G. argues that the terms "broker" and "agent" are interchangeable under § 499e(c)(2), therefore brokers have the same PACA rights as agents. Second, I.G. asserts that § 499e(c)(2)'s words "in connection with" include broker fees for selling produce held by the original buyer, here Z & S. Specifically, I.G. contends that the "in connection with" language includes not only the price of produce sold to the original purchaser, but also additional related expenses, including broker fees connected to the secondary or "to market" transaction. Third, I.G. contends that *Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.,* No. 03–CV–106–SAS, 2003 WL 21727788 (S.D.N.Y. July 23, 2003), controls the facts of this case.

A. *"Agents" and "Brokers" Under PACA*

I.G.'s first argument is based on its contention that "brokers" and "agents" are synonymous under PACA. According to I.G., because the statute fails to distinguish the two terms-or one incorporates the other, brokers have the same PACA rights as agents. I.G. explains:Clearly the protection of agents is part of the express purpose of [PACA]. A 'broker' has been defined in Black's Law Dictionary, Ninth Edition, as a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. An agent has been defined in the same disctionary as 'one who is authorized to act for an in the place of another.' Endemic to the purchase and sale of perishable agricultural commodities in the United States is the role of brokers. There are no cases in wherein it has been reported that hold brokers are not considered 'agents' within the definition of the statute, nor are there any cases expressly holding that brokers are included in the definition of the term 'agent.' The reason is clear—common sense and plain

language reveal that these terms are virtually synonymous.
(Doc. 343 at 112:2–112:11.)

I.G.'s arguments with respect to the connection between agents and brokers are without merit. Under PACA, these terms do not share a common meaning, nor are they incorporated into one another; they do not have the same PACA rights or responsibilities. *Compare A & J Produce Corp. v. Chang,* 385 F.Supp.2d 354, 358 (S.D.N.Y.2005) (PACA 'restricts those subject to liability to 'commission merchant[s], dealer[s] or broker[s]' [....]") *with* 7 U.S.C § 499e(c) ("Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents [....]"). The statute itself belies I.G.'s contention, as the term "broker" is specifically defined in 7 U.S.C § 499a (b)(7):

`The term 'broker' means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a "broker" if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year.
Id.

Section 499a(12) delineates the difference between brokers and agents: brokers are involved in the transaction based on their relationship with the produce buyer, not the produce supplier—the preferred PACA-protected claimant. In the ordinary case: grower sells produce on credit to a Buyer.[3] The Buyer then sells the produce on credit to a Supermarket, generating an account receivable from Supermarket. Broker earns a commission by arranging the sale between Buyer and Supermarket. An agent facilitates the original sale from Grower to

[3] *See JSG Trading Corp. v. Department of Agriculture,* 235 F.3d 608, 616 (D.C.Cir.2001) ("Brokers by definition negotiate 'for or on behalf of the vendor or the purchaser.' ").

Buyer.[4] Congress drafted the statute to provide an additional layer of protection to the sellers, suppliers, and agents of the original produce transaction. It did not include brokers within this ambit of protection. *See, e.g.,* 7 U.S.C § 499e(c).

With respect to the PACA trust, 7 U.S.C. § 499e provides that: "The unpaid supplier, seller, or *agent* shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or *broker* within thirty calendar days [....]" *Id.* (emphasis added). Applying I.G.'s analysis to § 499e, if brokers and agents are treated alike, a broker preserves its PACA rights by providing notice to *a broker?* Such an interpretation is nonsensical under the statute's express language. Moreover, the statute does not define the circumstances under which a broker loses its PACA rights. This is best explained by the non-existence of such rights.

The interpreting regulations further explain the distinction between agents and brokers. 7 C.F.R. § 46.46(a)(2) defines trust "dissipation" as any act resulting in the "diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions." Section 46.46(d)(2) imposes a duty on an *agent* to maintain the principal's rights as a PACA trust beneficiary:

Agents who sell perishable agricultural commodities on behalf of a principal are required to preserve the principal's rights as a trust beneficiary as set forth in § 46.2(z), (aa) and paragraphs (d), (f), and (g) of this section. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of Section 2 of the Act [...]

Id.

I.G.'s argument that brokers and agents have the same PACA rights conflicts with the relevant statutes and interpreting regulations. Title 7 U.S.C. §§ 499a and 499c make clear that when a party arranges a produce sale between a purchaser and a grocery outlet, it acts as a

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[4] Illustration taken from *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transportation,* 251 F.3d 1268, 1271 (9th Cir.2001).

broker, not an agent. A broker has an entirely different function from an agent, who acts on behalf of the grower. There is no ambiguity on this point. *See* 7 U.S.C. § 499e(c)(1) ("It is hereby found that a burden on commerce in [produce] is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for [produce] purchased, contracted to be purchased, or otherwise handled by them [....]"). In addition, there are no facts that I.G. acted as an agent *and* a broker in this case. Here, I.G. arranged sales from Z & S—the original purchaser—to several produce outlets (retailers), including Winn Dixie and Nature's Best. There is nothing to indicate that I.G. arranged, facilitated, or played an integral role in the original transaction from grower to Z & S.[5] It was therefore only a broker under PACA.

I.G.'s rights to PACA assets, if any, are separate and distinct from those of an agent. Here, I.G.'s interpretation of the agency/broker relationship runs contrary to the applicable statutes and interpreting regulations, which conclusively demonstrate that "agents" and "brokers" are involved in different aspects of the produce transaction.

B. *"In Connection With"*

I.G. next argues that § 499e(c)(2)'s language "in connection with" includes broker fees for selling produce held by the purchaser, here Z & S. According to I.G., Congress intended that all goods and services incurred "in connection with" the produce sale transaction qualify for PACA trust protection. I.G. suggests that because a broker's fees are " 'intimately associated' with the transaction, they are covered under PACA's remedies, which necessarily include the primary enforcement tool, the statute's trust provisions." (Doc. 219 at 3:20–3:23.)Z & S

[5] At oral argument on December 4, 2009, it was suggested that a "broker" could occupy dual roles in certain produce transactions: (1) as a broker for the merchant; and (2) the broker could sell its own produce to the merchant. Based on the record, I.G. only occupied the first role—as a broker for Z & S. There is nothing in the record to indicate that I.G. maintained a separately-owned supply of produce. There is also no evidence that Z & S ever purchased produce from I.G. Fruit.

responds that there is no basis for I.G.'s theory because PACA protects only growers/suppliers of produce, not "sell-side brokers" like I.G. Z & S acknowledges that § 499e(c)(2) protects unpaid suppliers, sellers, and/or agents in connection with agricultural commodity transactions, but argues that the protection ends there, i.e., sell-side brokers are not PACA-protected. Z & S further contends that I.G. fails to harmonize the text of § 499e(c) (2) and its legislative history and purpose. According to Z & S, I.G.'s application of § 499e(c)(2) leads to an illogical result: a party who did not take title to or possession of any produce, who acted on behalf of the buyer (not any of the growers, suppliers, or producers), and who did not sell/supply any produce, is protected under PACA to the same extent as growers.

7 U.S.C. § 499e(c) provides a starting point. In 1984, Congress amended PACA to more effectively protect produce sellers. Congress recognized that time constraints inherent in selling produce often required sellers of produce to sell their produce to commission merchants, dealers or brokers before ascertaining the creditworthiness of buyers. Under such circumstances, sellers typically became unsecured creditors of buyers, able to recover from defaulting buyers only after lenders holding security interests in defaulting buyers' assets recover in full. Often, after secured lenders collect on their security interests, no assets to pay sellers remain. To guard against such situations, Congress added § 499e(c), which enacted a statutory trust for the benefit of produce growers and their agents:

> Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents [...]
>
> It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on

> commerce in perishable agricultural commodities and to protect the public interest.

Id. at § 499e (c)-(c)(1).

Section 499e(c)(2) delineates trust eligibility, benefits, and preservation of the res:

> [Produce] received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from [produce], and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

Id.

The substance of I.G.'s arguments is that § 499e (c)(2)'s words "until full payment of the sums owing in connection with such transactions" include broker fees for selling produce held by the purchaser. However, Courts have universally held that Congress enacted § 499e (c) to give sellers a right to recovery against buyers superior to that of all other creditors, including brokers. *See Middle Mountain Land & Produce v. Sound Commodities,* 307 F.3d 1220, 1224 (9th Cir.2002) ("[T]he enactment of the PACA amendment elevated the claims of unpaid perishable agricultural commodities suppliers over all other creditors of the bankrupt estate with regard to funds in the PACA trust."); *R Best Produce, Inc. v. Shulman–Rabin Marketing Corp.,* 467 F.3d 238, 242 (2d Cir.2007) ("[T]he legislative history and the text of the statute as well as the implementing regulations all make clear that [PACA] trust assets are intended exclusively to benefit produce suppliers.") (citation omitted); *Am. Banana Co., Inc. v. Republic Nat. Bank of New York, N.A.,* 362 F.3d 33, 38 (2d Cir.2001) ("Through these mechanisms [PACA] Congress, in effect, extended a new benefit to produce sellers."). No Court has held that brokers are one of the classes intended to be protected by the PACA Trust.

I.G.'s legal theory incorporates language from *Coosemans*

Specialties, Inc. v. Gargiulo, 485 F.3d 701 (2d Cir.2007), *Country Best v. Christopher Ranch, LLC,* 361 F.3d 629 (11th Cir.2004), and *Middle Mountain,* 307 F.3d 1220, three cases holding that "where the parties' contracts include a right to attorneys' fees, they can be awarded as 'sums owing in connection with' perishable commodities transactions under PACA." *Coosemans Specialties,* 485 F.3d at 709. *Middle Mountain* is particularly instructive. There, an agricultural supplier filed a proof of claim under PACA for amounts due on unpaid invoices, outstanding attorneys' fees and interest. The supplier argued that it was entitled to fees and interest based on language included in its invoices to the buyer, which created a contractual right to such an award. The district court denied the claim. On appeal, the supplier argued that § 499e(c)(2)'s words "in connection with" encompassed not only the price of the produce but also related attorneys' fees and interest. The Ninth Circuit agreed:

> The plain meaning of the PACA statute's words 'in connection with' encompasses not only the price of the perishable agricultural commodities but also additional related expenses, including contractual rights to attorneys' fees and interest, in a PACA claim. We must give the statutory language its ordinary meaning, and '[w]here Congress has, as here, intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort.'
>
> Congress wrote the statute broadly to include not only the value of commodities sold but also expenses in connection with the sale of perishable agricultural commodities when it drafted the statute. It did not limit the claim to perishable agricultural commodities alone [...]
>
> A fair reading of the statute brings contractually due attorneys' fees and interest within the scope of the statute's protection of 'full payment owing in connection with the [perishable agricultural commodities] transaction.'

Id. at 1223 (citations omitted).

The Court also held that allowing a supplier to file a claim for attorneys' fees and interest was consistent with PACA's legislative history:

> [I]t cannot be contended seriously that interpreting PACA claims to include contractual rights to attorneys' fees and interest under

> the 'in connection with' language of the statute is contrary to the statute's purpose, absurd, or 'demonstrably at odds with the intentions of the drafters.' There is no evidence that Congress intended to exclude contractual rights to attorneys' fees and interest as outside the scope of a PACA claim. Rather, a congressional committee stated that PACA was intended 'to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them.' The House Agriculture Committee Report stated that it did not contemplate that PACA would affect 'the ability of the [seller] ... to set contract terms.' It is unlikely that Congress, in enacting a statute to provide better insolvency remedies to perishable agricultural commodities sellers, wanted selectively to exclude legitimate portions of a covered contract from the scope of a PACA claim.
>
> The inequities of including contractual rights to attorneys' fees and interest in a PACA claim is minimal since a PACA claimant can include terms in its contracts with a buyer that allow for collection of expenses arising from a perishable agricultural commodities transaction.

Id. at 1224 (citations omitted).

I.G.'s claim for broker fees is distinguishable from the claims advanced in *Coosemans Specialties, Country Best,* and *Middle Mountain.* In relying on the language contained in these cases, I.G. overlooks the critical distinction of the claimants's roles in those cases, unlike I.G., were sellers and suppliers who qualified as trust beneficiaries. Specifically, in all three cases, a PACA beneficiary sought to recover legal expenses and interest in addition to its underlying claims for unpaid produce. Here, I.G. is not a PACA trust beneficiary as it is not a "supplier, seller, or agent" and I.G. does not seek to recover administrative expenses in addition to unpaid charges for the produce itself. I.G.'s claim is distinguishable.

In addition, unlike *Middle Mountain,* expanding the PACA trust to "sell-side" brokers is contrary to the statute's purpose and "demonstrably at odds with the intentions of the drafters." There is considerable evidence that Congress intended to give produce sellers a meaningful

opportunity to recover full payment of the amounts due for their sales. *See Patterson Frozen Foods, Inc. v. Crown Foods Intern., Inc.,* 307 F.3d 666, 669 (7th Cir.2002) (one of the principal justifications Congress has given for granting such generous protection for sellers of produce is the need to protect small dealers who require prompt payment to survive.).[6] As the broker fees requested by I.G. were incident to a produce sale between a purchaser and a grocery outlet, they are outside the scope of a PACA claim. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.,* 222 F.3d 132, 138 (3rd Cir.2000) (PACA's stated purpose is to ensure "payment to the unpaid seller in the perishable agricultural commodities industry.").

Moreover, allowing I.G.'s claim opens the door to other creditors asserting similar claims and subverts Congress's intent to protect sellers as the exclusive beneficiaries of the PACA trust. *Pac. Int'l Marketing, Inc. v. A & B Produce, Inc.,* 462 F.3d 279 (3rd Cir.2006) is instructive. There, the Court denied a logistic company's claim for administrative expenses from the PACA trust for its services in transporting produce for Defendant A & B Produce. It held that the transaction between A & B and the logistics company was not made "in connection with" a covered commodities transaction under PACA. The Court also discussed how allowing such a claim would directly conflict with both the text of the statute and the purposes underlying it:

> As Pacific correctly notes, if we accepted Exel's characterization of its transportation services as being 'in furtherance of its administration of the trust, a multitude of general unsecured creditors [of the buyer of the produce] could step forward and assert administrative expense claims for services performed in the course of produce transactions.' A partial list of these creditors would include 'trucking companies which transport produce, utility companies, which ensure that produce companies have electrical power to refrigerate the produce, paper companies,

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[6] *See also D.M. Rothman & Co. v. Korea Commercial Bank of N.Y.,* 411 F.3d 90, 93 (2d Cir.2005) (PACA provides growers and sellers of agricultural produce with "a self-help tool enabling them to protect themselves against the abnormal risk of losses resulting from slow-pay and no-pay practices by buyers or receivers of fruits and vegetables.").

> which provide the paper on which invoices are printed and employees, who sold the [p]roduce and collected the proceeds.'
>
> Ultimately characterizing Exel's services as administrative expenses would enable all sorts of the buyer's unpaid creditors to assert priority administration expense claims ahead of the claims of the sellers and other entities that Congress intended to protect as beneficiaries of the PACA trust. The claims of such creditors, including Exel's, are simply too tangential to the claims that Congress intended PACA to protect to permit their payment as PACA administrative expenses.

Id. at 285 (citations and quotations omitted).

This language applies with equal force to the facts of this case.

I.G.'s final argument to support its position is that it included the statutorily-required PACA language in its invoices with Z & S. A review of the invoices confirms that I.G.'s invoices contain the required language. (See Doc. 99, pgs. 4 through 143.) That is not dispositive of the inquiry, however. If all that is required for an entity to become a PACA beneficiary is a statement that "all items are sold subject to PACA," then the 1984 amendments are without legal effect. Here, whether a party is a PACA beneficiary depends on the statute and its relationship to other parties in a transaction, not boilerplate language inserted into a contract.[7]

The facts of this case are clear. I.G. did not sell or supply produce to Z & S but instead brokered a number of produce transactions between Z & S and several grocery outlets. The transactions were performed pursuant to a written contract between Z & S and I.G., and did not include PACA-intended beneficiaires, the original growers/suppliers. *Middle Mountain* makes clear that Congress intended to protect growers, sellers and suppliers of produce, not brokers who are ancillary to the

[7] There is also no indication that I.G. provided notice of—or bargained for—the PACA language to the intended beneficiaries of the PACA trust, which was critical to the Ninth Circuit's analysis in *Middle Mountain*. *See* 307 F.3d at 1224 ("The inequities of including contractual rights to attorneys' fees and interest in a PACA claim is minimal since a PACA claimant can include terms in its contracts with a buyer that allow for collection of expenses arising from a perishable agricultural commodities transaction.").

original sale of produce between the seller and purchaser. As in *Pac. Int'l,* the provisions and intent of PACA cannot be interpreted to allow I.G. to recover its broker fees prior to the distribution of trust funds to the qualified beneficiaries.

C. *Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.*

I.G. argues that *Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.,* No. 03–CV–106–SAS, 2003 WL 21727788 (S.D.N.Y. July 23, 2003) controls the facts of this case. In particular, I.G. relies on *Eastside Food Plaza* for the proposition that "[i]f a broker is eligible under 7 U.S.C. § 499e(b) to recover brokerage commissions, then he is also eligible under the trust statute after complying with the requirements of invoice language and timely service of the invoice to render him eligible." (Doc. 396 at 4:20–4:21.)The *Eastside Food Plaza* decision is distinguishable. The issue in Eastside was whether a broker of produce sales has standing to advance an unfair conduct claim under PACA.[8] Defendant argued that Plaintiff lacked standing to bring a PACA claim because "PACA was enacted to protect unpaid sellers and suppliers of produce, and [Plaintiff] is merely an alleged unpaid broker of produce sales." The Court disagreed, finding that Defendant's approach was "constricting" and inconsistent with a plain reading of 7 U.S.C. § 499b:

> [§ 499b(4)] restricts those subject to liability to 'commission merchant [s], dealer[s] or broker[s]' and defines these terms in great detail. In contrast, [§ 499b(4)] denotes the protected claimant very generally as 'the person with whom such transaction is had.' [§ 499e(a)], which governs the amount of damages available under an unfair conduct claim, also refers to claimants as 'persons': 'If any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages ... sustained in consequence of such

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[8] PACA's unfair conduct provision provides, in relevant part:It shall be unlawful [...] [f]or any commission merchant, dealer, or broker [...] to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any [perishable agricultural] commodity to the person with whom such transaction is had [....]
7 U.S.C. § 499b.

> violation.' 'Person' is defined broadly to include 'individuals, partnerships, corporations and associations.' [Plaintiff], as a corporation, is a 'person.'
> *Id.* at 2 (citations omitted).The *Eastside* Court also held that a broker can pursue an unfair conduct claim under the "full payment promptly" language of § 499b(4):
>
> Moreover, as a broker, plaintiff may pursue an unfair conduct claim in light of the definition of 'full payment promptly.' 'Full payment promptly' is defined in part as '[p]ayment of brokerage earned and other expenses in connection with produce purchased or sold, within 10 days after the day on which the broker's invoice is received by the principal....' There is no question that the unfair conduct provision of PACA permits a broker to sue a principal for failure to remit 'full payment promptly.'
> *Id.* (citations omitted).

I.G.'s proposed reading of *Eastside Food Plaza* is flawed for two reasons. First, *Eastside Food Plaza* 's holding was limited to whether an unpaid broker could properly raise an unfair conduct claim under 7 U.S.C. § 499b. *Eastside Food Plaza* never addressed whether an unpaid broker is a PACA beneficiary pursuant to 7 U.S.C. § 499e(c)(2). As it never reached the issue—or even discussed § 499e(c)(2)—it is not helpful to I.G.'s claim in this case. Second, § 499b and § 499e (c)(2) are two different statutory schemes that do not apply to or interrelate to one another. For instance, § 499b(4) prohibits "unfair conduct" by entities in the agricultural commodities business, including the failure to maintain a statutory trust. It is an independent cause of action. Conversely, § 499e(c)(2) creates a statutory trust in favor of unpaid sellers, defines eligible parties, and preserves the trust res. *Eastside Food Plaza* is factually distinguishable.

D. *Conclusion*

Courts have held that § 499e(c)(2)'s words "in connection with" encompass not only the price of produce but also related attorneys' fees

and interest. *See Country Best,* 361 F.3d at 632; *Middle Mountain,* 307 F.3d at 1223. However, those are different cases. Here, I.G. did not sell, supply, or broker the sale of produce to Z & S. Rather, it brokered a number of produce transactions between Z & S and grocery outlets, parties not intended beneficiaries of § 499e(c)(2). I.G. is also not a PACA trust beneficiary as it is not a "supplier, seller, or agent" and it does not seek to recover administrative expenses in addition to unpaid charges for the produce itself.Allowing I.G.'s claim also opens the door to other creditors asserting similar claims and subverts Congress's intent to protect sellers as the exclusive beneficiaries of the PACA trust. Including invoice language stating that "all items are sold subject to PACA," does not conclusively demonstrate PACA beneficiary status. I.G. is not one of the classes intended to be protected by the PACA Trust. I.G.'s motion is DENIED.

IV. *CONCLUSION*

For the reasons stated:(1) Intervening Plaintiff I.G. Fruit, Inc.'s Motion To Determine Validity of and Objections to Proofs of Claim is DENIED.

Defendant Z & S shall submit a form of order consistent with, and within five (5) days following electronic service of, this memorandum decision.

IT IS SO ORDERED.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

DEPARTMENTAL DECISIONS

PRODUCE SUPPLY, INC. v. GUY E. MAGGIO, INC.
PACA Docket No. R-08-042.
Decision and Order.
Filed December 12, 2008.

PACA-R. – Jurisdiction – Interstate Commerce.

Respondent, a PACA licensee located in the state of California, purchased California-grown broccoli crowns from Complainant, a PACA licensee also located in the state of California. In defense of its alleged failure to pay Complainant the unpaid balance of the agreed purchase price for the broccoli crowns, Respondent asserted that neither the commodity in question, nor any of the products purchased by Respondent, are ever shipped out of state, so the Secretary lacks jurisdiction over this transaction. It was found that since the shipment in question involves a type of produce commonly shipped in interstate commerce and was shipped by a produce dealer that does a substantial portion of its business in interstate commerce, the subject shipment is considered to be in interstate commerce under the PACA. Based on this analysis, the Department could properly exercise jurisdiction over this dispute.

Gary Ball, Presiding Officer.
Thomas Oliveri, Representative for Complainant
Respondent, *pro se.*
Decision and Order issued by William G. Jenson, Judicial Officer.

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $1,232.00 in connection with one

truckload of broccoli crowns allegedly shipped in contemplation of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting that the Respondent does not operate in "interstate commerce."

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and an Affidavit of Patrick Smith, Complainant's President. Respondent did not elect to file any additional evidence. Neither party submitted a Brief.

In an effort to determine whether the disputed shipment was made in interstate commerce under the PACA, the Presiding Officer issued a Notice to Show Cause Why Complaint Should not be Dismissed. The Notice to Show Cause was served upon Complainant on July 7, 2008 and upon Respondent on July 9, 2008. On July 25, 2008, Complainant submitted a timely Motion To Show Cause Why Complaint Should Not Be Dismissed and an affidavit of Patrick Smith in support of its Motion. Complainant's Motion was served upon Respondent by the Department. Respondent did not submit a response to Complainant's Motion.

Findings of Fact

1. Complainant, Produce Supply, Inc., is a corporation whose post office address is P.O. Box 336, Arroyo Grande, California, 93421-0336. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Guy E. Maggio, Inc., is a corporation whose post office address is 1320 E. Olympic Boulevard, Room 220, Los Angeles, California, 90021. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about March 15, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Santa Maria, California, to Respondent, in Los Angeles, California, 616 cartons of broccoli crowns at $4.25 per carton, for a total f.o.b. contract price of $2,618.00. Respondent paid Complainant $2.25 per carton, or a total of $1,386.00, for the broccoli crowns, thereby leaving an unpaid invoice balance of $1,232.00.
4. The informal complaint was filed on May 11, 2007, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one truckload of broccoli crowns sold and shipped to Respondent. Complainant states Respondent accepted the broccoli crowns in compliance with the contract of sale, but has since paid only $1,386.00 of the agreed purchase price thereof, leaving a balance due Complainant of $1,232.00. In response to Complainant's allegations, Respondent asserts in its sworn Answer that the broccoli crowns were rejected upon arrival, after which Complainant verbally agreed to change the price terms of the contract to $2.25 per carton, which offer was accepted by Respondent, and Respondent remitted payment in full to Complainant in accordance with this agreement.[1] Respondent also asserts that the Department does not have jurisdiction to consider this dispute because the transaction was not conducted in the course of interstate commerce.[2]

We will first consider the jurisdictional defense asserted by Respondent, because Respondent's success or failure in proving this defense will determine whether we are able to consider the other matters in dispute. Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. Miller Farms & Orchards v. C.B. Overby, 26 Agric. Dec. 299 (1967). In addition to claiming that

[1] See Answer, paragraphs 6 and 8.

[2] See Answer, paragraph 7.

the transaction in question was not conducted in interstate commerce, Respondent asserts in its sworn Answer that, "[a]t no time has Respondent ever entered into interstate commerce, nor does any of the product ever handled by Guy E. Maggio, Inc. dba GEM Sales, ever leave the state of California."

Complainant has the burden of establishing that the Department has jurisdiction over the disputed transaction. This burden can be met by providing adequate evidence that: (1) the shipment actually moved from a state to any place outside that state;[3] (2) the shipment moved between points within the same state but through any place outside that state;[4] (3) the transaction was negotiated by parties located in different states;[5] (4) the parties entered into the transaction contemplating that the shipment would travel in interstate commerce;[6] or (5) "the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce."[7]

Based on the Report of Investigation and the initial evidence submitted by Complainant, we were unable to determine whether the Department had jurisdiction over this matter. While Complainant alleges in its Complaint that the shipment was made in "contemplation of interstate commerce," Complainant did not submit any evidence to support this claim. Furthermore, Respondent asserted in its Answer that it does not operate in interstate commerce.[8] In an effort to determine

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[3] 7 U.S.C. 499a(b)(3).

[4] 7 U.S.C. 499a(b)(3).

[5] *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc*., 65 Agric. Dec. 1418 (2006).

[6] *Tulelake Potato Distributors, Inc. V. John M. Giustino d/b/a Grand Slam Produce,* 52 Agric Dec. 752 (1993).

[7] *The Produce Place v. United States Department of Agriculture,* 319 U.S. App D.C. 369 (1996).

[8] See Answer at p. 1.

whether the Department has jurisdiction in this matter, a Notice to Show Cause Why Complaint Should not be Dismissed was issued to both parties. In response to the Notice to Show Cause, Complainant submitted evidence in the form of an affidavit from Patrick Smith, president and 100% shareholder of Produce Supply, Inc.[9] Mr. Smith's affidavit indicates that Complainant ships produce to numerous destinations outside the State of California, including Arizona, Texas, Kentucky, Washington, and Canada.[10]

Based on the evidence submitted by Complainant, we conclude that Complainant conducts a substantial portion of business in interstate commerce. Because broccoli is a commodity commonly shipped in interstate commerce and this particular shipment was shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce, the shipment in question was in interstate commerce under the PACA. *See The Produce Place v. United States Department of Agriculture,* 319 U.S. App D.C. 369 (1996). The Department has interstate commerce jurisdiction in this matter and may properly resolve the pending dispute between Complainant and Respondent.

Having resolved the interstate commerce issue raised by Respondent, we will now consider Respondent's allegation that it accepted the broccoli crowns only after Complainant verbally agreed to change the price terms of the contract to $2.25 per carton. The party who claims the contract was modified has the burden of proof. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F. H. Hogue Prod. Co. v. Singer's sons,* 33 Agric. Dec. 451 (1974). The only evidence Respondent offers to support its allegation that the price terms of the contract were changed to $2.25 per carton is its statement to this

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[9] Complainant submitted additional evidence with its Motion in response to the Notice to Show Cause. Complainant's Motion in response to the Notice to Show Cause is being treated as a petition to reopen the hearing to take further evidence under Section 47.24(b) of the Rules of Practice (7 C.F.R. § 47.24(b)).

[10] Complainant also submitted invoices indicating that, in June of 2006, a shipment of carrots purchased by Complainant from Respondent was ultimately shipped to Complainant's customer in Alberta, Canada.

effect in its sworn Answer. While Respondent also states that it has telephone records to support this allegation, Respondent neglected to submit these records.

In response to Respondent's sworn allegation of a contract price modification, Complainant submitted additional evidence in the form of an Opening Statement Affidavit from its President and Sales Manager, Patrick Smith, wherein Mr. Smith asserts, in pertinent part, as follows:

> As I recall it was on March 15, 2007 that I personally sold 616 cartons of broccoli crowns to Mr. Guy Maggio of GEM Sales for a confirmed price of $4.25 per carton… At no time was I ever advised by Mr. Maggio that the product had condition problems. At no time was I ever advised by Mr. Maggio or did I ever receive from Mr. Maggio a USDA inspection on the 616 cartons of broccoli crowns. At all times I was expecting payment in full as invoiced totaling $2,618.00.

Respondent did not submit any additional evidence in response to Mr. Smith's sworn denial that the contract price of the broccoli crowns was modified. Moreover, we also note that after Respondent paid Complainant $2.25 per carton, or a total of $1,386.00, for the broccoli crowns, Complainant's Patrick Smith promptly sent Respondent a memo that reads as follows:

> I RECEIVED YOUR CHECK NO. 042376, DATED 4/13/07 FOR $5,867.30. PSI NO. P6873 FOR $2,618.00 WAS SHORT PAID BY $1,232.00. THIS AMOUNT IS DUE AND PAYABLE. APPARENTLY, YOU MADE AN UNAUTHORIZED DEDUCTION ON MY INVOICE NO. 6873. WE DID NOT AGREE TO ANY ADJUSTMENT ON THIS FILE. PLEASE PAY THE BALANCE DUE OF $1,232.00.[11]

Given the promptness with which Mr. Smith took exception to the payment received from Respondent, and in light of his testimony asserting that he was never advised of any condition problems with the

[11] See Complaint, Exhibit No. 3.

product and that he at all times expected payment in full as invoiced, we conclude that Respondent has failed to sustain its burden to prove by a preponderance of the evidence that Complainant agreed to reduce the price of the broccoli crowns to $2.25 per carton.

Having failed to establish that the contract price of broccoli crowns was modified, Respondent is liable to Complainant for the broccoli crowns it accepted at the agreed purchase price of $4.25 per carton, or $2,618.00. Respondent paid Complainant $1,386.00 for the broccoli crowns. Therefore, there remains a balance due Complainant from Respondent of $1,232.00.

Respondent's failure to pay Complainant $1,232.00 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. 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.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $1,232.00, with interest thereon at the rate of 0.69 % per annum from April 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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JAMES C. CONNER AND ALICIA ISAIS v. MCBRYDE PRODUCE, LLC D/B/A FARMERS SELECT.
PACA Docket No. R-09-033.
Decision and Order.
Filed January 13, 2010.

PACA-R -- Breach of Contract - Breach of warranty of merchantability - Cabbage.

A timely inspection of green cabbage, showing 35% quality defects (ranging 15% - 61%), and 3% yellowing, and 2% insect damage, for a checksum of 40% damage by quality and condition defects, including 8% serious damage by quality defects, was held to show a breach of the implied warranty of merchantability (U.C.C. § 2-314).

Patrice H. Harps, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Respondent, pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $13,839.02 in connection with eight truckloads of perishable agricultural commodities, consisting of cabbage and watermelon, shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto denying liability to Complainant, and asserting the loads in dispute did not all cross state lines in the course of interstate commerce.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered 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. Neither party filed any additional evidence or Briefs.

Findings of Fact

1. Complainant is a partnership comprised of James C. Conner and Alicia Isais doing business as Farmers Select, whose post office address is 34123 FM 490, Edinburg, Texas, 78541-6995. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, McBryde Produce, LLC, is a limited liability company, whose post office address is P.O. Box 1483, Uvalde, Texas, 78802-1483. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about April 10, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 175 (14-16 count) sacks of cabbage at $4.00 per sack f.o.b., or $700.00, plus $25.00 for pallets, for a total agreed price of $725.00, billed on invoice number 07-3005 in accordance with Respondent's purchase order number 07-572. (ROI, Ex. A, p. 4) Respondent paid Complainant $725.00 in full for the cabbage with its check number 1605, dated December 13, 2007. (ROI, Ex. G, p. 1-2)
4. On or about April 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of

Texas to Respondent, "AS PER BUYER," 200 sacks of jumbo cabbage at $4.00 per sack f.o.b., or $800.00, plus $25.00 for pallets, for a total agreed price of $825.00, billed on invoice number 07-3034 in accordance with Respondent's purchase order number 07-605. (ROI, Ex. A, p. 5) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on April 26, 2007, with instructions to maintain temperature of 34 degrees Fahrenheit. (Complaint, Ex. 27) Respondent paid Complainant $800.00 with its check number 1426, dated July 16, 2007, leaving an unpaid balance of $25.00. (ROI, Ex. A, p. 6)

5. On or about May 2, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 120 sacks of jumbo cabbage at $4.50 per sack f.o.b., or $540.00, plus $15.00 for pallets, for a total agreed price of $555.00, billed on invoice number 07-3044 in accordance with Respondent's purchase order number 07-611. (Complaint, Ex. 2-3) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on May 2, 2007, with instructions to maintain temperature between 32 to 34 degrees Fahrenheit. (Complaint, Ex. 3) Respondent resold the truckload of cabbage and diverted it to a customer in Denver, Colorado. Respondent paid Complainant $495.00 with its check number 1448, dated August 8, 2007, leaving an unpaid balance of $60.00. (Complaint, Ex. 4-5)

6. On or about May 10, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 753 cartons of red cabbage at $10.00 per carton f.o.b., for a total agreed price of $7,530.00, billed on invoice number 07-3063 in accordance with Respondent's purchase order number 07-623A. (Complaint, Ex. 6) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on May 10, 2007, with instructions to maintain temperature at 34 degrees Fahrenheit. (Complaint, Ex. 7) Respondent paid Complainant $3,738.25 with its check number 1448, dated August 8, 2007, leaving an unpaid balance of $3,791.75. (Complaint, Ex. 8)

7. On or about May 21, 2007, Complainant, by oral contract, sold to

Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 35 cartons of red cabbage at $9.75 per carton f.o.b., or $341.25, plus $5.00 for pallets, for a total agreed price of $346.25, billed on invoice number 07-3091A in accordance with Respondent's purchase order number 07-658. (Complaint, Ex. 1, and ROI, Ex. A, p. 14) Respondent paid Complainant $341.25 with its check number 1606, dated December 13, 2007. Though Respondent's check was short $5.00, Complainant accepted the check as payment in full for the red cabbage. (Complaint, Ex. 1, and ROI Ex. G, p. 3) Complainant also sold and shipped 350 cartons of green cabbage to Respondent in the same shipment, number 07-3091A, in accordance with Respondent's purchase order number 07-658. Complainant did not bill Respondent for the 350 cartons of green cabbage, which were rejected by Respondent's customer. (Answer, Ex. 34-38)

8. On May 24, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Oklahoma City, Oklahoma, on the 350 cartons of green cabbage mentioned in Finding of Fact number 7. The cabbage was loaded at the time of the inspection and the inspector verified the carton count. The pulp temperatures ranged from 45 to 46 degrees Fahrenheit at the time of the inspection. The inspection revealed the cabbage was affected by 35% quality defects (15% to 61% thrips injury or edema, insect), 3% yellowing, and 2% insect damage, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects. (Answer, Ex. 35)

9. On or about June 8, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 56-35 count bins (42,859 pounds) of seeded watermelons at $.095 per pound f.o.b., for a total agreed price of $4,071.61, billed on invoice number 07-3113 in accordance with Respondent's purchase order number 1005. (Complaint, Ex. 9) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 8, 2007, with instructions to maintain temperature

between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 10) Respondent resold the watermelons to a customer in Chicago, Illinois. (Answer, Ex. 5) Respondent paid Complainant $3,594.25 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of $477.36. (Complaint, Ex. 11)

10.On or about June 9, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 40,886 pounds of seedless watermelons (45 count bins) at $.128 per pound f.o.b., for a total agreed price of $5,233.41, billed on invoice number 07-3115 in accordance with Respondent's purchase order number 1007. (Complaint, Ex. 12) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 9, 2007, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 13) Respondent resold the watermelons to a customer in San Antonio, Texas, who rejected the watermelons to Respondent. Respondent then sold the watermelons to another customer in San Antonio, Texas. (Answer, Ex. 7-8) Respondent paid Complainant $825.00 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of $4,408.41. (Complaint, Ex. 14)

11.On or about June 13, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 58-45 count bins (41,843 pounds) of seeded watermelons at $.095 per pound f.o.b., for a total agreed price of $3,975.09, billed on invoice number 07-3117, in accordance with Respondent's purchase order number 1020. (Complaint, Ex. 15) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons to "AS PER BUYER" on June 13, 2007, in a trailer with license plate number 197445, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 16) On or about June 14, 2007, Respondent sold 58 bins of small red watermelons, to a customer in North Kansas City, Missouri, and shipped the watermelons

to a destination in Overland Park, Kansas, in a trailer with license plate number 361587, which was pulled by a tractor with license plate number 361018. (Answer, Ex. 10 and 13) The customer in Overland Park, Kansas, had the watermelons weighed (Answer, Ex. 9-15), and Respondent alleges the weight was 4,000 pounds short.[1] Respondent paid Complainant $3,524.59 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of $450.50. (Complaint, Ex. 17)

12.On or about June 15, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 58-35 count bins (41,984 pounds) of seeded watermelons at $.11 per pound, f.o.b., for a total agreed price of $4,618.24, billed on invoice number 07-3194 in accordance with Respondent's purchase order number 1038. (Complaint, Ex. 18) The corresponding bill of lading is signed by the truck driver, "Roldan R Gonzalez Rolgon Corp," as agent of Respondent and shows Complainant shipped the watermelons on June 15, 2007, in a trailer with license plates number C1434wFL, and with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 19) On or about June 17, 2007, Respondent sold 58 bins of watermelons, to Wal-Mart, New Caney, Texas, which rejected the watermelons to Respondent on June 18, 2007. (Answer, Ex. 19, and ROI, Ex. C, p. 29) Respondent then resold the 58 bins of watermelons to Roger Ramos Produce, Houston, Texas. Respondent's invoice number 07-1039 shows it used the same trucking company, Rolgon, as shown on Complainant's original invoice. (Answer, Ex. 17) Respondent paid Complainant $1,932.58 with its check number 1132, dated August 9, 2007, leaving an unpaid balance of $2,685.66. (Complaint, Ex. 20)

13.On June 18, 2007, the U.S.D.A. issued an inspection report at

[1] There is no U.S.D.A. inspection report in the case file and no other evidence in the case file to account for the 4,000 pound discrepancy in the weight of the watermelons.

Respondent's customer's place of business, Roger Ramos Produce, Houston, Texas, on 58 bins of watermelons. The inspector verified the bin count of the watermelons, which were loaded at the time of the inspection in a trailer with identification number 2141CB FL, which does not match the truck identification shown on the bill of lading. (Finding of Fact 12) In addition, the weight of the watermelons shown on the inspection report (39,150 pounds) does not match the (41,984 pounds) invoiced weight.[2] (Finding of Fact 12) The inspection was restricted to the 25 bins nearest the rear door of the trailer. The pulp temperatures ranged from 60 to 62 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by an average of 16% quality defects (scars and rind worm injury), 4% transit rubs, and 2% decay, for a total of 22% damage by quality and condition defects, including 5% serious damage by quality and condition defects. (Complaint, Ex. 22)

14.On or about June 16, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 54-45 count bins (38,294 pounds) of seeded watermelons at $.095 per pound f.o.b., for a total agreed price of $3,637.93, billed on invoice number 07-3164 in accordance with Respondent's purchase order number 1022. (Complaint, Ex. 23) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 16, 2007, in a trailer with license plate number 78810/465085, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (ROI, Ex. A, p. 26) On or about June 16, 2007, Respondent sold 54 bins of red seeded watermelons, to a customer in Overland Park, Kansas, in the same trailer used by Complainant with license plate numbers 78810/465085. (Answer, Ex. 30) Respondent paid Complainant $1,697.59 with its check number 11283, dated September 18, 2007, leaving an unpaid balance of $1,940.34. (Complaint, Ex. 25)

15.On June 18, 2007, the U.S.D.A. issued an inspection report at

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[2] There is no evidence in the case file to account for the discrepancy in the Truck identification number or the weight of the truckload of watermelons.

Respondent's customer's place of business in Overland Park, Kansas, on 54 bins (38,450 pounds) of seeded watermelons. This weight does not match the (38,294pounds) invoiced weight of the watermelons.[3] (Fact number 14) The watermelons were unloaded at the time of the inspection and the inspector verified the bin count. The pulp temperatures ranged from 62 to 64 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by an average of 19% quality defects (rind worm injury), 3% bruising, and 3% decay, for a total of 25% damage by quality and condition defects, including 3% serious damage by condition defects. (Answer, Ex. 27)
16.The informal complaint was filed on October 20, 2007, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for eight truckloads of perishable agricultural commodities, consisting of cabbage and watermelon, allegedly sold and shipped f.o.b. to Respondent in the course of interstate commerce. Complainant states Respondent accepted all of the vegetables in compliance with the contracts of sale. Complainant originally filed its informal complaint with the Department claiming $14,910.27 was due on ten truckloads of fruits and vegetables,[4] but Complainant has since accepted $1,071.25 from Respondent as payment for two of the truckloads and has thereby reduced the amount of its Complaint to $13,839.02.[5] In support of its allegations, Complainant submitted copies

[3] There is no evidence in the case file to account for the discrepancy in the weight of the truckload of watermelons.

[4] ROI, Ex. A, p. 1-3.

[5] Complaint, ¶¶4-10, and Ex. 1.

of its receivables report, invoices, and bills of lading.[6]

In response to Complainant's allegations, Respondent submitted a sworn Answer generally denying the allegations and asserting the following:

> The loads in dispute did not all cross state lines in the course of interstate commerce. McBryde load #07-0623A, 07-1007 and 07-1030 were all loaded at a loading point in the state of Texas and delivered to a delivery point in the state of Texas. There fore [*sic*] these loads were not in the course of interstate commerce.[7]

We will first consider the jurisdictional defense asserted by Respondent, because Respondent's success or failure in proving this defense will determine whether we are able to consider all of the matters in dispute. Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby,* 26 Agric. Dec. 299 (1967). Complainant has the burden of establishing that the Department has jurisdiction over the disputed transactions. This burden can be met by proving that the shipments were sold in or in contemplation of interstate commerce by providing adequate evidence that: (1) the shipments actually moved from a state to any place outside that state;[8] (2) the shipments moved between points within the same state but through any place outside that state;[9] (3) the transactions were negotiated by parties located in different states;[10] (4) the parties entered into the transactions contemplating that the shipments

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[6] Complaint, Ex. 1-28, and ROI, Ex. A, p. 4-27.

[7] Answer, ¶7.

[8] See, 7 U.S.C. 499a(b)(3).

[9] *Id.*

[10] *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc.*, 65 Agric. Dec. 1418 (2006).

would travel in interstate commerce;[11] or (5) "the shipments are of a type of produce that commonly moves in interstate commerce and were shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce."[12]

Copies of invoices, bills of lading, and inspection reports attached by Respondent to its Answer show it sells and ships produce to numerous destinations outside of the state of Texas, including the states of Colorado, Illinois, Kansas, Missouri, and Oklahoma.[13] Similar evidence showing Respondent sells and ships produce to numerous destinations outside of the state of Texas, including the states of Colorado, Illinois, Kansas, Missouri, and Oklahoma was submitted by the parties in the course of the Department's informal proceedings and is contained in the ROI.[14]

Based on the evidence submitted by the parties, we conclude that Respondent conducts a substantial portion of its business in interstate commerce. Cabbage and watermelons are produce items commonly shipped in interstate commerce and these particular produce items were purchased for resale by a produce dealer doing a substantial portion of its business in interstate commerce. Therefore, all of the shipments in question were in interstate commerce. The Department has jurisdiction in this matter and may properly resolve the pending dispute between Complainant and Respondent.

Complainant's invoices and bills of lading in evidence show Uvalde, Texas, as Respondent's billing address, but show the contract destinations were, "AS PER BUYER," which indicates Complainant was aware Respondent would resell the vegetables and the ultimate

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[11] *Tulelake Potato Distributors, Inc. V. John M. Giustino d/b/a Grand Slam Produce,* 52 Agric Dec. 752 (1993).

[12] *The Produce Place v. United States Department of Agriculture,* 91 F.3d 173 (1996), *cert. den*., 519 U.S. 1116 (1997).

[13] Answer, Ex. 1-6, 9-15, 27-30, and 31-38.

[14] ROI, Ex. C, p. 8-15, 21-28, 41-47, and 51-53.

destinations would not be Respondent's address in Uvalde, Texas. On this basis, we conclude the warranty of suitable shipping condition was applicable for all of the shipments in question to the ultimate destinations assigned by Respondent, which could be a greater distance than Uvalde, Texas. *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991).

In f.o.b. sales the warranty of suitable shipping condition is applicable.[15] Suitable shipping condition is defined in the Regulations (7 C.F.R. § 46.43(j)) as meaning:

> . . . that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[16]

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[15] See, 7 C.F.R. § 46.43(i), which defined f.o.b. as meaning ". . . 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 the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

[16] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See, Williston, *Sales §* 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination

(continued...)

Having resolved the interstate commerce issue and the applicability of the warranty of suitable shipping condition to all of the shipments in question, we will now consider the testimony and evidence submitted by the parties in relation to the ten invoices originally submitted by Complainant for our consideration, as follows:

Complainant's invoice number 07-3005

This shipment involves 175 (14-16 count) sacks of cabbage purchased by Respondent for a total agreed price of $725.00 f.o.b.[17] Respondent paid Complainant $725.00 in full.[18] Therefore this invoice has been resolved in full.

Complainant's invoice number 07-3034

This shipment involves 200 sacks of jumbo cabbage Respondent purchased for a total agreed price of $825.00 f.o.b.[19] Respondent paid Complainant $800.00, leaving an unpaid balance of $25.00,[20] which Complainant seeks to recover in this proceeding. Respondent does not

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[16](...continued)
without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce,* 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

[17] ROI, Ex. A, p. 4.

[18] Complaint, Ex. 1, and ROI, Ex. G, p. 1-2.

[19] Complaint, ¶4a, and ROI, Ex. A, p. 5.

[20] Complaint, ¶4a, and ROI, Ex. A, p. 6.

deny accepting the cabbage.

In defense of its failure to make payment in full, Respondent asserts in its Answer that it was not aware of the $25.00 pallet charge until it received Complainant's invoice.[21] We note, Respondent does not allege it promptly objected to the $25.00 charge. Failure to promptly complain as to the terms set forth on an invoice is considered strong evidence such terms were correctly stated. *Pemberton Produce, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 1630 (1983). On this basis, we find Respondent liable to Complainant for the unpaid balance of $25.00.

Complainant's invoice number 07-3044

This shipment involves 120 sacks of jumbo cabbage Respondent purchased for a total agreed price of $555.00 f.o.b.[22] Respondent alleges the cabbage had brown and yellow leaves, and looked old on arrival in Denver, Colorado.[23] Respondent, however, has not provided any evidence it attempted to reject any of the cabbage to Complainant. Failure to reject produce is an act of acceptance.[24] A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.,* 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

Respondent paid Complainant $495.00, leaving an unpaid balance of

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[21] Answer, ¶4a.

[22] Complaint, ¶4b, and Ex. 2.

[23] Answer, ¶4b, and Ex. 1.

[24] See, 7 C.F.R. § 46.2 (dd)(3).

$60.00,[25] which Complainant seeks to recover in this proceeding. Respondent did not submit any evidence to establish a breach of contract by Complainant, but asserts in its Answer:

This load had some tipburn in the cabbage. This was reported to Mr. Conner at 9:00AM on May 5, 2007. It was agreed between me and Mr. Conner not to take an inspection on the 120 bags and let the customer handle the cabbage on an open basis. . .[26]

The party who claims the contract was modified has the burden of proof. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F. H. Hogue Prod. Co. v. Singer's Sons*, 33 Agric. Dec. 451 (1974). Finding no evidence that Complainant breached the contract or that Complainant agreed to modify the contract to open terms, we find Respondent liable to Complainant for the unpaid balance of $60.00.

Complainant's invoice number 07-3063

This shipment involves 753 cartons of red cabbage Respondent purchased for a total agreed price of $7,530.00 f.o.b.[27] Respondent paid Complainant $3,738.25, with check number 1448, leaving an unpaid balance of $3,791.75,[28] which Complainant seeks to recover in this proceeding. Respondent does not deny accepting the cabbage, but asserts the following defense in its Answer, "This load was originally billed at $10.00 per box I told Mr. Conner that I could only pay $8.00

[25] Complaint, ¶4b, and Ex. 4-5.

[26] Answer, ¶4b.

[27] Complaint, ¶4c, and Ex. 6.

[28] Complaint, ¶4c, and Ex. 8.

and he agreed to the $8.00 price."[29] The party who claims the contract was modified has the burden of proof.[30]

Respondent has not provided any evidence Complainant breached the contract or that Complainant agreed to modify the contract but deducted the amount of the alleged contract modification, $2.00 x 753 cartons = $1,506.00, plus $2,285.75 in alleged damages arising from green cabbage purchased in transaction number 07-3091A discussed below, for a total deduction of $3,791.75. On this basis we find Respondent liable to Complainant for the unpaid balance of $3,791.75.

Complainant's invoice number 07-3091A

This shipment involves 35 cartons of red cabbage Respondent purchased for a total agreed price of $346.25 f.o.b.[31] Respondent paid Complainant $341.25, which Complainant accepted as payment in full for the red cabbage.[32]

Respondent also purchased 350 cartons of green cabbage in the same transaction, which Complainant did not include on the invoice because Respondent's customer rejected the green cabbage, and Respondent rejected the cabbage back to Complainant. In its Answer, Respondent alleges Complainant breached the contract due to the condition of the green cabbage upon arrival.[33]

On May 24, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Oklahoma City, Oklahoma, on the 350 cartons of green cabbage. The green cabbage was loaded at the time of the inspection and the inspector verified the carton count. The pulp temperatures ranged from 45 to 46 degrees Fahrenheit

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[29] Answer, ¶4c.

[30] *Regency Packing Co., Inc.*, 42 Agric. Dec. 2042; *F.H. Hogue Prod. Co.*, 33 Agric. Dec. 457.

[31] Complaint, Ex. 1, and ROI, Ex. A, p. 14.

[32] Complaint, Ex. 1, and ROI, Ex. G, p. 1 and 3.

[33] Answer, ¶10, and Ex. 34-38, and ROI, Ex. G, p. 1 and 3.

at the time of the inspection. The inspection revealed the green cabbage was affected by an average of 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), 3% yellowing, and 2% insect, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects.[34]

To determine whether a commodity was in suitable shipping condition based on a federal inspection at destination, we normally look at the shipping point tolerances for defects set forth in the U.S. grade standards for the commodity, and we apply an additional allowance to the tolerances set forth in the standards to allow for normal deterioration in transit. We consulted the *United States Standards for Grades of Cabbage*,[35] which specifies defect tolerance at shipping point for cabbage sold under the U.S. No. 1 Grade, as follows:

> . . . not more than a total of 10 percent, by weight, of the heads in any lot may fail to meet the requirements of this grade, but not more than one-fifth of this amount, or 2 percent, shall be allowed for soft decay.

The green cabbage in question was affected by 5% condition defects. Finding no evidence that the green cabbage was sold with a grade designation, only the tolerances for condition defects set forth in the U.S. Grade Standards are relevant to determining whether the green cabbage was in suitable shipping condition. We need not consider the suitable shipping allowance, since the 5% condition defects revealed by the federal inspection fall within the shipping point tolerances specified in the standards. However, the inspection also disclosed the green cabbage was affected by 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), which are permanent defects not normally

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[34] Answer, Ex. 35.

[35] See, 7 C.F.R. §§ 51.450 - 51.464 the *United States Standards for Grades of Cabbage* available on the Internet at: http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5050254.

relevant to produce sold without a grade specification.[36] There are, however, instances where permanent defects are sufficiently extensive to cause the product to be unmerchantable, which would be a breach of the implied warranty of merchantability. For goods to be merchantable they must pass without objection in the trade under the contract description.[37]

The common law warranty of merchantability is applicable only at shipping point. *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982); and *J. D. Bearden Produce Company v. Pat's Produce Company*, 12 Agric. Dec. 682 (1953). Therefore, when we look at a destination inspection to establish a breach of the warranty of merchantability, the defects disclosed by the inspection must be sufficiently severe so as to allow us to conclude with reasonable certainty that the produce was non-conforming at shipping point.[38]

In *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc.*, 53 Agric. Dec. 887 (1994) a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, with a range of 7 to 79%, was held to show a breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade.

Similarly, here, where the green cabbage was sold f.o.b. without reference to any grade and a timely inspection revealed 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), and 3% yellowing, and 2% insect, for a total of 40% damage by quality and

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[36] Permanent or quality defects may be relevant to the determination of whether there is a breach of contract for produce sold without a grade specification where the defects are sufficiently extensive to establish that the produce is not merchantable. *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc*., 53 Agric. Dec. 887 (1994), where a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, ranging 7% to 79%, was held to show a breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade. See, also, *Teixeira Farms, Inc. v. Community-Suffolk, Inc.*, 52 Agric. Dec. 1700 (1993).

[37] See, U.C.C. § 2-314(2)(a).

[38] *Martori Bros. Distributors v. Houston Fruitland, Inc*., 55 Agric. Dec. 1331 (1996).

condition defects, including 8% serious damage by quality defects,[39] we find the defects are sufficiently severe for us to conclude with reasonable certainty the cabbage was non-conforming at shipping point, and to find that Complainant breached the warranty of merchantability.[40] Rejection of the green cabbage by Respondent's customer was justified. Where a load of produce is effectively rejected the seller has the burden of proving it complied with the contract. *Bud Antle v. Bohack,* 32 Agric. Dec. 1589 (1973). We assume Complainant agrees the green cabbage did not comply with the contract since Complainant did not bill Respondent for the green cabbage.

Respondent is claiming damages from incidental expenses resulting from Complainant's breach of contract.[41] We find Respondent is entitled to deduct such damages, including $125.00 for the cost of the federal inspection,[42] and $1,260.00 for inbound freight for the 350 cartons of cabbage at $3.60 per carton,[43] for total damages of $1,385.00. Since Respondent's customer rejected the green cabbage, we do not understand Respondent's deduction for expenses relating to truck detention and layover, unloading and reloading, and extra drops. We find that these expenses are not sufficiently explained and documented, and we find no evidence that Complainant agreed to be liable for these expenses. Therefore, these expenses should be disallowed.[44]

A party may offset losses from one transaction by deducting them from payment due on another. *Phillip Richard Weller d/b/a Richard Weller v. William P. George d/b/a William King George,* 41 Agric. Dec.

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[39] Complaint, Ex. 8, and Answer, ¶10, and Ex. 35.

[40] See, U.C.C. § 2-314.

[41] See, U.C.C. § 2-715(1).

[42] Answer, Ex. 35.

[43] Answer, Ex. 36.

[44] Answer, Ex. 34-38.

294 (1982); *McMillan Brokerage Co. v. Bushman Growers Sales, Inc.*, 32 Agric. Dec. 950 (1973). However, as previously discussed, Respondent deducted its total alleged damages of $2,285.75 from a payment made to Complainant with its check number 1448, dated August 8, 2007,[45] for Complainant's invoice number 07-3063. We find Respondent's allowable deduction for damages is only $1,385.00.

Complainant's invoice number 07-3113

This shipment involves 56-35 count bins (42,859 pounds) of seeded watermelons Respondent purchased for a total agreed price of $4,071.61 f.o.b.[46] Respondent paid Complainant $3,594.25, leaving an unpaid balance of $477.36,[47] which Complainant seeks to recover in this proceeding.

In defense of its failure to pay Complainant in full, Respondent alleges in its Answer that four bins of watermelons were leaking upon arrival in Chicago, Illinois, and were lost due to shrinkage during repacking, which it alleges Complainant acknowledged.[48]
Respondent has not provided any evidence to support this allegation and has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce in a reasonable time is an act of acceptance.[49] We conclude Respondent accepted the truckload of watermelons. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages

[45] Complaint, ¶4c, and Ex. 8, and Answer, Ex. 34.

[46] Complaint, ¶4d, and Ex. 9.

[47] Complaint, ¶4d, and Ex. 11.

[48] Answer, ¶4d, and Ex. 2.

[49] See, 7 C.F.R. § 46.2 (dd)(3).

resulting from any breach of contract by the seller.[50] The burden to prove a breach of contract rests with the buyer of accepted goods.[51]

Respondent has not provided any evidence Complainant breached the contract or agreed to be liable for any watermelons lost due to shrinkage in repacking. On this basis, we find Respondent liable to Complainant for the unpaid balance of $477.36.

Complainant's invoice number 07-3115

This shipment involves 40,886 pounds of seedless watermelons (45 count bins) Respondent purchased for a total agreed price of $5,233.41 f.o.b.[52] Respondent resold the watermelons to a customer in San Antonio, Texas, who rejected the watermelons to Respondent. Following its customer's rejection, Respondent sold the watermelons to another customer in San Antonio, Texas.[53] Respondent paid Complainant $825.00, leaving an unpaid balance of $4,408.41,[54] which Complainant seeks to recover in this proceeding. Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance.[55] We conclude Respondent accepted the truckload of watermelons.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of

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[50] *Ocean Breeze Export, Inc*., 60 Agric. Dec. 840; *World Wide Imp-Ex,* Inc., 47 Agric. Dec. 353.

[51] See, U.C.C. § 2-607(4). *See, also, The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

[52] Complaint, ¶4e, and Ex. 12.

[53] Answer, ¶4e, and Ex. 7-8.

[54] Complaint, ¶4e, and Ex. 14.

[55] See, 7 C.F.R. § 46.2 (dd)(3).

contract by the seller.[56] The burden to prove a breach of contract rests with the buyer of accepted goods.[57] Respondent has not provided any evidence to establish Complainant breached the contract. On this basis, we find Respondent liable to Complainant for the unpaid balance of $4,408.41.

Complainant's invoice number 07-3117

This shipment involves 58-45 count bins (41,843 pounds) of seeded watermelons Respondent purchased for a total agreed price of $3,975.09 f.o.b.[58] The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons to a final destination "AS PER BUYER" on June 13, 2007, in a trailer with license plate number 197445.[59]

On June 14, 2007, Respondent sold 58 bins of red watermelons, to a customer in North Kansas City, Missouri, with a final destination of Overland Park, Kansas, which Respondent shipped in a trailer with license plate number 361587, and pulled by a tractor with license plate number 361018.[60] Respondent's customer had the watermelons weighed,[61] and Respondent alleges the weight was 4,000 pounds short.[62] No U.S.DA. inspection report is contained in the case file. Respondent

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[56] *Ocean Breeze Export, Inc*., 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

[57] See, U.C.C. § 2-607(4). *See, also, The Grower-Shipper Potato Co*., 28 Agric. Dec. 511.

[58] Complaint, ¶4f, and Ex. 15.

[59] Complaint, Ex. 16.

[60] Answer, Ex. 10 and 13.

[61] Answer, ¶4f, and Ex. 9-15.

[62] See, n. 1.

paid Complainant $3,524.59, leaving an unpaid balance of $450.50,[63] which Complainant seeks to recover in this proceeding.

Respondent has not provided any evidence it attempted to reject any of the watermelons on the original shipment to Complainant. Failure to reject produce in a reasonable time is an act of acceptance.[64] We therefore conclude Respondent accepted the original truckload of watermelons. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller.[65] The burden to prove a breach of contract rests with the buyer of accepted goods.[66]

We note the carrier's license plate numbers recorded on Respondent's scale tickets do not match the license plates recorded on Complainant's bill of lading. On this basis, we are unable to conclude with reasonable certainty that the identity of the bins of watermelons Respondent's customer had weighed matches the identity of the bins of watermelons Complainant shipped on a different truck. Furthermore, Complainant states the following in its Complaint, ". . . unauthorized deductions were made without any notification. . ."[67]

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194 (1985); *Granada Marketing Co. v. Ben Gatz Co.,* 37 Agric. Dec. 448 (1978).

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[63] Complaint, ¶4f and Ex. 17.

[64] See, 7 C.F.R. § 46.2 (dd)(3).

[65] *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc*., 47 Agric. Dec. 353.

[66] See, U.C.C. § 2-607(4). *See, also, The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

[67] Complaint, ¶4(f).

The purpose of the requirement is to defeat commercial bad faith; i.e., if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence. *A. C. Carpenter, Inc. v. Boyer Potato Chips*, 28 Agric. Dec. 1557, 1560 (1969).

In the instant case, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. Finding no evidence Complainant breached the contract, we find Respondent is liable to Complainant for the unpaid balance of $450.50.

Complainant's invoice number 07-3194

This shipment involves 58-35 count bins (41,984 pounds) of seeded watermelons Respondent purchased for a total agreed price of $4,618.24 f.o.b.[68] The corresponding bill of lading is signed by the truck driver, "Roldan R Gonzalez Rolgon Corp, as agent of Respondent and shows Complainant shipped the watermelons on June 15, 2007, in a trailer with license plates number C1434wFL, and with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times.[69] On or about June 17, 2007, Respondent sold 58 bins of watermelons, to Wal-Mart, New Caney, Texas, which rejected the watermelons to Respondent on June 18, 2007.[70] Respondent resold the truckload of watermelons to Roger Ramos Produce, Houston, Texas. Respondent's invoice number 07-1039 shows it used the same trucking company, Rolgon, as shown on

[68] Complaint, ¶4g, and Ex. 18.

[69] Complaint, Ex. 19.

[70] Answer, Ex. 19, and ROI, Ex. C, p. 29.

Complainant's original invoice.[71] Respondent paid Complainant $1,932.58 with its check number 1132, dated August 9, 2007, leaving an unpaid balance of $2,685.66,[72] which Complainant seeks to recover in this proceeding.

On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business, Roger Ramos Produce, Houston, Texas, on 58 bins of watermelons. The inspector verified the bin count of the watermelons, which were loaded at the time of the inspection in a trailer with identification number 2141CB FL, which does not match the truck identification number shown on the bill of lading. In addition, the weight of the watermelons shown on the inspection report (39,150 pounds) does not match the (41,984 pounds) invoiced weight.[73] The inspection was restricted to the 25 bins nearest the rear door of the trailer. The pulp temperatures ranged from 60 to 62 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by a total of 22% damage by quality and condition defects, including 5% serious damage by quality and condition defects.[74]

Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance.[75] A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from

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[71] Answer, Ex. 17.

[72] Complaint, Ex. 20.

[73] See, n. 2.

[74] Complaint, Ex. 22.

[75] See, 7 C.F.R. § 46.2 (dd)(3).

any breach of contract by the seller.[76] The burden to prove a breach of contract rests with the buyer of accepted goods.[77]

Before we can consider whether the evidence supports a breach of contract by Complainant, we must consider the following statement by Complainant in its Complaint:

> No trouble was reported on this file, . . . federal inspection provided does not match our load's identification . . . please note that inspection DOES NOT match our load's license plates and/or weight shipped; therefore, leaving us skeptical about this inspection . . .[78]

In its defense, Respondent asserts the following in its sworn Answer: The inspection taken on Farmers Select 07-3194 on the said commodity. Was taken in a timely manner and Famers Select was notified of the actions. The license plate number was written down incorrectly at the loading dock. Enclosed in (Exhibit 19-22) you will notice that the same carrier name is on all the bill and rejection notice.[79]

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.,* 42 Agric. Dec. 1194 (1985); *Granada Marketing Co. v. Ben Gatz Co.,* 37 Agric. Dec. 448 (1978).

The purpose of the requirement is to defeat commercial bad faith; *i.e.*, if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party

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[76] *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

[77] See, U.C.C. § 2-607(4). *See, also, The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

[78] Complaint, ¶¶4(g) and 5.

[79] Answer, ¶5.

upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence. *A. C. Carpenter, Inc. v. Boyer Potato Chips*, 28 Agric. Dec. 1557, 1560 (1969).

In *Quail Valley Marketing, Inc. v. John A. Cottle, d/b/a Valley Fresh Produce,* 60 Agric. Dec. 318 (2000), where the buyer knew how to contact the seller, and had the inspection results but delayed conveying them while sales were made, we found the buyer did not act in good faith, and notice of breach was not timely because the seller was prevented from procuring a U.S.D.A. appeal inspection.
Similarly, here, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. We find Respondent is liable to Complainant for the unpaid balance of $2,685.66.

Complainant's invoice number 07-3164

This shipment involves 54-45 count bins (38,294 pounds) of seeded watermelons Respondent purchased for a total agreed price of $3,637.93 f.o.b.[80] The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 16, 2007, in a trailer with license plate number 78810KS/465085, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times.[81] On or about June 16, 2007, Respondent sold 54 bins of red seeded watermelons, to a customer in Overland Park, Kansas, in the same trailer used by Complainant with license plate

[80] Complaint, ¶4h, and Ex. 23.

[81] ROI, Ex. A, p. 26.

numbers 78810/465085.[82] Respondent alleges problems with the watermelons on arrival.[83] Respondent paid Complainant $1,697.59, leaving an unpaid balance of $1,940.34,[84] which Complainant seeks to recover in this proceeding.

On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Overland Park, Kansas, on 54 bins (38,450 pounds) of watermelons. This weight does not match the (38,294 pounds) invoiced weight of the watermelons.[85] The watermelons were unloaded at the time of the inspection and the inspector verified the bin count. The pulp temperatures ranged from 62 to 64 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by a total of 25% damage by quality and condition defects, including 3% serious damage by condition defects.[86]

Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance.[87] 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.[88] The burden to prove a breach of contract rests with the buyer of accepted goods.[89]

Before we can consider whether the evidence supports a breach of

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[82] Answer, Ex. 30.

[83] Answer, Ex. 28-29.

[84] Complaint, ¶4h, and Ex. 25.

[85] See, n. 3.

[86] Answer, Ex. 27.

[87] See, 7 C.F.R. § 46.2 (dd)(3).

[88] *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc*., 47 Agric. Dec. 353.

[89] See, U.C.C. § 2-607(4). *See, also, The Grower-Shipper Potato Co*., 28 Agric. Dec. 511.

contract by Complainant, we must consider the following statement by Complainant in its Complaint:

> . . . (no trouble reported on this load, no federal inspection provided, unauthorized deduction).[90]

In its defense, Respondent asserts the following in its sworn Answer:

> Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy.[91] The purpose of the requirement is to defeat commercial bad faith; i.e., if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence.[92]

In *Quail Valley Marketing, Inc. v. John A. Cottle, d/b/a Valley Fresh Produce,* 60 Agric. Dec. 318 (2000), where the buyer knew how to contact the seller, and had the inspection results but delayed conveying them while sales were made, we found the buyer did not act in good faith, and notice of breach was not timely because the seller was prevented from procuring a U.S.D.A. appeal inspection. Similarly, here, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. However, Respondent asserts in its sworn Answer that Complainant agreed to

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[90] Complaint, ¶4(h).

[91] *Produce Specialists of Arizona, Inc*., 42 Agric. Dec. 1194; *Granada Marketing Co*., 37 Agric. Dec. 448.

[92] *A. C. Carpenter, Inc*., 28 Agric. Dec. 1557, 1560.

let its customer handle the watermelons on an open basis.[93] The party who claims the contract was modified has the burden of proof.[94] Respondent has not provided any evidence to prove Complainant agreed to amend any part of the contract. Finding no evidence Complainant breached the contract or agreed to amend the terms thereof, we find Respondent liable to Complainant for the unpaid balance of $1,940.34.

The following table summarizes our findings, which were based upon the statements and evidence submitted by the parties for the ten transactions discussed above:

Shipment Number	Invoice or Contract Number	Respondent's Purchase Order Number	Agreed Contract Price	Amount Paid by Respondent	Respondent's Damages	Amount Respondent owes to Complainant
1	07 3005	572	$725.00	$725.00		$0.00
2	07 3034	605	$825.00	$800.00		$25.00
3	07 3044	611	$555.00	$495.00		$60.00
4	07 3063	623A	$7,530.00	$3,738.25		$3,791.75
5	07 3091A	558	$346.25	$346.25	$1,385.00	($1,385.00)
6	07 3113	1005	$4,071.61	$3,594.25		$477.36
7	07 3115	1007	$5,233.41	$825.00		$4,408.41
8	07 3117	1020	$3,975.09	$3,524.59		$450.50
9	07 3194	1038	$4,618.24	$1,932.58		$2,685.66
10	07 3164	1022	$3,637.93	$1,697.59		$1,940.34
			$31,517.53	$17,678.51	$1,385.00	$12,454.02

As shown on the table above, after we deducted Respondent's total payments of $17,678.51, and Respondent's damages of $1,385.00 from the total agreed contract price of $31,517.53, we find Respondent liable

[93] Answer, ¶4h.

[94] *Regency Packing Co., Inc*., 42 Agric. Dec. 2042; *F. H. Hogue Prod. Co*., 33 Agric. Dec. 451.

to Complainant in the amount of $12,454.02 for the mixed vegetables Respondent purchased from Complainant in the ten transactions.

Respondent, in further defense of its failure to pay this amount, asserts it is owed $3,876.48 by Complainant based upon a separate and unrelated transaction with Complainant that occurred on August 29, 2007, in accordance with its purchase order number 07-1575.[95] This transaction was not included by Complainant during the Department's informal or formal proceedings. Respondent is thereby asserting a Counterclaim, which must be accompanied by the required handling fee,[96] which Respondent did not submit. Therefore, we are unable to hear Respondent's Counterclaim for $3,876.48.

Respondent's failure to pay Complainant $12,454.02 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires 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, the Secretary also has the duty, where appropriate, to award interest. *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 to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

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[95] Answer, ¶10.

[96] See, 7 C.F.R. §47.8(a).

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 $12,454.02, with interest thereon at the rate of 0.41 % per annum from July 1, 2007, until paid, plus the amount of $300.00.
Copies of this Order shall be served upon the parties.
Done at Washington DC.

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BANACOL MARKETING CORPORATION v. JARD MARKETING CORPORATION.
PACA Docket No. RD–09-164.
Decision and Order.
Filed January 22, 2010.

PACA – Jurisdiction – Consent Injunction – Failure to Notify.

A Consent Injunction issued by a federal district court in a trust proceeding brought pursuant to section 5(c) of the Perishable Agricultural Commodities Act (7 U.S.C. 499e(c)) is given effect in reparation proceedings with proper notice to the Secretary. Where proper notice is given, reparation actions before the Secretary may be stayed. Where parties fail to provide the Secretary with proper notice of a Consent Injunction before the Secretary's reparation order becomes final, the Secretary lacks jurisdiction to consider a petition to reopen or request to vacate the order.

Delisle Warden, Presiding Officer.
Mark A. Amendola, Counsel for Complainant.
Steven C. Reingold, Counsel for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Order Denying Parties' Request to Set Aside or Vacate Default Order

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.;* hereinafter "PACA"). On July, 2, 2009, a Default Order was issued ordering Jard Marketing Corporation ("Respondent") to pay Banacol Marketing Corporation ("Complainant") $246,540.00, with interest thereon at the rate of 0.48 percent per annum from May 1, 2009 until paid, plus $500.00. On August 19, 2009, Complainant and Respondent filed correspondence petitioning the Secretary to set aside the July 2, 2009 Default Order.

In their respective requests, Complainant and Respondent give the Secretary notice of a pending civil action in the U.S. District Court for the District of Massachusetts in which Respondent is a defendant.[1] Respondent argues that the Secretary did not have jurisdiction to issue a default order in this proceeding because all actions by claimants based on unpaid produce debt pending before the Secretary (including the reparation case) were enjoined by a Consent Injunction and Agreed Order Establishing PACA Trust Claims Procedure issued in the district court proceeding on April 27, 2009 (the "Consent Injunction"), which preceded the issuance of the Default Order. Respondent claims that the Consent Injunction, specifically ¶35 thereof, divested the Secretary of jurisdiction to issue the Default Order.[2] Complainant, in its request, stated that a PACA Trust claim was filed on behalf of the Complainant in the aforesaid U.S. District Court case on June 10, 2009. Complainant further stated that its counsel was not informed of the reparation proceeding until August 6, 2009, and requested that the Secretary set aside the July 2, 2009 Default Order.

The Consent Injunction, per its terms, stays actions pending before the Secretary at the time of issuance. It must be noted that the Consent

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[1] *John Cerasuola Co., Inc., et al. v. Jard Marketing Corp., et al.,* Case No. 1:09-cv-10553-NG.

[2] Respondent cites to ¶35 of the Consent Injunction which states:
Any and all pending action by or on behalf of other persons or entities against JARD Marketing, its officers or employees, which arise under or relate to the trust provisions of PACA are hereby stayed and all subsequent actions by any unpaid seller of Produce under the trust provisions of PACA to JARD Marketing are hereby barred.

Injunction was issued more than two months prior to the issuance of the Secretary's Default Order. At the time of issuance of the Default Order, the Secretary had no knowledge of the Consent Injunction. At the time of the issuance of the Default Order, Complainant and Respondent were both parties to the district court action and this reparation proceeding. It was incumbent upon Complainant or Respondent to notify the Secretary of the Consent Injunction in order for that injunction to have any affect on the procedures followed in this case. Without notification of the issuance of the Consent Injunction and its terms, this reparation proceeding ran its normal course. Respondent's default in filing a timely answer to the Complaint herein warranted the issuance of the Default Order. If the Secretary had been notified of the Consent Injunction prior to the issuance of the Default Order, he would have given effect to the district court's injunction and stayed the proceeding at that time.[3]

Respondent's request contains several arguments challenging the issuance of the Default Order, including that the Secretary did not have jurisdiction to issue the Default Order at all. However, at this juncture, the pivotal issue is whether the Secretary has jurisdiction to consider the parties' respective requests. We find that the Secretary does not have jurisdiction to rule on the parties' requests.

In accordance with section 47.4 of the Rules of Practice (7 C.F.R. §47.4), the Default Order and service letter were mailed to Respondent at its last known business address by commercial mail delivery service (Federal Express). The express mail package was delivered on July 6, 2009, and Respondent is deemed to have received it on that date pursuant to section 47.4(b)(1) of the Rules of Practice (7 C.F.R. §47.4(b)(1)). Respondent therefore had 20 days from the date of receipt

[3] Citing Federal Rule of Civil Procedure 65, the district court states that "this Order is binding upon the parties to this action, their officers, agents, employees, banks, or attorneys and all other persons or entities who receive actual notice of the entry of this order." Consent Injunction, ¶ 1. The Consent Injunction, by its own terms, is not binding on the Secretary. Arguably, the Secretary would be bound by the injunction once he received actual notice thereof. However, notice of the injunction was provided by the Respondent well after the Default Order was issued and had become final.

of the Default Order on July 6, 2009, to file its petition.[4] The 20 day period to file a petition challenging the Default Order expired.

The Default Order required Respondent to pay reparation to Complainant within 30 days of the date of the Default Order. If neither a petition nor an appeal to the district court is filed within 30 days after the date of issuance of an order,[5] the order becomes final. The parties' requests, which were filed more than 30 days after the issuance of the Default Order, cannot stay this proceeding. Complainant's request and Respondent's request were each filed on August 19, 2009—well after the date the Default Order became final. The Secretary's jurisdiction in this case ended on August 1, 2009, when the Default Order became final. We, therefore, do not have jurisdiction to rule on the parties' requests.[6]

For the forgoing reason, Complaint's request and Respondent's request are denied for lack of jurisdiction.
Copies of this Order shall be served upon the parties.
Done at Washington, D.C.

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DEL CAMPO SUPREME, INC. v. CH RIVAS, LLC
PACA Docket No. R-09-040
Decision and Order.
Filed March 26, 2010.

PACA-R.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural

[4] 7 C.F.R. § 47.24(a).

[5] *See*, 7 U.S.C. §499g(c).

[6] *See, Morgan of Washington, Inc., v. Mort Bramson,* 48 Agric. Dec. 1121 (1989); *Southland Produce Co. v. Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

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 $62,043.73 in connection with six truckloads of tomatoes shipped in the course of foreign commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

Although the amount claimed in the Complaint exceeds $30,000.00[1], 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). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Neither party elected to file any additional evidence or a Brief.

Findings of Fact

1. Complainant, Del Campo Supreme, Inc., is a corporation whose post office address is P.O. Box 6550, Nogales, Arizona, 85628-6550. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, CH Rivas, LLC, is a limited liability company whose post office address is P.O. Box 6990, Nogales, Arizona, 85628-6990. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about January 8, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del

[1] We should also note the amount claimed in the Complaint is in error, as it fails to account for payments received from Respondent during the informal handling of this claim. (ROI Ex. D2, E2, F2, and G2) After crediting these payments, the amount that remains unpaid and in dispute is $19,555.73.

Campo Supreme extra large Roma tomatoes. Complainant issued invoice 72811 billing Respondent for the tomatoes at $8.95 per carton, f.o.b., for a total invoice price of $14,320.00. (Comp. Ex. 4; ROI Ex. A) Respondent paid Complainant $14,320.00 for the tomatoes billed on invoice 72811 with check number 6538, dated May 13, 2008. (Ans. Ex. 4)

4. On or about January 8, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del Campo Supreme large Roma tomatoes. Complainant issued invoice 73677 billing Respondent for the tomatoes at $10.95 per carton, f.o.b., for a total invoice price of $17,520.00. (Comp. Ex. 4; ROI Ex. A14)

5. On January 11, 2008, a USDA inspection was performed on 1,584 25-pound cartons of Del Campo Supreme large Roma tomatoes at Mex Flores Produce, in Houston, Texas. The inspection disclosed the following:

> INSPECTION: RESTRICTED TO WEIGHT ONLY AT APPLICANT'S REQUEST
> WEIGHT: NET WEIGHT RANGE 21.25 TO 26.75 POUNDS, AVERAGE 24.26 POUNDS. TARE WEIGHT AVERAGE 1.5 POUNDS.
> TEMPERATURES(3): 51°F (PRODUCT LOCATED IN COOLER), 49°F (PRODUCT LOCATED IN COOLER), 49°F (PRODUCT LOCATED IN COOLER)

6. On January 6, 2008, Complainant issued a "Trouble Adjustment" in the amount of $1,376.27 for the Roma tomatoes billed on invoice 73677. (ROI Ex. A14) Respondent has not paid Complainant for the tomatoes billed on invoice 73677.

7. On or about January 8, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del Campo Supreme large Roma tomatoes. Complainant issued invoice 73679 billing Respondent for the tomatoes at $7.95 per carton, f.o.b., for

a total invoice price of $12,720.00. (Comp. Ex. 4; ROI Ex. A18) Respondent paid Complainant $12,720.00 for the tomatoes billed on invoice 73679 with check number 6413, dated April 11, 2008. (ROI Ex. E2)

8. On or about January 9, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del Campo Supreme extra large Roma tomatoes. Complainant issued invoice 72813 billing Respondent for the tomatoes at $8.95 per carton, f.o.b., for a total invoice price of $14,320.00. (Comp. Ex. 4; ROI Ex. A10) Respondent paid Complainant $12,800.00 for the tomatoes billed on invoice 72813 with check number 6496, dated May 12, 2008. (Ans. Ex. 12)

9. On or about January 9, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 160 2-layer flats of Rancho Lucero 4x4 vine-ripe tomatoes and 80 2-layer flats of Rancho Lucero 4x5 vine-ripe tomatoes. Complainant issued invoice 72815 billing Respondent for the tomatoes at $12.95 per flat, f.o.b., for a total invoice price of $3,108.00. (Comp. Ex. 4; ROI Ex. A12) Respondent paid Complainant $1,216.00 for the tomatoes billed on invoice 72815 with check number 6362, dated April 4, 2008. (ROI Ex. D2)

10. On or about January 26, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 160 25-pound cartons of Del Campo Supreme extra large Roma tomatoes. Complainant issued invoice 73877 billing Respondent for the tomatoes at $8.95 per carton, f.o.b., for a total invoice price of $1,432.00. (Comp. Ex. 4; ROI Ex. A20) Respondent paid Complainant $1,432.00 for the tomatoes billed on invoice 73877 with check number 6362, dated April 4, 2008. (ROI Ex. D2)

11. Complainant's invoices referenced in Findings of Fact 3, 4, and 7 through 10 above, as well as the bills of lading issued for each shipment reference the 2002 Tomato Suspension Agreement. (Comp. Ex. 4-5). Respondent signed a document issued by Complainant indicating that future sales of tomatoes from Mexico would be made subject to the terms of the Suspension Agreement and the Clarification thereto. (ROI

Ex A 24-25).
12 The informal complaint was filed on March 10, 2008, which is within nine months from the date the cause of action accrued.

Conclusions

Only three of the six truckloads of tomatoes at issue in the Complaint remain in dispute, as Respondent has paid invoices 72811, 73679, and 73877 in full. We will address each of the remaining three truckloads of tomatoes individually by invoice number below.

Invoice 72813

There is no dispute the contract price of the 1,600 25-pound cartons of Del Campo Supreme extra large Roma tomatoes in this shipment was $8.95 per carton, or a total of $14,320.00. Respondent accepted the tomatoes and has paid Complainant $12,800.00, leaving an unpaid invoice balance of $1,520.00. Respondent states it paid the invoice in full based on an allowance granted by Complainant of $0.95 per carton, or a total of $1,520.00. (Ans. ¶2) Respondent, as the party asserting the contract price of the tomatoes was modified, has the burden to prove this allegation by a preponderance of the evidence.[2]

As evidence to substantiate its contention that Complainant granted a $0.95 per carton allowance, Respondent submitted a copy of both the invoice and the passing that Complainant prepared for the shipment. (Ans. Ex. 10-11) On the copies submitted by Respondent, the contract price of $8.95 per carton is crossed through and the alleged adjusted price of $8.00 per carton is handwritten beside it. As these notations do not appear on the invoice and passing copies submitted by Complainant (ROI Ex. A10-11), we presume these notations were made by

[2] The party which claims the contract was modified has the burden of proof. Regency Packing Co., Inc. v. The Auster Company, Inc., 42 Agric. Dec. 2042 (1983); F. H. Hogue Prod. Co. v. Singer's Sons, 33 Agric. Dec. 451 (1974). The party with the burden of proof must establish its allegation by a preponderance of the evidence. See Wigmore, Evidence, Vol. IX, § 2483 *et seq.*

Respondent. Respondent did not submit any documents prepared by Complainant indicating it agreed to reduce the price of the tomatoes by $0.95 per carton.

Complainant, on the other hand, submitted a copy of a document titled "Terms and Conditions of Sale," which was drafted by Complainant and signed by a representative of Respondent on November 11, 2005. (Comp. Ex. 2) As this document was signed by Respondent prior to the transaction in question and there is no termination date indicated, we find the terms and conditions stated in this document are incorporated into the parties' agreement. One of the terms specified in this document is: "Any adjustment must be authorized and accompanied by a written credit memo from Del Campo Supreme, Inc." (Comp. Ex. 2, ¶2) A written credit memo confirming the allowance claimed by Respondent is not contained in the record. Without such evidence, we conclude Respondent has failed to sustain its burden to prove the contract price of the tomatoes in this shipment was modified. Consequently, Respondent remains liable to Complainant for the unpaid balance of the agreed purchase price of the tomatoes, or $1,520.00.

Invoice 72815

There is no dispute the contract price of the 160 2-layer flats of Rancho Lucero 4x4 vine-ripe tomatoes and the 80 2-layer flats of Rancho Lucero 4x5 vine-ripe tomatoes was $12.95 per flat, or a total of $3,108.00. Respondent accepted the tomatoes and has paid Complainant $1,216.00, leaving an unpaid invoice balance of $1,892.00. Respondent states it paid this invoice (Ans. ¶1); however, the evidence of payment submitted by Respondent consists solely of a copy of check number 6362, made payable to Complainant in the amount of $2,648.00 (Ans. Ex. 7), and only $1,216.00 of this amount was applied to invoice 72815. (ROI Ex. D2) As there is no evidence showing Respondent made any additional payments to Complainant for the tomatoes billed on this invoice, Respondent is liable to Complainant for the unpaid invoice balance of $1,892.00.

Invoice 73677

There is no dispute the contract price of the 1,600 25-pound cartons of Del Campo Supreme large Roma tomatoes in this shipment was $10.95 per carton, or a total of $17,520.00. The record shows the actual quantity of tomatoes received by Respondent's customer was 1,584 cartons. (Ans. Ex. 20-20A) Respondent accepted the tomatoes but has not remitted any payment. In defense of its failure to pay Complainant for the tomatoes it accepted, Respondent asserts a federal inspection was performed for underweight, after which the tomatoes were repacked and 308 cartons were lost due to shrink. (Ans. ¶4) Respondent states its customer remitted $8,542.00, delivered, for the tomatoes, and that it paid $2,250.00 for freight. Respondent states it will pay Complainant the net amount of $6,292.00 ($8,542.00 - $2,250.00), but Complainant has refused to issue a credit memo in the correct amount. (Ans. ¶5)

The record shows Complainant granted an allowance for the tomatoes in this shipment in the amount of $1,376.27. (Ans. Ex. 13) Complainant calculated this allowance as follows:

Complainant calculated the adjustment set forth above based on a USDA inspection performed on January 11, 2008, showing 1,584 cartons of Del Campo Supreme large Roma tomatoes had an average net weight of 24.26 pounds. This constituted a misbranding violation under section 46.45 of the Regulations under the Perishable Agricultural Commodities Act, as the cartons were marked as weighing 25 pounds. (Ans. Ex. 19)

Respondent secured a subsequent USDA inspection on 967 cartons of the tomatoes on January 17, 2008, which disclosed these cartons had an average net weight of 25.42 pounds. (Ans. Ex. 16) On January 18, 2008, Respondent received a faxed message from Floyd E. White, Misbranding Officer of the PACA Branch, stating:

> OK WITH PACA TO SELL 967 CARTONS OF TOMATOES COVERED ON USDA T-025-0034-03653. PACA NEEDS YOUR EXPLAINATION [sic] AS TO WHAT HAPPENED TO THE OTHER 517 CARTONS NOT COVERED BY ANY USDA

INSPECTION. (Ans. Ex. 18)

In reference to the above message, Respondent received from its customer, Mex Flores Produce, a fax message advising that 308 cartons were lost due to shrink, and that the other 209 cartons were sold after reweighing disclosed the short weight was corrected. (Ans. Ex. 21)

Complainant's shipment of tomatoes that were misbranded constitutes a breach of contract for which Respondent is entitled to recover provable damages. Assuming Respondent's customer lost 308 cartons of tomatoes in repacking as reported, the reported return of $6,192.00 (not $6,292.00 as erroneously stated by Respondent) equals $4.85 per carton for the remaining 1,276 cartons. (Ans. Ex. 22) We note the tomatoes were sold by Complainant at an f.o.b. price of $10.95 per carton, a price that is approximately $6.00 per carton higher than the reported return. The tomatoes were inspected for net weight only, so there is no evidence of any quality or condition defects that would affect the resale value of the tomatoes once they were repacked to the correct carton weight. Without such evidence, the repacked tomatoes are presumed to be of average marketable quality, and should have been sold at prevailing market prices. In addition, we note that Respondent did not submit any repacking records to establish that 308 cartons were lost in repacking as alleged. We cannot, therefore, accept the reported return or the reported loss in repacking as evidence in the computation of Respondent's damages resulting from Complainant's breach.

As we mentioned, Complainant calculated an allowance based upon the actual shortage in weight disclosed by the inspection. In light of the deficiencies in the evidence presented by Respondent, we find this presents a better measure of the damages sustained by Respondent as a result of Complainant's breach. Complainant's allowance calculation does, however, omit the cost Respondent incurred to have the tomatoes inspected in order to establish a breach. Respondent is entitled to recover this cost, $167.50, as incidental damages. (Ans. Ex. 14) In addition, although we are unable to use the sales and losses reported by Respondent's customer to determine Respondent's damages, the documents submitted by Respondent establish it was necessary for Respondent's customer to have the tomatoes inspected following repacking to show the Department that the cartons were no longer

misbranded. Respondent may also recover the cost of this inspection, $151.00, as incidental damages. (Ans. Ex. 15-19) When the inspection fees totaling $318.50 are added to the $1,376.27 allowance calculated by Complainant, the total amount Respondent is entitled to deduct from the contract price of the tomatoes is $1,694.77.

As the shipment in question contained only 1,584 cartons of tomatoes, rather than the 1,600 cartons invoiced by Complainant, the total contract price for the shipment was $17,344.80 (1,584 cartons at $10.95 per carton). When we deduct from this amount the damages incurred by Respondent as a result of Complainant's breach, $1,694.77, the net amount due Complainant from Respondent for the tomatoes is $15,650.03.

In regard to our calculation of damages set forth above, we should note that the tomatoes in question were sold subject to the "Terms and Conditions of Sale" mentioned earlier in our discussion, as well as the 2002 Suspension Agreement covering fresh tomatoes imported from Mexico.[3] (ROI Ex. A24-25) Respondent appears to have satisfied the requirements for asserting a claim under Complainant's "Terms and Conditions of Sale," as Complainant acknowledges granting an allowance in response to Respondent's claim. (ROI Ex. A23) With respect to the 2002 Suspension Agreement, we note that there are specific procedures outlined in this Agreement for making adjustments to the sales price due to certain changes in condition after shipment. (67 FR 77044, Appendix D) However, the Agreement is silent as to what adjustments may be made for a material breach, or more specifically for damages resulting from a misbranding violation. The Agreement merely specifies that "any reimbursements from, by, or on behalf of the Selling Agent [Complainant] that are not specifically mentioned in items B.2., B.3., B.4., or B.5., above, or that are not properly documented, will be factored into the calculation of the price for the accepted tomatoes." (67

[3] This reference is to the December 4, 2002 Suspension Agreement signed by Mexican growers/exporters of tomatoes [Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, Federal Register: December 16, 2002 (Volume 67, Number 77044)]. The Agreement may also be accessed on the Internet at http://ia.ita.doc.gov/tomato/index.html.

FR 77044, Appendix D, ¶B6) The Agreement further specifies that the price for the accepted tomatoes may not fall below the reference price established under the Agreement. (67 FR 77044, Appendix D, ¶B1) Each signatory to the Agreement "individually agrees that, in order to prevent price suppression or undercutting, it will not sell, on and after the effective date of the Agreement, merchandise subject to the Agreement at prices that are less than the reference price." (67 FR 77044, Part III) Taken as a whole, we interpret this as meaning that any adjustments made to the sales price, other than those allowed for certain changes in condition following shipment, must be factored into the determination of the price of the tomatoes accepted, and that price must not fall below the reference price. The reference price at the time of the transaction was $0.2169 per pound.[4] We have determined that Respondent's liability for the 1,584 cartons of tomatoes in question is $15,650.03. The USDA inspection disclosed these cartons had an average net weight of 24.26 pounds. On this basis, we find the 1,584 cartons of tomatoes in question weighed a total of 38,427.84 pounds (1,584 cartons at 24.26 pounds each). The amount due from Respondent is, therefore, approximately equal to $0.4073 per pound ($15,650.03 ÷ 38,427.84 pounds). Since this price does not fall below the reference price, we conclude that the adjusted remittance is in accordance with the terms of the 2002 Suspension Agreement.

The total amount due Complainant from Respondent for six truckloads of tomatoes referenced in the Complaint is $19,062.03. Respondent's failure to pay Complainant $19,062.03 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,*

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[4] This price was obtained on April 27, 2009, from the Department of Commerce website at http://ia.ita.doc.gov/tomato/2002-agreement/announcement-10-02-2003.html.

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.*, 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 $19,062.03, with interest thereon at the rate of 0.41% per annum from March 1, 2008, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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FRESH HARVEST INTERNATIONAL, INC. v. TOMAHAWK PRODUCE, INC.
PACA Docket No. R-09-057.
Decision and Order.
Filed March 31, 2010.

PACA-R – Standing or Privity of Contract – Factoring.

Where invoices issued by Complainant to Respondent bore a prominent statement advising the account was sold to a factoring company and that the invoice amount should be remitted to the factoring company, found that Complainant had standing to sue in the absence of evidence showing the factoring company, as part of its agreement to purchase the receivables, assumed the risk of non-payment by the account debtor. In

other words, the purchase of the receivables by the factoring company effectively placed a lien on any monies collected by Complainant from Respondent for the subject invoices, but did not prevent Complainant from pursuing such collection.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, pro se.
Respondent, Thomas Oliveri, Western Growers Association.
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 $23,474.20 in connection with three truckloads of sugar snap peas shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Fresh Harvest International, Inc., is a corporation whose post office address is 1121 S. Military Trl. #325, Deerfield Beach, Florida, 33442-7604. At the time of the transactions involved

herein, Complainant was licensed under the Act.

2. Respondent, Tomahawk Produce, Inc., is a corporation whose post office address is P.O. Box 3077, Shell Beach, California, 93448-3077. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about September 5, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Florida, to Respondent in Pismo Beach, California, one truckload of snow peas and sugar snap peas. On the same date, Complainant issued invoice 26253 billing Respondent for 840 10-pound boxes of snow peas at $6.10 per box, or $5,124.00, and 600 10-pound boxes of sugar snap peas at $8.76 per box, or $5,256.00, plus $25.00 for a temperature recorder, for a total f.o.b. invoice price of $10,405.00. (ROI Ex. A2)

4. On or about September 11, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Florida, to Respondent in Pismo Beach, California, one truckload of sugar snap peas. On the same date, Complainant issued invoice 26290 billing Respondent for 600 10-pound boxes of sugar snap peas at $6.81 per box, for a total f.o.b. contract price of $4,086.00. (ROI Ex. A3)

5. On or about September 19, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Florida, to Respondent in Pismo Beach, California, one truckload of sugar snap peas. On the same date, Complainant issued invoice 26334 billing Respondent for 1,140 10-pound boxes of sugar snap peas at $7.88 per box, for a total f.o.b. contract price of $8,983.20. (ROI Ex. A4)

6. The invoices described in Findings of Fact 3, 4 and 5 each bear a stamp that reads:

> THIS ACCOUNT HAS BEEN SOLD TO AGRICAP FINANCIAL CORPORATION OWNER/ASSIGNEE TO WHOM PROMPT WRITTEN NOTICE MUST BE GIVEN TO ANY OBJECTION TO PAYMENT. PAYMENT IN PAR FUNDS SHOULD BE SENT TO: AGRICAP FINANCIAL CORPORATION P.O. BOX 100364, PASADENA, CA 91189-

7. Respondent made two payments to Complainant of $11,000.00 each, via wire transfers on September 5 and 14, 2007. (ROI Ex. G4, G7)
8. The informal complaint was filed on January 16, 2008, 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 three truckloads of snow peas and sugar snap peas 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 $23,474.20. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it generally denies the allegations of the Complaint. We note, however, that Respondent subsequently submitted an affidavit from its sales associate, Steve Hin, wherein Mr. Hin states, "I do not deny purchasing the product from Fresh Harvest International Inc. and the product was paid for with the $22,000 we advanced Complainant, Fresh Harvest International." (Ans. Stmt. p. 2) We therefore find Respondent's purchase and acceptance of the commodities at issue in the Complaint is not in dispute.

As Mr. Hin indicates, Respondent's defense to the action brought by Complainant is that the invoices in question were satisfied via Respondent's wire transfers to Complainant on September 5 and 14, 2007, totaling $22,000.00.[5] There are two problems with this contention. First, the evidence shows Complainant promptly invoiced Respondent for the produce on the respective dates of shipment, September 5, 11, and 19, 2007. Copies of the invoices submitted by Complainant disclose the existence of a prominent statement on the front of the invoice advising Respondent that the account was "sold to

[5] Inexplicably, Respondent fails to explain how it purportedly satisfied the remaining invoice amount of $1,474.20 ($23,474.20 less $22,000.00).

Agricap Financial Corporation" (hereafter "Agricap"), and that the invoice amount due should therefore be remitted to Agricap. (Comp. Ex. A-A2) Respondent does not deny receipt of these invoices. Although the first invoice was issued on the same date as the first wire transfer, September 5, 2007, so Respondent cannot be charged with knowledge of its obligation to remit payment to Agricap at the time it made this transfer, Respondent is presumed to be aware of its obligation to remit to Agricap at the time it made the second wire transfer on September 14, 2007. This raises the obvious question as to why Respondent allegedly paid Complainant for the invoices in question via wire transfer to Complainant's bank account when it was instructed to remit such payment to Agricap.

We should note that while the statement on the invoice indicating the account was "sold" to Agricap would appear to call into question Complainant's standing to bring this action, a factoring agreement such as that presumably entered between Complainant and Agricap is generally considered a secured loan rather than a bona fide purchase, because the risk of non-payment by the account debtor typically remains with the "seller" of the accounts receivable, in this case Complainant. *Nickey Gregory Co., LLC v. AgriCap, LLC*, 592 F. Supp. 2d 862, 878 (D.S.C. 2008). Accordingly, in the absence of any evidence that the agreement between Complainant and Agricap specified otherwise, we find Complainant did not relinquish its standing to pursue this claim by entering a factoring agreement with Agricap.[6]

A second problem with Respondent's assertion that it satisfied its liability to Complainant for the three invoices in question through wire transfers is the contrary assertion from Complainant, that the wire transfers represent Respondent's share of a joint investment between Complainant, Respondent, and a Peruvian firm, Andean Produce, to secure supplies of sugar snap peas grown in Peru. (ROI Ex. D2) To substantiate this contention, Complainant submitted evidence it wired

[6] While Agricap may have an enforceable lien against any proceeds collected by Complainant for the factored invoices, Complainant's obligation to Agricap is not a matter before us for consideration here.

$22,794.80 to the bank account of Andean Produce on September 5, 2007, and $26,794.80 on September 13, 2007. (ROI Ex. G3, G6) To explain the discrepancy in the dates and amounts, Complainant states it was asked for more money than the $22,000.00 provided by Respondent, and that the second wire transfer from Respondent was late, so Complainant had to send the funds a day before it received the wire from Respondent. (ROI Ex. G1) Complainant also submitted copies of e-mail messages exchanged between representatives of Complainant, Respondent, and Andean Produce in August and September of 2007. Two of the messages are particularly relevant to Complainant's claim concerning Respondent's alleged investment in a Peruvian sugar snap pea joint venture. The first message, dated August 14, 2007, is from Andean Produce's Tom Schuler to Respondent's Tom Israel, and reads, in pertinent part:

…

> We have allready [sic] 30 hectares on the ground and we need to rent land and grow an additional 30 hectares. In order to keep up with the delivery schedule we need to sow 16 hectares next week and the rest the week after that.
>
> Our cash requirements for the all growing [sic], up-keep, and harvesting cost until the first shipment is made on week 42, is of $20,000 per week for the next 6 weeeks [sic]. Making it a total of $120,000.
>
> I spoke with Ana Maria, and we agree, if we reach an agreement, it will be long term.
>
> Please let me know your possission [sic].

…

(ROI Ex. D7)

The second message, dated September 21, 2007, is from Complainant's George Ellis to Andean Produce's Anamaria, and copied to Respondent's Tom Israel, Complainant's Gustavo Martinez and Dominique Ellis, and Andean Produce's Tom Schuler, and reads:

> anamaria we tried to call you on the telephone but could not get through.
>
> tom Israel and myself feel the cold weather can reduce the volume of product and delay it several weeks and after losing $270,000 plus the $22,000 for fresh harvest and tom losing $22,000 this is to [sic] much of a risk.

(ROI Ex. D14)

We note these e-mail exchanges took place before the dispute with respect to the subject invoices arose.[7] Moreover, Respondent has failed to address the issue raised by the email messages. On this basis, we find the foregoing messages, coupled with the evidence showing Complainant wired funds to Andean Produce at the same time it received the wire transfers in question from Respondent, are sufficient to establish Complainant's contention that the $22,000.00 paid by Respondent was an investment in a Peruvian sugar snap pea joint venture, which was appropriately applied as such. Having therefore failed to prove its defense of payment, Respondent is liable to Complainant for the three truckloads of snow peas and sugar snap peas it accepted at the agreed purchase prices totaling $23,474.20.

Respondent's failure to pay Complainant $23,474.20 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co.*

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[7] The record shows Complainant's George Ellis sent an e-mail message to Respondent's Tom Israel on December 26, 2007, stating, in pertinent part, "I have sent you several e mails you have sent us a check with a major deduction that was for an investment in the peruvian project you can not [sic] offset the agric cap [sic] invoice with another deal I need you to pay agricap the amount they financed." (ROI Ex. D12)

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.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $23,474.20, with interest thereon at the rate of 0.42% per annum from November 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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JOSE MAGALLON, d/b/a JM FARMING v. PACIFIC SUN DISTRIBUTING, INC. AND/OR VALUE PRODUCE, INC.
PACA Docket No. R-08-078.
Decision and Order.
Filed April 4, 2010.
March 5, 2010.

PACA-R -- Interstate Commerce.

A transaction is in interstate commerce for the purpose of a reparation case if the shipment involves a type of produce commonly shipped in interstate commerce, and the

produce is shipped for resale by or to a dealer that does a substantial portion of its business in interstate commerce.

Agency – Apparent Authority

It was held that the manager of a cold storage facility of the PACA licensed firm, had the apparent authority to accept and sell consigned produce from the cold storage facility. The firm provided insufficient notice to the consignor that the manager did not have the actual authority to a handle produce on consignment. Therefore, the firm was liable for the manager's actions, even though it was unaware of the consignment and did not authorize the manager to handle produce on consignment.

Jurisdiction - Cold Storage Fees

While the PACA reparation forum does not ordinarily have jurisdiction over cold storage fee claims, there is jurisdiction to adjudicate those claims when the cold storage fees are incident to the consignment of a perishable agricultural commodity.

Jonathan Gordy, Presiding Officer
Thomas Oliveri, for Complainant
Joseph Choate, Jr. for Respondent Pacific Sun Distributing, Inc.
William L. Zeltonoga for Respondent Value Produce, Inc.
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 the Respondents in the amount of $118,851.70 in connection with multiple truckloads of tomatoes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. Copies of the Complaint were served upon the Respondents. Respondent Pacific Sun Distributing, Inc. filed an Answer to the Complaint denying liability to Complainant. Respondent Value Produce, Inc. filed an Answer and Counterclaim, denying liability and asserting a claim for unpaid storage fees allegedly owed by Complainant to Respondent Value Produce, Inc. Complainant

filed a reply to the Counterclaim, denying liability to Respondent Value Produce, Inc.

The amount claimed in the Complaint exceeds $30,000.00, and both Respondents requested an oral hearing. Therefore, in accordance with section 47.15 of the Rules of Practice (7 CFR § 47.15), an oral hearing was held on December 2, 2008, in Los Angeles, California, before Mr. Jonathan Gordy, Presiding Officer. The Complainant was represented by Mr. Thomas R. Oliveri of Western Growers, Newport Beach, California. Respondent Pacific Sun Distributing, Inc. was represented by Mr. Joseph Choate, Jr., Esq., San Marino, California. Respondent Value Produce, Inc. was represented by Mr. William L. Zeltonoga, Esq., Los Angeles, California.

Respondent Value Produce, Inc. introduced into evidence Exhibit RVX-1 and the deposition of Mr. Raymond Lowell Park, attached to which are three exhibits. All documents contained in the Report of Investigation are automatically considered as being in evidence. (7 C.F.R. § 47.7) After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law, as well as briefs in support thereof, and claims for fees and expenses. The Department received post-hearing briefs and timely claims for fees and expenses from all parties. Copies of all pertinent documents were served upon each party in accordance with the Rules of Practice.

Findings of Fact

1. Complainant is an individual, Jose M. Magallon, doing business as JM Farming, whose post office address is 1941 Spyglass Trail, Oxnard, California, 93030-2765. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, Pacific Sun Distributing, Inc., is a corporation whose post office address is 5624 Bandini Boulevard, Bell, California, 90201-6407. At the time of the transactions involved herein, this Respondent was licensed under the Act.

3. Respondent, Value Produce, Inc., is a corporation whose post office address is P.O. Box 21486, Los Angeles, California, 90021. At the time of the transactions involved herein, this Respondent was licensed under the Act.

4. On or about November 20, 2006, Complainant shipped to Value Cold Storage, a cold storage facility owned and operated by Respondent Value Produce, Inc., load JM# 2251/Value# 12634, comprised of 1,360 cartons of roma tomatoes. The load was received by Value Cold Storage on November 21, 2006. (ROI Ex. A76-A77) Between November 22 and 27, 2006, the 1,040 cartons of large roma tomatoes and 320 cartons of medium roma tomatoes in load JM# 2251/Value# 12634 were sold to DiMare Fresh, Brea, California, at prices ranging from $5.00 to $8.00 per carton, for gross proceeds of $9,280.00. (ROI Ex. E1, E27)

5. On or about November 23, 2006, Complainant shipped to Value Cold Storage load JM# 2138/Value# 12643, comprised of 1,680 cartons of roma tomatoes. (ROI Ex. A36) The load was received by Value Cold Storage on November 24, 2006. (ROI Ex. A40) Between November 27 and December 4, 2006, the 1,440 cartons of large roma tomatoes and 240 cartons of medium roma tomatoes in load JM# 2138/Value# 12643 were sold to DiMare Fresh and CV Fruit, Inc. (hereafter "CV Fruit"), Glendale, California, at prices ranging from $4.50 to $6.50 per carton, for gross proceeds of $8,640.00. (ROI Ex. A37-A38, E2)

6. On or about November 24, 2006, Complainant shipped to Value Cold Storage load JM# 2033/Value# 12645, comprised of 1,600 cartons of roma tomatoes. (ROI Ex. A13) The load was received by Value Cold Storage on November 25, 2006. (ROI Ex. A16) Between November 30 and December 5, 2006, the 1,120 cartons of large roma tomatoes and 480 cartons of medium roma tomatoes in load JM# 2033/Value# 12645 were sold to DiMare Fresh and CV Fruit at prices ranging from $4.50 to $5.00 per carton, for gross proceeds of $7,720.00. (ROI Ex. A14-A15, E3)

7. On or about November 28, 2006, Complainant shipped to Value Cold Storage load JM# 2036/Value# 12654, comprised of 1,280 cartons of roma tomatoes. (ROI Ex. A20) The load was received by Value Cold Storage on November 28, 2006. (ROI Ex. A24) Between December 1 and 5, 2006, the 1,280 cartons of large roma tomatoes in load JM# 2036/Value# 12654 were sold to DiMare Fresh and CV Fruit at prices ranging from $4.50 to $6.00 per carton, for gross proceeds of $6,620.00. (ROI Ex. A21-A22, E3)

8. On or about November 30, 2006, Complainant shipped to Value Cold Storage load JM# 2039/Value# 12673, comprised of 1,599 cartons of roma tomatoes. (ROI Ex. A27) The load was received by Value Cold Storage on November 30, 2006. (ROI Ex. A31) Between December 1 and 6, 2006, the 1,599 cartons of large roma tomatoes in load JM# 2039/Value# 12673 were sold to DiMare Fresh and CV Fruit at prices ranging from $2.00 to $4.75 per carton, for gross proceeds of $7,335.50. (ROI Ex. E4, E13, E14)

9. On or about December 5, 2006, Complainant shipped to Value Cold Storage load JM# 2141/Value# 12695, comprised of 1,600 cartons of roma tomatoes. (ROI Ex. A43) On December 6, 2006, 240 cartons of large roma tomatoes and 1,200 cartons of medium roma tomatoes from load JM# 2141/Value# 12695 were sold to DiMare Fresh and CV Fruit at prices ranging from $1.00 to $5.00 per carton, for gross proceeds of $3,840.00. The remaining 160 cartons of large roma tomatoes were dumped. (ROI Ex. E17-E18)

10. On or about December 8, 2006, Complainant shipped to Value Cold Storage load JM# 2158/Value# 12706, comprised of 1,600 cartons of roma tomatoes. (ROI Ex. A64) The load was received by Value Cold Storage on December 8, 2006. (ROI Ex. A81) Between December 11 and 14, 2006, the 1,040 cartons of large roma tomatoes and 560 cartons of medium roma tomatoes in load JM# 2158/Value# 12706 were sold to DiMare Fresh and E.D. Produce, Los Angeles, California, at prices ranging from $2.00 to $7.00 per carton, for gross proceeds of $5,600.00. (ROI Ex. H1)

11. On or about December 14, 2006, Complainant shipped to Value Cold Storage load JM# 2154/Value# 12734, comprised of 1,760 cartons of roma tomatoes. (ROI Ex. A44) The load was received by Value Cold Storage on December 14, 2006. (ROI Ex. A47) Between December 15 and 18, 2006, the 1,040 cartons of large roma tomatoes and 720 cartons of medium roma tomatoes in load JM# 2154/Value# 12734 were sold to E.D. Produce at prices ranging from $4.00 to $5.00 per carton, for gross proceeds of $7,920.00. (ROI Ex. A45 to A46)

12. On or about December 14, 2006, Complainant shipped to Value Cold Storage load JM# 2155/Value# 12738, comprised of 1,760 cartons of roma tomatoes. (ROI Ex. A50) The load was received by Value Cold Storage on December 15, 2006. (ROI Ex. A52) Between December 18

and 19, 2006, the 720 cartons of large roma tomatoes and 1,040 cartons of medium roma tomatoes in load JM# 2155/Value# 12738 were sold to E.D. Produce at prices ranging from $3.00 to $5.00 per carton, for gross proceeds of $6,440.00. (ROI Ex. A51).

13. On or about December 15, 2006, Complainant shipped to Value Cold Storage load JM# 2156/Value# 12744, comprised of 1,280 cartons of roma tomatoes. (ROI Ex. A54) The load was received by Value Cold Storage on December 16, 2006. (ROI Ex. A56) Between December 19 and 26, 2006, the 720 cartons of large roma tomatoes and 560 cartons of medium roma tomatoes in load JM# 2156/Value# 12744 were sold to DiMare Fresh and E.D. Produce at prices ranging from $1.50 to $5.00 per carton, for gross proceeds of $3,680.00. (ROI Ex. A55)

14. On or about December 18, 2006, Complainant shipped to Value Cold Storage load JM# 2157/Value# 12747, comprised of 1,760 cartons of roma tomatoes. (ROI Ex. A59) The load was received by Value Cold Storage on December 18, 2006. (ROI Ex. A61) Between December 19 and 20, 2006, the 1,040 cartons of large roma tomatoes and 720 cartons of medium roma tomatoes in load JM# 2157/Value# 12747 were sold to DiMare Fresh and E.D. Produce at prices ranging from $2.00 to $5.00 per carton, for gross proceeds of $5,440.00. (ROI Ex. A60)

15. On or about December 21, 2006, Complainant shipped to Value Cold Storage load JM# 2163/Value# 12763, comprised of 1,504 cartons of roma tomatoes. (ROI Ex. A65) The load was received by Value Cold Storage on December 21, 2006. (ROI Ex. A68) Between December 22 and 26, 2006, the 624 cartons of large roma tomatoes and 880 cartons of medium roma tomatoes in load JM# 2163/Value# 12763 were sold to DiMare Fresh at prices ranging from $4.50 to $5.00 per carton, for gross proceeds of $7,168.00. (ROI Ex. A66)

16. On or about December 27, 2006, Complainant shipped to Value Cold Storage load JM# 2165/Value# 12813, comprised of 480 cartons of roma tomatoes. (ROI Ex. A69) The 480 cartons of roma tomatoes in load JM# 2165/Value# 12813 were sold at prices ranging from $3.00 to $4.00 per carton, for gross proceeds of $1,840.00. (ROI Ex. H3)

17. Respondent Pacific Sun Distributing, Inc., who invoiced and collected payment from the purchasers of the tomatoes, issued the

following payments to Complainant for the tomatoes:

Date	Check No.	Amount
12/05/2006	29093	$15,000.00
12/22/2006	28947	$10,000.00
01/11/2007	29229	$12,000.00
01/19/2007	29308	$7,000.00
02/06/2007	29461	$20,000.00
03/09/2007	29820	$16,723.50
	Total	$80,723.50

(ROI Ex. A70-A75)

18. The informal complaint was filed on April 16, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the fair market value for 19,263 25-pound cartons of roma tomatoes that were allegedly handled by the Respondents on a consignment basis for the account of Complainant. Based on the prices reported by USDA Market News during the time period in question, Complainant states the tomatoes had a fair market value of $13.00 per carton, or a total of $250,419.00 for the 19,263 cartons of roma tomatoes in question. Complainant states the Respondents may withhold from this amount 20 percent, or $50,083.80, for commission, leaving a net amount due Complainant of $200,335.20. Complainant states the Respondents have paid a total of $81,483.50[8] for the tomatoes, thereby leaving a balance due Complainant of $118,851.00.

In response to Complainant's allegations, both Respondents deny having a contractual relationship with Complainant. In addition, Respondent Value Produce, Inc. (hereafter "Value Produce") asserts a

[8] This amount includes the check payments listed in Finding of Fact 17, as well as a cash payment of $760.00 made by Raymond Park to Complainant (ROI Ex. E4 and F3).

Counterclaim, contending Complainant stored produce in Value Produce's cold storage facility but has failed and refused to pay Value Produce $5,215.75 for cold storage fees.

Certain basic facts of this case are undisputed. The subject tomatoes were shipped by Complainant to Value Cold Storage, a cold storage facility owned and operated by Respondent Value Produce. (TR-H[9] 17:8-18:1; 28:14-17; 105:19-21; TR-RP[10] 8:6-10:6) Complainant reached a verbal agreement with Raymond Park, warehouse manager for Value Cold Storage, whereby Mr. Park would contact customers who normally purchased product stored at Value Cold Storage to see if those customers would be interested in purchasing Complainant's tomatoes. (TR-RP 11:14-12:2; 14:18-24; TR-H 26:8-17; ROI Ex. A4) Three of those customers, DiMare Fresh, CV Fruit, and E.D. Produce, purchased all of the tomatoes in question. (TR-RP 19:18-20) Raymond Park contacted Ray Davis, President of Respondent Pacific Sun Distributors, Inc. (hereafter "Pacific Sun"), who agreed on behalf of Pacific Sun, and as a favor to Mr. Park, to have Pacific Sun invoice and collect payment for Complainant's tomatoes. (TR-H 130:16-132:4) Pacific Sun issued a number of checks to Complainant representing the proceeds it collected from the sale of the tomatoes. (ROI Ex. A70-A75) Neither Respondent Pacific Sun nor Respondent Value Produce, nor its employee Raymond Park, received any compensation for the services provided to Complainant. (TR-H 114:13-16; 133:19-22; TR-RP 36:8-12)

Before we consider Complainant's claims, we must first consider Respondent Value Produce's contention in its post-hearing brief that the Secretary lacks jurisdiction to consider this claim because the transactions did not occur in the course of interstate commerce. (Value Produce Brief, ¶¶ 39-41.) Respondent Value Produce bases this claim on the lack of any evidence indicating the tomatoes in question were shipped outside the state of California. We have, however, recently held

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[9] Transcript from the Oral Hearing.

[10] Transcript from the Deposition of Raymond Lowell Park.

that when the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce, the subject shipment is considered to be in interstate commerce under the Act. *Produce Supply, Inc. v. Guy E. Maggio, Inc*., PACA Docket R-08-042, slip op. at 4 (December 12, 2008). Applying this analysis to this case, we find the transactions in question were conducted in interstate commerce. First, tomatoes are a commodity that is commonly shipped in interstate commerce. Second, one of the companies to which the tomatoes were sold, DiMare Fresh, is a dealer licensed by the Department to engage in the business of buying and selling produce in interstate and foreign commerce. We take judicial notice of license records in these proceedings.[11] The license records for DiMare Fresh, Inc., indicate that it has offices in many different states, including California and Texas. Thousands of dollars of produce in this case alone was delivered from Value Produce to DiMare Fresh. We believe that this fact alone demonstrates that Value Produce, by doing substantial business in these transactions with DiMare Fresh, shipped a substantial portion of its business in interstate commerce. Further, Respondent did not present countervailing evidence at the hearing or raise the issue until its post hearing brief. We therefore consider the transactions to be in interstate commerce and find that the Secretary can properly exercise jurisdiction over this dispute.

As it pertains to Respondent Value Produce, the issue to be determined here is whether Value Produce is responsible to Complainant for the actions undertaken by its employee, Raymond Park, who sold the tomatoes on behalf of Complainant. Raymond Park used Pacific Sun to invoice and collect payment for the tomatoes, so the issue to be determined with respect to Respondent Pacific Sun is whether its performance of these functions created any liability on the part of Pacific Sun to Complainant.

Complainant, in its post-hearing Brief, asserts Raymond Park was acting on behalf of Respondent Value Produce when he agreed to handle

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[11] *See, e.g., Washburn Potato, Co. v. B.R. Wood and Troy A. Wood, d.b.a. Wood Bros.*, 46 Agric. Dec. 1717 (1987); *Tom Lange Company, Inc. v. Emerson H. Elliot d/b/a Emerson Elliot Produce,* 44 Agric. Dec. 1026 (1985).

Complainant's tomatoes on consignment. (Complainant's Brief, pp. 2-3) With respect to Respondent Pacific Sun, Complainant states Pacific Sun issued checks made payable to Complainant, and argues on this basis that there was a contractual relationship between Pacific Sun and Complainant. (Complainant's Brief, p. 6) Complainant does not, however, cite any basis for this conclusion, and we conclude that Raymond Park's use of Pacific Sun to collect and remit the funds from the buyers of Complainant's tomatoes did not create a contractual relationship between Complainant and Respondent Pacific Sun. Moreover, it also does not appear there was any agency relationship between Respondent Pacific Sun and Raymond Park. Respondent Pacific Sun did not employ Raymond Park, and there is no indication that either Raymond Park or Pacific Sun represented to Complainant that Mr. Park was acting as agent for Respondent Pacific Sun. (TR-H 43:6-17, 129:21-130:7) Complainant was not even aware of any involvement on the part of Respondent Pacific Sun until the proceeds from the sale of the tomatoes were remitted to Complainant, at which time Complainant noted that the checks were issued by Pacific Sun. (TR-H 76:7-19) Consequently, absent a contractual relationship between Complainant and Respondent Pacific Sun, or any indication of an agency relationship between Raymond Park, the individual who sold Complainant's tomatoes, and Respondent Pacific Sun, we find Complainant has failed to establish a cause of action against this Respondent. The Complaint against Respondent Pacific Sun should therefore be dismissed.

Next we will consider whether the evidence establishes any liability on the part of Respondent Value Produce. As we mentioned, Complainant states Raymond Park was acting on behalf of Value Produce when he agreed to handle Complainant's tomatoes on consignment. Complainant has not alleged Raymond Park had actual authority from Respondent Value Produce to act as its agent in regard to sales, and the evidence of record in this proceeding fails to establish the existence of such actual authority. (TR-H 105:22-106:19) Rather, the allegation here is that Raymond Park, through his employment as warehouse manager at Value Produce's cold storage facility, was placed

in the position of having apparent authority to conduct sales as agent for Respondent Value Produce.

In response to this allegation, Respondent Value Produce asserts Complainant knew Mr. Park was not acting within the scope of his duties and authority as manager of Value Produce's cold storage facility when he conducted the tomato sales transactions in question. As evidence to substantiate this contention, Respondent Value Produce points out that it has a sales office at 1601 Olympic Boulevard, Los Angeles, California, which is separate and distinct from Value Produce Cold Storage, which is located at 640 Santa Fe Avenue, Los Angeles, California. Respondent Value Produce states Raymond Park's management position was at the cold storage facility, not at the sales office, and that this is plainly stated in Value Produce's listing in the industry publication, *The Blue Book*, which reads, in pertinent part:

Value Produce, Inc.
P.O. Box 21486 (90021-0486)
1601 E. Olympic Blvd.,
Suite 210-212.
…
Buying & Sales handled by
Jesse Martin, Lupe Martin,
Chris Martin, Sal Barba, Jr.,
Gordon Dixon, Gabriel Barba,
Joe Duran, Dave Hirata,
Jose (Pete) Martin,
Alexandra Ruiz & Hector Flores
…
Cold Storage Facility:
Value Produce Cold Storage,
640 Santa Fe Ave. (90021)
…
Raymond Park, Warehouse Mgr.

(ROI Ex. A4)

Complainant has, however, testified he was unaware that Value Produce maintained a separate sales office. (TR-H 77:6-22, 78:1-9.) Moreover, there is no indication in the Blue Book that Raymond Park was not authorized to conduct sales.

The general rule for creation of apparent authority, as stated in the Restatement (Second) of Agency, § 27, is as follows:

> Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Comment (a) to Restatement (Second) of Agency, § 27, explains further,

> Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such a belief.

The conduct of Respondent Value Produce that caused Complainant to believe Raymond Park was authorized to conduct sales on Respondent Value Produce's behalf was: (1) its employment of Raymond Park as manager of its cold storage facility; (2) its failure to provide notice to those that dealt with Raymond Park that he did not have the authority to conduct sales; (3) and its failure to properly supervise Raymond Park to prevent him from exercising authority that would cause a reasonable observer that understand that he was not authorized to conduct sales on behalf of Respondent Value Produce.

At the hearing, Mr. Jesse Martin, president of Value Produce, testified there were no notices posted at the cold storage facility stating Raymond Park could not buy or sell fruits and vegetables. (TR-H 121:20-22, 122:1) Respondent Value Produce also acknowledges in its post-hearing brief that the cold storage facility was open to the public.

(Value Produce Brief, ¶3) Such access was apparently provided for the purpose of affording potential buyers the opportunity to view the produce stored there. (TR-RP 12:16-22, 14:16-24) And, in 2005, even before Raymond Park sold the tomatoes at issue in this case, he had arranged for the sale of some chilies on behalf of Complainant Jose Magallon. (TR 67.) Under the circumstances, we must consider whether a reasonable person visiting this facility and encountering Raymond Park, the manager of the facility, being advised by Mr. Park that he could locate buyers for the produce stored at the facility, and having received this service in the past, would be justified in believing Mr. Park had authority from the owner of the facility, Value Produce, to engage in this activity.

The most prevalent situations in which apparent authority is created are those in which an agent is appointed to a position which, because of business customs, would include implied authority to conduct a variety of acts, unless his authority to do this was excluded by the principal. *Jacobsen Produce Company, Inc. v. R.L. Burnett, Jr.*, 37 Agric. Dec. 1743, 1745 (1978), quoting Seavey, Law of Agency, 1964. A principal is liable in contract for the acts its agents when: (1) the agent has the express authority from the principal to do those acts; (2) the agent has the implied authority to do all that is proper, usual, and necessary to exercise the authority actually granted; (3) the principal provides apparent authority by holding one out as an agent by words or conduct; and (4) the principal, through culpable negligence in failing to supervise the affairs of his agent, allows him to exercise powers not granted to him, and so justifies others in the belief that the agent possesses the requisite authority. *Jacobsen Produce Co*., 37 Agric. Dec. at 1746.

For example, in *A. Levy and J. Zentner Co. v. American National Growers*, 19 Agric. Dec. 1022 (1960), we held that William L. Mailloux, an employee of American National Growers ("ANG"), had at least apparent authority to purchase potatoes on ANG's behalf by virtue of the fact that ANG placed Mailloux in the position of representing the firm at its field office in Bakersfield and did not provide notice to the trade that Mailloux had no authority to make produce purchases. Similarly, in *Goldston v. Murlas Bros*., 21 Agric Dec. 542 (1962), we held that an employee was clothed with at least apparent authority to make purchases on behalf of his employer by virtue of his employment

as manager of a branch office.

In this case, Raymond Park held a management position at Value Produce's cold storage facility, and Value Produce did not post any notice within that facility advising the trade that neither Mr. Park, nor anyone else employed at the cold storage facility, was authorized to conduct sales out of that facility.

In consequence, we find Respondent Value Produce clothed Mr. Park with apparent authority to conduct such sales.

While Respondent Value Produce was clearly unaware of Mr. Park's conduct with respect to the sale of Complainant's tomatoes at the time the sales were taking place (TR-H 112:22, 113:1-7, 137:6-10), Value Produce is nevertheless responsible for any damages suffered by Complainant as a result of Mr. Park's conduct.[12] Section 8 of the Restatement (Second) of Agency, defines apparent authority as:

…the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Comment (a) to section 8 points out that when there is apparent authority, a third person has the same rights against the principal as where the agent is authorized, and that this circumstance normally results from a prior relation of principal and agent**.** Comment (g) to section 49 of the Restatement (Second) of Agency, explains:

…the fact that an agent secretly intends to act for a purpose of his own or otherwise to disobey the principal does not prevent the existence of a power to bind the principal to one who relies upon facts which indicate

[12] An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal. *California Civil Code, § 2330*.

apparent authority, unless the one dealing with the agent has notice of such intent.

There is no indication in this case that Complainant was aware Mr. Park was acting in his own interest, and that his actions were not in accordance with the instructions he received from his employer, Respondent Value Produce. (TR-H 99:5-12)

For the foregoing reasons, we find Respondent Value Produce may be held liable to Complainant for any damages caused by the actions of Raymond Park.

Returning to our consideration of Complainant's claim for damages, Complainant bases its claim on the delivery of 19,263 cartons of roma tomatoes to Value Cold Storage. (TR-H 7:4-6) As is set forth more fully in Findings of Fact 4 through 16, Raymond Park promptly resold 19,103 cartons of the tomatoes at prices ranging from $1.00 to $8.00 per carton. The remaining 160 cartons of tomatoes were reportedly dumped. While Complainant takes issue with the prices at which some of the tomatoes were sold (TR-H 81:10-18, 91:8-92:4), we hasten to point out that Complainant made the decision to allow Raymond Park to sell the tomatoes on his behalf. A consignor chooses his agent and derives full benefit from exceptionally good performance and must also bear the consequences of poor performance. Absent fraud, or some other breach of its fiduciary obligations, a consignee is not liable to a consignor merely because the goods fetched less on resale than the market price or the amount the consignor expected.[13] Accordingly, for the 19,103 cartons of tomatoes Raymond Park sold, Complainant is entitled to recover the proceeds collected from those sales, which total $81,523.50.

With regard to the 160 cartons of tomatoes from the 1,600 cartons in the load JM # 2141/Value # 12695 (Finding of Fact No. 9) that were reportedly dumped, section 46.22 of the Regulations, Accounting for dumped produce, states the following, in pertinent part:

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[13] *Tex-Sun Produce v. International Produce Distributors, Inc*., 48 Agric. Dec. 1111 (1989); *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420 (1972); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956).

A clear and complete record shall be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of such produce regardless of percentage cannot be sold due to poor condition or is lost through resorting or reconditioning. In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties.

7 C.F.R. § 46.22. The record does not contain a USDA inspection certificate or other adequate evidence to establish the 160 cartons of tomatoes that were dumped had no commercial value. Moreover, there is no indication the parties specifically agreed that such evidence was not needed. Consequently, for the shipment of tomatoes in question, which contained a total of 1,600 cartons of tomatoes, only five percent, or 80 cartons, could be dumped without securing evidence that the dumped tomatoes had no commercial value. Therefore, Respondent Value Produce is liable to Complainant for the fair market value of the remaining 80 cartons of tomatoes that were unjustifiably dumped. In this case, we find the best measure of this value is the average sales price Raymond Park obtained from the sale of the remaining 1,440 cartons of tomatoes in the shipment. The account of sales prepared Mr. Park (ROI Ex. E18) shows gross sales of $3,840.00, which equates to an average sales price of $2.67 per carton based on sales of 1,440 cartons. Assigning a value of $2.67 per carton to the 80 cartons of tomatoes that were unjustifiably dumped results in additional sales proceeds of $213.60.

After taking into account the additional sales proceeds of $213.60, the total proceeds from the sale of the thirteen consigned loads (19,263 cartons) of roma tomatoes in question amount to $81,737.10 ($81,523.50 plus $213.60). With respect to commission, Raymond Park has testified "I didn't expect anything nor did I ask." (TR-RP 18:15-21) Accordingly, we will not deduct commission from the gross proceeds of $81,737.10 owed to Complainant for the tomatoes. The record shows

that Respondent Pacific Sun paid Complainant a total of $81,483.50 for the tomatoes. Therefore, Respondent Value Produce is liable to Complainant for the remaining balance due of $253.60.

Next we will consider the Counterclaim asserted by Respondent Value Produce against Complainant. As we mentioned, Respondent Value Produce asserts Complainant stored produce in Value Produce's cold storage facility but has failed and refused to pay "rent and related costs concerning such produce in a sum to be proved." (Value Produce Ans. and Counterclaim ¶A) Respondent Value Produce subsequently asserted in its post-hearing brief that Complainant owes $5,215.75 for cold storage fees. (Value Produce Brief ¶107) This is apparently based on the storage of 20,863 cartons of tomatoes at Respondent Value Produce's stated storage rate of $0.25 per carton. (ROI Ex. E1-E3) We note, however, that the evidence establishes only 19,263 cartons of tomatoes were delivered to Value Cold Storage under the consignment agreement in question. At $0.25 per carton, the amount Respondent Value Storage is entitled to recover for storing 19,263 cartons of tomatoes is $4,815.75. In this reparations forum, we do not have jurisdiction over storage contracts that are not incident to the purchase, sale or consignment of a perishable agricultural commodity.[14] However, these cold storage fees were a part of the consignment and sale of the tomatoes, because storage of these tomatoes was a necessary expense to carry out the consignment of the tomatoes. Thus, this case fits within a line of cases, such as *Krzmarzick v. King Salad Avocado Co*., 44 Agric. Dec. 1048 (1985), which allow storage fee counterclaims on consigned produce. As Complainant offered nothing more than a general denial in response to the Counterclaim, and since it is undisputed Complainant delivered 19,263 cartons of tomatoes to Value Cold Storage for the purpose of resale, we conclude Respondent Value

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[14] *See Burden v. Taylor,* 50 Agric. Dec. 1009, 1012 (1991); *see also The Kingsbury Co. v. Metzler*, 52 Agric. Dec. 1724 (1993) *citing Grand Prairie Produce Brokerage, Inc. v. Royal Packing Co.*, 34 Agric. Dec. 1580 (1975); *Maine Banana Corp. v. Walter D. Davis,* 32 Agric. Dec. 983 (1973); *R. B. Todd Produce Co., Inc. v. Frostreat Frozen Foods, Inc.*, 22 Agric. Dec. 917 (1963); *C. J. Prettyman, Jr. v. J. E. Nelson & Sons*, 20 Agric. Dec. 947 (1961); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884 (1956); *Anonymous*, 7 Agric. Dec. 1128 (1948); *Anonymous*, 4 Agric. Dec. 934 (1945); *Anonymous*, 4 Agric. Dec. 332 (1945).

Produce is entitled to recover $4,815.75 in storage fees from Complainant pursuant to its Counterclaim.

In summary, we have determined Respondent Value Produce is liable to Complainant in the amount of $253.60. Respondent Value Produce's failure to pay Complainant $253.60 is a violation of section 2 of the Act. We have also determined that Respondent Value Produce can recover $4,815.75 from Complainant through its Counterclaim. Complainant's failure to pay Respondent Value Produce $4,815.75 is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co*., 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *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).

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. Complainant submitted a $300.00 handling fee to file its formal Complaint, as did Respondent Value Produce to file its Counterclaim. As the handling fees paid by the parties offset one another, neither party is liable for the handling fee paid by the other.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) states that after an oral reparation hearing the "Secretary shall order any commission merchant,

dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing." In this case, Respondent Pacific Sun has successfully defended against the claims asserted by Complainant, and while Respondent Value Produce did not successfully defend against the claims asserted by Complainant, it did prevail on its Counterclaim. Therefore, both Respondents are considered to be prevailing parties.

Complainant, on the other hand, recovered only $253.60 of the $118,851.70 sought in the Complaint and failed to defend against the Counterclaim asserted by Respondent Value Produce. Consequently, Complainant cannot be considered a prevailing party. *Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766 (1994), *petition for reconsideration denied* 54 Agric. Dec. 1444 (1995). *See, also, Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric. Dec. 342 (2003); and *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990).

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc*., 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707, 715 (1989). In accordance with 7 CFR § 47.19(d), Mr. William L. Zeltonoga, attorney for Respondent Value Produce, timely filed a statement of attorney's fees and costs. Mr. Zeltonoga claims a total of $2,778.85, including $520.00 (1.3 hours at $400.00 per hour) for attendance at the deposition of Raymond Park, $1,400.00 (3.5 hours at $400.00 per hour) for attendance at the oral hearing, $300.00 for the Counterclaim filing fee, $263.85 for the transcript of Raymond Park's deposition, and $295.00 for the transcript of the oral hearing. Aside from the counterclaim filing fee, which is not an expense incurred in connection with the oral hearing and is therefore not recoverable,[15] the remaining costs totaling $2,478.85

[15] Only expenses incurred in connection with the oral hearing will be awarded. *Mountain Tomatoes*, 48 Agric. Dec. 707, 715 (1989).

appear reasonable and will be permitted.[16] This amount should be awarded to Respondent Value Produce.

Mr. Joseph Choate, Jr., attorney for Respondent Pacific Sun, also timely filed a statement of fees and costs. Mr. Choate claims a total of $7,712.50, including $5,747.50 (20.9 hours at $275.00 per hour) for preparation for the hearing, $1,100.00 (4 hours at $275.00 per hour) for attendance at the oral hearing, $570.00 for the cost of transcripts, and $275.00[17] (1 hour at $275.00 per hour) for review of transcript and objections. Mr. Choate also submitted an itemized list of the work done in preparation of the hearing. Upon review, we find that $2,997.50 (10.9 hours at $275.00 per hour) of the amount claimed for work done in preparation for the oral hearing is recoverable.[18] The fee for time spent at the hearing is also recoverable; however, since the hearing lasted only 3.5 hours, this expense should be adjusted to $962.50. The $570.00 claimed for the cost of transcripts is also recoverable. With respect to the review of the transcript and objections, the time spent on these activities was presumably for the purpose of preparing a post-hearing brief. Fees and expenses for the preparation of post-hearing briefs are not allowed because they are fees that would also be incurred in the

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[16] The costs associated with depositions admitted into evidence at the hearing are allowable expenses. *See Potato Sales v. Perfection Produce*, 38 Agric. Dec. 273, 281 (1979).

[17] The claim was written "$290.00," but we expect that the "9" was a typographical error.

[18] The allowable charges include: telephone call to Presiding Officer and draft notice of appearance (1 hr.), preparation for deposition of Raymond Park (4.5 hrs.), deposition of Raymond Park (1.3 hrs., adjusted for actual time of attendance not including travel time), and review witness list (0.6 hr.). In addition, Mr. Choate claimed 2.8 hours for "review of Raymond Park deposition and letter to client" and 4.1 hours for "final preparation for hearing and drafting of brief; telephone call to presiding officer." As only the review of the deposition, the preparation for the hearing, and the call to the Presiding Officer may be viewed as expenses that would not have been incurred if the matter had been heard by documentary procedure, we included only one-half of the amount claimed, or 3.5 hours, in our calculation of the amount recoverable for time spent in preparation for the oral hearing.

documentary procedure. *E.g., East Produce,* 59 Agric. Dec. at 865; *Pinto Bros., Inc. v. Frank J. Balestrieri Co.*, 38 Agric. Dec. 269, 272 (1979). Therefore, we will award Respondent Pacific Sun fees and expenses totaling $4,530.00 for the legal services of Mr. Choate.

Order

Within 30 days from the date of this Order, Respondent Value Produce, Inc., shall pay Complainant as reparation $253.60, with interest thereon at the rate of 0.34 per annum from February 1, 2007, until paid.

Within 30 days from the date of this Order, Complainant shall pay to Respondent Value Produce, Inc., as reparation $4,815.75, with interest thereon at the rate of 0.34 per annum from February 1, 2007, until paid. Within 30 days from the date of this Order, Complainant shall pay Respondent Value Produce, Inc., $4,530.00 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of _____ per annum from the date of this Order, until paid.

Within 30 days from the date of this Order, Complainant shall pay Respondent Pacific Sun Distributing, Inc., $2,478.85 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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PAGANINI FOODS, LLC v. WESTLAKE DISTRIBUTORS, INC.
PACA Docket No. R-08-047.
Decision and Order.
Filed June 8, 2010.

PACA-R.

Proof of Oral Contract – Written Confirmations

Complainant's unilateral email proposals to Respondent did not prove the existence of a sales contract for 150 containers of Italian oranges where neither parties' conduct adhered to the terms of the proposed agreement and the oranges were not received or accepted by Respondent. The sender of a written confirmation of an oral agreement

must prove that a contract was in fact made orally prior to the sending of the written confirmation.

Bankruptcy -- Claim for Fees and Expenses Stayed
Respondent, as the prevailing party, is entitled to reasonable fees and expenses pursuant to 7 U.S.C. § 499g(a), however, the award of fees and expenses is stayed pursuant to the automatic stay provision of the Bankruptcy Code because Complainant filed a Chapter 11 bankruptcy petition before the issuance of a Decision and Order.

Charles Spicknall, Presiding Officer
Stephen P. McCarron, Counsel for Complainant
Lawrence H. Meurs and Steven E. Nurenberg, Counsel for Respondent
Decision and Order issued by William G. Jenson, Judicial Office.

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the "Act." A formal Complaint was timely filed by Paganini Foods, LLC, ("Paganini Foods"), on October 31, 2007, seeking an award of reparation in the amount of $3,034,202.89 from Respondent Westlake Distributors, Inc., ("Westlake"), in connection with multiple shipments of oranges from Italy to the United States in 2007. Respondent filed an Answer on December 17, 2007, denying the material allegations in the Complaint and asserting a number of affirmative defenses. Copies of the Department's Report of Investigation were served on the parties. Both parties requested an oral hearing. Based on the parties' requests, and because the amount of damages alleged in the Complaint is in excess of $30,000.00, a hearing was held in Los Angeles, California on September 9 -10, 2008. *See* 7 C.F.R. § 47.15(a)(2) (requiring a hearing where the amount in controversy exceeds $30,000). Charles Spicknall of the United States Department of Agriculture, Office of the General Counsel, Trade Practices Division, served as the Presiding Officer. Complainant was represented at the hearing by Stephen P. McCarron, McCarron & Diess, Washington, DC. Respondent was represented at the hearing by

Lawrence H. Meuers and Steven E. Nurenberg, Meuers Law Firm, P.L., Naples, Florida.

At the hearing, the parties were given an opportunity to present testimony and submit evidence. Complainant called one witness, Celso Paganini, the president of Paganini Foods. Respondent Westlake called two witnesses: 1) Leonard Wallace, the former general manager of Paganini Foods, and 2) Jeffrey Miller, the president of Westlake Distributors. The hearing was transcribed and is cited herein as "Hrg Tr. at ____."[1] Complainant introduced nineteen exhibits into evidence at the hearing. Complainant's hearing exhibits are cited herein as CX-1 through 9 and CX-2A, 3A, 3B, 4A, 4B, 4C, 4D, 4E, 5A and 5B. Respondent introduced thirty-three exhibits into evidence at the hearing which are cited as RX-1 through 33. In addition, the Department's Report of Investigation is considered as evidence in this case. Following the hearing, Complainant and Respondent both filed post-hearing briefs, as well as claims for fees and expenses.

Findings of Fact

Complainant Paganini Foods is a limited liability company whose address is 100 Dartmouth Drive, Suite 400, Swedesboro, New Jersey 08085. *See* Complaint at ¶ 1. Paganini is licensed under the PACA. *See id*., at ¶ 2. Paganini Foods imports food and produce from Italy for sale in the United States. *See id*.; Hrg Tr. at 20 (Paganini).

Paganini Foods has been in business since August 8, 2002. *See* Hrg Tr. at 20, 352 (Paganini). Celso Paganini is the president of the company. *See id*., at 20. Celso Paganini's family has been in the produce business in Europe for generations. *See id*., at 345.

At the time of the transactions at issue in this case, Paganini Foods' general manager was Leonard Wallace. *See id*., at 580 (Wallace). Mr. Wallace was hired by Celso Paganini in March of 2006. *See id*. He ran the company's North American operation for approximately 18 months. *See id*, at 581.

Westlake is a corporation doing business as Westlake Produce Company. *See* Answer at ¶ 3. Westlake's business address is 1320 E. Olympic Blvd., Suite 208, Los Angeles, California 90021. *See id*. Westlake is licensed under the PACA. *See id*., at ¶ 5. Westlake sells

wholesale quantities of fruits and vegetables to retail stores, including large chain stores, primarily in Southern California. *See id*., at ¶ 4; Hrg Tr. at 797 – 798 (Miller).

Jeffrey Miller is a partner in Westlake and is also the president of the company. *See* Hrg Tr. at 779 (Miller). He has been in the produce business for over 30 years and has worked for Westlake since 1997. *See id*., at 779, 785.

In October of 2006, Paganini Foods promoted its products, including oranges, at the Produce Marketing Association ("PMA") convention. *See id*., at 782 (Miller), 610, 618 - 619 (Wallace). Jeff Miller of Westlake attended the PMA convention and visited Paganini Foods' booth. *See id*.

Following the PMA convention, representatives of Paganini Foods and Westlake discussed the prospect of doing business together. *See id*., at 786 (Miller). The discussions focused on Tarocco oranges that Paganini Foods imports from Italy. *See id*., at 784. The Tarocco is a blood orange. *See* CX-1 at 6 (Paganini Foods' promotional materials); Hrg Tr. at 32 (Paganini). It is the most popular table orange in Italy. *See* CX-1 at 6. Taroccos are easy to peel, seedless, and high in vitamin C. *See id.,* at 5; Hrg Tr. at 33 (Paganini). Paganini Foods sells Tarocco oranges in the United States under its own "BellaVita" brand. *See* CX-1 at 5.

Paganini's "First Proposal" – January 5, 2007

On January 3, 2007, Celso Paganini and another representative of Paganini Foods, Tip Murphy, met with representatives of Westlake to discuss the possibility of selling Tarocco oranges to Westlake's customers in or around the State of Florida. *See* Hrg Tr. at 32, 34 (Paganini); 788 – 791 (Miller). At the time, Tip Murphy was Paganini Foods' director of corporate sales. *See id*., at 34 (Paganini). Tip Murphy memorialized the terms of Paganini Foods' proposal to Westlake in an internal email to Leonard Wallace on January 4, 2007. *See* CX-1 at 13 – 14. Paganini Foods proposed that Westlake would order 125 loads of Tarocco oranges and return $13.50 per box to Paganini. *See id*., at 14. Westlake would receive a three percent

commission on the Tarocco sales, promotional money, and fifty percent of any sales amounts that exceeded the base price of $13.50 per box. *See id*.

Tip Murphy's January 4th internal email containing the terms of Paganini Foods' Tarocco orange proposal to Westlake was ultimately forwarded to Jeff Miller in Westlake's California office. *See id*., at 12 – 13. Jeff Miller rejected Paganini Foods' proposal via email on January 5th. *See id*. Westlake refused to commit to moving 125 loads of Tarocco oranges. *See id*.; Hrg Tr. at 38 (Paganini). Westlake could not predict how its customers would promote the new orange or how consumers would respond. *See* CX-1 at 13.

Shortly thereafter, on January 11, 2007, a freeze hit parts of California. *See* Hrg Tr. at 801 (Miller); 44 - 46 (Paganini). Some forecasters predicted severe damage to the California navel orange crop. *See* CX-7. Paganini Foods and Westlake anticipated that the damage to the California orange crop would generate interest in imported Tarocco oranges. *See* CX-1 at 16, 21.

On January 12, 2007, Westlake requested price look-up ("PLU") numbers from Paganini Foods for Tarocco oranges and asked when the fruit would be available. *See id*., at 16. Five containers of Taroccos were scheduled to arrive in the Port of Newark on February 5, 2007. *See* CX-8 at 2. Six more containers of Taroccos were scheduled to arrive on February 12th. *See id*. Paganini Foods advised Westlake of the arrival date for the first shipment. *See* CX-1 at 17.

On January 13, 2007, Paganini Foods' president, Celso Paganini, expressed his concern about "putting too many containers on the water without orders/programs" in an email to his staff and Jeff Miller of Westlake. *See id*., at 17. It takes at least four weeks for an order of Tarocco oranges from Italy to arrive in the United States. *See* Hrg Tr. at 53 (Paganini); CX-5 (Paganini logistics from Italy).

On January 16, 2007, Jeff Miller at Westlake emailed Celso Paganini to inform him that as a result of the freeze in California, customers were interested in the Tarocco oranges and that they were anxious to see samples. *See* CX-1 at 21. Westlake represented that it could get commitments on "all fruit available as early as next week." *See id*. Celso Paganini noted his desire to finalize an agreement on "pricing, commitments, and building our partnership." *See id*., at 23.

In mid-January of 2007, Westlake learned that Paganini Foods was working with one of Westlake's competitors in Los Angeles. *See id*., at 24. Jeff Miller advised Paganini Foods that Westlake could not put together a program for the Tarocco oranges if a direct competitor was pushing the same fruit. *See id*. Paganini Foods' general manager, Leonard Wallace, assured Jeff Miller that Westlake was Paganini Foods' West Coast distribution partner of choice. *See id*., at 25. Leonard Wallace noted that they would be able to work out the details of their partnership when he visited Westlake in California the following week. *See id*.

During the week of January 22 through 26, 2007, Tip Murphy and Leonard Wallace of Paganini Foods visited Westlake and potential chain store customers for the Tarocco in California. *See id*., at 25 – 27, 29.

On January 26, 2007, Westlake requested advertising money from Paganini Foods that would be used to promote the Tarocco orange in one large retail chain store starting on February 21st. *See id*., at 28.

Paganini's "Second Proposal" – January 27, 2007

On January 27, 2007, Tip Murphy of Paganini Foods sent an email to Jeff Miller and Dale Leifer of Westlake thanking them for their hospitality and letting them know that Paganini Foods would be sending Westlake an "understanding of our Partnership Agreement." *See id*., at 29. Tip Murphy's email listed the following points:

1) Volumes – We will sell a minimum of 150 containers of the Bellavita brand Tarocco oranges from Feb 2007 – May 2007. Listed below is the size breakdown, volumes per container, etc.

Size	% volume (est)	boxes/pallet	pallets/cont
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size FOB price/box
4's$16.00
6's$14.00
8's Loose/ $?? (I will have to follow up on this one 8's Bags $25.20

3) Samples – We will send you at least one more box of the Tarocco oranges and at least one box of our Kiwi's.

4) By the end of next week (Feb 2nd), Jeff will provide to Tip the following by customer:
*Overview of volumes/sizes
*Ad dates
*projected promotional dollars
*other POS needs

5) We will send the following to Jeff:
*300 of the POS signs for Ralph's
*PDF file of our artwork for Stater Bros. (this is what Roger talked about . . . doing a story line, etc.)

6) future visits for me – I tentatively would like to come back to the West Coast on the following weeks: Feb 26th, March 19th, April 16th and May 17th. Please let me know of this works for you guys.

These are my notes . . . if I missed something, let me know. Also, feel free to share this e-mail with Joe. Thanks again for an outstanding week!!

See id., at 29 – 30 (emphasis added). Jeff Miller of Westlake responded to Tip Murphy's email on January 30, 2007 stating:
Tip, this all looks good. Let me get with our customers and try and get a feel of their volumes. So far ad dates are as follows: Kroger/Ralphs-Feb 21st. 5 to 7,000 ctns. 6's and 8's. Stater Bros. Feb. 21st. 6's and 4's. Food 4 Less Feb. 28th. volume to be determined. Bristol Farms ad date to be determined.

See id., at 32.

Paganini's "Third Proposal" – January 30, 2007

As promised in Tip Murphy's January 27th email to Westlake, Leonard Wallace of Paganini Foods sent a proposed partnership agreement to Westlake via email on January 30, 2007, which stated as follows:

> Good Morning Jeff and Dale,
>
> I wanted to tag onto Tip's email and thank each of you for your time and incredible hospitality. More importantly thank you for the many laughs and quality time spent. I believe we will have a very long friendship and develop an outstanding partnership over the years.
>
> This will outline our Partnership Agreement. Please put this on your official letterhead, have your attorney look at and send back a signed copy to Tip and myself.
>
> This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!
>
> 1) Volumes – We agreed to a minimum of 150 containers of Tarocco oranges from Feb 2007 – May 2007.
>
> Westlake Produce Company will place a non-cancelable purchase order commitment for a minimum of 150 standard size containers of Italian Tarroco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase with its growers and packers for an equal number of containers and coordinate a schedule of deliveries based on fruit size and delivery date[s] as set forth in exhibit (A) to meet Westlake produce supply chain requirements. Listed below is the size

breakdown, volumes per container, etc.

Size	% of volume (est)	boxes/pallet	pallets/cont
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size	FOB price/box
4's	$16.00
6's	$14.00
8's Loose/	$13.00
8's Bags	$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using it own carriers. Pananini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

8) Promotional Money – Westlake Produce will negotiate promotional plans/dollars with retailers. The promotional money

> includes Demos, ads, pos, etc. Westlake will plan promotional money with Paganini in advance. Westlake will pay the retailers and Paganini will reimburse Westlake. All invoicing provided by Westlake must be specific on company letter head indicating Print Advertising, In store demo Run dates from/to, number of stores covered and coverage area ect.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all o[f] our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace

See id., at 35 – 36 (emphasis added).

Westlake did not execute or return the partnership agreement that Paganini Foods proposed via email on January 27, 2007. *See* Hrg Tr. at 389, 395 (Paganini).

Paganini's "Fourth Proposal" – February 6, 2007

In response to Westlake's continuing objections to any requirement that it purchase a set number of containers of oranges, Paganini Foods sent a revised partnership agreement to Westlake via email on February 6, 2007. *See* CX-1 at 40. The email read as follows:

> Listed below are the changes to our Partnership Agreement that we discussed today. Please have your lawyer put this on your official letterhead, have your attorney look at and send back a signed copy to Leonard and myself.
>
> This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce

Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!

1) Volumes – We agreed to a target volume of 150 containers of Tarocco oranges from Feb 2007 – May 2007. We will review the volumes weekly and Westlake will provide advance notice of changes to the target volume (150 containers). The advance notice is a minimum of 4 weeks. Westlake Produce Company will place a non-cancelable purchase order commitment for a standard size container of Italian Tarroco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase order with its growers and packers for an equal number of containers and coordinate a schedule of deliveries.

Listed below is the size breakdown, volumes per container, etc.

Size/	% of volume (est)/	boxes per pallet/	pallets per container
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags	65	21	

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size	FOB price/box
4's	$16.00
6's	$14.00
8's Loose/	$13.00
8's Bags	$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using it own carriers. Pananini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

8) Promotional Money – Westlake Produce will negotiate promotional plans/dollars with retailers. The promotional money includes Demos, ads pos, etc. Westlake will plan promotional money with Paganini in advance. Westlake will pay the retailers and Paganini will reimburse Westlake. All invoicing provided by Westlake must be specific on company letterhead indicating Print Advertising, in store demo run dates from/to, number of stores covered and coverage area, etc.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all of our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace and Tip Murphy

See id., at 40-41 (emphasis added).

Despite the softening of the purchase volume provision in the proposed agreement to a "target" sales volume, Westlake continued to refuse to execute the agreement. *See* Hrg Tr. at 101, 389, 395, 468 - 469 (Paganini). Nevertheless, representatives of Paganini Foods and Westlake continued to discuss the business of marketing and selling Tarocco oranges in California. *See, e.g., id*., at 829 - 830 (Miller); 681 - 697 (Wallace); CX-1 at 44- 45, 49 (email correspondence regarding

promotional activities at retail stores). Some of Westlake's customers communicated directly with representatives of Paganini Foods about promotional events for the Tarocco orange. *See* RX-2 at 80 – 86.
The first five shipping containers of Tarocco oranges from Italy arrived in Newark on or about February 7, 2007. *See* CX-8 at 2; CX-1 at 48. Six more containers of oranges arrived on February 12, 2007. *See id*. Westlake placed its first Tarocco order for five truckloads of oranges on February 13, 2007. *See* CX-1 at 53; CX-2 at 5 – 49; Hrg Tr. at 153 – 154 (Paganini). Westlake forwarded positive customer comments that it received about samples of Taroccos to Paganini Foods. *See* RX-2 at 94.

On February 25, 2007, an additional twenty-three containers of Tarocco oranges destined for Paganini Foods' warehouse arrived in the port of Newark. *See* CX-1 at 56; CX-8 at 2.

On March 4, 2007, another fifteen containers of Tarocco oranges arrived at port from Italy. *See* CX-8 at 2.

On March 5, 2007, Jeff Miller of Westlake emailed Leonard Wallace at Paganini Foods to let him know that Westlake had several chain stores that were interested in the Tarocco oranges and that one chain store was running an advertisement featuring the oranges on the coming weekend. *See* CX-1 at 62.

On March 7, 2007, Westlake emailed an order for a sixth truckload of Tarocco oranges to Paganini Foods. *See id*., at 63; CX-2 at 69 - 84. The email noted that several chain stores were "putting the oranges in" and running ads. *See* CX-1 at 63.

On March 12, 2007, Jeff Miller at Westlake emailed Celso Paganini about great responses that Westlake had gotten from their chain stores. *See id*., at 68. One chain store had ordered 5000 cartons of Tarocco oranges. *See id*. Celso Paganini's email response to Mr Miller, which copied several people at Paganini Foods, including Leonard Wallace, stated that: "[a]t this point, without any programs, I don't feel we should order more containers, but given the situation this might be a mistake." *See id*., at 67. He requested information about the inventory and prices of other oranges being sold in California. *See id*. Mr. Paganini also noted that of the fifty containers of Taroccos that had arrived thus far, "we sold about 20 already, consequently we still have another 30 containers to go." *See id*. Paganini Foods had an additional

fifteen containers on order. *See id*. Mr. Paganini's message further stated that: "[W]e need to decide by Wednesday, if we want to go ahead with our original program of 150 containers." *See id*. Westlake did not respond to Mr. Paganini's email. *See* Hrg Tr. at 202 (Paganini).

By March 23, 2007, Paganini Foods had received a total of sixty containers of Italian blood oranges at its warehouse in New Jersey. *See* CX-8 at 2.

On or about March 25, 2007, Paganini Foods ordered three more containers of Tarocco oranges from Italy. *See* Hrg Tr. at 205 – 206 (Paganini).

By early April it was clear to Paganini Foods that the Tarocco orange was not selling as well as anticipated and that the company was "faced with the challenge of distributing approximately 200,000 boxes [i]n the remaining 6 to 8 week selling period." *See* CX-1 at 76. On April 3, 2007, Leonard Wallace sent an email to Jeff Miller and various sales people at Paganini Foods allocating sales targets for the remaining 200,000 boxes of oranges in Paganini Foods' warehouse. *See id*.

On April 24, 2007, Celso Paganini and other representatives of Paganini Foods met with representatives of Westlake in California. *See id*., at 90. The Paganini representatives looked at shipments that were affected by condition issues, such as skin breakdown or decay. *See id*., at 91, 93, 94.

On May 7, 2007, Jeff Miller of Westlake sent an email to Celso Paganini and Leonard Wallace requesting Paganini Foods' approval to sell the fruit at less than $10.00 per carton delivered based on the condition of the oranges. *See id*., at 94.

By May 7, 2007, sixty loads of Tarocco oranges still needed to be sold in the remaining four to six weeks of the season. *See id*., at 93.

Between April 6 and May 11, Westlake ordered an additional thirteen truckloads of oranges from Paganini Foods. *See* CX-2 at 3 - 4.

On May 22, 2007, Jeff Miller sent Celso Paganini and Leonard Wallace a letter requesting a signed acknowledgement from Paganini Foods that Westlake could price the oranges as it saw fit. *See* CX-1 at 96 - 98. Paganini Foods refused to sign the agreement. *See id*., at 99. Westlake did not purchase any more Tarocco oranges from Paganini Foods.

In total, during the period of February through May of 2007, Westlake purchased 27 truckloads (roughly 22 containers) of Tarocco oranges from Paganini Foods' warehouse in New Jersey. *See* CX-2. Paganini Foods was unable to sell many of the Tarocco oranges that it imported in 2007.

Conclusions

Complainant Paganini Foods asserts that Respondent Westlake contracted to purchase 150 containers of Italian "Tarocco"[1] oranges from Paganini at fixed prices during the period of February through May of 2007 and that Westlake breached the agreement by refusing to take a majority of the oranges that it ordered. *See* Complainant's Brief at pp. 16 - 17. Ultimately, Westlake only purchased twenty-seven truckloads of Tarocco oranges from Paganini Foods in 2007. *See* CX-2.[2] Complainant asserts that it suffered damages in the amount of $2,812,934.58 as result of Respondent's breach of the parties' contract. *See* Complainant's Brief at p. 28. Westlake denies that it ever contracted to purchase 150 containers of Tarocco oranges from Complainant.

As the proponent of the claim of a 150-container purchase agreement with Respondent, Complainant bears the burden of proving its claim by a preponderance of the evidence. *See Carlton Jones v. Samuel S. Barrage*, 16 Agric. Dec. 1142, 1143 (1957) (the "[c]omplainant has the burden of proving by a preponderance of evidence the essential

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[1] As noted in the findings of fact above, the "Tarocco" is a blood orange. *See* CX-1 at 6 (Paganini Foods' promotional materials); Hrg Tr. at 32 (Paganini). It is the most popular table orange in Italy. *See* CX-1 at 6. Paganini Foods sells imported Tarocco oranges in the United States under the "BellaVita" brand. *See id*., at 5.

[2] A truckload is not equivalent to a container of oranges. "A container loads about 55,000 pounds. A load is about 44,000 pounds." *See* Hrg Tr. at 160 (Paganini). The twenty-seven truckloads of oranges that Westlake purchased from Paganini Foods equated to approximately 22 ocean containers. *See id*., at 160, 471.

allegations of his complaint").[3] Paganini Foods first presented a Tarocco orange distribution proposal to Westlake in an email on January 4, 2007, following a meeting with Westlake representatives in Florida. *See* CX-1 at 12 – 14. Westlake's Florida office was not interested in partnering with Paganini Foods to sell imported oranges. The Florida office forwarded Paganini Foods' Tarocco proposal to Jeff Miller in Westlake's California office. At the time, Jeff Miller was a partner in Westlake and a salesman for the company. He is now Westlake's president.

Paganini Foods' initial proposal was that Westlake would order 125 loads of Tarocco oranges and return $13.50 per box to Paganini. *See id*.[4] Westlake would receive a three percent commission, promotional money, and fifty percent of any sales amounts that exceeded the base price of $13.50 per box. *See id*. Jeff Miller of Westlake rejected Paganini Foods' first proposal. Although Westlake was interested in selling Tarocco oranges in California, Westlake refused to be obligated to purchase 125 loads. *See id*. Westlake explained that it could not predict how its customers would promote the new orange or how consumers would respond. *See id*.

Despite Respondent's refusal to commit to purchase a large volume of oranges from Complainant, the parties continued making plans to

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[3] *See also G.W. Palmer & Co., Inc. v. Sun Valley Potato Growers, Inc.,* 65 Agric. Dec. 673, 677 (2006) ("the party alleging that the contract called for Respondent to supply up to a truckload of 60-count cartons of Idaho Russet potatoes on a weekly basis . . . has the burden to prove this allegation by a preponderance of the evidence"); *Esch Far, v. Packers Canning Co., Inc*., 50 Agric. Dec. 930, 933 (1991) ("[t]he burden is on the moving party . . . to prove the contract terms by a preponderance of the evidence"); *Sun World International, Inc. v. J. Nichols Produce Co., Inc.*, 46 Agric. Dec. 893, 894 (1987) ("a complainant has the burden of proving all of the allegations of its complaint including the existence of a contract with the respondent, the terms of the contract, respondent's breach of the contract, and the resulting damages, by a preponderance of the evidence").

[4] Paganini Foods' former general manager testified that Paganini wanted Westlake to move 125 loads of oranges because that was the number of loads that Paganini Foods needed to sell in order to break even for the season. *See* Hrg Tr. at 647 – 648 (Wallace).

promote and sell Tarocco oranges to Westlake's customers in California. In mid-January 2007, a freeze hit parts of California. Some forecasters predicted severe damage to the California navel orange crop. *See* CX-7. As a result of the freeze, Westlake's customers were interested in the Tarocco oranges and were anxious to see samples. *See* CX-1 at 18, 21. On January 16, 2007, Westlake represented to Paganini Foods that it could get commitments on "all fruit available as early as next week." *See id.*, at 21. Paganini Foods was concerned about "putting too many containers on the water without orders/programs." *See id*., at 17.[5] During the latter part of January 2007, representatives of Paganini Foods, including the company's general manager, Leonard Wallace, visited Westlake in California. *See id*., at 24. At Westlake's request, Paganini Foods terminated its relationship with other potential distributors in southern California. The parties worked together to arrange for promotional events and advertisements for the Tarocco with Westlake's chain store customers. On January 27, 2007, Paganini Foods' director of corporate sales, Tip Murphy, sent an email to Jeff Miller and others at Westlake to let them know that Paganini Foods was going to send Westlake another proposal for a partnership agreement between the parties. *See id*., at 29.

Tip Murphy's email to Jeff Miller at Westlake listed the main points of Paganini Foods' second proposal.[6] With regard to volume, the email stated: "We will sell a minimum of 150 containers of the Bellavita brand Tarocco oranges from Feb 2007 – May 2007." *See id*. Jeff Miller of Westlake responded to Tip Murphy's email on January 30, 2007 stating:

> Tip, this all looks good. Let me get with our customers and try and get a feel of their volumes. So far ad dates are as follows: Kroger/Ralphs- Feb 21st. 5 to 7,000 ctns. 6's and 8's. Stater

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[5] Celso Paganini testified that "'program' . . . means commitment. It means hard sales. It [means] when it arrives here it is sold, it goes to somebody." *See* Hrg Tr. at 55, 68 -69.

[6] As Respondent points out in its brief, the "second proposal" from Tip Murphy was not really a proposal at all. *See* Respondent's Reply Brief at p. 10. It was merely Tip Murphy's summary of key points of a proposed agreement that Paganini Foods anticipated sending to Westlake. *See* CX-1 at 29.

> Bros. Feb. 21st. 6's and 4's. Food 4 Less Feb. 28th. volume to be determined. Bristol Farms ad date to be determined.

See id., at 32.

Shortly after receiving Jeff Miller's response to Tip Murphy's email, Paganini Foods' general manager, Leonard Wallace, sent a third proposal, which was merely a more refined version of the second proposal, to Westlake by email that stated as follows:

> Good Morning Jeff and Dale,
>
> I wanted to tag onto Tip's email and thank each of you for your time and incredible hospitality. More importantly thank you for the many laughs and quality time spent. I believe we will have a very long friendship and develop an outstanding partnership over the years.
>
> This will outline our Partnership Agreement. Please put this on your official letterhead, have your attorney look at and send back a signed copy to Tip and myself.
>
> This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!
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> 1) Volumes – We agreed to a minimum of 150 containers of Tarocco oranges from Feb 2007 – May 2007. Westlake Produce Company will place a non-cancelable purchase order commitment for a minimum of 150 standard size containers of Italian Tarroco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase with its growers and packers for an equal number of containers and coordinate a schedule of deliveries based on fruit size and delivery date[s] as set forth in exhibit (A) to meet Westlake produce supply chain requirements. Listed below is the size breakdown, volumes per

container, etc.

Size	% of volume (est)	boxes/pallet	pallets/cont
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags	65	21	

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size	FOB price/box
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8's Bags	$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using it own carriers. Pananini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

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Westlake. All invoicing provided by Westlake must be specific on company letter head indicating Print Advertising, In store demo Run dates from/to, number of stores covered and coverage area ect.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all o[f] our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace

See id., at 35 – 36 (emphasis added). Leonard Wallace testified that Paganini Foods' third proposal was intended to force Westlake to commit to purchase 150 containers of Tarocco oranges. *See* Hrg Tr. at 665 -- 666 (Wallace). The strategy failed. *See id*., at 670, 685 - 686 (Wallace). Westlake refused to sign the agreement and informed Paganini Foods that if it was going to insist on a volume commitment, it would have to find a new distributor. *See id*., at 669 – 670, 682 (Wallace); 829 (Miller); 90 (Paganini).

Based on Westlake's continuing refusal to order 150 containers of Tarocco oranges, Paganini Foods sent a fourth proposal to Westlake on February 6, 2007, which read, in relevant part, as follows:

Listed below are the changes to our Partnership Agreement that we discussed today. Please have your lawyer put this on your official letterhead, have your attorney look at and send back a signed copy to Leonard and myself.

This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!

1) Volumes – We agreed to a target volume of 150 containers of Tarocco oranges from Feb 2007 – May 2007. We will review the

volumes weekly and Westlake will provide advance notice of changes to the target volume (150 containers). The advance notice is a minimum of 4 weeks. Westlake Produce Company will place a non-cancelable purchase order commitment for a standard size container of Italian Tarroco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase order with its growers and packers for an equal number of containers and coordinate a schedule of deliveries.

Listed below is the size breakdown, volumes per container, etc.

Size/	% of volume (est)/	boxes per pallet/	pallets per container
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size	FOB price/box
4's	$16.00
6's	$14.00
8's Loose/	$13.00
8's Bags	$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using it own carriers. Pananini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

8) Promotional Money – Westlake Produce will negotiate promotional plans/dollars with retailers. The promotional money includes Demos, ads pos, etc. Westlake will plan promotional money with Paganini in advance. Westlake will pay the retailers and Paganini will reimburse Westlake. All invoicing provided by Westlake must be specific on company letterhead indicating Print Advertising, in store demo run dates from/to, number of stores covered and coverage area, etc.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all of our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace and Tip Murphy

See CX-1 at 40-41 (emphasis added). Despite the softening of the purchase volume requirement to a "target" sales volume of 150 containers of oranges, Westlake still declined to execute or return the proposed agreement. *See* Hrg Tr. at 101, 389, 395, 468 - 469 (Paganini).[7] Nevertheless, the parties continued to work together to promote and sell Tarocco oranges to Westlake's chain store customers in California. *See, e.g., id*., at 829 – 830 (Miller); 681 -- 697 (Wallace); CX-1 at 44-45, 49; RX-2 at 80 – 86 (email correspondence regarding promotional activities at retail stores). Paganini Foods' first five containers of

[7] *See also id*., at 674 (Wallace) (discussing the reason for the change to a "target" volume in Paganini Foods' final proposal of February 6, 2007).

Tarocco oranges from Italy arrived in port at Newark on or about February 7, 2007. *See* CX-8 at 2; CX-1 at 48. Westlake ordered its first truckload of Tarocco oranges from Paganini Foods' warehouse in New Jersey on February 13, 2007. *See* CX-1 at 53; CX-2 at 5 - 14.

Although many of Westlake's chain store customers responded positively to the samples of the Tarocco oranges that they received, the positive feedback did not result in the overall sales volume that Paganini Foods had anticipated.[8] By mid-March 2007, Westlake and Paganini Foods, which independently marketed the Tarocco oranges throughout the remainder of the United States, had only sold twenty of the fifty containers that had arrived from Italy. *See* CX-1 at 67. Paganini Foods had an additional fifteen containers of Tarocco oranges on order. *See id*. By May 7, 2007, Paganini Foods had sixty loads of Tarocco oranges in its warehouse that needed to be sold in the remaining four to six weeks of the season. *See id*., at 93. The condition of the oranges began to deteriorate over time. *See* Hrg Tr. at 237 (Paganini); CX-1 at 93. On May 22, 2007, Jeff Miller sent Celso Paganini and Leonard Wallace a letter requesting a signed acknowledgement from Paganini Foods that Westlake could price the oranges as it saw fit. *See* CX-1 at 96 - 98. Paganini Foods refused to sign the agreement. *See id*., at 99. Westlake did not purchase any more Tarocco oranges from Paganini Foods. *See* Hrg. Tr at 247 (Paganini).

Paganini Foods was unable to sell many of the Tarocco oranges that it imported from Italy in 2007. Some had to be destroyed. Paganini Foods asserts that its final email proposal to Westlake, (the "fourth" proposal), dated February 6, 2007, was a written confirmation of an oral agreement that had been reached between the parties.[9] From Paganini's

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[8] The freeze that affected the California orange crop in 2007 produced little benefit for Paganini Foods' Tarocco orange sales. *See* Hrg Tr. at 637 – 638 (Wallace). The Tarocco orange was more expensive than other table oranges in the market. *See id*., at 643.

[9] Under the Uniform Commercial Code ("UCC"), failing to object to a written confirmation of an oral contract takes the contract out of the statute of frauds where the sales transaction is between merchants. S*ee* UCC § 2-201(2). A merchant is defined as someone "who deals in goods of the kind" or who "holds himself out as having

(continued...)

perspective, "the parties formed a contract under which Westlake purchased 150 containers of Tarocco oranges from Paganini unless Westlake gave a four (4) week advance notice of a lesser quantity." *See* Complainant's Brief at p. 16. Paganini Foods contends that "Westlake started ordering Tarocco oranges from Paganini, confirming that it agreed to the terms in the February 6 email." *See* Complainant's Reply Brief at p. 3.[10]

Typically, a contract for the sale of goods in excess of $500 is unenforceable unless it is in writing and signed by the party against whom enforcement is sought. *See* UCC § 2-201(1).[11] Enforcement is barred by the statute of frauds. *See, e.g.*, *Thomson Printing Machinery Co. v. B.F. Goodrich Co.*, 714 F.2d 744, 746 (7th Cir. 1983) (outlining the dispute over a fighting cock named Fiste that led to the creation of the original "statute of frauds" in 1677). However, procedural applications of state law statute of fraud provisions are not applied to render oral contracts unenforceable in reparation proceedings under the PACA. *See Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 528 (3rd Cir. 1950).[12] Although there is no statute of frauds bar to

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[9](...continued)
knowledge or skill peculiar to the practices or goods involved in the transaction." *See* UCC § 2-104. Westlake and Paganini Foods are both licensed under the PACA to do business in the produce trade and both are "merchants" as that term is used in the UCC.

[10] *See also* Hrg Tr. at 444 (Paganini) (confirming that Complainant is alleging that the February 6th proposal is the agreement between the parties).

[11] *See also* N.J. Stat. Ann. § 2-201 (2005) (section 2-201 as adopted in Complainant's principal place of business, New Jersey); Cal. Com. Code § 2201 (section 2-201 as adopted in Respondent's principal place of business, California). In this case, there is no question that Westlake refused to sign the agreement that was proposed by Paganini Foods. *See* CX-1 at 84; Hrg Tr. at 389, 395 (Paganini).

[12] *See also G.W. Palmer,* 65 Agric. Dec. at 679; *Faris Farms v. Lassen Farms d/b/a Midstate Corp.*, 59 Agric. Dec. 471, 478 - 479 (2000); *Donald Woods v. Conogra Inc., et al.,* 50 Agric. Dec. 1018, 1020 - 1022 (1991); *Barton Willoughby d/b/a Willoughby Farms v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1259 - 1260 (1986); *Ron Whitfield d/b/a*
(continued...)

Complainant's claim, Complainant still bears the "burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation." *See* Comment 3 to UCC § 2-201.[13] The terms of Complainant's unilateral email proposals to Respondent "are not conclusive evidence of the terms of an agreement." *See General Matters, Inc. v. Penny Products, Inc.*, 651 F.2d 1017, 1020 (5th Cir. 1981).[14] For the reasons discussed below, we conclude that Complainant has failed to sustain its burden of proving that Respondent contracted to purchase 150 containers of Tarocco oranges from it in 2007.

As Complainant points out, "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." *See* UCC § 2-204. "The parties themselves know best what they meant by their words of agreement and their action under the agreement is the best indication of what the meaning was." *See* Comment 1 to UCC § 2-208

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[12](...continued)
Whitfield Brokerage Co. v. City Wide Distributors, Inc., 44 Agric. Dec. 936, 941 - 945 (1985); *Hegel Branch and James Bennett v. Mission Shippers, Inc.*, 35 Agric. Dec. 726, 731 - 732 (1976). "Reparations precedent presumes that the Statute of Frauds in the U.C.C. is procedural, and not substantive." *See G.W. Palmer,* 65 Agric. Dec. at 679. The party seeking to invoke the statute of frauds bears "the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable." *See Donald Woods,* 50 Agric. Dec. at 1021 - 1022 (finding California's statute of frauds inapplicable to reparation proceedings). Although Westlake asserted a statute of frauds defense in its Answer, it did not argue the defense in its post-hearing briefs. *See* Answer at p. 15 ("Second Affirmative Defense").

[13] "Beyond producing a writing 'sufficient to indicate that a contract for sale has been made between the parties,' the [complainant] must still persuade the trier of fact that the parties did make an oral contract and that its terms were thus and so." *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 2.3 (5th ed. 2006) (quoting *Perdue Farms, Inc. v. Motts, Inc*., 459 F.Supp. 7, 14 (N.D. Miss. 1978)). *See also Thomson Printing*, 714 F.2d at 746 ("[t]he sender [of the written confirmation] must still persuade the trier of fact that a contract was in fact made orally, to which the written confirmation applies") (quoting Ohio Rev. Code Ann. § 1302.04(B)).

[14] *See also Perdue Farms*, 459 F.Supp. at 14 ("[a]lthough the confirmatory writing may be used as evidence to prove the contract's terms, it is not conclusive proof").

(course of performance). In the instant case, although the parties' conduct confirms that Westlake agreed to market Paganini Foods' Tarocco oranges to its customers in California, it does not support the allegation that Westlake ordered 150 containers of oranges from Complainant in 2007.

As Paganini Foods received multiple container shipments of Tarocco oranges from Italy during the period of February through April of 2007, it did not tender the containers to Westlake and demand payment. "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." *See* UCC § 2-503(1).[15] Instead of holding the containers of oranges for Respondent, Complainant stored the oranges in its own warehouse and waited for orders from customers, including Westlake, while admittedly bearing the risk of loss as the oranges deteriorated over time. *See* Hrg Tr. at 773 – 774 (Wallace), 555 – 557, 562 (Paganini). Westlake emailed orders for truckload quantities of oranges to Paganini Foods. *See* CX-1 at 53 (order for five truckloads of oranges on February 13, 2007), 65 (order for one truckload of oranges on March 7, 2007). Paganini Foods prepared an invoice and demanded payment after an order was received, processed, and shipped. *See e.g.,* CX-2 at 70 – 84 (Westlake purchase order no. 139385); CX-1 at 71 – 72 (demanding payment for $167,156 on five shipments to Westlake); RX-2 at 89 (demanding payment for $5,536 on a shipment to Westlake).

Paganini Foods' orange sales in 2007 are well documented. *See* Hrg Tr. at 163 – 171 (Paganini) (discussing sales documentation). The sales files contain, *inter alia*, handwritten orders, email correspondence, invoices, bills of lading, freight bills and USDA inspection reports. *See* CX-2 (documentation for sales to Westlake). Although we would expect to see similar documentation, tender of delivery, and payment demands in connection with a sale of 150 containers of oranges to

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[15] Complainant's February 6th proposal to Westlake addressed this issue. It required the parties to "coordinate a schedule of deliveries." *See* CX-1 at 42. Earlier versions of the agreement attached a delivery schedule for the proposed orange shipments to Respondent. *See* CX-1 at 35.

Westlake, there is nothing to show that the sale was ever consummated.[16] Paganini Foods did not invoice Westlake for 150 containers of oranges until July 24, 2007, after filing an informal complaint with the Department on July 13, 2007. *See* Report of Investigation at Exhibit B1.[17] As Paganini Foods' president conceded at the hearing in this case:

[Lawrence Meuers, Attorney for Respondent]

Q. But, my question was before the complaint was filed, was there ever any written communication or invoice statements to Westlake saying that they [owed] Paganini for those 150 containers?

[Celso Paganini, President of Paganini Foods]

A. No.

See Hrg Tr. at 522 (Paganini). Consistent with this testimony, there is no evidence to suggest that Paganini Foods ever demanded assurances from Westlake that it would honor its purported commitment to purchase 150 containers. *See* UCC § 2-609 (right to adequate

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[16] Paganini Foods' claim that Westlake ordered 150 containers of oranges is documented solely by its partnership proposals to Westlake, including Paganini's final proposal on February 6, 2007. *See* Hrg Tr. at 401 - 402 (Paganini). The proposed agreement unambiguously required express acceptance by Respondent. *See* CX-1 at 40 ("put this on your official letterhead, have your attorney look at and send back a signed copy to [Paganini Foods]"). Offers to form a contract can generally be accepted in any manner reasonable under the circumstances, *unless* the offer unambiguously specifies the manner of acceptance. *See* UCC § 2-206(1). Here, Respondent unquestionably refused to sign and return any of Complainant's offers to sell 150 containers of Italian oranges. *See*, *e.g.*, CX-1 at 84 (email from Celso Paganini noting the absence of the signed contract); Hrg Tr. at 101, 389, 395, 468 - 469 (Paganini).

[17] Self-serving documents prepared or exchanged after the institution of a proceeding do not prove the existence of a contract between the parties. *See, e.g., Sun World*, 46 Agric. Dec. at 894.

assurance).[18]

Although Paganini Foods solicited input from Westlake with regard to the number of containers of oranges that it should import from Italy on at least one occasion, Westlake declined to respond. *See* CX-1 at 67; Hrg Tr. at 202, 205 – 206, 411 (Paganini), 701 - 702 (Wallace). In the absence of any input from Westlake, Paganini Foods exercised its own judgment in deciding the overall volume of oranges that it ordered from Italy in 2007. As Paganini Foods' former general manager explained:
HEARING OFFICER SPICKNALL: Okay. Well, how did it end up that there ended up being so much inventory in Swedesboro, New Jersey that was unsold?

THE WITNESS: I think Celso [Paganini] just made the decision to keep bringing the product in. Because at any -- at any given time, he could have -- he could have stopped with the ordering as long as there was four weeks in advance because that's what it takes to put it on the water. You know, with picking time and -- and carrying and everything, it just takes 14 [days] that long to get over -- over the water. So, there was plenty of time. There was plenty of time. You know, I mean we -- only to bring in about 90 -- 90 or so containers and, you know, we'd bring in 150. We brought in about 90 and of those, you know, we -- we had severe loss. So.

HEARING OFFICER SPICKNALL: So, was there a certain point in time, and I think this came up earlier, that you -- it was your -- did you voice the opinion to stop at some point in time?

THE WITNESS: Yes, Tip [Murphy] and myself, yes, we -- we had several discussions with Celso that, you know, that based on the numbers that were coming in throughout the United States there was no more -- it was impossible to continue to -- continue bringing it in.

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[18] Representatives of Westlake and Paganini Foods communicated by telephone every day -- sometimes two or three times a day. *See* Hrg Tr. at 696 – 697, 742 (Wallace) (discussing telephone contact with Westlake); 81, 441 (Paganini) (same).

You know, but I think at that point, we had -- we already had so much on the water and then, I don't know if he was in Italy or where he was doing his – his additional buying from -- he made one more trip to Italy, but, you know, we had put I think 20 or 25 containers on the water when we already had, you know, maybe 50 in-house. So -- that we were desperately trying to move. So, that was unfortunate, but that's the way it worked out. . . .

See Hrg Tr. at 770 – 771 (Wallace). Even when it became clear that Paganini Foods had an overwhelming amount of orange inventory on hand, the company still did not tender the oranges to Westlake and demand payment. Instead, Paganini Foods attempted to motivate the company's own sales staff and Westlake to sell more oranges. *See* CX-1 at 76, 93; Hrg Tr. at 704 – 706, 708 – 710 (Wallace), 524 – 530 (Paganini). Complainant's conduct is not consistent with its allegation that it truly believed that Westlake had already purchased these oranges. Although Paganini Foods' president testified that he would have only imported ten to twenty containers in the absence of any dealings with Westlake, the reality is that by the time of Paganini Foods' final partnership proposal to Respondent on February 6, 2007, the company had already ordered at least thirty-four containers of oranges from Italy. *See* Hr Tr. at 138, 505 (Paganini).[19] Paganini Foods was not relying on a standing order from Westlake when it imported these oranges.[20] As Paganini Foods' former general manager explained at the hearing:

[Steven Nurenberg, Attorney for Respondent]

Q. So, when you're talking about the 150 containers, what was your anticipation of how this fruit was going to be moved once it got here? Was it all going to be sold by Westlake?

[Leonard Wallace, former General Manager of Paganini Foods]

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[19] *See also* CX-1 at 48 (Paganini Foods' tracking sheet showing orders for 56 containers as of February 9, 2007).

[20] Paganini Foods' former general manager, Leonard Wallace, testified that the company had planned to import sixty to sixty-five containers of Tarocco oranges in 2007, even before meeting Westlake. *See* Hrg Tr. at 617 - 618, 715 - 716.

A. All 150 containers?

Q. Right.

A. No, I mean it's -- it's -- we have the responsibility -- I mean it's my responsibility as general manager/managing director of North America is to -- is to move the fruit. If I depended on one company, I -- then I wouldn't be making a very good business decision. My -- my business decision and strategy are based upon, you know, a global perspective and I have to look at things how do we -- how do we sell what we're bringing in to -- to the masses and Jeff Miller is – is only one of many -- many retailers out there and obviously, you know, him and his – his organization have great distribution channels. But, you know, it would be a bad decision on my part to say well, I'm only going to sell, you know -- well, we had -- we had many. We had -- we had the northeast. We had the northwest. We had the -- we had all the south. We had a lot of -- a lot of retailers that we had to sell to.

Q. Who was going to sell to the northeast?

A. We were. We did sell to the northeast.

Q. Who's we?

A. Paganini Foods, the entire company.

Q. Okay.

A. Steve, Tip, myself. Celso was involved with many of the sales when it came to Path Mart, et cetera.

Q. Okay.

HEARING OFFICER SPICKNALL: When it came to?

THE WITNESS: Path Mart. Path Mart. Price Shopper. Those were

Celso's accounts specifically that he had built relationships with. That we had sold the year before and we were going to do it again.

See Hrg Tr. at 660 – 662. Paganini Foods' sales of Tarocco oranges to other customers in 2007 exceeded the company's sales to Westlake. *See, e.g*., Report of Investigation at Exhibit B1; CX-8 at 1.
Complainant's claim that Westlake was obligated to take all of the Tarocco oranges that it imported from Italy unless it gave four weeks' advance notice of changes to the "target" sales volume of 150 containers, is derived from the language of Paganini Foods' final proposal to Westlake on February 6, 2007, which reads as follows:
Volumes – We agreed to a target volume of 150 containers of Tarocco oranges from Feb 2007 – May 2007. We will review the volumes weekly and Westlake will provide advance notice of changes to the target volume (150 containers). The advance notice is a minimum of 4 weeks.

See CX-1 at 40; Complainant's Reply at 6.[21] Complainant's argument that Westlake was obligated to pay for all of the oranges that it imported in 2007 because it failed to give advance notice of a change to the "target" sales volume of 150 containers of oranges simply ignores the fact that the proposed agreement goes on to specify the manner in which Westlake became obligated to purchase a container of oranges from Italy:
Westlake Produce Company will place a non-cancelable purchase order commitment for a standard size container of Italian Tarroco oranges . . . . Paganini Foods LLC. will in turn place a non-cancellation purchase order with its growers and packers for an equal number of containers and coordinate a schedule of deliveries.

See CX-1 at 40. There is no evidence to suggest that Westlake ever placed a purchase order for a standard size container of Tarocco oranges

[21] The notice provision in the Paganini Foods' final proposal to Westlake was designed to account for the four weeks that it takes for an ocean container of oranges from Italy to reach the United States. *See* Hrg Tr. at 53, 97 -98, 442 - 443 (Paganini).

from Italy. Nor did Paganini Foods ever, "in turn," convey an order from Westlake to orange growers in Italy.

As noted above, by the time of Complainant's final partnership proposal to Respondent on February 6, 2007, Paganini Foods had already ordered at least thirty-four containers of oranges from Italy, despite having no purchase order commitments from Westlake. *See* Hr Tr. at 505 (Paganini).[22] Even after the proposal was transmitted to Westlake, and purportedly agreed to verbally by Westlake, Paganini Foods continued to order oranges from Italy without purchase orders from Westlake. As Jeff Miller of Westlake explained at the hearing:

[Lawrence Meuers, Attorney for Respondent]

Q. Now, at anytime, did you ask Paganini to order Taroccan oranges for you from Italy that you would receive them five/six weeks later in California?

[Jeff Miller, President of Westlake]

A. Never.

Q. So, isn't it true that you were ordering them from the New Jersey warehouse?

A. Correct.

Q. And you -- when you had some e-mails back and forth saying we'll take all available, you're talking about in the New Jersey warehouse.

A. I think that e-mail was referring to something that was just getting started and there was only a few loads in the warehouse or maybe

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[22] *See also* CX-1 at 48 (Paganini Foods' tracking sheet showing orders for 56 containers as of February 9, 2007). Celso Paganini testified that Paganini Foods would have only imported ten to twenty containers in the absence of an agreement with Westlake. *See* Hrg Tr. at 138.

coming out of the warehouse. So.

Q. Then you were talking about the warehouse?

A. Exactly.

Q. You're not talking about Italy.

A. Correct.

Q. So, is it safe to say that how they came from Italy was not your concern?

A. No, it was Celso's doing I guess and Leonard I believe and Tip and his other salesmen were also selling off their warehouse.

Q. But, it was your concern from the warehouse?

A. Well, we were -- we were placing our orders on what we knew was there. Correct.

See id., at 880 – 881. In short, Respondent's orange orders from Paganini Foods' existing inventory in New Jersey did not signal acceptance of Complainant's February 6th proposal. Westlake's orders did not follow the purchase procedure set forth in the proposed agreement. As discussed above, Respondent never issued a purchase order for a container of oranges from Italy. *See id*., at 401 (Paganini). Respondent was under no obligation to cancel orders for containers of oranges that it never placed.

Consistent with the lack of evidence that either party performed in accordance with the Paganini Foods' February 6th proposal, the principal negotiators for both parties testified that Westlake did not agree to purchase 150 ocean containers of Italian oranges from Complainant. Paganini Foods' general manager, Leonard Wallace, testified as follows: [Steven Nurenberg, Attorney for Respondent]

Q. Okay. What, if anything, was said by Mr. Miller or what, if

anything, was his response to the proposal that Westlake would place a noncancelable purchase order commitment for a minimum of 150 standard-size containers?

[Leonard Wallace, former General Manager of Paganini Foods]

A. He said Leonard, you know I can't do that. You know, I'm not willing to do that.

* * *

[Steven Nurenberg, Attorney for Respondent]

Q. To the best of your recollection, was this proposal of February 6, 2007 accepted by Westlake either verbally or in writing?

[Leonard Wallace, former General Manager of Paganini Foods]

A. Accepted how?

Q. Did they ever accept the terms -- did they ever accept this agreement or this proposal either orally or in writing?

A No. No. We talked about the target. We talked about the targets of we could -- what each -- what I wanted each of them to hit.

See id., at 670, 676 – 677 (Wallace).[23] Westlake's representative, Jeff Miller, gave similar testimony:

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[23] *See also id*., at 655 – 656. Paganini Foods' president, Celso Paganini, who believed that Westlake had agreed orally to purchase 150 containers of oranges from Paganini Foods, relied on Leonard Wallace and Tip Murphy to negotiate with Westlake. *See* CX-1 at 84 ("[in] words though, you and Tip told me, they agreed"); Hrg Tr. at 80 ("[t]hey told me that they had an agreement of []150"), 393, 454 – 455, 537 – 538, 571, 574 - 575 (Paganini). Leonard Wallace testified that he informed Celso Paganini that Westlake had not agreed to Paganini Foods' February 6th proposal. *See* Hrg Tr. at 714 (Wallace).

[Lawrence Meuers, Attorney for Respondent]

Q. Okay. What did you do or did you discuss this February 6th agreement with anybody after you received it?

[Jeff Miller, President of Westlake]

A. Yes, this was the e-mail that I was referring to earlier. This was the third one and for some reason, it seemed like they were continuing to send proposals and we were continuing to -- to -- to disagree. That we weren't going to sign them. Therefore, at that point, I called. Leonard and Celso and myself got on a conference call and they wanted me to sign this and I said absolutely not and it got to the point where I told them that if they wanted to have someone sign off and agree to accept 150 loads of fruit without having any -- you know, flat out, that we would absolutely not do that and they should find another handler for their product and another distributor and we were going to quit.

Q. And what was their response?

A. I don't believe that there was a response on that phone call, but we later talked and agreed that we would be buying this product on a load-by-load basis and that they would give us prices at the time of shipment and that we would take those -- those prices and those -- and go -- go attack our customers.

See id., at 828 – 830. The transactional documents that were produced by both parties are fully consistent with this testimony. *See*, *e.g*., CX-2. As noted above, Westlake ordered oranges on a load-by-load basis from Paganini Foods' existing inventory in New Jersey. *See id*. Respondent did not issue purchase orders for ocean containers of oranges from Italy. Typically, oral contracts are enforceable with respect to the goods for which payment has been made and accepted, or which have been received and accepted. *See, e.g., La Casita Farms, Inc. v. Johnston City Produce Co.,* 34 Agric. Dec. 506, 507 - 508 (1975) (enforcing oral

contracts for cantaloupes that were received and accepted).[24] In the instant case, Respondent paid in full for the truckload quantities of oranges that it ordered, received, and accepted. *See* Complainant's Reply Brief at p. 4 (noting that "Westlake paid Paganini for the oranges in accord with the invoices"). Respondent was required to do no more.

Complainant's reliance on our decision in *George P. McDonald d/b/a Lazy Nag Produce v. Eagles Three, Inc. d/b/a Trademark Produce & Sales*, 46 Agric. Dec. 882, 885 (1987), is misplaced. In that case, the complainant sought an award of reparation in connection with a sale of 850 sacks of yellow onions, grade U.S. No. 1. The respondent brokered the sale to a customer in New York at an agreed price of $7.00 per sack on July 11, 1984. The onions shipped that same day and the respondent sent a confirmation of sale to complainant noting that the delivery terms of the contract were "f.o.b. as to price – delivered as to grade and condition." On July 12, 1984, complainant issued an invoice which stated that the sale was "f.o.b. – Net due 10 days." The shipment of onions experienced transportation problems and a destination inspection on July 16, 1984, found that the onions had deteriorated and failed to grade U.S. No. 1. The respondent negotiated a price adjustment of $5.25 per sack and sent a written confirmation of the adjusted price to the complainant. Roughly a week later, the complainant denied that it had accepted the price adjustment and ultimately filed a claim against respondent to recover the original sale price of the onions.

In deciding the *George P. McDonald* case, we found that complainant's failure to timely object to the terms of the respondent's

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[24] *See also, e.g.*, *Jerome M. Matthews d/b/a Matthews Groves v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681, 1682 - 1683 (1987) (enforcing oral contracts for longnans that were received, accepted, and partially paid for by the respondent); *Saras, Inc. v. Continental Farms, Inc.*, 46 Agric. Dec. 1260, 1261 - 1262 (1987) (enforcing oral contracts for peppers, squash and pickles that were received, accepted, and partially paid for by the respondent); *Gold Bell, Inc. v. S. Naiman & Sons, Inc.*, 46 Agric. Dec. 1132 (1987) (enforcing oral contracts for broccoli, potatoes, turnips and onions that were received and accepted by the respondent). Obviously, oral contracts are also enforceable if the party against whom enforcement is sought admits that a contract was made. *See, e.g.,* UCC § 2-201(3)(b).

confirmation of sale established that the transaction was "f.o.b. as to price – delivered as to grade and condition." As a result, the complainant was responsible for the onions making grade at destination, regardless of whether the transportation service was normal. Our decision in *George P. McDonald* is consistent with section 2-207(2) of the UCC which states in relevant part:

The additional terms [in confirmations of sale] are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

See UCC § 2-207(2). We also found that the complainant in *George P. McDonald* failed to prove that it had rejected the price adjustment negotiated by respondent.

In *George P. McDonald* it was abundantly clear that the parties had agreed to a sale involving 850 sacks of yellow onions, grade U.S. No. 1. The onions were received and accepted at their destination after an inspection and price adjustment. The dispute was over price and conflicting delivery terms in respondent's confirmation of sale and complainant's invoice. In the instant case, the facts are far different. Complainant's February 6th proposal to Respondent was not a confirmation of sale – it was an offer to sell Respondent 150 containers of oranges. For the reasons already discussed, we find that Complainant has failed to prove that Respondent ever accepted the offer. Neither party performed in accordance with the terms of Complainant's proposed agreement. Respondent did not receive or accept 150 ocean containers of oranges. *George P. McDonald* and section 2-207(2) of the UCC, which resolve disputes over the terms of otherwise valid sales contracts, have no application to the instant case.

Accordingly, Complainant's claim for reparation is denied. Complainant has failed to prove by a preponderance of the evidence that

Respondent contracted to purchase 150 containers of Italian oranges in 2007. Therefore, Respondent is the prevailing party. Under section 7(a) of the PACA, Respondent is entitled to reasonable fees and expenses incurred in connection with the hearing. *See* 7 U.S.C. § 499g(a).

Although we would have awarded Respondent a total of $83,290.11 in fees and expenses that were incurred in connection with the hearing in this case as reparation, Complainant has now filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey, Case No. 10-13006-GMB. The bankruptcy filing stays proceedings, including administrative proceedings, against the debtor. *See* 11 U.S.C. § 362(a)(1). Respondent's claim for fees and expenses against Complainant, pursuant to 7 U.S.C. § 499g(a), is an "action or proceeding against the debtor" within the meaning of § 362(a)(1), notwithstanding the fact that Complainant initiated this case. *See, e.g., M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 607 (1990) (staying an order for fees and expenses as a result of complainant's bankruptcy filing). Therefore, the award of fees and expenses to Respondent must be stayed.

The parties are instructed to notify the PACA Branch when the bankruptcy court grants relief from the automatic stay or when the stay lapses. Until such information is received by the PACA Branch, all further proceedings with regard to Respondent's claim for fees and expenses are stayed.

Order

The Complaint in this matter is dismissed.

Respondent's claim for fees and expenses is hereby stayed pending the conclusion of Complainant's bankruptcy proceeding.

Copies of this Order shall be served upon the parties.

Done in Washington, D.C.

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METZ FRESH LLC v. D'ARRIGO BROS. CO. OF CALIFORNIA.
PACA Docket No. R-09-074.
Decision and Order.
Filed June 15, 2010.

PACA-R.

Bailment.

Where Respondent took possession of product sold by Complainant to a third party, Kingston, solely for the purpose of "cross-docking," i.e., segregating the product into smaller lots so that it could be shipped, following consolidation with product from other shippers, to Kingston, found that Respondent and Kingston were engaged in a bailment. Although Respondent agreed to take billing for the commodities, the sales prices were negotiated between Complainant and Kingston, with Respondent billing Kingston an additional $0.25 per carton for its cross-docking fee. Since Kingston was the true purchaser of the commodities, found that Respondent, as part of the bailment arrangement, was acting as agent for Kingston, its disclosed principal, when it agreed to taking billing, and that Respondent did not incur any liability under the contracts absent any indication that it specifically agreed to pay for the commodities in the event that Kingston did not pay.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, pro se
Respondent, pro se
Decision and Order issued by William G. Jenson, Judicial Officer

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $7,958.80 in connection with eight truckloads of spinach and spring mix shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (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. Both parties also submitted a brief.

Findings of Fact

1. Complainant, Metz Fresh LLC, is a limited liability company whose post office address is 39405 Metz Road, King City, California, 93930. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, D'Arrigo Bros. Co. of California, is a corporation whose post office address is P.O. Box 850, Salinas, California, 93902. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On August 18, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach and spring mix. (ROI Ex. A p. 5) Complainant prepared invoice number 180820 billing Respondent for 140 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at $10.50 per carton, or $1,470.00, and 288 cartons of Metz Fresh pillow spring mix (3 lb.) at $4.50 per carton, or $1,296.00, for a total invoice price of $2,766.00. (ROI Ex. A p. 4) Respondent paid Complainant $1,103.60 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)
4. On August 20, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach and spring mix. (ROI Ex. A p. 7) Complainant prepared invoice number 180918 billing Respondent for 210 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at $10.50 per carton, or $2,205.00, and 288 cartons of Metz Fresh pillow spring mix (3 lb.) at $4.50 per carton,

or $1,296.00, for a total invoice price of $3,501.00. (ROI Ex. A p. 6) Respondent paid Complainant $1,296.00 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)

5. On August 21, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 9) Complainant prepared invoice number 180926 billing Respondent for 140 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at $10.50 per carton, for a total invoice price of $1,470.00. (ROI Ex. A p. 8) Respondent has not paid Complainant for the spinach billed on this invoice.

6. On August 23, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 11) Complainant prepared invoice number 181074 billing Respondent for 70 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at $10.50 per carton, for a total invoice price of $735.00. (ROI Ex. A p. 10) Respondent has not paid Complainant for the spinach billed on this invoice.

7. On August 24, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 13) Complainant prepared invoice number 181118 billing Respondent for 140 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at $10.50 per carton, for a total invoice price of $1,470.00. (ROI Ex. A p. 12) Respondent has not paid Complainant for the spinach billed on this invoice.

8. On August 27, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach and spring mix. (ROI Ex. A p. 15) Complainant prepared invoice number 181265 billing Respondent for 350 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at $10.50 per carton, or $3,675.00, and 432 cartons of Metz Fresh pillow spring mix (3 lb.) at $4.50 per carton, or $1,944.00, for a total invoice price of $5,619.00. (ROI Ex. A p. 14) Respondent paid Complainant $5,517.75 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)

9. On November 12, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 17) Complainant prepared invoice number 184363 billing Respondent for 144 cartons of Metz Fresh pillow

spring mix (3 lb.) at $4.50 per carton, for a total invoice price of $648.00. (ROI Ex. A p. 16) Respondent paid Complainant $375.00 for the spinach billed on this invoice. (ROI Ex. A p. 3)

10. On November 16, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 19) Complainant prepared invoice number 184586 billing Respondent for 288 cartons of Metz Fresh pillow spring mix (3 lb.) at $4.50 per carton, for a total invoice price of $1,296.00. (ROI Ex. A p. 18) Respondent paid Complainant $1,253.85 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)

11. The informal complaint was filed on April 4, 2008, which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the unpaid balance of the invoice price for eight truckloads of spinach and spring mix allegedly sold and shipped to Respondent. Complainant states Respondent purchased and accepted the commodities in compliance with the contracts of sale, but that it has since paid only $9,546.20 of the agreed purchase prices thereof, leaving a balance due Complainant of $7,958.80. (Complaint ¶ 6) In response to Complainant's allegations, Respondent states it was invoiced for the product in question on a "collect and remit" cross-dock basis as a convenience for Complainant's customer, Kingston Produce ("Kingston"), and that it remitted full payment to Complainant for the commodities based on the proceeds collected from Kingston. (Answer ¶ 4, Second and Third Affirmative Defenses)

There is no dispute that Respondent took billing, received delivery, and remitted partial payment to Complainant for the subject loads of spinach and spring mix. The controversy concerns the issue of whether Respondent was the true purchaser of the product, or whether it was simply taking billing on a collect and remit basis as a convenience to a third party purchaser, Kingston. Respondent's sales manager, Matthew Amaral, explains in affidavit testimony submitted as part of

Respondent's Answering Statement that Respondent acted as a cross-docking facility for Kingston. Mr. Amaral describes "cross-docking" as the consolidation of product from several vendors at a single "cross dock" location for shipment to a common destination. Mr. Amaral states Respondent would get product that Kingston had negotiated with individual shippers throughout Monterey County, and, for a fee, Respondent would consolidate the loads and do the accommodation invoicing as a convenience for the shippers and Kingston. When billing Kingston, Mr. Amaral states Respondent would add a cross-docking charge to the original f.o.b. price billed by the shipper, but would not otherwise mark up the price of the product. Because the amount of product Kingston purchased from individual shippers such as Complainant was small, Mr. Amaral states it would not be practical for Complainant to ship less than trailer load (LTL) equivalents to Kingston. Mr. Amaral states it was more economical and efficient to consolidate Complainant's product with that of other shippers into a full trailer load. With respect to the contract negotiations, Mr. Amaral states he was the "point person" on behalf of Respondent with Kingston, and that he dealt with Mr. Bill Stafford, who at the time was employed as lead salesperson for Complainant. Mr. Amaral states he never discussed pricing with Complainant and asserts that all prices were negotiated between Complainant and Kingston directly. Mr. Amaral states Kingston paid Respondent, after which Respondent paid Complainant the full proceeds received from Kingston minus the cross-docking fees. According to Mr. Amaral, this business relationship was working until Complainant issued a voluntary recall of its spinach on August 28, 2007, prompting Kingston to dump all the spinach received from Complainant during that timeframe and to deduct their cost from Respondent's invoices, which Respondent in turn deducted from its remittance to Complainant. Mr. Amaral states he did not participate in any discussions with Kingston concerning their decision to dump the spinach. (Answering Statement Affidavit of Matthew Amaral pp. 1-3)

To further substantiate its allegations regarding its relationship with Complainant and Kingston, Respondent submitted affidavit testimony from Richard Connelly, a buyer for Kingston. Mr. Connelly states he was the individual on behalf of Kingston who negotiated the purchases of spring mix and spinach from Complainant. Mr. Connelly states he

negotiated the contracts, including pricing, with Mr. Bill Stafford, Complainant's former salesperson. Mr. Connelly states the parties reached an agreement whereby product would be brought by Complainant to Respondent's cold storage facility for cross-docking. The purpose of the agreement, according to Mr. Connelly, was to enhance the efficiency of the loads being sent to Kingston's distribution centers and to avoid shipping partial truckloads. Mr. Connelly states it was mutually agreed with all parties that Respondent would be doing all of the invoicing for all of the outside commodities that shippers brought to Respondent's facility as a service for Kingston and its suppliers. On August 28, 2007, when Kingston was advised that Complainant had voluntarily recalled its spinach, Mr. Connelly states Kingston made the decision to dump all of the spinach shipped during that timeframe for preconditioning reasons and for the safety of its customers. Mr. Connelly states this action was taken as a precaution due to the prior unrelated spinach outbreak of 2006 which sickened hundreds of people. When remitting to Respondent, Mr. Connelly states Kingston deducted the cost of the dumped spinach and related expenses, and Kingston expected these deductions would be passed to Complainant by Respondent. Mr. Connelly states Kingston understood that its contract was with Complainant, and that Respondent, as a courtesy to Kingston, invoiced on a collect and remit basis. According to Mr. Connelly, Kingston considered itself as purchasing the product from Complainant, not Respondent. (Answering Statement Affidavit of Richard Connelly pp. 1-2)

In response to the affidavit testimony of Matthew Amaral and Richard Connelly,[1] Complainant submitted a sworn statement from its sales manager, Marty Howington. In this statement, Mr. Howington acknowledges that what is said in the affidavits of Mr. Amaral and Mr. Connelly is basically true. Mr. Howington states Matthew Amaral and

[1] Respondent's Answering Statement also includes an affidavit from David Martinez, Respondent's Director of Sales; however, we are not considering Mr. Martinez's testimony here because Mr. Martinez readily admits he "was never involved in the establishment of the agreement by Kingston Produce to purchase spinach and spring mix from Metz Fresh LLC." (Answering Statement Affidavit of David Martinez p. 1)

Richard Connelly did deal with Mr. Bill Stafford, who at the time was part of Complainant's sales staff. Mr. Howington states the prices were negotiated between Complainant and Kingston, and that Respondent's role was that of a facilitator who presumably added a cross-docking charge to the invoices issued to Kingston. Mr. Howington states Kingston would pay Respondent the f.o.b. price plus the cross-docking charge, and Respondent, in turn, would pay Complainant the f.o.b. price. According to Mr. Howington, this relationship was working until Complainant issued a voluntary recall of its spinach on August 28, 2007, prior to which Respondent either paid Complainant's invoices in full or would call citing trouble with quality upon arrival at different distributors around the country. Mr. Howington states he agrees with Mr. Amaral and Mr. Connelly that the decision to dump the spinach supplied by Complainant was made by Kingston, and that Kingston evidently did so due to concerns resulting from a spinach problem in 2006. Mr. Howington states he also agrees with Mr. Amaral and Mr. Connelly that the spinach problem of 2006 was totally unrelated and had nothing to do with the voluntary recall issued by Complainant in the summer of 2007. The voluntary recall, Mr. Howington states, was of one lot of spinach produced on one production day, August 22, 2007, and identified by three different eight-digit tracking codes. With respect to Respondent's remittances, Mr. Howington disagrees with Mr. Amaral's implication that Respondent was only obligated to pay the proceeds received from Kingston less cross-docking fees. Mr. Howington states that unless Complainant was notified in a timely manner that there were quality problems upon arrival at the distributor's dock, Complainant was to be paid the full f.o.b. invoice price of the product by Respondent. Mr. Howington states he sees no reason why Complainant should not be paid the full f.o.b. price for the subject loads that were cross-docked at Respondent's facilities, since both Kingston and Respondent freely admit that Kingston took it on their own to destroy the spinach. Finally, Mr. Howington states there was never any mention of Respondent acting in a collect and remit capacity for Complainant and Kingston, nor did Complainant receive any documentation from Respondent or Kingston stating that Respondent would be working as a collect and remit broker. (Statement in Reply pp. 1-2)

As the aforementioned testimony illustrates, there is really no dispute as to the manner in which the transactions in question took place. The parties agree that prices were negotiated between Kingston's Richard Connelly and Complainant's Bill Stafford, after which Respondent placed orders with Complainant presumably based on the projected needs communicated by Kingston's Richard Connelly to Respondent's Matthew Amaral. The product was then shipped to Respondent, where it was segregated into multiple lots to be shipped in smaller quantities to Kingston's various distribution outlets. A single invoice was then issued by Complainant to Respondent for each individual truckload of spinach and spring mix, and Respondent, in turn, issued multiple invoices to Kingston for the consolidated loads that were comprised of small quantities of Complainants' product along with product from other suppliers. (Complaint Ex. 1-8; Answering Statement Ex. 3-4, 7-11, 14-17, 19-21, 24-32, 37, 39-40) In each case, Complainant billed Respondent for the spinach at $10.50 per carton, and for the spring mix at $4.50 per carton. Respondent, in turn, billed Kingston for the spinach at $10.75 per carton ($10.50 plus $0.25 for cross-docking), and for the spring mix at $5.25 per carton ($4.50 plus $0.75 for cross-docking).

While Respondent asserts its involvement in the invoicing of the product was on a "collect and remit" basis, the term "collect and remit," when used in connection with produce transactions, typically refers to a brokered sale where the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller. *See* 7 C.F.R. § 46.28(b). In such a case, the agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. *See* 7 C.F.R. § 46.28(c). There is, however, no indication Respondent was acting as a broker in the subject transactions. The Regulations (other than Rules of Practice) under the Act state that the primary function of a broker "is to facilitate good faith negotiations between parties which lead to valid and binding contracts." *See* 7 C.F.R. § 46.28(b). The parties are in agreement that the price negotiations for the subject transactions were conducted between Complainant and Kingston, without Respondent's involvement. That Respondent subsequently agreed to be billed by

Complainant at the price Complainant negotiated with Kingston, and to bill Kingston at the same price plus cross-docking fees, does not make Respondent a broker.

The relationship between Respondent and Kingston may be more properly characterized as a bailment.

Courts have described bailments in broad terms that are applicable to this situation. In a broad sense a bailment is the delivery of a thing to another for some special object or purpose, on a contract, express or implied, to conform to the objects or purposes of the delivery which may be as various as the transactions of men. Ordinarily the identical thing bailed or the product of, or substitute for, that thing, together with all increments and gains, is to be returned or accounted for by the bailee when the use to which it is to be devoted is completed or performed or the bailment has otherwise expired. *H. S. Crocker Company, Inc. v. McFaddin*, 307 P.2d 429 (Cal. Ct. Ap. 1957)

The record establishes that Kingston was the true purchaser of the commodities from Complainant, as Complainant negotiated the sales prices directly with Kingston. Respondent did not have any input, nor did it have any involvement at all, in the sales price negotiations.[2] Rather, Respondent took possession of the commodities Kingston purchased from Complainant for the sole purpose of segregating Complainant's product into smaller lots so that it could be shipped, following consolidation with product from other Monterey County shippers, to Kingston. Therefore, when Respondent accepted the commodities for cross-docking it was acting as bailee for Kingston.

As part of the bailment, Respondent agreed to take billing for the commodities on Kingston's behalf. This billing arrangement allowed Complainant to invoice for the product sold to Kingston in truckload quantities, while at the same time it allowed Kingston to be billed according to the truckloads of commodities it received after the cross-docking services were provided by Respondent. That Kingston was the

[2] Respondent also was not involved in Kingston's decision to dump certain lots of the spinach received from Complainant. *See* Answering Statement Affidavit of Richard Connelly pp. 1.

actual purchaser of the commodities was plainly disclosed to Complainant because, as we already mentioned, the sales prices were negotiated directly between Complainant and Kingston. Respondent recovered its cross-docking fee by adding $0.25 per carton to the prices negotiated between Complainant and Kingston. Therefore, when Respondent accepted billing for the commodities it was acting as agent for Kingston, its disclosed principal.

The general law of agency is that an agent for a disclosed principal does not become a party to the contract unless he agrees independently to be bound.[3] Respondent's agreement to take billing on behalf of Kingston does not make it liable under the contracts negotiated between Kingston and Complainant, and there is no evidence indicating that Respondent agreed to pay for the commodities in the event Kingston did not pay. Respondent is, therefore, only liable to Complainant for what it collected from Kingston. *See Forney Fruit & Produce Co., Inc. v. Dixie Brokerage Co.,* 29 Agric. Dec. 1433 (1970). After withholding its cross-docking fees, Respondent paid Complainant the sales prices it collected from Kingston. The Complaint should, therefore, be dismissed.

Order

The Complaint is dismissed.
Copies of this Order shall be served upon the parties.
Done at Washington, D.C.

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[3] This principle has been applied in numerous reparation decisions under the Packers and Stockyards Act, 1921, as amended and Supplemental (7 U.S.C. §§ 181 *et. seq*.) that hold that where an agent buys livestock for a disclosed principal**,** there is no liability for the purchase price on the part of the agent absent a specific agreement between the parties to the contrary. *See, e.g., Ward v. Scale, et al.,* 31 Agric. Dec. 105, 106-107; (1972); *Bottorff v. Ault,* 22 Agric. Dec. 20, 22-23 (1963).

ROSENTHAL FOODS CORP. v. W-W PRODUCE, INC.
PACA Docket No. R-09-049.
Decision and Order.
June 18, 2010.

PACA-R – Damages – Seller's for wrongful rejection.

Following Complainant's wrongful rejection of several lots of corn, Respondent could not recover damages using the measure set forth in U.C.C. § 2-706, i.e., the difference between the contract price and the resale price, because Respondent did not submit any evidence of the proceeds collected from the resale of the corn. Respondent was relegated to recovery of damages under U.C.C. § 2-708, *i.e*., the difference between the contract price and the market price. However, since relevant U.S.D.A. Market News reports showed market prices for similar corn that were substantially greater than the f.o.b. contract price plus freight, Respondent failed to establish it was damaged according to the measure of damages set forth in U.C.C. § 2-708(1).

Patrice H. Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $16,482.29 in connection with five truckloads of corn shipped in the course of interstate commerce.

Copies of the Report of Investigation and the Amended Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting a Counterclaim in the amount of $15,120.00 in connection with the same five truckloads of corn at issue in the Complaint. Due to a procedural error, Complainant was never instructed that it could file a reply to Respondent's Counterclaim. Instead, upon receipt of Respondent's Answer with Counterclaim, Complainant was instructed that it could file

an Opening Statement. Complainant did file an Opening Statement in which it denied liability to Respondent on the Counterclaim. Because Complainant's Opening Statement responds to Respondent's Counterclaim, it is deemed to constitute a reply as well as an Opening Statement and throughout this Decision and Order, will be referred to as "Opening Statement and Reply."

Neither the amount claimed in the Complaint nor the Counterclaim exceeds $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (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 are the Department's Report of Investigation (ROI) and Amended Report of Investigation (AROI). 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 Reply. Respondent did not elect to file any additional evidence. Neither party submitted a brief.

Findings of Fact

1. Complainant, Rosenthal Foods Corp., is a corporation whose post office address is P.O. Box 237, Sioux City, Idaho, 51102-0237. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, W-W Produce, Inc., is a corporation whose post office address is P.O. Box 891, Belle Glade, Florida, 33430-0891. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22014 billing Complainant for the corn at $3.00 per crate, for a total invoice price of $3,024.00. (Answer with Counterclaim Ex. A)

4. On October 25, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 3 at Capital City Fruit, Inc., in Norwalk,

Iowa. The inspection disclosed 42 percent injury by quality defects (not well filled, poorly filled, auxiliary ears), including 20 percent which was scored as damage and 8 percent which was scored as serious damage. Pulp temperatures at the time of the inspection ranged from 41 to 43 degrees Fahrenheit. (AROI Ex. A p. 3) Following the inspection, the corn was moved to Proffer Wholesale, in Park Hills, Missouri.

5. The transportation of the corn billed on invoice 22014, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Park Hills, Missouri, was handled by D.J. Franzen, Inc. On October 31, 2007, D.J. Franzen, Inc. issued invoice 2014 billing Complainant $1,100.00 for the initial haul and $1,003.86 for the reconsignment, for a total invoice amount of $2,103.86. (AROI Ex. A p. 2) Complainant paid D.J. Franzen, Inc. $2,103.86 for invoice 2014 with check number 34461, dated November 14, 2007. (AROI Ex. H p. 4)

6. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22015 billing Complainant for the corn at $3.00 per crate, for a total invoice price of $3,024.00. (Answer with Counterclaim Ex. C)

7. On October 25, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 6 at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 23 percent injury by quality defects (not well filled, poorly filled, auxiliary ears), including 13 percent which was scored as damage and 4 percent which was scored as serious damage. Pulp temperatures at the time of the inspection ranged from 41 to 44 degrees Fahrenheit. (AROI Ex. A p. 6) Following the inspection, the corn was moved to The Auster Company, in Chicago, Illinois.

8. The transportation of the corn billed on invoice 22015, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Chicago, Illinois, was handled by Beer Transportation, Inc. On October 29, 2007, Beer Transportation, Inc. issued invoice 10582 billing Complainant $1,100.00 for the initial haul, $1,600.00 for redelivery, and $500.00 (5 days at $100.00 per day) for detention, for a total invoice amount of $3,200.00. (AROI Ex. A p. 5) Complainant paid Beer Transportation, Inc. for the freight billed on invoice 10582

with check number 34484, dated November 15, 2007. (AROI Ex. H p. 5)

9. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22016 billing Complainant for the corn at $3.00 per crate, for a total invoice price of $3,024.00. (Answer with Counterclaim Ex. E)

10. On October 25, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 9 at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 20 percent injury by quality defects (not well filled, auxiliary ears, immature), including 4 percent which was scored as damage and 3 percent which was scored as serious damage. Pulp temperatures at the time of the inspection ranged from 41 to 42 degrees Fahrenheit. (AROI Ex. A p. 11) Following the inspection, the corn was moved first to Heartland Produce, Kenosha, Wisconsin, and then to Rochester Produce, in Winona, Minnesota.

11. The transportation of the corn billed on invoice 22016, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Winona, Minnesota, was handled by Nottestad Trucking, Inc. On November 1, 2007, Nottestad Trucking, Inc. issued invoice 211 billing Complainant $1,100.00 for the initial haul, $450.00 for detention, $714.00 for redelivery to Heartland Produce, Kenosha, Wisconsin, $312.00 for redelivery to Rochester Produce, Winona, Minnesota, and $424.00 for fuel and extended trailer usage, for a total invoice amount of $3,000.00. (AROI Ex. G p. 4) Complainant paid Nottestad Trucking, Inc. $3,000.00 for invoice 211 with check number 34466, dated November 9, 2007. (AROI Ex. A p. 8)

12. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22017 billing Complainant for the corn at $3.00 per crate, for a total invoice price of $3,024.00. (Answer with Counterclaim Ex. G) Hy-Vee Food Stores accepted 714 crates of the corn and rejected the remaining 294 crates.

13.On October 26, 2007, a USDA inspection was performed on the 294 crates of corn rejected by Hy-Vee Food Stores at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 35 percent injury by quality defects (not well filled, auxiliary ears), including 4 percent which was scored as damage. Pulp temperatures at the time of the inspection ranged from 42 to 44 degrees Fahrenheit. (AROI Ex. A p. 16) Following the inspection, the 294 crates of corn were unloaded at Capital City Fruit, Inc.

14.The transportation of the corn billed on invoice 22017, from the initial haul originating in Bainbridge, Georgia, to the reconsignment in Norwalk, Iowa, was handled by Stoughton Trucking, Inc. On November 8, 2007, Stoughton Trucking, Inc. issued invoice 230882 billing Complainant $1,100.00 for the initial haul and $500.00 for detention/layover, for a total invoice amount of $1,600.00. (AROI Ex. A p. 13) Complainant paid Stoughton Trucking, Inc. $1,600.00 for invoice 230882 with check number 34477, dated November 16, 2007. (AROI Ex. H p. 6)

15.On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22018 billing Complainant for the corn at $3.00 per crate, for a total invoice price of $3,024.00. (Answer with Counterclaim Ex. I)

16.On October 26, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 15 at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 14 percent injury by quality defects (not well filled, poorly filled), including 6 percent which was scored as damage and 4 percent which was scored as serious damage, and 4 percent injury by indented kernels. Pulp temperatures at the time of the inspection ranged from 46 to 48 degrees Fahrenheit. (AROI Ex. A p. 19) Following the inspection, the corn was moved to Strube Celery Co., in Chicago, Illinois.

17.The transportation of the corn billed on invoice 22018, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Chicago, Illinois, was handled by Elliott Transport Systems, Inc. On October 31, 2007, Elliott Transport Systems, Inc. issued invoice 83661 billing Complainant $1,100.00 for the initial haul,

$544.05 for redelivery, $133.38 for a fuel surcharge, and $1,500.00 for detention, for a total invoice amount of $3,277.43. (AROI Ex. A p. 18) Complainant paid Elliott Transport Systems, Inc. $3,277.43 for invoice 83661 with check number 34460, dated November 14, 2007. (AROI Ex. H p. 7)

18. The informal complaint was filed on December 11, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover $16,482.29 for freight and related expenses allegedly incurred in connection with its rejection of five loads of corn purchased from Respondent. Respondent asserts in response that Complainant accepted the corn in compliance with the contracts of sale, but has since failed, neglected and refused to pay Respondent the agreed purchase prices totaling $15,120.00, which amount Respondent seeks to recover through its Counterclaim.

We will address each transaction individually by invoice number below:

Invoice 22014

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee Food Stores (hereinafter "Hy-Vee") in Chariton, Iowa. (Complaint Ex. 1-2; AROI Ex. A pp. 2, 4) Hy-Vee rejected the corn, after which the load was moved to Capital City Fruit, Inc. (hereinafter "Capital City"), in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 6, Ex. 4; AROI Ex. A p. 3) Based on the results of the inspection, Complainant rejected the corn, after which Respondent states it placed the product for resale to minimize the loss to Complainant. (Answer with Counterclaim ¶ 4)

As Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection.

James E. Wade, Respondent's president, asserts in Respondent's sworn Answer that Respondent never directed the loads to be inspected at any location other than Hy-Vee's warehouse. (Answer with Counterclaim ¶ 3) Brent Rosenthal, Complainant's president, asserts in response that when Hy-Vee complained about the quality of the corn, he asked Dale Pope, Respondent's salesman, if he would have any objection to moving the product from Hy-Vee to Capital City to secure an inspection. (Opening Statement and Reply ¶ 2) Mr. Rosenthal states Mr. Pope advised "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) Respondent did not submit a statement from Dale Pope to refute Mr. Rosenthal's statement. Sworn statements that have not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (1982). We therefore find the preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection, as Respondent proceeded to have the corn moved to an alternate receiver. (*See* Answer with Counterclaim ¶ 4) We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

Respondent asserts that the rejection claimed by Complainant is improper because the corn was sold with no grade specification. (Answer with Counterclaim ¶¶ 4-8) Mr. Rosenthal asserts in response that Mr. Pope assured that the corn would make "good delivery," and stated specifically "this corn was of good quality and could go anywhere." (Opening Statement and Reply ¶ 1) As we mentioned, the record is absent a statement from Dale Pope to refute Mr. Rosenthal's testimony. Nevertheless, the statement attributed to Mr. Pope is too vague to establish that Complainant warranted the corn would meet the requirements of a specific grade.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j); hereinafter "Regulations") define suitable shipping condition as meaning:

> that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[1]

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[1] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration" (emphasis added), or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. *See* Williston, *Sales §* 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. *See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155, 1157-58 (1987); *G & S Produce Co. v. Morris Produce Ex.*, 31 Agric. Dec. 1167, 1169-70 (1972); *The Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140, 142-143 (1959); *Haines City Citrus Growers Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968, 972-73 (1951).

Complainant secured a destination inspection of the corn which disclosed 42 percent injury by quality defects[2] (not well filled, poorly filled, auxiliary ears), including 20 percent which was scored as damage and 8 percent which was scored as serious damage. (AROI Ex. A p. 3) No condition defects were found.[3] As we previously discussed, it has not been established that the corn in question was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when the produce is sold without a U.S. grade specification. *E.g., Sucasa Produce v. A.P.S. Mktg., Inc.*, 59 Agric. Dec. 421, 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish that the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g. Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co*., 50 Agric. Dec. 957, 964 (1991). "Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314(1). For goods to be merchantable, they must "pass without objection in the trade under the contract description." U.C.C. § 2-314(2)(a). The evidence demonstrates that Respondent is a wholesale dealer of corn. (Answer with Counterclaim ¶ 1; AROI Ex. E) Therefore, any sale by Respondent of corn would include a warranty of merchantability. The inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 42 percent injury by quality defects, the *damage* disclosed by the inspection

[2] Quality defects are defects that do not tend to change over time. *E.g., The Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 457 (2000); *Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909, 914 n. 7 (1994).

[3] Condition defects tend to be of a progressive nature; they are subject to change due to a worsening condition. *The Lionheart Group*, 59 Agric. Dec. at 457; *Diazteca*, 53 Agric. Dec. at 914 n. 7. All decays are condition defects. *Diazteca*, 53 Agric. Dec. at 914 n. 7.

averaged only 20 percent. We have previously held that no grade lettuce containing 27 percent average quality defects (seedstems), as determined by a federal inspection at destination, is merchantable. *Pemberton Produce, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1686, 1692 (1987). Because the corn was not sold with a U.S. grade specification and the damage averaged only 20 percent, we find the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. Although Respondent seeks through its Counterclaim to recover the contract price of the corn (Answer with Counterclaim ¶¶ 19, 21), there was no acceptance of the corn by Complainant. Rather, title to the corn reverted back to Respondent following the effective rejection by Complainant. *Yokoyama Bros. v. Cal-Veg Sales, Inc.*, 41 Agric. Dec. 535, 537 (1982); *Produce Brokers & Distributors, Inc. v. Monsour's, Inc.*, 36 Agric. Dec. 2022, 2025 (1977).

One of Respondent's available remedies under the circumstances is to resell the corn and claim damages under section 2-706 of the Uniform Commercial Code.[4] U.C.C. section 2-706(1) states specifically:

> In an appropriate case involving breach by the buyer, the seller may resell the goods concerned or the undelivered balance thereof. If the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the contract price and the resale price together with any incidental or consequential damages allowed under Section 2-710, but less expenses saved in consequence of the buyer's breach.

[4] U.C.C. § 2-703(2)(g) states, "[i]f the buyer is in breach of contract the seller, to the extent provided for by this Act or other law, may . . . (g) resell and recover damages under Section 2-706."

As we already mentioned, Respondent states it placed the product for resale to minimize the loss to Complainant. Respondent did not, however, provide any evidence of the proceeds collected from the resale of the corn. Without this information, we cannot determine the damages sustained by Respondent using the method provided in U.C.C. § 2-706.

Although Respondent cannot avail itself of the measure of damages provided in U.C.C. § 2-706, it may still be able to recover damages under U.C.C. § 2-708(1)(a),[5] which states the measure of damages for nonacceptance or repudiation by the buyer "is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided in Section 2-710, but less expenses saved in consequence of the buyer's breach." The contract price of the corn was $3.00 per crate f.o.b., to which we will add $1.09 for freight ($1,100.00 inbound freight ÷ 1,008 crates = $1.09 per crate), which results in an f.o.b. plus freight price of $4.09 per crate. (Complaint Ex. 1-2; AROI Ex. A p. 2) By comparison, the USDA Market News Report for Chicago, Illinois, the nearest reporting location to the contract destination of Chariton, Iowa,[6] shows that on October 25, 2007, yellow sweet corn originating from Georgia was mostly selling for $11.00 per crate. Since the prevailing market price, and the price at which Respondent would presumably be able to resell the corn, is substantially greater than the f.o.b. contract price plus freight, there is no indication Respondent was damaged according to the

[5] U.C.C. § 2-706, Official Comment 11.

[6] U.C.C. § 2-723(2) states:

If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

The distance from the shipping point of Bainbridge, Georgia, to Chicago, Illinois, is approximately equal to the distance from Bainbridge, Georgia, to Chariton, Iowa; therefore, no freight adjustment is needed in this case.

measure of damages set forth in U.C.C. § 2-708(1). *See* U.C.C. § 2-708, Comment 1(c).

We conclude that neither party has proven their respective claims for damages in connection with the load of corn billed on invoice 22014.

Invoice 22015

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 7; AROI Ex. A pp. 5-7) Hy-Vee rejected the corn, after which the load was moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 7; AROI Ex. A pp. 5-7) Based on the results of the inspection, Complainant rejected the corn.

Since Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection. While Respondent has asserted that it never directed the loads to be inspected at any location other than Hy-Vee's warehouse (Answer with Counterclaim ¶ 3), Complainant has submitted uncontroverted sworn testimony from its President, Brent Rosenthal, wherein Mr. Rosenthal asserts that Respondent's salesman, Dale Pope, advised that "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) We therefore find that the preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection because, as the discussion that follows will demonstrate, Respondent proceeded to have the corn moved to an alternate receiver. We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The USDA inspection of the corn disclosed 23 percent injury by quality defects (not well filled, poorly filled, auxiliary ears), including 13 percent which was scored as damage and 4 percent which was scored as serious damage. (AROI Ex. A p. 6) No condition defects were found. As our discussion of invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish that the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore, any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 23 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 13 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable. Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 13 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the

expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. As with invoice 22014, one possible remedy is that Respondent may resell the corn and claim damages under U.C.C. § 2-706; namely, the difference between the contract price and the resale price together with any incidental damages, but less expenses saved in consequence of Complainant's breach. Respondent asserts, however, that it did not redirect the load following the rejection. (Answer with Counterclaim ¶ 5) In response, Complainant references several documents which it states establish that Respondent did, in fact, reconsign the load to The Auster Company at the Chicago market. (Opening Statement and Reply ¶ 4) The first is a gate entrance fee ticket made out to Beer Transportation, Inc., the trucking company that transported the load of corn in question, which purportedly shows the corn was delivered to The Auster Company, on October 30, 2007. (Opening Statement and Reply Ex. A) We note, however, that the license plate number shown on this ticket is SA6159, whereas the truck license plate number for the load of corn in question was TC6117 Ia. (*Compare* Opening Statement and Reply Ex. A *to* Answer with Counterclaim ¶ 5, Ex. C-D) No explanation for this discrepancy is provided.

Complainant also references Respondent's invoice 22016a, whereon Respondent billed Windsor Distributing, Inc., Naples, Florida, on a delivered open price basis, for 1,008 crates of yellow corn delivered to The Auster Company on October 28, 2007. (Opening Statement and Reply Ex. B) The invoice bears a stamp dated October 30, 2007, that reads "AUSTER ACQUISITIONS, LLC RECEIVED SUBJECT TO USDA INSPECTION." (Opening Statement and Reply Ex. B) We note, however, that both the invoice number "22016a" and the license number "529131 Wi." indicate this invoice was issued in connection with the corn billed to Complainant on invoice 22016, rather than the load at issue here, which was billed on Complainant's invoice 22015. (*Compare* Opening Statement and Reply Ex. B *and* Complaint Ex. 10 *to* Complaint Ex. 5 and AROI Ex. A p. 5)

The third and final document referenced by Complainant is a copy of trucking instructions prepared by Complainant on October 29, 2007,

advising Beer Transportation, Inc. to deliver a load of rejected corn to The Auster Company in Chicago. (Opening Statement and Reply Ex. C) Review of the record discloses that Beer Transportation, Inc. issued invoice 10582 billing Complainant $1,100.00 for the initial haul, $1,600.00 for redelivery, and $500.00 (5 days at $100.00 per day) for detention, for a total invoice amount of $3,200.00. (Complaint Ex. 6; AROI Ex. A p. 5) This invoice indicates the corn was delivered to Chicago, Illinois, on October 29, 2007. (Complaint Ex. 6; AROI Ex. A p. 5)

Respondent, in its response submitted during the informal stages of this claim, states, in pertinent part, as follows:

> W-W Produce, Inc. can only account for three loads of rejected corn. We shipped one load to Strube in Chicago and the other two loads were handled by Windsor Dist., one of these loads was shipped to their customer, Auster Co. in Chicago and the other one to Proffer Wholesale Produce in Park Hills, Mo.

(AROI Ex. E p. 1) A review of the evidence shows that the invoice Complainant received from D.J. Franzen, Inc. for the corn billed on invoice 22014, discussed above, indicates the corn was reconsigned to Proffer Wholesale, in Park Hills, Missouri. (AROI Ex. A p. 2) Another invoice in the file, invoice 22017a, from Respondent to Strube Celery & Vegetable Co. (hereafter "Strube"), indicates the corn billed to Complainant on invoice 22017 was resold by Respondent to Strube on or about October 28, 2007, on a delivered open price basis. (Opening Statement and Reply Ex. K) We note, however, that the corn billed to Complainant on invoice 22017 was transported by Stoughton Trucking, LLC (AROI Ex. A p. 12), and the record includes correspondence prepared by a representative of Stoughton Trucking, LLC, advising that only seven pallets of the corn in this load were rejected. (AROI Ex. G p. 6) This is in accord with the testimony of Brent Rosenthal, wherein Mr. Rosenthal states that Hy-Vee kept 714 crates of the corn and rejected the other 294 crates. (Opening Statement and Reply ¶ 6, Ex. E) Mr. Rosenthal states the 294 crates that were rejected were re-consigned by Respondent to Capital City, and the evidence substantiates this contention. (Opening Statement and Reply ¶ 6; AROI Ex. G pp. 10-23)

The freight bill for the corn billed to Complainant on invoice 22018, on the other hand, indicates the corn in this load was redelivered by Elliott Transport Systems, Inc. (AROI Ex. A p. 17; Answer with Counterclaim Ex. J), to Chicago, Illinois. (AROI Ex. A p. 18; Opening Statement and Reply Ex. M) Although the name of the consignee is not provided, Complainant asserts the load billed on invoice 22018 was redelivered to Strube, in Chicago, Illinois (Opening Statement and Reply ¶ 7), and we believe the preponderance of the evidence supports this assertion.

We are therefore left with only two loads of corn that Respondent could have sent to The Auster Company in Chicago, Illinois, i.e., the corn billed to Complainant on invoice 22015 and the corn billed to Complainant on invoice 22016. As we already mentioned, Respondent billed Windsor Distributing, Inc., Naples, Florida, on a delivered open price basis, for 1,008 crates of yellow corn delivered to The Auster Company on October 28, 2007. (Opening Statement and Reply Ex. B) As we also mentioned, the invoice number used by Respondent is "22016a" and the license number listed thereon is "529131 Wi." (Opening Statement and Reply Ex. B) This information comports with the corn billed to Complainant on invoice 22016. (*Compare* Opening Statement and Reply Ex. B *to* AROI Ex. A p. 9) We note, however, that the corn billed to Complainant on invoice 22016 was transported by Nottestad Trucking, Inc. (Answer with Counterclaim Ex. F) The record includes both an invoice and correspondence from a representative of Nottestad Trucking, Inc., showing the corn billed to Complainant on invoice 22016 was redelivered to Heartland Produce in Kenosha, Wisconsin, and Rochester Produce, in Winona, Minnesota. (AROI Ex. G p. 4; Opening Statement and Reply Ex. D) On this basis, we find the preponderance of the evidence supports the conclusion that the load of corn under discussion here, that billed to Complainant on invoice 22015, was redelivered by Respondent to The Auster Company, in Chicago, Illinois.

Respondent did not provide any evidence of the resale proceeds collected from The Auster Company for the subject load of corn. Without this information, we cannot determine the damages sustained by Respondent using the method provided in U.C.C. § 2-706. We will, therefore, resort to the alternative measure of damages set forth in

U.C.C. § 2-708(1)(a), i.e., the difference between the contract price and the market price at the time and place for delivery. The contract price of the corn was $3.00 per crate f.o.b., to which we will add $1.09 for freight ($1,100.00 inbound freight ÷ 1,008 crates = $1.09 per crate) (Complaint Ex. 5-6; AROI Ex. 7), which results in an f.o.b. plus freight price of $4.09 per crate. By comparison, the USDA Market News Report for Chicago, Illinois, the nearest reporting location to the contract destination of Chariton, Iowa,[7] shows that on October 25, 2007, yellow sweet corn originating from Georgia was mostly selling for $11.00 per crate. Since the prevailing market price, and the price at which Respondent would presumably be able to resell the corn, is substantially greater than the f.o.b. contract price plus freight, there is no indication Respondent was damaged according to the measure of damages set forth in U.C.C. § 2-708(1). *See* U.C.C. § 2-708, Comment 1(c).

We conclude that neither party has proven their respective claims for damages in connection with the load of corn billed on invoice 22015.

Invoice 22016

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 8, Ex. 10-11; AROI Ex. A p. 9) Hy-Vee rejected the corn, after which the load was moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 8; AROI Ex. A p. 11) Based on the results of the inspection, Complainant rejected the corn.

Since Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection. While Respondent has asserted that it never directed the loads to be inspected at any location other than Hy-Vee's warehouse (Answer with Counterclaim ¶ 3), Complainant has submitted uncontroverted sworn testimony from its President, Brent Rosenthal, wherein Mr. Rosenthal

[7] The use of Chicago market prices to estimate the market value of the corn in Chariton is in accordance with U.C.C. § 2-723(2). *Supra* note 6.

asserts that Respondent's salesman, Dale Pope, advised that "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) We therefore find that the preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection because Respondent proceeded to have the corn moved to an alternate receiver. (Answer with Counterclaim ¶ 6) We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The USDA inspection disclosed 20 percent injury by quality defects (not well filled, auxiliary ears, immature), including 4 percent which was scored as damage and 3 percent which was scored as serious damage. (AROI Ex. A p. 11) No condition defects were found. As our discussion of Invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore,

any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 20 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 4 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable. Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 4 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. As with invoice 22014, one possible remedy is that Respondent may resell the corn and claim damages under U.C.C. § 2-706; namely, the difference between the contract price and the resale price together with any incidental damages, but less expenses saved in consequence of Complainant's breach.

As we already mentioned in our discussion of invoice 22015, this load was redirected first to Heartland Produce in Kenosha, Wisconsin, and then to Rochester Produce, in Winona, Minnesota. Brent Rosenthal testifies specifically:

> At the sole direction of Respondent/W-W Product [sic], this product was re-consigned to Heartland Produce, Kenosha, WI (262-653-1000). Attached as exhibit "D" is a letter from Nottestad Trucking (608-625-2203) explaining what they were directed to do with this load. Unfortunately, Heartland Produce felt that there was no salvage to this load. At this point, Dale told Brent to take the product anywhere you can get it off the truck, so we attempted to take to Rochester Produce, which also failed to accept it. Finally, after Dale Pope of W-W Produce gave up trying to find any other home for the product, the trucker, with no option to sell the product, gave it to a farmer to dump.

(Opening Statement and Reply ¶ 5) The letter from Nottestad Trucking, Inc., referenced by Mr. Rosenthal above, reads as follows:

> Nottestad Trucking of Westby, WI hauled a load of sweet corn for Rosenthal Foods that was rejected at Hyvee Chariton.
>
> Next we were instructed to deliver at 6 AM Sunday morning at Heartland Produce in Kenosha, WI. But, they rejected it on the spot.
>
> The corn was unloaded at Rochester Produce in Winona, MN. The receiver stated they would sort the corn and make an attempt to sell. I spoke with Rochester Produce days after the delivery and was told that the product was not being accepted by anyone and due to the corn starting to rot it was donated to a local farmer.

(Opening Statement and Reply Ex. D) Although the letter from Nottestad says nothing in regard to who directed the load to Heartland Produce, Brent Rosenthal has testified that the movement of the load was done at the direction of Dale Pope, and Respondent did not submit a statement from Mr. Pope to refute this assertion. Nevertheless, whether the rejected corn was moved at the direction of Respondent, or Complainant acting on behalf of Respondent, the evidence shows the corn could not be resold and had to be donated. (Opening Statement and Reply ¶ 5, Ex. D) Therefore, according to the measure of damages set forth in U.C.C. § 2-706, i.e., the difference between the contract price and the resale price, Respondent is entitled to recover $3,024.00 (the contract price of $3,024.00 less $0.00 resale proceeds) as damages resulting from Complainant's wrongful rejection of the corn.

While Respondent's inability to sell the corn following Complainant's rejection may appear to raise a question once again as to the corn's merchantability at the time of sale, we hasten to point out that the corn was originally shipped on Tuesday, October 23, 2007 (AROI Ex. A p. 7), was delivered to and refused by Heartland Produce five days later, on Sunday, October 28, 2007 (Opening Statement and Reply Ex. D), and after further attempts to rework and resell the corn were made

by Rochester Produce, it was ultimately deemed unsalable due to rot (Opening Statement and Reply Ex. D). In addition, at the time of inspection on October 25, 2007, the damage disclosed by the inspection only averaged 4 percent. (AROI Ex. A p. 11) Therefore, by the time the corn was donated, the unmerchantability of the corn was likely due to the normal senescence of the product rather than any inherent defect present at the time of sale.

We conclude that Respondent is entitled to damages in the amount of $3,024.00 for the load of corn billed on invoice 22016.

Invoice 22017

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 9, Ex. 14-15; AROI Ex. 12-13) Hy-Vee accepted 714 crates of the corn and rejected the remainder. The remaining 294 crates were moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 9; AROI Ex. A p. 16) Following the inspection, Complainant states the 294 crates were reconsigned by Respondent to Capital City. (Opening Statement and Reply ¶ 6)

The Uniform Commercial Code provides that "[a]cceptance of a part of any commercial unit is acceptance of that entire unit." U.C.C. § 2-606(2). "Commercial unit" is defined in the Code as:

> such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

U.C.C. § 2-105(5). The Regulations (7 C.F.R. § 46.43(ii)) define "commercial unit" as "a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract." Under these definitions, the 1,008 crates of corn in this shipment

comprise a commercial unit. A commercial unit must be accepted or rejected in its entirety. *See* 7 C.F.R. § 46.43(ii); U.C.C §§ 2-105(5), 2-601(c). Therefore, Hy-vee's acceptance of 714 crates of corn from the shipment operated as acceptance of the entire shipment. Since "[a]n acceptance is operative all the way up the line to the ultimate seller", Hy-vee's acceptance of the corn prevented any subsequent rejection by Complainant. *Phoenix Vegetable Distributors v. Randy Wilson, Co*., 55 Agric. Dec. 1345, 1349 (1996). Accordingly, we find Complainant accepted the corn in this shipment.

Complainant is liable to Respondent for the full purchase price of the corn it accepted, less any damages resulting from any breach of warranty by Respondent. Complainant secured a destination inspection of the corn which disclosed 35 percent injury by quality defects (not well filled, auxiliary ears), including 4 percent which was scored as damage. (AROI Ex. A p. 16) No condition defects were found. As our discussion of invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore, any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 35 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 4 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable.

Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 4 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

Having failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, Complainant is liable to Respondent for the corn it accepted at the agreed purchase price of $3,024.00. While it would, however, be appropriate to reduce this amount by any proceeds collected by Respondent for the 294 crates of corn that were sold on its behalf by Capital City, the record shows Capital City's attempts to sell the corn were unsuccessful and that the corn was ultimately donated or dumped. (AROI Ex. G pp. 10-23)

We conclude that Respondent is entitled to damages in the amount of $3,024.00 for the load of corn billed on invoice 22017.

Invoice 22018

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 10, Ex. 18-19; AROI Ex. A pp. 17-18) Hy-Vee rejected the corn, after which the load was moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 10; AROI Ex. 19) Based on the results of the inspection, Complainant rejected the corn.

Since Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection. While Respondent has asserted that it never directed the loads to be inspected at any location other than Hy-Vee's warehouse (Answer with Counterclaim ¶ 3), Complainant has submitted uncontroverted sworn testimony from its President, Brent Rosenthal, wherein Mr. Rosenthal asserts that Respondent's salesman, Dale Pope, advised that "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) We therefore find that the

preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection because Respondent proceeded to have the corn moved to an alternate receiver. (Opening Statement and Reply ¶ 7, Ex. K-M) We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The USDA inspection disclosed 14 percent injury by quality defects (not well filled, poorly filled), including 6 percent which was scored as damage and 4 percent which was scored as serious damage, and 4 percent injury by indented kernels. (AROI Ex. A p. 19) No condition defects were found. As our discussion of invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the only damage disclosed by the USDA inspection consisted of quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish the corn was not merchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore, any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the

requirements of the U.S. Fancy grade, and while it disclosed 18 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 6 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable. Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 6 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the warranty of suitable shipping condition or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. As with invoice 22014, one possible remedy is that Respondent may resell the corn and claim damages under U.C.C. § 2-706; namely, the difference between the contract price and the resale price together with any incidental damages, but less expenses saved in consequence of Complainant's breach.

We have already determined that Respondent sent the rejected corn to Strube, in Chicago, Illinois. Respondent did not, however, provide any evidence of the resale proceeds collected from Strube for the subject load of corn. Without this information, we cannot determine the damages sustained by Respondent using the method provided in U.C.C. § 2-706. We will, therefore, resort to the alternative measure of damages set forth in U.C.C. § 2-708(1), i.e., the difference between the contract price and the market price at the time and place for delivery. The contract price of the corn was $3.00 per crate f.o.b., to which we will add $1.09 for freight ($1,100.00 inbound freight ÷ 1,008 crates = $1.09 per crate) (Complaint Ex. 19; AROI Ex. A p. 18), which results in an f.o.b. plus freight price of $4.09 per crate. By comparison, the USDA Market News report for Chicago, Illinois, the nearest reporting location to the contract destination of Chariton, Iowa,[8] shows that on October 26, 2007, yellow sweet corn originating from Georgia was mostly selling for $9.00 to $10.00 per crate, or an average of $9.50 per

[8] The use of Chicago market prices to estimate the market value of the corn in Chariton is in accordance with U.C.C. § 2-723(2). *Supra* note 6.

crate. Since the prevailing market price, and the price at which Respondent would presumably be able to resell the corn, is substantially greater than the f.o.b. contract price plus freight, there is no indication Respondent was damaged according to the measure of damages set forth in U.C.C. § 2-708(1). *See* U.C.C. § 2-708, Comment 1(c).

We conclude that neither party has proven their respective claims for damages in connection with the load of corn billed on invoice 22018. Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent with respect to any of the five loads of corn at issue in this dispute. We have concluded on this basis that Complainant's rejection of the corn billed on invoice numbers 22014, 22015, 22016, and 22018 was wrongful. For the load of corn billed on invoice 22017, the evidence established that Complainant accepted the corn. On the basis of these findings, we conclude that the Complaint, where Complainant seeks recovery of expenses incurred in connection with its rejection of the corn, should be dismissed. Respondent, on the other hand, is entitled to recover $3,024.00 as damages resulting from Complainant's wrongful rejection of the corn billed on invoice 22016, and $3,024.00 for the agreed purchase price of the accepted load of corn billed on invoice 22017, for a total of $6,048.00.

Complainant's failure to pay Respondent $6,048.00 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Respondent. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "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, 239-240 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (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, 979 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 338 (1970); *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66, 67 (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.*, 65 Agric. Dec. 669, 672-73 (2006).

Respondent in this action paid $500.00 to file its Counterclaim. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

Order

The Complaint is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent as reparation $6,048.00, with interest thereon at the rate of 0.33 percent per annum from December 1, 2007, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

L&M FARMS, INC. v. Y2S TRADING, INC., AND TOPLINE TRADING, INC. AND TOPLINE TRADING, INC. v. L&M COMPANIES, INC.
PACA Docket No. R-07-072.
PACA Docket No. R-08-050.
Filed June 30, 2010.

PACA-R -- Alter ego – evidence of.

An a newly-formed corporation was found to have been the alter ego of an established corporation because the established corporation: (1) accepted produce for both corporations, (2) provided warehouse space for both corporations, (3) comingled funds by delivering remittance checks from accounts it controlled, (4) shared an employee and owner, and (5) the employee in common to both corporations negotiated for both corporations. There was some evidence of separation, but the weight of the evidence

showed that the two corporations were not acting as separate entities for the purposes of the joint venture. Because of these facts, the newly-formed corporation's interests were dominated by the established corporation to the extent that the newly-formed corporation was the alter-ego of the established corporation

Alter-ego, evidence of

Two corporations that were formed in different states, at different times, and the corporations had different owners and officers, separate employees, and accounting departments, were not alter-egos of one another.

Joint Venture , duties of

Partners in a joint account relationship owe each other the utmost good faith in their dealings with one another. If the joint venture sustains damages because a joint venturer breaches his duties, the breaching partner must bear the loss, although in matters of judgment the joint venturer will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud.

Joint venture, evidence of

Where parties to an agreement agreed to share profits, and committed time, effort, and money, to the growing of Napa cabbage, the agreement was held to be a joint venture.

Joint venture, evidence of

Where one party to an agreement only marketed the cabbage from a joint venture, and took on no risk or control over the venture, that party was held to not be a part of a joint venture.

Joint venture, expenses of

The ordinary rule of a joint venture is that each party bears their individual expenses. The basic principle is that general overhead expenses are excluded from the gross profit of the joint venture where the overhead represents an attempt to charge compensation for services in providing capital and in providing the organization to handle the transaction. Joint account partners may agree to share expenses differently, however, joint venturers do not ordinarily agree to share the expenses of turning on the lights, making telephone calls, buying uniforms, or paying the salaries of office staff.

Accounting , adequacy of

An accounting from a joint venturer showed the date of shipment, the lot number, the name of the purchaser, the amount of cabbage sold, the initial invoice price, the amount actually received, the bill of lading number, the trucking company who delivered the cabbage, and notes on the problems with each load was held to be an adequate accounting even though it it lacked an itemized explanation of the shipping charges, the commissions taken, or costs incurred, and it referred to the date of shipment without regard to the date of sale.

Accounting – damages for failure to account

Damages in the amount of the reasonable value of the produce are awarded when a party fails to account for produce.

Dumping, evidence of

Where a joint venturer accounted zero and negative returns for lots of cabbage, the accounting must also have included other adequate evidence to justify the zero and negative returns. Inspections or other adequate evidence are required to demonstrate that produce is without commercial value, and that documentation must be given to the joint account partner. Because the expenses were not separately accounted for, presumption arose that zero and negative returns were a result of dumping.

Attorney's Fees and Expenses

Attorney's fees and expenses were not awarded because there was no prevailing party. Each of the four parties to this litigation failed in aspects of their allegations. With the exception of one party, all of the other parties were required to pay damages. The single party that did not have to pay damages, however, made arguments contrary to the statements of its witnesses at the hearing, and charged excessive amounts to the joint venture that was the subject of the litigation. It did not substantially prevail on the arguments it made in its complaint or on the arguments that it made in its post-hearing briefs.

Jonathan Gordy, Presiding Officer
Louis W. Diess, III, Counsel for L&M Farms, Inc. and L&M Companies, Inc.
Paul T. Gentile, Counsel for Y2S Trading, Inc., and Topline Trading, Inc.
Decision and Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499t)(PACA). A timely formal complaint (L&M Farm's Complaint) was filed with the Department on February 20, 2007, in which Complainant L&M Farms, Inc. (L&M Farms) sought a reparation award of $142,536.25 in connection with transactions in interstate commerce involving sales of

Napa cabbage, which is also known as Chinese cabbage. L&M Farms claimed that Respondents Y2S Trading, Inc., (Y2S) and Topline Trading, Inc., (Topline) had received cabbage from L&M Farms as a grower's agent. L&M Farms claimed that Y2S and Topline failed to fully account and remit the net proceeds of the sales of cabbage.

On April 6, 2007, Y2S and Topline filed answers that denied the allegations of the Complaint, and Topline filed a counterclaim. Topline claimed that it and L&M Farms had entered into a joint venture whereby L&M Farms would plant seeds provided by Topline, and Topline would sell the cabbage on consignment. Topline claimed that it had accounted for the cabbage, and that it was owed commission, expenses, and excessive charges that L&M Farms charged the joint account for planting and harvesting the cabbage.

In its Complaint, L&M Farms claimed that it was not a licensee subject to the PACA. During the initial telephone conference on August 15, 2007, the presiding officer, Jonathan Gordy, informed the parties that Topline's counterclaims could be dismissed for lack of jurisdiction.[1]

At that telephone conference, the representative of Y2S and Topline requested an opportunity to file a motion to amend the pleadings. The presiding officer granted the request and permitted Topline's motion and L&M Farm's response. On November 26, 2007, the Presiding Officer issues an order that denied Y2S's and Topline's motion to amend the pleadings, but permitted Topline to file a separate Complaint against L&M Companies, Inc. (L&M Companies).

Accordingly, Topline filed a Complaint against L&M Companies on December 17, 2007 (Topline's Complaint). Topline's Complaint reiterated, in substance, the same claims it originally brought as part of its counterclaim. Topline sought $131,991.00 in damages in connection with the same loads of Napa cabbage that were the subject of L&M

[1] *See*, *e.g.*, *L.J. Crawford v. Ralph & Cono Comunal Produce Corp.*, 51 Agric. Dec. 804, 809 (1992); *E.S. Harper Co., Inc., v. Magic Valley Growers, Ltd.*, 46 Agric. Dec. 1864, 1866 (1987); *Kesteren Jr. v. Yukon & Sons Produce, Inc.*, 12 Agric. Dec. 989, 995 (1953).

Farm's Complaint against Y2S and Topline. L&M Companies timely answered Topline's Complaint, and denied its allegations.

The cases were consolidated for hearing, which was held in Washington, DC from July 29, 2008 through July 31, 2008, before Presiding Officer Jonathan Gordy of the Office of the General Counsel. L&M Farms and L&M Companies presented 16 exhibits (CX) and Y2S and Topline presented 42 exhibits (RX). L&M Farms and L&M Companies presented the testimony of two witnesses, and Y2S and Topline presented the testimony of three witnesses. After the hearing, the parties timely filed briefs in this matter. L&M Farms and L&M Companies initially filed a joint "Brief of L&M Farms, Inc. and L&M Companies, Inc." (L&M's Initial Brief) and, after the initial briefing, L&M Farms and L&M Companies filed a "Reply of L&M Companies, Inc. and L&M Farms, Inc." (L&M's Reply Brief) Y2S and Topline initially filed a joint "Proposed Findings of Fact and Conclusions of Law by Respondents/Complainants Y2S Trading, Inc. and Topline Trading, Inc." (Y2S Initial Brief) and, after the initial filings, Y2S and Topline filed a joint "Reply Brief of Topline Trading, Inc. and Y2S Trading, Inc" (Y2S Reply Brief). The parties also timely filed requests for fees and expenses. The exhibits from the Report of Investigation (ROI EX) are considered a part of the evidence in this proceeding. *See* 7 C.F.R. § 47.7.

Findings of Fact

L&M Farms is a produce growing operation incorporated and existing under the laws of the State of Florida, with its corporate headquarters located at Suite 204, 2925 Huntleigh Dr., Raleigh, North Carolina. L&M Farms does not maintain a PACA license, and sells produce of its own raising.

L&M Companies is a produce dealer incorporated and existing under the laws of the state of North Carolina. L&M Companies is a licensee under the PACA, PACA license No. 19980840, which is next due for renewal on March 18, 2011. L&M Companies corporate headquarters is located at Suite 204, 2925 Huntleigh Dr., Raleigh, North Carolina.

Y2S Trading is a corporation, with a business address of 16-28 Prince Street, Brooklyn, New York. According to its corporate records, Y2S

Trading was founded in May 7, 2002 as Seven Seas Wholesale Produce, Inc. (CX 14-15.) Before that, its employees and owners had been a part of Seven Seas Trading Co., Inc., d/b/a Valley View Farms (Valley View). On April 25, 2005, Valley View was found to have committed willful repeated and flagrant violations of the PACA. Abraham Tan, the owner of Valley View, was subject to employment restrictions from April 26, 2005 to April 28, 2006. (Letter of Karla D. Whalen, File PACA RC N-A-2002-2357.) But, he remained associated with Y2S Trading as an advisor. (TR 264.) By the time of the Hearing, Y2S Trading was a licensee under the PACA. It received its PACA license, number 20021589, on September 23, 2002. (CX 16.) Also, at the time of the Hearing, Tan described his role at Y2S Trading as similar to a CEO, managing daily operations and purchasing produce from the United States, Canada, and Mexico. (TR 285-86.)

In the summer of 2005, Abraham Tan, acting on behalf of Y2S, began to seek out a growing operation in Florida. He intended that this operation would supply Napa cabbage to Y2S for the winter of 2005. Y2S would sell the cabbage to its Asian American customers, particularly Korean customers. Tan contacted Steve Rosen, a friend in California, who recommended that Tan speak with Joseph McGee. (TR 162-64.) Joseph McGee, who was an owner of both L&M Farms, and L&M Companies, spoke with Tan via telephone, and agreed to meet with Tan in August of 2005. (TR 164-65.)

In August, the parties met to discuss a joint venture for the growing and marketing of Napa cabbage. Present from L&M Companies and L&M Farms were Joseph McGee, Mike McGee, Scott Beach (Beach), and Jim Mackenzie (Mackenzie); present from Y2S was Abraham Tan (Tan); and, present from a to-be-named-in-the-future company was Jae Ha (Ha), and Ha's son. (*See* TR 36-37, 561.) There was also an eighth person that attended the meeting who was a friend of Ha's son. (TR 561; *see* TR 37.)

The parties agreed to the following terms: Joseph McGee and McKenzie would make arrangements through L&M Farms to grow approximately 150 acres of Napa cabbage for the joint venture. (*See* TR 298; 621.) L&M Farms would arrange for packing and shipments of

70% of the cabbage to the companies related to Tan. Tan's companies — the company that would later be named Topline Trading, Inc. and Y2S — would market 70% of the cabbage. The remaining 30% of the cabbage would be marketed by L&M Companies. (TR 239.) Ha would provide advice to the joint venture on the growing of Napa cabbage, (TR 38) and he would provide one quarter of the capital to start the process of planting cabbage (*See* TR 42). Y2S would also provide one quarter of the capital for the joint venture. (*See id.*) L&M Farms would provide the other half of the capital for the joint venture. The marketing operations of L&M Companies, and Tan's companies would each take a percentage commission before returning the proceeds to the joint venture. If the gross proceeds exceeded the costs, any net proceeds would be divided equally between L&M Farms and Tan's companies.

There was disagreement at the meeting concerning the specifics of the costs to be allocated to the joint venture. Beach had prepared an expense report of L&M Farm's attempt to grow Napa cabbage on a test basis the prior year. (RX 32.) Those expenses reached the sum of $1635.12 per acre. (*Id.*) These costs were not acceptable to Tan or Ha. In their experience, both concluded that expenses for growing Napa cabbage should not exceed $1,000.00 per acre. (*See* TR 33-34; 57; 179; 282.) As a result, the parties did not agree on a fixed expense per acre that would be charged to the operation.

The parties also failed to agree on a minimum price to be set for the cabbage. Beach and Joseph McGee believed that a minimum (or floor) price agreement was reached, (*see* TR 340; 669) but there is no indication that Y2S or Topline agreed to a minimum price. When L&M Companies marketed its portion of the cabbage, it did not pay a minimum price to the joint venture. (*See* TR 669.)

Despite the fact that L&M Farms and L&M Companies had their attorney draft a written contract, none of the parties signed the contract. (TR 240; 343)

Sometime before the end of October 2005, Ha and Sung Y. Yang (aka Michelle Yang) (Yang), who is the owner of Y2S, formed Topline for the purpose of entering into the joint venture with L&M Farms and L&M Companies. PACA licensing records show that Topline had a business address of 16-28 Prince Street, Brooklyn, NY, 11201. It was

issued a PACA license on October 31, 2005, and that license terminated on November 4, 2006 for failure to file the annual renewal fee.

On October 24, 2005, November 28, 2005 and December 29, 2005, Y2S sent three checks to the order of "L&M Companies" to the corporate headquarters of L&M Farms and L&M Companies as the initial amount of capital to cover half of the expenses for growing the Napa cabbage. These payments totaled $70,000.00. (CX 13 at 2-4.) This is half of a projected cost of $1000 per acre.

On January 14, 2006, Napa cabbage began to ship to Y2S at its facility at 16-28 Prince Street, Brooklyn, NY. After the first two bills of lading issued to "Y2S Trading, Inc," later bills of lading were issued to "Topline." (RX 59; CX 5.) All the loads shipped to 16-28 Prince St., Brooklyn, NY 11201. (*Id.*)

As the cabbage was delivered to Y2S Trading and Topline, Topline began writing checks to "L&M." These were: a $50,000 check on April 28, 2006, a $20,000 check on May 26, 2006, a $25,000 check on June 9, 2006, and a $24,871 check on July 6, 2006. (RX 13-20.) The total amount Y2S and Topline remitted to "L&M" and "L&M Companies", including the checks to cover expenses, was $189,871.00.

During this period, Y2S and Topline were selling the cabbage. Topline and Y2S employed Brian Cho (Cho) to sell most of the cabbage, and a smaller portion of the cabbage was also sold by Y2S and Yang. According to Cho and Tan, the buyers were unhappy with the cabbage. There were two quality defects that caused this unhappiness: First, the cabbages had begun to bolt.[2] This occurs when a flower develops inside the center of the cabbages. The center of the cabbage becomes bitter and undesirable. (TR 116.) In Napa cabbage, which is an oblong cabbage, early bolting can only be detected by cutting the cabbage in half. (*See* TR 117.) Second, the cabbage was the wrong size for the Asian market. (*See* TR 26-27; 51.)

[2] The term used at the hearing was variously "seeder" or "flower." (*See*, *e.g.*, TR 115-16.) This decision will use the term "bolt" instead of the awkward "seeder." *A Dictionary of Agricultural and Allied Terminology*, Winburn, Michigan State Press (1962), defines "bolt" as "5. to flower or to produce seed stalks, often prematurely."

Despite the money remitted to "L&M," Tan's companies did not send an accounting until sometime after all of the sales were complete. Tan ordered Cho to prepare a typed accounting sometime during the end of April or beginning of May 2006 that was later modified with handwritten entries from Michelle Yang, who had sold the other loads of cabbage. (*See* TR 133, 135-38, 140; RX 34-35)

The accounting (RX 34-35) included the date of sale, a lot number, the name of the purchaser, the amount of cabbage sold, the price obtained per unit, the total price, the bill of lading number, the trucking company who delivered the cabbage, and finally notes on the problems that Cho had with each load. (TR 134-37.) The handwritten entries, from Michelle Yang, are intended to substitute for "Topline" in the columns for the total price of the sale. (TR 136.)

Topline and Y2S did not account for the commission that they were owed under the contract.

L&M Companies remitted to L&M Farms a return of a little more than $8,000 on 13,880 boxes of Napa cabbage. (TR 663.) It accounted for the cabbage to L&M Farms, but, Y2S and Topline did not receive an accounting from L&M Companies or L&M Farms.

Discussion

1. The parties' allegations.

In August of 2005, representatives of the parties met to negotiate an agreement for the growing, harvesting, and marketing of Napa Cabbage. This case is based on the disagreements that resulted from the oral agreement the parties reached. The parties have disagreed as to nearly every term of this contract. The parties dispute: the kind of agreement, the parties to the agreement, breaches of contractual duties, and breaches of regulatory duties, and the amount of damages that result from the breaches of those duties.

The dispute begins with the type of agreement that the parties entered into, because, depending on the type of agreement, the parties' duties could be substantially different. At first, L&M Farm's Complaint claimed that Y2S and Topline were grower's agents. Later, in L&M's Initial Brief, L&M Farms and L&M Companies describe these transactions as a consignment. In Topline's Complaint against L&M

Companies, Topline discusses both an "oral joint venture" agreement, (Topline's Complaint ¶ 3) and a "consignment" of the cabbage (Topline's Complaint ¶ 6). In their Initial Brief, Topline and Y2S settle on calling the agreement a "joint venture." (Y2S Initial Brief at 3.)

The parties also dispute who was a party to the agreement. In the informal proceeding, L&M Farms has focused its allegations against Y2S. But, Y2S has claimed it was not a party to the oral contract, and that, instead, Topline was the party to the agreement. Only after this was brought to the attention of L&M Farms during the informal proceeding did it add Topline as a Respondent in its formal Complaint. While Topline initially made counterclaims against L&M Farms, it withdrew its counterclaims and Topline filed its Complaint exclusively against L&M Companies. Topline insists that L&M Companies was the party to the agreement, and that L&M Farms was never referred to as a separate corporate entity from L&M Companies during the negotiations. (Y2S Initial Brief at 3-4.)

Next, the parties have presented several possible breaches of contractual or regulatory duties, which they believe warrant a damage award.

L&M Farms may have intended, at first, to treat the agreement as one for the sale of cabbage from L&M Farms to Y2S, because it created and sent a package of invoices to Abraham Tan and Y2S. But, by the time of the informal complaint, L&M Farms alleged that Y2S was a grower's agent that had failed in the various regulatory duties of a grower's agent. (*See* ROI EX 1 at 2.)

In its formal Complaint, L&M Farms based its claims on Y2S' purported failure to account for its handling of consigned cabbage, and Y2S' purported failure to remit the net proceeds from those sales. (L&M Farm's Complaint ¶ 7.) After the hearing, however, L&M Farms conceded that it received "a document apparently summarizing the sales" of Topline and Y2S. (L&M's Initial Brief at 6.) But, L&M Farms asserted that the accounting was inadequate. (L&M's Initial Brief at 7.) Moreover, L&M Farms also added the claim that by using Brian Cho to sell the cabbage, and by selling the cabbage outside of the New York area, Y2S and Topline were liable for breaching the duties of a

consignee. (L&M's Initial Brief at 9-10.) Finally, L&M Farms claimed that Y2S and Topline failed to exercise reasonable care in the handling of the cabbage. (L&M Complaint at 2; L&M's Initial Brief at 7.)

For these breaches, L &M Farms has claimed the fair market value of the cabbage minus the amounts remitted by Y2S. (Complaint ¶ 8; L&M's Initial Brief at 16.) The fair market value was based, in part, on invoices that L&M Farms presented in the informal procedure. (ROI at Exhibit 1.) The total amount claimed is $142,536.25. (Complaint ¶ 8; L&M's Initial Brief at 16.)

Topline and Y2S have countered that they — or at least Topline — accounted for the cabbage, and that the net proceeds were remitted. (Y2S Initial Brief at 6-7.) In reply to the allegations that it mishandled the produce, Topline and Y2S presented evidence that the cabbage was of poor quality, and that L&M Farms failed to follow their instructions regarding the proper seed and planting of the cabbage. Topline also countered that the invoices were fraudulent, and did not represent the agreement of the parties. (*See* Topline's Complaint ¶ 11.)

Topline, on the other hand, originally claimed that L&M Companies — which Topline treats as the alter-ego of L&M Farms — owes Topline for: commissions on the sale of the cabbage in the amount of $13,156.05, un-reimbursed expenses in the amount of $5,132.00, box credit in the amount of $10,703.00, and L&M Companies' overcharges for the planting and harvesting of the cabbage in the amount of $102,000.00. (Topline's Complaint ¶¶ 7-10.) In its Initial Brief, however, Topline revised its claims and claimed it was owed $70,000.00 for growing costs due because L&M Companies failed to follow the planting instructions, commission in an unspecified amount for the sales it conducted, and some portion of L&M Companies' sale of 30% of the cabbage. (Y2S Initial Brief at 7.) Or, more broadly, "Topline, Y2S, Ha, Cho, and Tan, have received not a penny for their efforts and/or sales relating to the joint venture." (*Id.*)

First, we must decide the questions of alter-ego; second we must decide the terms of the agreement and whether it was a consignment, or a joint venture; third, we will decide who was a party to the agreement and what duties, if any, these parties had; fourth, we will decide whether the parties breached their duties; fifth, we will determine what damages

resulted from any breach; and finally, we will calculate to what extent each party will recover damages.

2. The evidence shows that Topline Trading was the alter-ego of Y2S, but L&M Farms was not the alter-ego of L&M Companies.

In re: Marysville Enterprises, Inc., 59 Agric. Dec. 299, 315 (2000), explained that control determines if a corporation is the *alter ego* of its owner. Control must be active and substantial, though it need not be exclusive. In general, the corporate form may be ignored when an individual so dominates a corporation so that the corporation fails to have a separate personality. Some of the factual factors which demonstrate that a company is the *alter ego* of an individual are: (1) the individual directed the formation of the corporation; (2) the individual exercised substantial control over the corporation; (3) the individual's funds and the corporation's funds were commingled; (4) the corporation failed to have persons other than the individual as corporate officers and directors; (5) corporate formalities, such as meetings of the board of directors, were not followed; and (6) the individual used the corporation as a façade for his or her operations. *See id.*

A. Topline was the alter-ego of Y2S.

There is substantial evidence that Y2S controlled Topline. Y2S provided warehouse space to Topline, and the initial $70,000 in checks to L&M. Moreover, Y2S also delivered the later remittances; Y2S's mailed the later remittance checks in envelopes with its name on the return address. (CX 13 at 5, 8.) The mailings and the initial checks show that Y2S may have commingled funds. In addition to sharing funds, Topline and Y2S shared an owner, Yang, and the two companies shared an agent, Tan.

Tan's actions indicate further direct control of Topline by Y2S. Tan, who negotiated the agreement, later ordered Cho to produce a report for L&M. There is no indication that Topline had separate accounting or staffing from Y2S. The produce was either shipped directly to customers or shipped to the warehouse controlled by Y2S. Because of Y2S's involvement in arranging this venture and because Y2S intended

to receive this venture's benefits, Y2S dominated Topline's interests and Topline ceased to have a separate will from the interests of Y2S.

Not all of the evidence supports our finding of alter-ego. We recognize that Ha testified that he invested $35,000 into Topline, and Cho testified that he was hired by Ha. Thus, there is some indication that Topline was a separate entity. But, we conclude that the preponderance of the evidence presented shows that the Y2S and Topline were the same entity for the purposes of this venture.

B. L&M Farms was not the alter-ego of L&M Companies.

In contrast to Y2S and Topline, L&M Companies was a separate entity from L&M Farms. L&M's Exhibits, CX 1 and CX 2, show that L&M Companies had different owners and officers from L&M Farms. L&M Companies and L&M Farms were founded in different states and at different times. Both companies appeared to follow corporate formalities, submitting their statutory filings in their respective states. As the witnesses explained, the two companies have separate accounting departments, with separate employees. (See TR 560.) There is no indication in the record that L&M Farms or L&M Companies intentionally commingled funds. When it came to L&M Companies' attention that it had mistakenly deposited checks intended for L&M Farms, L&M Companies remitted the money over to L&M Farms. (*See* TR 501; 582.)

Accordingly, the evidence does not show that L&M Companies exercised the requisite level of control over L&M Farms to lead to the conclusion that L&M Farms was an alter-ego of L&M Companies.

3. The oral agreement between the parties

There have been three different agreement types suggested during this litigation. Before there was an informal complaint, L&M Farms delivered 74 invoices to Abraham Tan at Y2S Trading that showed the sale of 13,880 boxes of "Cabbage-Napa" for the value of $332,407.25. (ROI 1 at 3-76.) If this was in fact the original position of L&M Farms, L&M Farms reconsidered. L&M Farms filed its informal and formal complaints alleging that L&M Farms had consigned the produce to Y2S and Topline who acted as grower's agents for L&M Farms. Accordingly, L&M Farms has conceded that as to the type of the agreement, this was not a sale for which L&M Farms expected a fixed

price per box. Topline has argued that this was a joint venture between Topline and L&M Companies and L&M Farms. L&M Companies denies that it was a party to a joint venture. (L&M Companies Answer at ¶ 2.)

After considering all of the available evidence and arguments of the parties, we conclude that Y2S, Topline, and L&M Farms entered into a joint venture. The joint venture did not include L&M Companies, who instead entered into a consignment with the joint venture.

A. Y2S, Topline, and L&M Farms entered into a joint venture for the growing and marketing of the Napa cabbage.

A joint account transaction is defined in the PACA regulations as "a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction." 7 C.F.R. § 46.2(s). A joint venture is based on an agreement — express, or implied from the parties' conduct — where: (1) the parties contribute money, property, effort or knowledge to a common undertaking; (2) there are joint property interests in the subject matter of the venture; (3) there is a right of mutual control or management of the venture; and, (4) the parties agree to share profits and losses of the venture. *See In re: Produce Distributors, Inc.*, 58 Agric. Dec. 506, 529 fn. 5 (1999).

The elements of a joint venture are met by this agreement. Y2S, Topline, and L&M Farms committed money, effort and knowledge to the undertaking. Y2S contributed money to this venture, issuing three checks for $70,000.00 to "L&M" from October to December 2005. (CX 13, 2-4; RX 7-12.) Ha provided seeds, (*see* TR 38), expert advice on growing techniques, (s*ee* TR 39, 568), and planting schedules (TR 125). L&M Farms provided equipment, land, and personnel to grow the cabbages.

We infer joint property interests from the fact that both parties exercised control over the cabbage and that Topline remitted the money from the sales of the cabbage to "L&M." Both parties intended to exercise control over the venture, because the parties intended that

Topline and L&M Farms would provide oversight over the process of growing the cabbage.

Finally, these parties agreed to share the profits and losses; Tan testified that costs of planting were intended to be shared equally, and Joseph McGee agreed that profits and the growing costs from the venture were to be split equally. (*See* Tr. 235, 340, 452.) For these reasons, we conclude that this was a joint venture of L&M Farms, Y2S, and Topline.

B. The joint venture consigned cabbage to L&M Companies, which was not a member of the joint venture.

L&M Companies did not participate in the joint venture. L&M Companies did not have managerial rights in the venture, did not intend to share in the profits and losses of the venture, and did not contribute to the venture. Unlike L&M Farms, which provided the expertise and property to grow the cabbage, and clearly took on considerable risk, there is no evidence in the record that L&M Companies was expected to take on any risk as part of the venture. The only writing that is evidence of the oral agreement — a consignment marketing agreement drafted by L&M Farms and L&M Companies — shows that L&M Companies expected that it would only have responsibility for marketing the cabbage. (ROI 4 at 4.)

The testimony for Y2S and Topline focused on whether L&M Farms was an alter-ego of L&M Companies. As explained in the earlier sections, L&M Farms was not the alter-ego of L&M Companies.

However, even while L&M Companies was not a member of the joint venture, L&M Companies did have contractual responsibilities. As a commission merchant, L&M Companies was designated to market 30% of the cabbage in exchange for a 7% commission. (TR 239; ROI 4 at 4.)

2. The parties' rights and duties under the oral contract and the regulations.

Even though we find this agreement was a joint venture, it is also clear that the parties to this agreement did not have equal rights and duties under the oral agreement, or under the regulations. The duties of each firm were hotly contested at the hearing and in the briefs. When the parties disagree on the terms of a contract, each party bears the burden to establish its allegations by a preponderance of the evidence.

See, e.g., Stake Tomatoes v. Worldwide Consultants, Inc., 52 Agric. Dec. 770, 771-72 (1993); *Justice v. Eastern Potato Dealers of Maine, Inc.*, 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Guerin*, 27 Agric. Dec. 384 (1968).

A. The contractual rights and duties of Y2S and Topline.

The companies that Tan represented, Y2S and Topline, had two primary contractual duties. First, they were to provide advice to L&M Farms on the proper methods of growing Napa cabbage so that it would be suitable for sale to Asian food stores and restaurants. In particular, Ha — who ultimately became a part owner in Topline — was to provide the seeds, (TR 38), expert advice on growing techniques, (*see* TR 39), and planting schedules (TR 125). Second, Y2S and Topline were to market approximately 70% of the cabbage to customers in the Asian market. In addition, these two companies were to pay half of the growing costs of the cabbage. In exchange, Y2S and Topline would have the right to a 7% commission on sales directly shipped to customers and a 15% commission on sales that were redistributed from Y2S's warehouse. (TR 498-99.)

A joint venturer has the duties of a partner in a partnership. *See Florida Lime & Avocado Growers, Inc. v. Kegar-Caribe of 158 Florida, Inc.*, 20 Agric. Dec. 795 (1961); *A. Bertolla & Sons v. Hyman Distributing Company*, 13 Agric. Dec. 961 (1954); *L. Gillarde Company v. Elbert D. Ball*, 4 Agric. Dec. 588 (1945). As joint venturers with L&M Farms, the evidence shows that Topline and Y2S had the right to half of the profits, if any, on the sale of all of the cabbage. Likewise, as joint venturers, they would also have the duty to bear half of any losses from the joint venture. As a practical matter, there is no dispute that Topline took on these duties as part of the contract to grow and market the cabbage. But, there is some dispute of whether Y2S should be considered to have the same duties as Topline.

During the informal proceeding, Y2S claimed that it was not a part of the joint venture. Y2S claimed that only a "small portion" of the cabbage was sold to Y2S by Topline. (ROI EX 4 at 1-2.) The position that Y2S was not a party to the contract persisted into Y2S and Topline's Answer and Topline's own Complaint. (*See* Y2S and Topline

Answer at ¶ 5-11; Topline's Complaint at ¶ 12.) We disagree. We have found, *supra*, that Topline was the alter-ego of Y2S. When there is a finding of alter-ego, a court may pierce the corporate veil and hold the controlling entity liable for the obligations of the alter-ego. *E.g.*, *Filo America v. Olhoss Trading Co.,* 321 F. Supp. 2d 1266, 1269 (M.D. Ala. 2004); *Village at Camelback Property Owners Assn. Inc. v. Carr*, 538 A.2d 528, 533 (Pa. Sup. Ct. 1988). Therefore, we will permit L&M Farms to pierce the corporate veil and hold Y2S directly responsible for Topline's actions in this case.

Even if we had not found alter-ego in this instance, we think Y2S shared contractual duties with Topline as a member of the joint venture. In general, an obligation entered into by more than one person is presumed to create a joint duty unless the contract states otherwise. *See* Calamari & Perillo, Contracts, § 20.2 (4th ed. 1998); *Mileaseing Co. v. Hogan*, 451 N.Y.S.2d 211, 213 (N.Y. Supreme Court, Third Department, 1982).

The evidence shows that Y2S jointly accepted the same duties as Topline. For instance, Tan's testimony contradicts Y2S's position that it was not a party to the agreement. He explained that the impetus for the August meeting with Joseph McGee was that Y2S needed a steady supply of Napa cabbage for the winter months to supply Y2S's Korean customers. (TR 162.) The joint venture, as Tan described it at the hearing, would be a "good project for both sides, for L&M and also for Y2S Trading." (TR 166.) Moreover, Y2S issued three checks for $70,000.00 to "L&M" from October to December 2005, (CX 13, 2-4; RX 7-12) which, according to Tan, covered half of the growing costs (TR 197-98). In addition, Y2S issued at least two of these checks after Ha and Yang formed Topline. L&M Farms also presented evidence that Joseph McGee had the strong impression, even if unstated, that Y2S was an important part of the joint venture. (TR 335.)

B. The contractual rights and duties of L&M Farms and L&M Companies.

For the most part, the parties agree that L&M Farms had a contractual duty to grow the cabbage and deliver it to L&M Companies and Topline. L&M Farms also has the right to half of the profits, if any,

on the sale of the cabbage, and L&M Farms shares equally in any losses from the venture.

The evidence, from the witnesses and the Report of Investigation, shows that L&M Companies had the duty to market approximately 30% of the cabbage that L&M Farms grew. It had the right to receive a 7% commission on the sales it made for the joint venture. But, L&M Companies had no right to profits, nor does L&M Companies share the losses of the joint venture.

C. The regulatory duties of the parties.

Aside from contractual duties, the four parties had other duties because this case involves an agreement concerning perishable agricultural commodities between licensees under the PACA.

Joint account partners who receive produce have a duty to exercise reasonable care and diligence in disposing of produce promptly and in a fair and reasonable manner. 7 C.F.R. § 46.29(a). Those partners must also truly and correctly account for produce handled on a joint account. 7 C.F.R. § 46.29(a). True and correct accounts in connection with joint account transactions means accountings that include: the date of receipt and date of final sale, the quantities sold at each price or other disposition of produce, the joint account cost of the produce, and the expenses properly incurred or other charges specifically agreed to in the handling of the produce. 7 C.F.R. § 46.2(y)(2). For produce that has been dumped, a joint account partner must forward the original dump certificate or other adequate evidence to justify dumping to its partner. 7 C.F.R. § 46.22.

Unless the parties otherwise agree, joint account partners do not ordinarily charge commission. 7 C.F.R. § 46.29(b). But, commission merchants — who are engaged to sell consigned produce on commission — have a duty to sell the produce inside their geographic area, and not to hire other people or firms to dispose of the produce, unless the consignor gives specific prior permission. *Id.* In all consignments, receivers of produce may not re-consign produce to other persons or firms, or incur additional commissions, charges or expenses, unless the receiver has the consignor's approval. *Id.*

Because this was a joint venture, Topline and Y2S had those duties of a joint account partner to L&M Farms. In addition, Y2S, Topline, and L&M Companies were expected to charge commission, and therefore they had the duties of commission merchants as well.

4. Breaches of the contract or regulations by the parties.

As discussed, the parties allege a wide variety of contractual breaches and regulatory violations. L&M Farms alleges that Y2S and Topline failed in their duty to properly handle the cabbage; failed to timely provide an adequate accounting; failed to justify negative returns and dumping (Complaint's Initial Brief at 10-11); and employed, without authorization, an agent to resell the produce.

In turn, Topline has alleged that L&M Companies failed to account for the produce that it sold; charged excessive fees to the joint venture; and failed to remit commissions that Topline was owed under the contract.

A. Y2S and Topline did not breach their duty to exercise reasonable care in the sale of the Napa Cabbage.

L&M Farms alleged that Y2S and Topline failed to exercise reasonable care and diligence in marketing of the cabbage. (L&M Complaint at 2; L&M's Initial Brief at 7.) Poor performance alone is not enough to find that produce was handled negligently:

> Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.
>
> *Lavern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc.*, 46 Agric. Dec. 1673, 1678 (1987).

Also, partners in a joint account relationship owe each other the utmost good faith in their dealings with one another. *D. L. Piazza Company, Inc. v. Harshfield Brothers*, 13 Agric. Dec. 521, 524 (1954). If the partnership sustains injuries because a partner breaches his duties, the breaching partner must bear the loss, although in matters of

judgment the partner will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud. *Florida Lime & Avocado Growers, Inc.*, 20 Agric. Dec. at 799; *D.L. Piazza Co.*, 13 Agric. Dec. at 524.

While *Lavern* considered negligence in the handling of consigned produce, and *D.L. Piazza Company, Inc.* considered the duties of a partnership in a joint account relationship, we believe that these same principles from those cases apply to a joint venture. Presumably, the parties to a joint venture would not jeopardize their own interests in the handling of produce, because parties to a joint venture share the profits and the losses of the venture. *See*, *The Kunkel Co., Inc. v. Salisch Produce Company, Inc.*, 32 Agric. Dec. 1585, 1588 (1973). A joint venturer contracts for good faith and integrity, but, the venturer does not receive a guarantee that a co-venturer will make no mistakes. *Id.*, *quoting L. Gillarde Co. v. Ball*, 4 Agric. Dec. 588, 592 (1945).

L&M Farms must show that Y2S or Topline breached its duties as a joint-venturer by a preponderance of evidence, and that L&M Farms suffered damages as a result of that breach. *C.f. Sam Petro Produce v. Vega and Sons Produce*, 39 Agric. Dec. 980 (1980); *A Bertolla & Sons*, 13 Agric. Dec. at 968.

L&M Farms complained that the sales were below market prices. However, Y2S and Topline presented testimony from individuals that examined the cabbage in the field, sold the cabbage, and communicated with customers concerning its quality and condition. The testimony was that the cabbages had begun to bolt and were bitter. (*See* TR 116.) In addition, Topline and Y2S were unable to market the cabbage for as much as they had hoped because the cabbage was the wrong size for their Asian customers. (*See* TR 26-27; 51.) In other words, the cabbage suffered from quality issues that prevented its being sold for a higher price. (*See* TR 248.) Quality was not the only issue, because some customers purportedly reported condition defects, such as mold, with some loads of the cabbage. (*See* TR 142-45.)

Y2S and Topline's explanation for the low returns was corroborated by the poor returns that L&M Companies received for cabbage from L&M Farms. Beach testified that L&M Companies — which did not

present an accounting to Y2S and Topline — received an extremely low per-box return on the Napa cabbage grown by L&M Farms. Beach testified that L&M Farms received from L&M Companies a return of a little more than $8,000 on 13,880 boxes of Napa cabbage. (TR 663.)

This is a $0.58 per box return.[3] By comparison, for the 52,519 boxes[4] Topline and Y2S sold, their accounting showed that they received at least $143,816.75. When averaged, this is $2.74 per box. In the final calculation, Topline and Y2S received over four times the per box amount that L&M Companies remitted to L&M Farms. Thus, we cannot find that Y2S and Topline were negligent in their handling of this cabbage.

B. Y2S and Topline did not breach their regulatory duty to provide an accounting to L&M Farms and L&M Companies.

L&M Farms alleges that Y2S and Topline failed to timely render an account of sales. (L&M Farm's Complaint at 2; L&M's Initial Brief at 7, 9.) In this respect, L&M Farms claims that the accounting that Y2S and Topline provided (RX 34-35) was late and inadequate.

To support this position, L&M Farms has cited cases that held consignees responsible for false or fraudulent accountings. (L&M's Initial Brief at 7-8.) In *Sam Petro Produce v. Vega and Sons Produce*, 39 Agric. Dec. 980 (1980), for example, a tomato consignor complained that it had received inadequate accountings from its agent. The consignor requested an audit of the accounting. The USDA audit and Report of Investigation showed that the agent had failed to maintain the records including sales tickets with lot numbers and dumping certificates that the agent is required to maintain under 7 C.F.R. §§ 46.18-23, 46.29. Therefore, the agent's internal records did not support the accounting. We drew a negative inference from the agent's lack of

[3] L&M Companies probably also took its commission before remitting this amount to L&M Farms. Even assuming that L&M Companies took a 7% commission, it would have received only $0.62 per box return ($0.58/.93).

[4] The number of boxes listed in the accounting was not disputed at the hearing. Complainant had clearly used the accounting to create a set of invoices (CX 9) which included the names of the firms that Y2S and Topline sold the cabbage. To create those invoices, L&M Farms adopted the same number of boxes as appeared on the accounting. Therefore, L&M Farms has tacitly admitted that the number of boxes in the accounting were accurate.

records. Likewise, when there was no accounting at all for a lot of consigned grapes in *Shipley v. Tom Lange, Co.*, 52 Agric. Dec. 679, 683 (1992), we awarded the complaining party a reasonable price based on market reports.

In this case, Y2S and Topline supplied an accounting to L&M Farms which included: the date of shipment, the lot number, the name of the purchaser, the amount of cabbage sold, the initial invoice price, the amount actually received, the bill of lading number, the trucking company who delivered the cabbage, and notes on the problems with each load. The accounting lacks, however, an itemized explanation of the shipping charges, the commissions taken, or costs incurred, and it refers to the date of shipment without regard to the date of sale. (*See* RX 34-35.)

This account of sale raises some questions concerning its validity, but those questions do not rise to the level of deception in *Sam Petro Produce* or the complete absence of an accounting in *Shipley*. The most serious question raised by the accounting is a discrepancy between the amount accounted for, and the amount remitted. The sale of cabbage accounted for on the typed portion of the accounting was $134,648.75. (RX 35.) After subtracting $10,703.00 for boxes, the total amount on the accounting is $123,945.75. The total amount Y2S and Topline remitted (not including the $70,000 for initial expenses) was only $119,871.00. (CX 13 at 5-8.) Moreover, the total amount on the accounting should be increased by at least $22,871.00[5] for the handwritten amounts which were added later by Yang in order to account for the cabbage sold by Y2S. The difference between the

[5] RX 34-35 shows the following hand written amounts on the following lines:

Amount	Line No.
$3,234.00	1
$3,234.00	8
$3,234.00	10
$3,272.50	21
$3,272.50	22
$3,003.00	29
$3,003.00	30
$618.00	35

amount remitted from the sale of the cabbage, which was $119,871.00, and the amount that Y2S and Topline actually accounted, is $23,945.75. The accounting also includes numerous examples of zero and negative returns, for which Y2S and Topline have not supplied Federal Inspections or other adequate evidence to justify dumping.

But, there is no audit or records in this proceeding that establishes that Y2S and Topline did not keep the required records or falsified this accounting. Unlike *Sam Petro Produce* — and cases similar to *Sam Petro Produce* — L&M Farms did not present evidence of the underlying records, or evidence of the absence of those records. Accordingly, this accounting from a joint venturer has not been shown to be fraudulent or inadequate. Therefore, to the extent that Y2S and Topline have not remitted the full value accounted for, they have breached the agreement. However, we do not find that the accounting itself demonstrates that L&M Farms is due the "market" value of all of the produce listed on the accounting.

As to the accounting's lateness, L&M Farms has not alleged that it suffered economic harm from the lateness, and there is no evidence in the record that demonstrates L&M Farms was harmed by the late accounting. While late delivery of the accounting is a violation of the regulations, the reparation forum does not provide a remedy where there is no injury. *See* 7 U.S.C. § 499g(a) ("[T]he [Secretary] shall . . . determine the amount of damage, if any, to which such person is entitled . . .")

C. Y2S and Topline failed to provide L&M Farms with evidence to justify dumping in violation of the regulations.

The regulations are clear that dump certificates[6] or other adequate evidence to justify dumping must not only be maintained, but also "shall be forwarded to the consignor or joint account partner with the accounting." 7 C.F.R. § 46.22; *Franklin Produce, Inc., v. Val-Pro, Inc.*, 46 Agric. Dec. 1861, 1863-64 (1987). Beach and Joseph McGee have explained that they did not receive dump certificates, and this testimony

[6] There is some indication — from testimony in prior cases — that the USDA no longer issues "dump certificates." Even if a dump certificate could not be obtained, 7 C.F.R. § 46.22 requires that other adequate evidence be obtained to prove that the produce is without commercial value.

was unchallenged. No documentary evidence to show that the produce had no commercial value was presented at the hearing. While the overall quality of the cabbage was not good quality, evidence to justify dumping produce is required by the regulation, even when we conclude — as we did in *Franklin Produce* — that the produce is in otherwise poor condition. *Franklin Produce, Inc.*, at 1864. Inspections or other adequate evidence are required to demonstrate that produce is without commercial value, and that documentation must be given to the joint account partner. *See id*.; 7 C.F.R. § 46.22.

In *Franklin Produce*, we awarded damages in the amount of the reasonable value of produce that allegedly lacked commercial value. In this case, there are many instances of zero or negative returns on the accounting. Because expenses are not separately accounted for, we must assume that the lack of return resulted from outright rejections of the cabbage and dumping. If the cabbage had no commercial value, Y2S and Topline should have provided timely proof to L&M Farms. They did not so provide. Accordingly, we will award damages to L&M Farms for Y2S's failure to demonstrate that its dumping and reported negative returns were justified.

D. Y2S and Topline did not violate the regulations by employing Cho to sell the cabbage.

L&M Farms has alleged that Y2S and Topline hired Brian Cho to sell the produce in violation of 7 C.F.R. § 46.29, because L&M Farms did not give express prior permission to hire a person not employed by Topline to sell the cabbage. The regulations at 7 C.F.R. § 46.29(b) require that "the receiver may not reconsign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without a specific prior authority of the consignor."

Cho — although he may have owned a produce business at the time of hearing — was not hired as a commission merchant separate and apart from Topline. Cho testified that he was contacted by Ha to sell the produce, and he testified that he did not receive a commission or a salary. While the absence of compensation is suspicious, there was no indication in the record that he was a separate "person or firm" within

the meaning of 7 C.F.R. § 46.29(a). Cho was an employee, taking direction from Ha and Tan.

E. L&M Companies failed to account to Y2S and Topline.

At the hearing it also became clear the L&M Companies has never accounted for its sales to Y2S or Topline. As we have explained, the failure to account is a breach of the regulations for which Y2S and Topline may receive proven damages.

F. L&M Farms breached the agreement by charging the joint venture excessive expenses.

Topline has claimed that L&M Farms (as the *alter ego* of L&M Companies) had overcharged for expenses, and never accounted for the expenses that it charged the joint venture. (Respondent's Initial Brief at 6; Respondent's Complaint ¶ 11.) L&M Farms, at the hearing, presented an exhaustive accounting of all of its expenses associated with the packaging and shipment of the Napa cabbage. (CX 10-11.) The two accountings are a "cost summary sheet," CX 10, (Summary Report) and a "cost accounting activity report," CX 11, (Activity Report). These accountings show the growing costs of the joint venture were between $486,000 on the Activity Report (CX 11 at 28) and $308,000 (CX 10 at 1) on the Summary Report. The Summary Report shows that L&M Farms allocated over $176,000 of the packing costs to Y2S alone. (*Id.*). Thus, on the Summary Report, L&M Farm's claimed a total due from Y2S of over $330,000 (*Id.*). After reviewing these accountings, we find that L&M Farms misallocated expenses to the joint venture in two ways: by improperly charging individual expenses, and by unequally allocating harvesting and packing costs.

First, L&M Farms improperly charged individual expenses to Y2S and Topline. The ordinary rule of a joint venture is that each party bears their individual expenses. *See Florida Lime & Avocado Growers, Inc.*, 20 Agric. Dec. at 801. For instance, we have held that costs like telephone calls are not a part of the expenses properly charged to a joint venture. *Id.* The basic principle is that general overhead expenses are excluded from the gross profit of the joint venture where the overhead represents an attempt to charge compensation for services in providing capital and in providing the organization to handle the transaction. *Commercial Metals Co. v. Pan Am Trade and Inv. Corp.*, 163 A.2d 264 (1960).

It is clear from the Summary Report, that L&M Farms has accounted for far more than the costs directly associated with planting and harvesting the cabbage. On the face of the Summary Report, L&M Farms has charged much of its individual expenses to the joint venture. Included in these individual expenses on the accounting are: consulting, utilities, well analysis, supplies, uniforms, scouting, depreciation, and general and administrative costs. (*See* CX 10.) In addition, the accounting that was presented at the parties' first meeting (RX 32) included fewer items than the accounting presented that the hearing. Some of the new items are: Rent - labor camp, soil/ph amendments, equipment maintenance - parts, contact labor - discing, weeding, weeding - burden, contract labor - field supervisor.

Another type of misallocation of individual expenses was the many items that were not segregated expenses. Beach was the accountant from L&M Farms that created the Summary Report and the Activity Report. He explained that two kinds of costs were shown on L&M Farms' accounting: those directly associated with the production of the cabbages, and those that were allocated and "indirectly related." (TR 604.) These allocations were part of an overhead allocation calculation that was done by computer program. (*See id.*)

Allocated costs are, in effect, an estimation based on all the costs for all of the produce grown by L&M Farms. Y2S and Topline did not agree to pay L&M Farms to turn on the lights, make telephone calls, buy uniforms, or pay the salaries of the office staff. Those sorts of expenses are not a part of the ordinary shared expenses of a joint venture. We also will not allow charges for items like "weeding" and "cover crop" when the evidence shows that that cost was "allocated" and not actually separately accounted for the 150 acres of Napa cabbage.

Therefore, L&M Farm's allocated costs are a part of the compensation for services that should be excluded from the costs taken by the joint venture. It may be that the parties could have agreed to share in these allocated costs; however, the evidence at the hearing was that they did not agree. Therefore, we will not allow the allocated costs. As such, L&M Farms has made excessive claims for expenses, and we will adjust the damages accordingly.

Second, L&M Farms also unequally allocated the costs of growing and harvesting the cabbage. On the Summary Report, L&M Farms allocated the costs of the pallets, harvesting, packing house in/out, and boxes entirely to L&M Companies and Y2S. (CX 10.) For example, the cost of "Contract Labor - Harvesting" on the Summary Report was $55,221.63. But, the actual charges listed in the Activity Report were $70,316.12. On the Summary Report, Beach distinguished "growing" costs from "cost of goods." (*See* TR 816-17.) He explained that the cost of goods were not a part of the costs that were shared equally. Some of the charges under the "cost of goods" had been charged directly to L&M Companies, with the remainder to be paid by Y2s and Topline. Beach believed that L&M Companies should pay approximately twenty percent of the harvesting costs and Y2S and Topline, should pay eighty percent of the harvesting costs.[7]

When we compare the Summary Report to the Activity Report we see that there are four expenses that are accounted for differently between the two accountings. On the Summary Report, there are the expenses, "Packing House In/Out" and "Boxes" which are not on the Activity Report, and "Handling" which is not on the Summary Report. In addition, "Contract Labor - Harvesting" is $70,316.12 on the Activity Report, but only $55,221.63 on the Summary Report. Beach's testimony at the hearing fairly shows that "Packing House In/Out" and "Boxes" were created by estimating values to the number of boxes shipped. (Tr. 565.) Meanwhile, the Activity Report shows all of the expenses Beach actually calculated.

The record, however, does not reflect that the parties actually agreed to an unequal distribution of harvesting and packing costs. Therefore, the total expenses from the Activity Report for "Pallets," "Handling," and "Contract Labor - Harvesting" will be divided equally between Y2S/Topline and L&M Farms. We will base the calculation of this expense on the Activity Report, which we believe is a more accurate representation of these costs.

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[7] Beach testified that L&M Companies had paid a portion of the "cost of goods." L&M Companies did not submit an accounting at the hearing, and therefore, L&M Farms and L&M Companies have failed to show that the amounts on the accountings should be reduced.

G. Topline failed to show that L&M Companies owe them for unreimbursed expenses or a box credit.

In its formal Complaint, Topline alleged it was owed $13,156.05, unreimbursed expenses in the amount of $5,132.00 and box credit in the amount of $10,703.00. (Topline Complaint ¶ 10.) At hearing, there was no significant evidence presented on this point, and Topline abandoned this position in the briefing of the case.

H. Y2S and Topline are contractually owed a commission for their sales.

The parties agreed that Y2S and Topline would be owed a 7% commission on their sales that were sent directly to buyers and 15% on sales that were sorted at the Y2S facility. However, Y2S and Topline did not account for a commission, and Tan testified that no commission was taken. (TR 246, 250-51.) Therefore, Y2S and Topline are owed their commission from the joint venture.

But, the accounting is not entirely clear on which produce was handled at Y2S's warehouse. The bills of lading show that all of the cabbage was shipped to the warehouse at Y2S's location in New York. (CX 5.) Y2S and Topline made no attempt to show on which sales they would have been owed the larger commission. Accordingly, we will limit Y2S and Topline to a 7% commission for the sales they conducted in this case.

I. L&M Farms was not shown to have breached the duty of care in the growing of the cabbage.

In this instance, Topline has claimed that L&M Companies, the licensee, breached its duty to exercise due care in the planting and harvesting of the cabbage. L&M Companies did not have the duty to grow the cabbage. Therefore, L&M Companies did not breach the duty, and Topline will not receive a damage award for the alleged breach.

We will accept, for the purposes of argument, that Topline's claim applies equally to L&M Farms as it does to L&M Companies. L&M Farms is a grower, and not a licensee under the PACA. In past cases, we have allowed licensees to offset the monetary claims of unlicensed growers against damages caused by the licensee. But, even if we were to agree that Topline's claim should hold equally for L&M Companies

as it does for L&M Farms, we do not believe that L&M Farms breached its standard of care.

Ha was a key member of this joint venture. He was to impart his expertise in growing Napa cabbage, including the types of seed, planting schedules, and presumably, planting instructions. At an early point, when seeing a bag of seed at the greenhouse in Georgia, he became convinced that the wrong seed had been used. (*See* TR 53, 62-63.) His testimony relied on the fact that he saw a different seed than he had sent to L&M Farms. (*See id.*) Perhaps he was right; but, we are not convinced that his word is enough considering that he was not there at the time of planting, and no witness present at the planting testified. There was some testimony that the bolting can be caused by the use of the wrong type of seed, but as Ha explained bolting could also have been caused by fluctuations in temperature. (TR 30.) There was no evidence that this factor was not the cause of premature bolting in this instance.

At the point that Ha believed that the wrong seed had been used, he gave up on the venture. (TR 53-54.) There is little evidence that Topline then gave the level of advice that could have improved the cabbage's chances of success. L&M Farms appears to have proceeded in the manner in which it was familiar with other kinds of cabbage, and we will not second guess those choices here. Neither side presented disinterested testimony on this matter, but it was Topline's burden to show that L&M Farms failed to meet the appropriate standard of care. Even if we could find that L&M Farms breached the standard of care, it would be difficult to apportion damages between Topline and L&M Farms, where both companies took on the responsibility of the success of the crop. As we explained in earlier sections, a joint venturer contracts for good faith and integrity, but, there is no a guarantee against mistakes. *See L. Gillarde Co. v. Ball*, 4 Agric. Dec. 588, 592 (1945). This principal applies fairly to decisions on growing produce as well as the handling of it.

5. Damages

Y2S and Topline have breached the agreement, and violated the PACA, by failing to provide evidence that justified dumping some of the cabbage and failing to fully remit the proceeds from the sales of

cabbage. However, the proceeds should be reduced by their 7% commission. L&M Farms charged excessive expenses to the joint venture. L&M Companies failure to account is also a violation of the PACA, for which it owes reparation to Topline. Because L&M Farms has actually covered the expenses of this venture, and Y2S and Topline have remitted funds to L&M Farms, the amounts that each suffered damages need to be reconciled.

A. Damages sustained by L&M Farms

The parties agree that 74 loads of cabbage were consigned to Y2S and Topline. But, Y2S and Topline failed to account for, or failed to justify the dumping of and negative returns for 8553 boxes of cabbage from those loads. On the other hand, Y2S and Topline accounted for positive returns of $163,654.75 for 43,966 boxes of cabbages.[8] For the boxes that Y2S and Topline accounted for a positive return, the companies received an average of $3.49 per box.

As we have explained, we agree with Y2S and Topline that the cabbages were of poor quality, and that Y2S and Topline did not breach their responsibility to handle the cabbage with due care. However, Y2S and Topline have violated the regulations by failing to provide dump certificates or federal inspections for the cabbages that it accounted for as lacking in commercial value. In *Franklin Produce, Inc.*, 46 Agric. Dec. at 1863-64, the award of damages was based on the average value of the produce that the consignee had sold. Following this precedent, we believe that Y2S and Topline owe an additional $3.49 per box for the 8553 boxes for which it failed to adequately account. The 8553 boxes of cabbages have a value of $29,849.97. Thus, the total value of the 74 loads of cabbage was $193,504.72.

The parties agreed that Y2S and Topline would earn a 7% commission on their sales that were sent directly to buyers and 15% on sales that were sorted at the Y2S facility. Y2S and Topline did not account for a commission, and Tan testified that no commission was taken. (TR 246, 250-51.) But, the accounting is not entirely clear on which produce was handled at Y2S's warehouse. The bills of lading show that all of the cabbage was shipped to the warehouse at Y2S's

[8] This amount includes the handwritten positive returns.

location in New York. (CX 5.) Y2S and Topline have not shown, by preponderance, on which sales that they would be owed the larger commission. Accordingly, we only allow the 7% commission. Therefore, Y2S and Topline owe the joint venture for 93% of the value of the 74 loads of cabbage, or $179,959.39.

B. Damages sustained by Y2S and Topline

As we have explained, L&M Farms has improperly attempted to charge fees to the joint venture, and it did not equally allocate expenses. Allocated costs and individual expenses must be eliminated from the costs that L&M Farms charged the joint venture. In addition, those costs must be equally divided between L&M Farms, on the one side, and Y2S and Topline, on the other.

A close examination of the Activity Report and the Summary Report show that the following expenses are the expenses of the joint venture. All other expenses claimed are disallowed because they were either allocated or estimated.

Pallets	$5,118.00
Handling	$116,154.25[1]
Contract Labor - Planting	$4,045.49
Planting - Day Labor	$17,471.76
Planting - Day Labor Burden	$24,652.79
Contract Labor - Harvesting	$70,316.12[2]
Chemicals	$255.85
Fertilizer/Nutrition	$39,273.87
Fumigant	$10,214.37
Fungicide	$12,679.21
Insecticide	$19,698.27
Machine Hire - Spraying	$7,146.94
Plants	$45,580.64

Total	$372,607.56

The parties share these expenses equally.

In addition, Y2S and Topline never received an accounting from L&M Companies (or L&M Farms) that set forth the value of the 13,880 boxes of cabbage that L&M Companies sold on behalf of the joint venture. Beach noted that L&M Companies provided a return of a little more than $8,000 on the 13,880 boxes of Napa cabbage. (TR 663.) And, L&M Companies supplied and account to L&M Farms. (TR 664.) However, as we have explained when analyzing L&M Farm's claims against Y2S and Topline, we award the reasonable value of the produce in consignment transactions where there has been no accounting. *Shipley v. Tom Lange, Co.*, 52 Agric. Dec. 679, 683 (1992).

This rule fairly applies in this instance, where L&M Companies has failed to account toY2S and Topline. L&M Companies therefore owes a reasonable amount for the 13,880 boxes of cabbage that it sold on behalf of Y2S and Topline. Without knowing in which geographic markets the Napa cabbage was sold, it would be inappropriate to assign a value associated with a specific region. Further, we have already concluded that the cabbage was of poor quality. It would, therefore, be unreasonable to assert a higher value based on market reports for a specific geographic area. Accordingly, we will award damages as we did, *supra*, using the precedent of *Franklin Produce, Inc.*, 46 Agric. Dec. at 1864.

A reasonable amount would be the average amount that Y2S and Topline received per box, or $3.49 per box. The reasonable amount for 13,880 boxes is $48,441.20. L&M Companies was expected to take a 7% commission. L&M Companies would, therefore, owe for 93% of the reasonable value of the 13,880 boxes of cabbage, or $45,050.32 to the joint venture. Half of this amount is owed to Y2S and Topline.

C. Reconciliation of the damages and payments already made by Y2S and Topline.

The expenses of the joint venture were $372,607.56. All of the allowed expenses from this venture were borne by L&M Farms.

Therefore, Y2S and Topline owed the joint venture half of those expenses, or $186,303.78. Y2S and Topline should have also received, for the benefit of the joint venture, $179,959.39, as returns of the consigned cabbage. Half of these returns are due to L&M Farms, or $89,979.70. For this reason, the amount Y2S and Topline should have remitted to L&M Farms is $276,283.48 for Y2S's and Topline's share of the expenses and returns.

Y2S and Topline remitted a total of $70,000.00 to cover the initial expenses, and $119,871.00 as returns on the consigned cabbage. In total, Y2S and Topline remitted $189,971.00 to L&M Farms. Accordingly, Y2S and Topline owe L&M Farms $86,312.48.[9]

As for the profits from L&M Companies, L&M Companies only paid $8,000 to L&M Farms in this matter. Y2S and Topline did not receive any of this profit. L&M Companies owes $22,525.16 to Y2S and Topline for its failure to account for the cabbage.[10]

6. Fees, expenses, and interest.

Fees and expenses will not be awarded, because we do not believe that any of the parties prevailed in this case. Handling fees, however, are awarded to Topline and L&M Farms. And, finally, interest is awarded as additional reparation in this matter.

A. Fees and Expenses will not be awarded because no party prevailed at hearing.

Under section 7 of the PACA (7 U.S.C. § 499g), "[t]he Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any [reparation] hearing." Because this fee shifting provision only covers fees incurred in connection with an oral hearing, any determination with respect to a prevailing party should be made by looking specifically at

[9] These calculations share the losses equally between L&M Farms and Y2S/Topline. According to our calculations — which include the amounts for L&M Companies failure to account — when divided equally between L&M Farms and Y2S/Topline, each side has lost over $73,000 from this venture.

[10] L&M Farms did not make a claim against L&M Companies, but, even if it had, L&M Farms claims that L&M Companies made an accounting to L&M Farms. In this action, however, Topline claimed that L&M Companies had failed to account to it.

the outcome of claims and issues raised at the hearing. *See Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric. Dec. 343 (2003). The pleadings, the hearing, and the briefs, were all contentious to a fault, with arguments at nearly every point of the litigation. With so many varied claims and counterclaims, we must ultimately conclude that no party prevailed on their claims.

In the formal Complaint, L&M Farms misconstrued the agreement of the parties in this case, by claiming that this was a grower's agent relationship with Y2S and Topline. While they prevailed on their claims that both Y2S and Topline were party to the agreement, the witnesses from L&M Farms were forced to concede that the agreement was a joint venture, with the costs of the venture shared between the parties. Moreover, of the $142,536.25 L&M Farms initially claimed, it received $86,312.48. This was mainly because Topline and Y2S did not provide adequate funds to cover the expenses that L&M Farms incurred when growing the cabbage. The damage award was not due because L&M Farms proved that Topline and Y2S had submitted a false accounting and underpaid for the consigned cabbage; or because we awarded the fair market value of the cabbage , as L&M Farms claimed in its briefs. We have found, in fact, that Y2S and Topline paid $189,971.00 to L&M Farms, which exceeded the amount that was due for the consigned cabbage. And, Y2S and Topline succeeded in demonstrating that they had not taken a commission from the sales of the cabbage, which they were due under the joint venture agreement.

Much of L&M Farms' arguments and evidence failed to carry the day. For example, Beach attempted to claim expenses that were well beyond any possible agreement of the parties, by claiming L&M Farms was due over $300,000 of expenses from Y2S. Moreover, L&M Farms initially plead in its Complaint that Y2S was a grower's agent. But, after the hearing, L&M Farms argued in its briefs that the agreement was a consignment. (See L&M Farms Initial Brief at 8.) Nonetheless, Joseph McGee testified that the parties met, discussed a joint agreement, and they agreed to enter into a joint venture agreement. (TR 338-39.) L&M Farm's shifting positions in the Complaint and then in its post-hearing briefs was not supported by its own witnesses, who conceded that this

was a joint venture. Therefore, while L&M Farms prevailed for monetary damages, it did not prevail on many of its main allegations in the Complaint and in the briefs. L&M Farms is not a prevailing party. Likewise, we determined that L&M Companies did not account to Y2S and Topline. The actual amount remitted from L&M Companies was only demonstrated during the cross examination of Beach. Otherwise, we would never have found out how much L&M Companies paid to L&M Farms for the cabbage marketed on behalf of the joint venture. We have found that L&M Companies must pay Topline $22,525.16 for its violation of the PACA and regulations. Therefore, L&M Companies is not a prevailing party.

Moreover, we found that Y2S and Topline owe L&M Farms damages in the amount of $86,312.48 while Topline claimed $131,991.00 in damages. Topline was able to prevail against L&M Companies for $22,525.16, but, when offset against the damage award to L&M Farms, Y2S and Topline are actually $63,787.32 poorer for their litigation. They failed to show that L&M Companies was the alter-ego of L&M Farms, which was one of their main allegations in this proceeding. Y2S and Topline were not prevailing parties.

For these reasons, we will not award fees and expenses.

B. Handling fees are awarded to those parties that were injured.

Topline and L&M Farms paid the handling fees required by section 6(a)(2) of the PACA. Section 5(a) of the PACA provides: "If any commission merchant, dealer, or broker violates any provision of section 2, he shall be liable to the person or persons injured thereby for the full amount of the damages (including any handling fee paid by the injured person or persons under section 6(a)(2))...." As discussed, L&M Companies violated section 2 of the PACA, and, therefore, must pay Topline its handling fees. Y2S and Topline violated section 2 of the PACA, and, therefore, must pay L&M Farms for its handling fees.

C. Interest is awarded as additional reparation.

Y2S and Topline's failure to pay L&M Farms $86,312.48 is a violation of section 2 of the PACA. L&M Companies failure to pay Topline $22,525.16 is a violation of section 2 of the PACA. Section 5(a) of the PACA requires that we award to the person or persons injured by a violation of section 2 of the PACA "the full amount of damages sustained in consequence of such violations." These damages

include interest. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. *See Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied is determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate is 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.*, 65 Agric. Dec. 669 (2006).

Order

Within 30 days from the date of this Order, Y2S Trading, Inc. and Topline Trading, Inc. shall pay, jointly and severally, L&M Farms, Inc. as reparation $86,312.48, with interest thereon at the rate of 0.29 % per annum from June 1, 2006, until paid, plus the amount of $300.00.

Within 30 days from the date of this Order, L&M Companies, Inc. shall pay Topline Trading, Inc. as reparation $22,525.16, with interest thereon at the rate of 0.29% per annum from June 1, 2006, 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

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at:

http://www.dm.usda.gov/oaljdecisions/aljmisdecisions.htm.

UNITED PRODUCE CORP.
PACA Docket No. D-09-0164.
Dismissal Order.
Filed May 14, 2010.

PACA.

Leah C. Battaglioli, for AMS.
Respondent, Pro se.
Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

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PERISHABLE AGRICULTURE COMMODITIES ACT

DEFAULT DECISIONS

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: http://www.dm.usda.gov/oaljdecisions/aljdefdecisions.htm.

J & M PRODUCE SALES, INC.
PACA Docket No. D-09-0016.
Default Decision.
Filed March 22, 2010.

PACA-D -- Default.

Charles E. Spicknall, for the Deputy Administrator, AMS.
James L. Odom, for Respondent.
Default Decision issued by Jill S. Clifton, Administrative Law Judge.

KALIL FRESH MARKETING, INC., d/b/a HOUSTON'S FINEST PRODUCE CO.
PACA Docket No. D-09-0095.
Default Decision.
Filed March 23, 2010.

PACA – Default.

Ciarra A. Toomey, for AMS.
Respondent, Pro se.
Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

VINE RIPE TEXAS, INC.
PACA Docket No. D-09-0163.
Default Decision.
Filed April 9, 2010.

PACA – Default.

Leah Batagioli for AMS.
Respondent Pro se.
Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

MEXI PRODUCTS, INC.
PACA Docket No. D-09-0156.
Default Decision.
Filed May 3, 2010.

PACA – Default.

Jonathan Gordy, for AMS.
Michael Radzilowsky, for Respondent.
Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

SALYER AMERICAN FRESH FOODS, INC.
PACA Docket No. 10-0140.
Default Decision.
Filed June 4, 2010.

PACA – Default.

Brian P. Sylvester, for AMS.
Respondent, Pro se.
Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.

Consent Decisons

Perishable Agricultural Commodities Act

Z & S Fresh, Inc., PACA D-10-0070, 10/02/19.

LBD Produce, Inc., Randall Berger, Michael Hirsch, John Thomas

PACA-D-09-0171 , 0172, 0173, 0174, 10/04/01.

AGRICULTURE DECISIONS

Volume 69

January - June 2010
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*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

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 texts of Consent Decisions are 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 decisions from 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.dm.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 reverse chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

Selected individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available until current supplies are exhausted.

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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