AGRICULTURE DECISIONS

Volume 69

July – December 2010

UNITED STATES DEPARTMENT
OF AGRICULTURE

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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

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LIST OF DECISIONS REPORTED

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COURT DECISION

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COURT DECISION

MARVIN D. HORNE AND LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS and RAISIN VALLEY FARMS MARKETING ASSOCIATION; DON DURBAHN; and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS v. USDA.
Case No. CV-F-08-1549 LJO SMS.
Filed December 11, 2009.

[Cite as: 2009 WL 4895362].

AMAA – Raisins – Civil penalties – Handler – Failure to inspect incoming raisins – Failure to hold raisins in reserve – Failure to pay assessments to RAC – Failure to allow inspections.

United States District Court,
E.D. California.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Docs.24, 26)

LAWRENCE J. O'NEILL, District Judge.

I. Introduction

Plaintiffs appeal an administrative decision of a defendant United States Department of Agriculture ("USDA") Judicial Officer ("JO") that imposed civil penalties and assessments for Plaintiffs' alleged violation of various provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. ("AMAA") and the order regulating the Handling of Raisins Produced from Raisin Variety Grapes Grown in California, 7 C .F.R. Part 989 ("Marketing Order"). This appeal presents four issues on cross motions for summary judgment: First, this Court considers Plaintiffs' challenge to the JO's opinion that Plaintiffs are "handlers" who "acquired" raisins and were therefore subject to the Marketing Order. Second, the Court considers whether

the penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Third, the Court is asked to decide whether the Marketing Order's reserve requirement violates the Due Process Clause of the Fifth Amendment to the United States Constitution as a physical taking of Plaintiffs' property without just compensation. Finally, this Court determines whether the JO's decision to dismiss Plaintiffs' administrative petition was arbitrary, capricious, an abuse of discretion, and contrary to the law. Having read and reviewed the parties' arguments, and considering the administrative record and the applicable case law, this Court GRANTS summary judgment in favor of defendant USDA and against Plaintiffs.

II. Background

A. Legal Framework

"The AMAA was originally enacted during the Depression, with the objective of helping farmers obtain a fair value for their agricultural products." *Lion Raisins, Inc. v. U.S.,* 416 F.3d 1356, 1358 (Fed.Cir.2005) (*"Lion II"*), *citing Pescosolido v. Block,* 765 F.2d 827, 828 (9th Cir.1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). To accomplish this, the AMAA delegates authority to the Secretary of Agriculture to issue marketing orders regulating the sale and delivery of various commodities, including raisins. The Marketing Order was created in an effort to limit the supply of raisins on the open market, and thus, to stabilize prices. *See* 7 U.S.C. §§ 608c (1), (2), (6)(C).

The Marketing Order does not regulate raisin producers (i.e., growers, farmers). Instead, "handlers" of California raisins are subject to the requirements of the Marketing Order, 7 C.F.R. § 981.1 et seq. Handlers who acquire raisins are required, inter alia, to: (1) obtain

USDA inspections of raisins acquired or received from growers, 7 C.F.R. § 989.58(d); (2) file accurate reports with the USDA's Raisin Administrative Committee ("RAC"), 7 C.F.R. § 989.73; and (3) allow access to records to verify the accuracy of the reports filed with the RAC. 7 C.F.R. § 989.77. The USDA may obtain injunctive relief, civil penalties, and criminal penalties against handlers who fail to comply with the regulatory provisions of the Marketing Order. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14).

The Marketing Order creates the RAC, a raisin industry group responsible for the administration of the Marketing Order. The RAC is composed of forty-seven members who represent different groups in the raisin industry, including thirty-five producers, ten handlers, one cooperative bargaining association, and one member of the public. The RAC is an agent of the federal government. Members of the RAC are nominated by the industry groups and appointed by the Secretary of Agriculture. 7 C.F.R. §§ 989.26, .29, .30. The RAC receives no federal appropriations. To fund the RAC, handlers must pay an $8 per ton assessment for free tonnage raisins. 7 C.F.R. § 989.90. The assessments pay for approximately 50% of the administration costs of the RAC. 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

The Marketing Order is designed "to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective." *Parker v. Brown,* 317 U.S. 341, 368, 63 S.Ct. 307, 87 L.Ed. 315 (1943). To accomplish this goal, and as an additional way to fund the RAC, the Marketing Order contains a reserve requirement. The Marketing Order reserve requirement requires handlers to separate the raisins they receive or acquire from producers into "reserve tonnage" raisins for the benefit of the RAC and "free tonnage" raisins. Handlers may sell the free tonnage raisins on the open markets. The reserve tonnage is determined each year as a portion of the raisins that handlers buy from producers. Handlers are required to transfer the reserve tonnage to the RAC. 7 C.F.R. § 989.66, 989.166. While raisin producers hold an equity interest in the reserve tonnage, the RAC may sell or dispose of the reserve raisins in secondary, non-competitive markets. The RAC uses some of the proceeds to fund

its administration. The RAC pays to the producers any net proceeds remaining after it has disposed of the crop year's reserve raisins. It generally takes a few years for the RAC to dispose of a crop year's reserve tonnage raisins.

B. Plaintiffs' alleged activities

Marvin D. Horne ("Mr.Horne") has been a raisin farmer since 1969. Administrative Record ("AR") 1646. Mr. Horne and his wife, Laura R. Horne ("Ms.Horne") (collectively "the Hornes") produce raisins under the name of Raisin Valley Farms. *Id.* AR 1646, 1732. Raisin Valley Farms is a California general partnership, with the Hornes as partners. The Raisin Valley Farms name was registered in 1999.

Mr. Horne determined to sell his Raisin Valley Farms raisins without the use of a packer or handler, because he felt that the packers and the RAC "were stealing [his] crop." AR 1676. Mr. Horne consulted with many people, including attorneys, university professors, and officials, in an attempt to create a way to market his raisins without the use of the raisin packer system. Mr. Horne also exchanged several letters with the USDA in an effort to determine how he could market his raisins without becoming subject to the Marketing Order, as discussed in the relevant sections below. The focus of this action relates to the Hornes' activities during the 2002-2003 and 2003-2004 crop years,[1] when the Hornes implemented their plan to market raisins outside of the bounds of the Marketing Order.

Mr. Horne, a former alternate member of the RAC, became a vocal opponent of the Marketing Order. AR 954. Mr. Horne wrote multiple letters to the Secretary of Agriculture and to the RAC to complain about the Marketing Order. AR 6343-44; AR 2423. On April 23, 2002, the Hornes sent a letter to the Secretary of Agriculture and to the RAC asserting that they were registering as a handler "under protest" because:

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[1]The crop year for raisins begins on August 1 and ends on July 31 of the following year.

> we are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States ... [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA ... [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.

AR 2423. Thereafter, the USDA issued Plaintiffs handler number 94-101 in 2002.

In addition to growing raisins through Raisin Valley Farms, the Hornes entered into a partnership with Ms. Horne's parents, Don Durbahn ("Mr.Durbahn") and Rena Durbahn (collectively, "the Durbahns"), to create Lassen Vineyards. AR 1647-1850, 5550. Lassen Vineyards is a California general partnership between the Hornes and the Durbahns. Lassen Vineyards grows grapes and produces raisins. In addition to its grape growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package raisins in 2001.

The Lassen Vineyards raisin packing equipment and facilities were located on land owned by Lassen Vineyards. Mr. Durbahn oversaw the Lassen Vineyard raisin packing plant. Mr. Horne's son, Marvin Horne, Jr. ("Marvin") was the plant manager. The equipment at the plant operated by Lassen Vineyards cleaned, stemmed, sorted, and packaged raisins throughout the 2002-2003 and 2003-2004 crop years. During this time, Lassen Vineyards packed Raisin Valley Farms and Lassen Vineyards raisins, and packed other farmer's raisins for a fee.

Raisins that were packed at Lassen Vineyards' plant were marketed and sold to wholesale customers by Raisin Valley Farms Marketing Association, an unincorporated association organized and operated by the Hornes ("Raisin Valley Marketing"), during crop years 2002-2003 and 2003-2004. AR 1652, 1996-97, 2117. Over 60 raisin growers joined Raisin Valley Marketing to gain volume selling power. Grower

members of Raisin Valley Marketing sent their raisins to Lassen Vineyards' plant to be cleaned, stemmed, sorted, and packaged. According to Plaintiffs, Raisin Valley Marketing sold raisins on behalf of its members, while the growers maintained ownership. According to Mr. Horne, Raisin Valley Marketing held grower sales funds in a trust account, paid Lassen Vineyards for the use of their equipment, paid a third party broker fee, and distributed the net proceeds to the growers.

Lassen Vineyards charged a fee to Raisin Valley Marketing members, typically twelve cents per pound, to pack California raisins at the plant. Lassen Vineyards charged these growers an additional five dollars per pallet for raisins that were boxed and stacked. AR 1940-41, 1957. The packing fee covered the cost of the labor and packaging materials. AR 1942-44. The workers who operated the equipment were "leased" to Lassen Vineyards by Ms. Horne and Ms. Durbahn. AR 1710. The Lassen Vineyards packing operation was supervised on a daily basis by Mr. Durbahn and Marvin, whose wages were paid by Lassen Vineyards. AR 1948-49.

Plaintiffs contend that during the 2002-2003 and 2003-2004 crop years: Lassen Vineyards was a "leasing company" that "rented" the equipment to other growers to clean, stem, and sort their own raisins and "leased" employees of the plant who operated the machinery; Mr. Durbahn did not process raisins as a handler, he oversaw the operation of a leased plant; Marvin managed the leased equipment; growers leasing the equipment from the Lassen Vineyards plant were assigned lot numbers to preserve the identity of their product; Lassen Vineyards never stored, purchased, controlled, acquired, or handled raisins; growers using the facilities engaged in the cleaning, stemming, sorting, grading, and packing function through leased employees and equipment; and lessees maintained right, title, ownership, and control of the raisins until they were sold to the consumer market. Plaintiffs maintain that they were exempt from the Marketing Order during the 2002-2003 and 2003-2004 crop years, because they were raisin growers, never acquired raisins, and were working within the Farmers to Consumers Direct Marketing Act.

In his testimony, Mr. Horne admitted that both Lassen Vineyards and Raisin Valley Farms acted as "packers" under the Marketing Order during the 2002-2003 and 2003-2004 crop years. AR 1761-62. Mr. Horne admitted that Raisin Valley Farms did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002-2003 and 2003-2004 crop years. AR 1743-45. When asked whether he held raisins in reserve, Mr. Horne replied, "No. They're my raisins." AR 1743. He admitted that his reports to the RAC disclosed "zero acquisitions." AR 1744.

Mr. Horne admitted that for crop years 2002-2003 and 2003-2004, Lassen Vineyards operated a packing house on land with equipment owned jointly by the Hornes and the Durbahns. AR 1685. Mr. Horne further admitted that Lassen Vineyards did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002-2003 and 2003-2004 crop years, because "they're not acquired raisins." AR 1747-51.

The USDA performed outgoing inspections on the raisins packed at Lassen Vineyards. AR 1745, 1747-48. During the hearing, the USDA introduced evidence that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-2003 crop year and more than 1.9 million pounds of raisins for the 2003-2004 crop year. AR 740-51, 2186-2304, AR 2602-5512.

C. Administrator's Proceedings against Plaintiffs

On April 1, 2004, AJ Yates, Administrator of the Agriculture of the Agriculture Marketing Service ("administrator") filed a complaint before the Secretary of Agriculture against the Hornes, d.b.a. Raisin Valley Farms (collectively referred to as "Raisin Valley Farms"). AR 1-5. The administrator's complaint alleged that Raisin Valley Farms was "engaged in the business as 'handler' of California raisins" during the 2002-2003 and 2003-2004 crop years. AR 1. The administrator alleged that Raisin Valley Farms violated the AMAA and the Marketing Order

by submitting inaccurate forms to the RAC, failing to hold inspections of incoming raisins, failing to hold raisins in reserve, failing to pay assessments, and failing to allow access to records. The administrator filed an amended complaint on October 25, 2004.

Raisin Valley Farms denied the allegations. In addition, Raisin Valley Farms filed an amended answer on January 21, 2005 asserting various affirmative defenses, including that the AMAA and the Marketing Order are unconstitutional; Raisin Valley Farms is not a handler and did not acquire physical possession of raisins within the meaning of the regulations; Raisin Valley Farms did not handle or acquire raisins of third-party producers that processed their raisins through equipment owned by Lassen Vineyards; and Raisin Valley Farms was not required to comply with the reporting, incoming inspection, and other requirements alleged in the amended complaint. AR 82-88.

A hearing on the administrator's action took place in front of the administrative law judge ("ALJ") between February 9-11, 2005. At the February 2005 hearing, Mr. Horne testified. After the hearing, and to conform the complaint to the evidence presented at the February 2005 hearing, the administrator moved to amend the complaint to include Raisin Valley Marketing and the Hornes and the Durbahns, doing business as Lassen Vineyards (collectively referred to as "Lassen Vineyards") as parties to the administrative proceedings.[2] The ALJ granted the administrator's opposed motion to amend, and the second amended complaint was filed on August 10, 2005. Thereafter, a second hearing took place on May 23, 2006.

On November 1, 2006, the ALJ issued a decision and order finding that the Hornes and the Durbahns, "acting together as partners doing

[2]Ms. Durbahn died after the initial administrative action was filed but before Lassen Vineyards was added as a party to the administrative complaint. It is unclear from the record whether the Estate of Rena Durbahn was added as a party to the administrative proceedings, although the Estate of Rena Durbahn is a plaintiff in this action.

business as Lassen Vineyards" acted as first handlers of raisins and were subject to the Marketing Order. The ALJ found that Lassen Vineyards violated the AMAA and the Marketing Order, and ordered Lassen Vineyards (the Hornes and Mr. Durbahn), to pay the following, jointly and severally: (1) $731,500 in civil penalties; (2) $9,389.73 in assessments; and (3) $523,037 as the dollar equivalent of the raisins that Lassen Vineyards failed to hold in reserve.

Plaintiffs appealed the ALJ's decision to the JO on January 4, 2007. In its April 11, 2007 Decision and Order ("Initial Decision"), the JO found that Raisin Valley Farms *and* Lassen Vineyards committed the following violations of the Marketing Order:

1. Twenty violations of 7 C.F.R. 989.73 for filing inaccurate reporting forms to the RAC;

2. Fifty-eight violations of 7 C.F.R. § 989.58(d) for failure to obtain incoming inspections;

3. Two violations of 7 C.F.R. § 989.66 for failure to hold reserve raisins for crop year 2002-2003 and 2003-2004;

4. Two violations of 7 C.F.R. § 989.80 for failure to pay assessments to the RAC; and

5. One violation of 7 C.F.R. § 989.77 for failure to allow the Agricultural Marketing Service to have access to the records.

AR 665-706. The administrator sought reconsideration of the JO's Initial Decision, challenging the JO's calculations of the civil penalties and assessments. In its Order Granting Petition to Reconsider, issued September 18, 2008 ("Reconsideration Order"), the JO imposed the following penalties against Lassen Vineyards and Raisin Valley Farms, jointly and severally:

1. $202,600.00 as a civil penalty;

2. $8,783.39 in assessments for the 2002-2003 and 2003-2004 crop years; and

3. $483,843.53 for the alleged dollar equivalent of the California raisins Plaintiffs failed to hold in reserve for the 2002-2003 and 2003-2004 crop years.

AR 757-778.

D. Plaintiffs' Administrative Petition Against USDA

Plaintiffs filed an administrative petition on March 5, 2007 to challenge various Marketing Order regulations. Plaintiffs filed their administrative petition pursuant to 7 U.S.C. § 608c(15)(A), a procedure created by the AMAA that expressly provides *handlers* an administrative procedure to challenge the Marketing Order. *See United Dairyman of Ariz. v. Veneman,* 279 F.3d 1160, 1164 (9th Cir.2002). In moving to dismiss Plaintiffs' petition, the USDA argued, among other things, that since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers. The ALJ denied the USDA's motion to dismiss, reasoning that because the USDA investigated Plaintiffs, determined Plaintiffs were handlers, and initiated proceedings against Plaintiffs to establish they were handlers, Plaintiffs had jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The administrator appealed the ALJ's denial of its motion to dismiss. On February 4, 2008, the JO agreed with the administrator to rule that Plaintiffs lacked jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A).

On March 18, 2008, forty-three days after the JO's decision, Plaintiffs initiated an action in this Court to appeal the JO's decision. *Horne v. USDA,* CV-08-402 OWW SMS. The USDA moved to dismiss for lack of subject matter jurisdiction. On November 13, 2008, Judge Oliver W. Wanger granted the USDA's motion to dismiss, finding that Plaintiffs' appeal was untimely pursuant 7 U.S.C. § 608c(15)(B).

Plaintiffs appealed Judge Wanger's decision to the Ninth Circuit Court of Appeals. That appeal remains pending.

E. Procedural History

On October 14, 2008, Plaintiffs[3] filed their complaint in this Court seeking declaration relief and review of the USDA's decision pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs moved for summary judgment on August 28, 2009. The USDA moved for summary judgment on October 6, 2009. Plaintiffs opposed the USDA's motion on November 3, 2009. The USDA opposed Plaintiffs' motion on November 19, 2009. As no party requested oral argument, this Court vacated the December 4, 2009 hearing by minute order on November 30, 2009.

III. Standard of Review

Plaintiffs challenge the JO's Initial Decision and Reconsideration Order pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). When reviewing an order under the APA, "[j]udicial review of an agency decision is narrow." *Balice v. USDA,* 203 F.3d 684, 689 (9th Cir.2000). This Court may not weigh the evidence and substitute its own findings for those of the agency. *Id.* According to the statute, this Court may set aside an agency decision only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency does not act in an arbitrary and capricious manner when it presents a "rational connection between the facts found and the conclusions made." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs,* 384 F.3d 1163, 1170 (9th

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[3]Plaintiffs are the Hornes, d.b.a. Raisin Valley Farms; the Hornes' unincorporated association Raisin Valley Marketing; and the Hornes, Mr. Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards. Although the JO's orders affect the Hornes, Mr. Durbahn, Lassen Vineyards, and Raisin Valley Farms, all plaintiffs collectively assert their arguments against the JO's orders. Accordingly, when referring to Plaintiffs' arguments, this Court's use of the term "Plaintiffs" refers to all of the named plaintiffs. When referring to "Plaintiffs" with regard to the JO's orders, the term "Plaintiffs" refers only to those plaintiffs affected by the JO's orders. To avoid confusion, this Court will use specific plaintiff names where practicable.

Cir.2004).

In an action for judicial review of an administrative decision, the burdens of persuasion and proof rest with the party challenging the ALJ's or JO's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396, 1399 (9th Cir.1994), *superceded on other grounds by statute, as recognized in M.L. v. Federal Way Sch. Distr.,* 341 F.3d 1052 n. 7 (9th Cir.2003); *see also, Sorenson Communications, Inc. v. F.C.C.,* 567 F.3d 1215 (10th Cir.2009) (in APA challenge of agency decision, burden is on petitioner to establish the action is arbitrary and capricious); *Transportation Workers Union of America, AFL-CIO v. Transportation Sec. Admin.,* 492 F.3d 471 (D.C.Cir.2007) (on petition for review of order of administrative agency, petitioner bears the burden of production on appeal and must support each element of its claim to challenge order by affidavit or other evidence); *Save Our Heritage, Inc. v. F.A.A.,* 269 F.3d 49 (1st Cir.2001) (those who assail an agency's findings or reasoning have the burden to identify the defects in evidence and the faults in reasoning.).

The APA authorizes this Court to set aside factual findings only if they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *Armstrong v. Comm'r of Soc. Sec. Admin.,* 160 F.3d 587, 589 (9th Cir.1998); *Balice,* 203 F.3d at 689. Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). "Substantial evidence is more than a scintilla but less than a preponderance." *Tidwell v. Apfel,* 161 F.3d 599, 601 (9th Cir.1999). If the record supports more than one rational interpretation of the evidence, the Court will defer to the administrative officer's decision. *Bayliss v. Barnhart,* 427 F.3d 1211, 1214 n. 1 (9th Cir.2005). Thus, in its review of a JO decision, the Court will not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).

IV. Discussion

A. Whether Plaintiffs are "handlers" who "acquired" raisins and are therefore subject to the Raisin Order

The JO found that Lassen Vineyards and Raisin Valley Farms were handlers who acquired raisins and, therefore, were subject to the Marketing Order during the 2002-2003 and 2003-2004 crop years. The JO further found that Lassen Vineyards and Raisin Valley Farms violated numerous provisions of the AMAA and Marketing Order. The parties do not dispute that a handler that acquires raisins is required to obtain incoming inspections, hold the designated amount in reserve, file reports with the RAC, allow access to records to verify the accuracy of the reports, and pay assessments to the RAC. 7 C.F.R. §§ 989.58(d); 989.66; 989.166; 989.73; 989.77; and 989.90.

In this challenge to the JO's decision, Plaintiffs advance multiple theories that they were either not subject to the Marketing Order or qualified for an exemption. First, Plaintiffs claim that they were not subject to the Marketing Order because they were not handlers. Second, Plaintiffs contend that they were not subject to the Marketing Order because they did not acquire raisins. Third, Plaintiffs assert that prior USDA opinion letters to Plaintiffs support Plaintiffs' position that they would not be subject to the Marketing Order for their activities. Fourth, Plaintiffs argue that there is no evidence that any plaintiff was a handler. Fifth, Plaintiffs assert that the Marketing Order does not apply to lessors of packing equipment. Sixth, Plaintiffs argue that as raisin growers they were exempt from the Marketing Order. Seventh, Plaintiffs argue that the Farmer to Consumer Direct Marketing Act creates an applicable exemption to the Marketing Order. The Court considers, and ultimately rejects, each of Plaintiffs' arguments below.

1. Plaintiffs were "handlers"

Plaintiffs contend that the JO erred to conclude that they were handlers, because the substantial evidence demonstrates that they are raisin growers, not raisin handlers. A "handler" is:

> (a) any processor or packer; (b) any person who places, ships, or continues natural conditioned raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. According to this definition, an entity is a handler if it is a packer. A "packer" is:

> any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: *Provided, That:* (a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer, shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

7 C.F.R. § 989.14 (emphasis in original). Thus, if Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant to the Marketing Order. Plaintiffs may also be handlers if they "place natural conditioned raisins in the current of commerce." 7 C.F.R. 989. § 15.

The evidence establishes that Lassen Vineyards stemmed, sorted, cleaned and packaged raisins. Thus, pursuant to 7 C.F.R. § 989.14, Lassen Vineyards was a handler of raisins. Substantial evidence further establishes that Raisin Valley Farms contributed to the packing of raisins at the Lassen Vineyards plant, as discussed more fully below. Moreover, substantial evidence shows that Raisin Valley Farms placed raisins in the stream of interstate commerce. Accordingly, Raisin Valley Farms was a handler.

Plaintiffs argue, however, that as raisin producers, both Lassen

Vineyards and Raisin Valley Farms are exempt from the definition of packer. Plaintiffs correctly point out that according to the definition, "[n]o producer with respect to the raisins produced by him ... shall be deemed a packer if he or it sorts or cleans ... such raisins in their unstemmed form." 7 C.F.R. § 989.14. Plaintiffs fail to demonstrate, however, that Lassen Vineyards or Raisin Valley Farms sorted or cleaned their raisins in an *unstemmed* form. The substantial evidence introduced by the USDA at the administrative hearing supports the JO's conclusion that Lassen Vineyards stemmed the raisins in addition to the other packing activities. In addition, Plaintiffs concede that the definition of handler within the Marketing Order "captured within its scope any producer who seeds, grades, packages, or stems raisins or places raisins into interstate commerce." Pl. Mem., 15 (referencing 7 C.F.R. §§ 989.14, 989.15). Accordingly, this exemption is inapplicable to Plaintiffs. Because the substantial evidence demonstrates that Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant, and subject, to the Marketing Order.

2. Plaintiffs "acquired" raisins

Plaintiffs contend that there is no evidence that they "acquired" raisins. Plaintiffs argue that the USDA "failed to produce any evidence of a single seller, or buyer, or evidence of consideration or of title transfer. It failed to prove a sale of goods as is required for a simple, ordinary case governed by the Uniform Commercial Code, and it offered no proof of any acquisition." Plaintiffs construe the term "acquire" to require a purchase and sale of goods as demonstrated by the transfer of title.

This Court agrees with the JO that Plaintiffs "arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term." AR 773. The Marketing Order defines "acquire" in the following way:

> "Acquire" means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other

> established receiving station, operated by him: provided that a handler shall not be deemed to acquire raisins (including raisins produced or dehydrated by him) while: (a) he stores them for another person or as a handler-produced tonnage in compliance with the provisions of 989.58 & 989.70; (b) he reconditions them, or; (c) he has them in his possession for the purpose of inspection, and provided further, that the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17. This definition is not ambiguous. Plaintiffs "acquire" raisins if they "obtain physical possession of raisins ... at [the] packing or processing plant ... operated by [them]." The definition cannot be interpreted reasonably to required a sale of goods under the UCC, as Plaintiffs argue. The plain and unambiguous definition of "acquire" requires "physical possession" at a packing facility; it does not require the transfer of legal title.

Reasonable inferences made from substantial evidence support the JO's conclusion that Plaintiffs acquired raisins. The JO noted: "The record does not contain direct evidence that Mr. Horne and partners 'received' raisins but there is ample evidence that they 'packed-out' raisins (CX 82-CX 87). Logic allows me to conclude that raisins cannot be 'packed-out' unless they are received." AR 677, n. 4. Under the same sound logic, this Court finds that substantial evidence supports the JO's finding that Plaintiffs acquired raisins during the 2002-2003 and 2003-2004 crop years. The uncontroverted evidence demonstrates that Plaintiffs stemmed, sorted, cleaned and packaged raisins at Lassen Vineyard's plant. During the hearing, the USDA introduced evidence that Plaintiffs, in their operation of Lassen Vineyards and using Raisin Valley Farms' handler number stamp, "packed out" more than 1.2 million pounds of raisins during the 2002-2003 crop year and more than 1.9 million pounds of raisins for the 2003-2004 crop year. This evidence supports the logical conclusion that Plaintiffs has physical possession of, and thus acquired, those raisins that they handled and packed out at Lassen Vineyards.

3. USDA Opinion Letters were Consistent with the JO's Decision

Plaintiffs contend that an April 23, 2001 letter from Robert Keeney of USDA-AMS Fruit and Vegetable Programs ("Keeney Letter") "should be dispositive of this case." The Keeney Letter reads:

> In your letter, you indicated that Raisin Valley Farms has entered into an agreement with Del Rey Packing Company (Del Rey) whereby Del Rey will "custom pack" all of Raisin Valley's organic raisin crop. Del Rey will perform "packer" functions on Raisin Valley Farms' raisins such as stemming, sorting, and seeding. Del Rey will also ensure that the raisins are inspected but will not take title to the raisins ...
>
> [I]n this situation you described, you are correct that Raisin Valley Farms would be neither a packer nor a handler under the order.

AR 6316-17. Plaintiffs interpret this letter to opine that Raisin Valley Farms would not be a handler in the situation where Raisin Valley Farms uses a custom packer to pack its raisins, and would not be a handler under facts of ths action. Plaintiffs argue that the USDA "cannot have it both ways, and be situational about when it will, and will not, treat one of the Respondents as a 'handler' or 'packer." '

The USDA points out that Plaintiffs "omit any mention of the critical part of the [Keeney] letter and misconstrue entirely its importance in this case." The Keeney Letter was a response to a March 15, 2001 letter that Plaintiffs wrote to the USDA in which Plaintiffs advised the USDA that "Raisin Valley Farms has entered into an arrangement whereby Del Rey Packing will 'custom pack' in 50 pound boxes the certified 100% organic raisin crop produced by Raisin Valley Farms." AR 6316-17. Plaintiffs further informed the USDA in their letter that:

> Raisin Valley Farms will not stem, sort, seed, or grade its organic raisin crop. That will be accomplished pursuant to the "custom

> packing" arrangement entered into between Raisin Valley Farms and Del Ray Packing ... Del Rey Packing will not take title, will not place any of Raisin Valley Farms' raisins in its inventory, and will not sell any portion of Raisin Valley Farms' organic raisin crop. It will merely "custom pack" on behalf of Raisin Valley Farms. As such, Raisin Valley Farms does not fall within the definition of a "packer" under ... the Raisin Marketing Order.

Id. Plaintiffs asked the USDA to "advise if your interpretation of ... the ... Marketing Order is inconsistent with the intent of the marketing program as interpreted by Raisin Valley Farms." *Id.* The Keeney Letter was written in response to Plaintiffs' March 2001 letter to address the hypothetical situation therein described. And while the Keeney Letter opines that Raisin Valley Farms would not be handler or packer under that hypothetical situation, Plaintiffs omit the following key passage:

> Rather, Del Rey would be a packer and handler. Del Rey would acquire Raisin Valley Farms' raisins, and would further be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

AR 6316-17.

From this letter exchange, three points emerge. First, the USDA made clear that it would consider a custom or toll packer to be a handler that would be required to fulfill the Marketing Order obligations. The evidence supports, and Plaintiffs do not deny, that Lassen Vineyards performed "packer" functions on Raisin Valley Farms' raisins, such as stemming, sorting, and seeding. Thus, the USDA's opinion in the Keeney Letter is consistent with the JO's opinion; to wit, an entity that custom packs raisins is a handler and has a duty to meet the obligations under the Marketing Order.

Second, the Keeney Letter informed Plaintiffs that transfer of title was irrelevant to whether the custom packer was considered to be a

handler under the Marketing Order. In their letter, Plaintiffs proposed that Del Rey will not place any of Raisin Valley Farms' raisins in its inventory, will not sell any portion of Raisin Valley Farms' organic raisin crop, and will not take title. Plaintiffs proposed that Del Rey would merely "custom pack" on behalf of Raisin Valley Farms. Under this scenario, the Keeney Letter concluded that Del Rey would be a packer and handler subject to the provisions of the Marketing Order. Thus, Plaintiffs were on notice since 2001 that a packer acquires raisins even if there is no transfer of title.[4]

Third, Plaintiffs's reliance on this hypothetical scenario is inapposite, because it describes a situation that is incongruent with the evidence. Plaintiffs hypothesized a situation in which they would perform none of the handler or packer functions. Instead, Raisin Valley Farms would pay an unrelated third-party (Del Rey) to stem, sort, seed and grade the raisins. Under this scenario, the raisin producer would not be a handler. As set forth above, however, Raisin Valley Farms and Lassen Vineyards collectively packed raisins during the 2002-2003 and 2003-2004 crop years, and charged others for that packing service. To the extent that Raisin Valley Farms and Lassen Vineyards produced raisins, they were not subject to the Marketing Order. But, to the extent that Raisin Valley Farms and Lassen Vineyards custom packed raisins for themselves and others, they were subject to the Marketing Order as handlers. The latter activities are the subject of this action, and the latter subjects Plaintiffs to the Marketing Order. In sum, Plaintiffs are correct that the Keeney Letter "should be dispositive;" however, the disposition of Plaintiffs' claims based on an accurate reading of this letter exchange and the evidence favors the USDA.

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[4]Although the term "acquire" is unambiguous, this Court would defer to the USDA's interpretation of the meaning of the term if it were. *Barnhart v. Walton,* 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (To the extent that a regulation is ambiguous, the agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."). Here, the USDA consistently interpreted the meaning of the term "acquire" to include the scenario proposed, and ultimately pursued, by Plaintiffs.

4. Evidence Supports Liability of both Lassen Vineyards and Raisin Valley Farms

In opposition to the USDA's summary judgment motion, Plaintiffs assert that the "USDA failed ... to assert substantial specific facts as to each 'Respondent' (Plaintiffs herein) that would justify that that specific person or a specific entity was a 'handler' and a handler who 'acquired' raisins and thus subject to the substantial (in this case massive) penalties under the AMAA." The Court notes that the JO used the terms Raisin Valley Farms, Lassen Vineyards, Mr. Horne, and "Mr. Horne and partners" interchangeably in its Initial Decision. At different points of the opinion, the JO found that Raisin Valley, Lassen Vineyards, and "respondents" individually engaged in the handling of raisins and violated the Marketing Order. Ultimately, the JO imposed sanctions against both Raisin Valley Farms and Lassen Vineyards. In the Reconsideration Order, the JO refers to the respondents through the term "Mr. Horne and partners" only. AR 757-778. The JO's findings and orders depart from the ALJ's order that imposed sanctions against Lassen Vineyards only. Plaintiffs contend that there was no evidence presented that any entity handled, packed or acquired raisins.

While this Court finds that the evidence supports the ALJ's conclusion that Lassen Vineyards was the handler of raisins and violated the Marketing Order, this Court will not disturb the JO's orders. For the following reasons, this Court finds that there is "such relevant evidence as a reasonable mind might accept as adequate to support" the JO's conclusion. *Pierce,* 487 U.S. at 565. Because the record supports more than one rational interpretation of the evidence, the Court will defer to the JO's decision, *Bayliss,* 427 F.3d at 1214 n. 1, and will not substitute its judgment for the JO's opinion. *Marsh,* 490 U.S. at 378.

First, this Court agrees with the JO to find "Mr. Horne's business structure confusing at best." AR 685. As the JO explained:

> There appear [sic] to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing

> Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards.

AR 685. The following findings of fact represent the interplay between the three entities:

> When Raisin Valley Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged. The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Marketing Association has a "bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers.

AR 674-75. Moreover, the JO found that the confusion of the parties was caused, in significant part, by Mr. Horne's untimely and incomplete production of records. AR 684-85. The JO found that evidence established that the Plaintiffs "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. Based on Mr. Horne's testimony, in which he interchanged the entities, intermingling of funds, absence of separate bank accounts, and intermingling of duties between the entities, this Court finds that substantial evidence supports the JO's decision against both Raisin Valley Farms and Lassen Vineyards.

Second, substantial evidence supports the JO's finding that Raisin Valley Farms took direct part in the handling and packing of raisins. The Hornes, under the name of Raisin Valley Farms, filed RAC-5 forms during the 2001-2002, 2002-2003, and 2003-2004 crop years, "notifying the RAC of their intention to handle raisins as a packer under the Raisin Order." AR 670. "All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004 were packaged in boxes stamped with the handler number 94-101. That number had been assigned to Marvin D. Horne and Laura R. Horne" doing business as Raisin Valley Farms. AR 671. Because all of the raisins packed out of Lassen Vineyards were stamped with Raisin Valley Farms' handler number, it was not unreasonable to conclude that Raisin Valley Farms handled and acquired raisins.

5. Plaintiffs' were subject to the Marketing Order notwithstanding their "Lease" Arrangement

Plaintiffs contend that the Marketing Order regulates "[o]nly genuine handlers," and "does not reach equipment lessors." Plaintiffs describe the evidence as follows:

> Yes, there was evidence that Lassen Vineyards leased employees for the purpose of packing raisins and that it also leased equipment to farmers, including the Hornes and Durbahn [sic] so they can pack their own raisins but the Durbahns and Hornes were simply producers, not handlers, and Lassen Vineyards, acting as a lessor of labor and equipment and without putting raisins in the stream of interstate commerce or selling said raisins do not make them handlers, not packers, nor processors, nor is evidence of "acquiring" raisins.

Pl. Reply, 4:5-10. The Court finds that the JO correctly rejected Plaintiffs' arguments.

In his testimony, Mr. Horne testified that for a fee, his "family" packing operation "furnished equipment and employees to run the

equipment." AR 1669. Lassen Vineyards owned the land, structures, and equipment of the packing plant. AR 1938-40. Lassen Vineyards did not have a separate bank account from the Hornes, Raisin Valley Marketing, or Raisin Valley Farms. AR 2034.

Substantial evidence adduced at the hearings demonstrate that Plaintiffs performed the functions of a handler. According to Mr. Horne's testimony, raisin producers paid Lassen Vineyards through Raisin Valley Marketing and Raisin Valley Farms to send their raisins "through the line; the cap stems are removed; the raisins are washed; they're vacuumed; substandard is removed; sticks, stems, rocks, and any ... foreign material." AR 1668. The raisins at Lassen Vineyards then go:

> through an observation line where employees remove something that may not have been vacuumed out or a berry or raisin that may have mold on it. And from there, it goes into a scale where it's weighed and put into a box with liner-a food grade plastic liner. And the box is then put through taping machine, where it is sealed. And then it goes through another metal detector with a marking device that puts on the side of the box the date, the time packed, the packer number assigned to me, and the lot number of the grower or the customer.

AR 1669-70. Mr. Horne testified that his operation charged raisin producers a fee for the "use of the facility, the labor, the fiber, the plastic [used to package the raisins]." AR 1943. While Mr. Horne may characterize this arrangement as a lease, the evidence demonstrates that Plaintiffs were paid a fee to handle raisins that they had physical possession of in their packing plant, thus subjecting them to the Marketing Order.

Mr. Horne's testimony also revealed that the employees who operated Lassen Vineyards' equipment were employees of Plaintiffs, despite Mr. Horne's efforts to obscure this fact by creating another "leasing" agreement. It is undisputed that Mr. Durbahn supervised and Marvin managed the Lassen Vineyards plant. Plaintiffs assert that the raisin producers packed their own raisins or leased employees who were

not associated with the partnership. However, there is no evidence that anyone other than employees of Lassen Vineyards worked at the plant. Moreover, the "leasing employer[s]" of the employees were Ms. Horne and Ms. Durbahn, and most of the employees worked on Lassen Vineyards land.

Legally and factually, Plaintiffs were handlers subject to the Marketing Order despite the "leasing" agreements. No language in the AMAA or Marketing Order provides an exemption for an entity that performs the functions of a handler under a leasing agreement. Plaintiffs fail to support their argument that lessors of labor and equipment are exempt from the Marketing Order. The substantial evidence establishes that Plaintiffs were handlers, notwithstanding the various entities and lease agreement arrangements. The evidence supports the JO's conclusion that Plaintiffs were playing "a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. The evidence further supports the JO's conclusion that "Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone else in the raisin industry who complied with the Raisin Order." AR 694.

6. Raisin producers are exempt from the Marketing Order in their capacity as producers, not in their capacity as handlers

Plaintiffs contend that as producers, they are exempt from the Marketing Order. As set forth above, the AMAA and the Marketing Order impose obligations on handlers, not producers. The AMAA specifically excludes producers from regulation pursuant to the Marketing Order. 7 U.S.C. § 608c(13)(B). More specifically, the AMAA provides that a marketing order does not apply to "any producer *in his capacity as producer."* 7 U.S.C. § 608c(13)(B) (emphasis added).

The exemption of 7 U.S.C. § 608c(13)(B) applies to Raisin Valley Farms and Lassen Vineyards in their capacities as raisin producers, but

does not provide an exemption from the Marketing Order in their capacities as handlers. "The language 'in his capacity as * * * ' limits the exemption [.]" *Acme Breweries v. Brannan,* 109 F.Supp. 116, 188 (N.D.Cal.1952) (holding that hops producer was exempt from regulation as a producer under § 8c(13)(B) of the Act, but that it could be regulated as a handler since it did something to the hops other than grow them). Based on the express and explicit limiting clause, Plaintiffs are only exempt from the Marketing Order in their capacity as producers of raisins. *See Ideal Farms, Inc. v. Benson,* 288 F.2d 608, 614 (3d Cir.1961), *cert. denied,* 372 U.S. 965, 83 S.Ct. 1087, 10 L.Ed.2d 128 (1963) ("Other provisions of this section of the Act explicitly recognize that a person or business entity may be engaged in the milk business in more than one capacity and that a producer is exempt from regulation only in his capacity as a producer.") (citing 7 U.S.C. § 608c(13)(B)); *see also, United States v. United Dairy Farms Co-op. Ass'n,* 611 F.2d 488, 491 n. 7 (3rd Cir.1979) ("producers who also function as handlers ... are subject to regulation under the milk marketing order); *Freeman v. Vance,* 319 F.2d 841, 842 (5th Cir.1963) (same). As the administrator's action against Plaintiffs focuses on Plaintiffs' activities as handlers, the 7 U.S.C. § 608c(13)(B) exemption is inapplicable. *See Lion,* 416 F.3d at 1360 ("Although producers are not directly bound by the statute, 7 U.S.C. § 608c(13)(B), under the specific terms of the Raisin Marketing Order, all persons seeking to market California raisins out-of-state are deemed handlers and must comply with the Order.")

In opposition, Plaintiffs repeat the assertion that "noone at USDA advised the Plaintiffs that [their proposed activities] would violate the Marketing Order." To the contrary, the USDA advised Plaintiffs on *multiple* occasions that a raisin producer who performs handling functions upon his or her own crop is subject to the Marketing Order. Additionally, the administrator and the RAC advised Plaintiffs that their proposed activities would fall within the Marketing Order regulations. Accordingly, Plaintiffs' assertion is insincere at best.

In addition to the Keeney Letter above, the USDA sent Plaintiffs advisory letters to interpret the Marketing Order regulations as they relate to Plaintiffs' proposed activities. In a January 18, 2002 letter,

Maureen T. Pello, Senior Marketing Specialist in the Fresno, California Field Office of the AMS informed Mr. Horne that his proposed activities would make him a handler under the Marketing Order:

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal Marketing Order for California raisins ... As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspections), assessments, and reporting to the Raisin Administrative Committee.

AR 6329. On May 20, 2002, the administrator (AJ Yates) responded to an inquiry from the Hornes with the following message:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations ... Those who pack raisins are handlers under the order.

AR 6330-31. A year later, the administrator reiterated this point in response to another letter from the Hornes. The administrator wrote: "You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate. Handlers who produce and handle raisin production are subject to marketing order requirements, including reserve requirements." AR 6373-74.

The RAC also advised Mr. Horne that he is not exempt from the Marketing Order as a producer if he handles raisins. On January 21, 2002, the RAC's Director of Compliance advised Mr. Horne in a letter that a handler is not exempt from the Marketing Order even if he or she is a producer. AR 2444-45. Notably, the Director of Compliance explained: "More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," and that those

handler-producers comply with the Marketing Order's requirements. *Id.*

7. Farmer to Consumer Direct Marketing Act is inapplicable

Plaintiffs contend that they were exempt from the Marketing Order because their activities were in compliance with the Farmer to Consumer Direct Marketing Act, 7 U.S.C. § 3001 et seq. ("Farmer to Consumer Act"), passed by Congress forty years after the AMAA. Plaintiffs assert that the Farmer to Consumer Act is a "national policy that encouraged producers' circumvention of packers and middlemen." The Farmer to Consumer Act's statement of purpose declares:

> It is the purpose of this chapter to promote, through appropriate means, and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers. To accomplish this objective, the Secretary of Agriculture (hereinafter referred to as the "Secretary") shall initiate and coordinate a program designed to facilitate direct marketing from farmers to consumers for the mutual benefit of consumers and farmers.

7 U.S.C. § 3001. Plaintiffs argue that the JO erred to impose assessments and penalties of nearly $700,000 "for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed the Secretary to implement in 1976 through 7 U.S.C. § 3001."

The USDA contends that the JO correctly rejected Plaintiffs' argument that the Farmer to Consumer Act creates an exemption to the Marketing Order. The USDA argues that Plaintiffs may not rely on the Farmer to Consumer Act for two reasons. First, the USDA maintains that nothing in the language of the Farmer to Consumer Act creates an exemption to the Marketing Order. Second, the USDA asserts that Plaintiffs offered no evidence that their activities were within the meaning of the Farmer to Consumer Act. As discussed below, both of the USDA's arguments are meritorious.

Both the ALJ and the JO found Plaintiffs' argument related to the

Farmer to Consumer Act "patently specious." AR 772. This Court agrees. The ALJ and JO concluded that the Farmer to Consumer Act does not exempt raisin producers from the requirements of the Marketing Order. In this appeal, Plaintiffs have failed to articulate why this conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The USDA points out that nothing in the language of the Farmer to Consumer Act creates an exception to the Marketing Order. Plaintiffs repeat their position that they are exempt from the Marketing Order pursuant to the Farmer to Consumer Act, but cite no authority to support their position. Without authority or argument to support their position, Plaintiffs fail to carry their burden to identify the fault in the JO's reasoning and conclusion. *See, Save Our Heritage, Inc.,* 269 F.3d 49. Accordingly, the JO's decision that the Farmer to Consumer Act does not exempt Plaintiffs from the requirements of the Marketing Order is not clearly erroneous.

Moreover, even if the Farmer to Consumer Act did create an exemption to the Marketing Order for raisin producers, Plaintiffs failed to establish that their activities fell within the Farmer to Consumer Act or its goals. The Farmer to Consumer Act defines "direct marketing" from farms to consumers as:

> the marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers.

7 U.S.C. § 3002. Pursuant to this statutory definition, Plaintiffs would

need to sell their raisins "directly to individual consumers" in marketplaces such as "roadside stands, city markets," farmer's markets, and the like to fall within the Farmer to Consumer Act. *Id.* Plaintiffs introduced no evidence to support their repeated claim that the raisins packed at Lassen Vineyards were sold directly to consumers. To the contrary, the evidence submitted led the JO's reasonable conclusion that: "Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer-to-Consumer Direct Marketing Act." AR 772. As the USDA points out, the evidence introduced during the administrative hearing established that Plaintiffs' raisins were packaged in large cases (AR 1740-41) and sold in large quantities-often tens of thousands of pounds-to commercial food companies. E.g., AR 2458 (invoice from Raisin Valley Farms to New York candy company for 1,160 twenty-five-pound cases of raisins); AR 2724 (invoice to Canadian food company for 1,190 thirty-pound cases of raisins); AR 2732 (invoice to Pennsylvania nut products company for 1,400 thirty-pound cases of raisins); AR 2863 (invoice to baking company for 700 thirty-pound cases of raisins). Plaintiffs offer no evidence to refute these invoices and offer no evidence that Plaintiffs sold raisins directly to consumers. Accordingly, the substantial evidence of the administrative record supports the JO's conclusion that the Farmer to Consumer Act was inapplicable to Plaintiffs and their activities during the 2002-2003 and 2003-2004 crop years.

B. Whether the penalties imposed violate the Excessive Fines Clause of the Eighth Amendment

Plaintiffs contend that the assessments and penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Plaintiffs argue that the imposition of "almost $700,000-for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed," is an excessive fine because: (1) the USDA cannot demonstrate "harm" from Plaintiffs' activities; (2) Plaintiffs' actions were in compliance with the Farmer to Consumer Act;

and (3) Plaintiffs "used every available means to determine in advance whether or not what they anticipated and proposed doing was an alleged violation of the Marketing Order."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. The word "fine" within this amendment has been interpreted to mean "a payment to a sovereign as punishment for some offense." *United States v. Bajakajian,* 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States,* 509 U.S. 602, 609-610, 113 S.Ct. 2801, 125 L.Ed.2d 488, (1993) (emphasis deleted); *see also, Enquist v. Oregon Dep't of Agric.,* 478 F.3d 985, 1007 (9th Cir.2007) (Excessive Fines Clause applies to a government action that constitutes a punishment for an offense). Pursuant to *Bajakajian, supra,* a fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." 524 U.S. at 334-35. "Excessive fines challenges involve a two-step inquiry: (1) whether the Excessive Fines Clause applies, and (2) if so, whether the fine is 'excessive." ' *Enquist,* 478 F.3d at 1006 (citing *Bajakajian,* 524 U.S. at 334).

The JO imposed three distinct remedies against Plaintiffs: (1) an order to pay the RAC $483,843.53 pursuant to 7 C.F.R. § 989.166(c); (2) an order to pay the RAC $8,783.39 in assessments pursuant to 7 C .F.R. § 989.80(a); and (3) civil penalties in total of $202,600 pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs' Eighth Amendment arguments are the same for each of the three penalties and assessments, and Plaintiffs assert that the entire sum is unconstitutional. Nevertheless, this Court considers Plaintiffs' challenge as it applies to each remedy under each regulation to determine whether the Excessive Fines Clause applies and, if so, whether the fine was excessive.

When reviewing the JO's choice of sanctions, this Court is limited to determining "whether, under the pertinent statute and relevant facts, the Secretary made an allowable judgment in choice of remedy." *Balice,* 203 F.3d at 689 (citing *Farley & Calfee, Inc. v. U.S. Dep't of Agric.,* 941 F.2d 964, 967 (9th Cir.1991)). This Court will not overturn a penalty unless it is either "unwarranted in law or unjustified in fact." *Bosma v. U.S. Dep't of Agric.,* 754 F.2d 804, 810 (9th Cir.1984) (citing *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185-88, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)).

1. Reserve requirement compensation

The JO ordered Plaintiffs to pay $483,843.53 to the RAC, pursuant to 7 C.F.R. § 989.166(c), which reads:

> **Remedy in the event of failure to deliver reserve tonnage raisins.** A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated ... shall compensate the Committee for the amount of the loss resulting from his failure to so deliver ... The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]"

Id. Pursuant to this regulation, the JO multiplied the quantity of the reserve raisins Plaintiffs failed to deliver for crop years 2002-2003 and 2003-2004 by the applicable average prices per ton to arrive at the total penalty. Plaintiffs do not challenge the JO's calculation of the fine. Rather, Plaintiffs argue that the penalty violates the Excessive Fines Clause because the USDA failed to demonstrate a harm in the amount of $483,843.53.

The USDA argues successfully that the Excessive Fines Clause is inapplicable to the penalty imposed based on 7 C.F.R. § 989.166(c), because the regulation is compensatory, not punitive. The plain

language of the statute makes clear that this provision requires a handler who fails to deliver reserve raisins to *"compensate* the Committee *for the amount of the loss* resulting from his failure to deliver." 7 C.F.R. § 989.166(c) (emphasis added). Compensating the government for a loss serves a remedial purpose, but is not punitive. *Bajakajian,* 524 U.S. at 328 (citing Black's Law Dictionary 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to obtain compensation or indemnity")). By its terms, the penalty pursuant to 7 C.F.R. § 989.166(c) compensates the RAC for lost revenues and recovers the value that Plaintiffs failed to deliver into the reserve pool. Thus, the penalty imposed, which allows the USDA to recover from Plaintiffs the dollar equivalent of the California raisins that Plaintiffs failed to hold in reserve for crop years 2002-2003 and 2003-2004, is remedial rather than punitive. *See, One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (monetary penalty provides "a reasonable form of liquidated damages" to the Government and is thus a "remedial" sanction because it compensates Government for lost revenues). Because 7 C.F.R. § 989.166(c) is a remedial provision, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.[5]

2. Assessment payment

The JO ordered Plaintiffs to pay $8,783.39 in assessments for the 2002-2003 and 2003-2004 crop years, pursuant to 7 C.F.R. § 989.80(a), which reads:

> Each handler shall, with respect to free tonnage acquired by him ... pay to the [RAC], upon demand, his pro rata share of the expenses ... which the Secretary finds will be incurred, as aforesaid, by the [RAC] during each crop year ... Such handler's pro rata share of such expenses shall be equal to the ratio between

[5]Even if the Excessive Fines Clause applies to the challenged regulation, the fine imposed by the JO does not violate the Eighth Amendment because the fine is not "excessive," as explained more fully *infra.*

> the total free tonnage acquired by such handler ... during the applicable crop year and the total free tonnage acquired by all handlers during the same crop year.

The JO multiplied the established assessment rate of $8 per ton by the established free tonnages to determine the total assessments due for the 2002-2003 and 2003-2004 crop years. Plaintiffs do not challenge the JO's calculation of the assessments.

Similar to the challenge above, Plaintiffs argue that the JO's order to pay $8,783.39 was an excessive fine because the USDA failed to demonstrate harm. Plaintiffs argue that they were not handlers, were not subject to the Marketing Order, and the JO's order is a "post hoc vendetta against Plaintiffs" by the USDA to punish Plaintiffs for activities that comply with the Farmer to Consumer Act.

The USDA contends that the remedy under 7 C.F.R. § 989.80(a), like 7 C.F.R. § 989.166(c) discussed above, is compensatory. The USDA argues that the JO's order to pay $8,783.39 in assessments was designed to compensate the RAC for Plaintiffs failure to pay the assessments, as required by the Marketing Order. The USDA concludes that 7 C.F.R. § 989.80(a) is not subject to the Excessive Fines Clause.

The provision that requires handlers to pay assessment to the RAC, 7 C.F.R. § 989.80(a), is not punitive in nature; the assessments are levied to fund the RAC and its operations. *See Evans v. United States,* 74 Fed. Cl. 554, 557 (2006), *aff'd by Evans v. United States,* 250 Fed. Appx. 321 (Fed.Cir.2007). As set forth above, the RAC receives no federal appropriations. The RAC is funded by the assessments levied on handlers pursuant to 7 C.F.R. § 989.80(a) and from the proceeds of sales of the reserve raisins withheld from the open market. *Evans,* 74 Fed. Cl. at 557 (citing 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82). Under this regulation, the Marketing Order requires all raisin handlers to pay assessments to the RAC to fund the RAC and its operations. The obligation to pay is automatic and is triggered by a handler's acquisition or receipt of raisins; it requires no culpability. *C.f., Bajakajian,* 524 U.S. at 328 (forfeiture of currency is punishment because it is a an "additional

sanction ... imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony"). Thus, assessments are not imposed on handlers as a punishment for an action. Because 7 C.F.R. § 989.80(a) a funding regulation that is not punitive in nature, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.

3. Civil Penalties

In addition to the compensatory assessments and penalties above, the JO imposed civil penalties totaling $202,600 against Plaintiffs pursuant to 7 U.S.C. § 608c(14)(B), which reads:

> Any handler subject to an order issued under this section ... who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation shall be deemed a separate violation ... The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principle place of business. The validity of such order may not reviewed in an action to collect such civil penalty.

Neither party disputes that this provision is punitive in nature, designed to punish a handler who violates any provision of the Marketing Order. Thus, the civil penalty is a "fine" within the meaning of the Excessive Fines Clause.

Because the JO imposed a "fine" pursuant 7 U.S.C. § 608c(14) (B), this Court must determine whether the fine imposed was excessive. A fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Bajakajian,* 524 U.S. at 334-35. "Whether a penalty is grossly disproportionate calls for the application

of a constitutional standard to the facts of a particular case, and in that context, de novo review is appropriate." *Balice,* 203 F.3d at 698.

The JO found that Plaintiffs committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C .F.R. § 989.73) by filing inaccurate forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of 989.80 of the Raisin Order (7 C.F.R. § 989 .80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003 and 2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) for failing to allow access to Plaintiffs' records.

To deter Plaintiffs from continuing to violate the Marketing Order, and to deter others from similar future violations, the JO concluded that the following civil penalties for these violations were "appropriate" and "sufficient": (1) $300 per violation for filing inaccurate reporting forms; (2) $300 per violation for the failure to obtain incoming inspections; (3) $300 per violation for failing to pay the assessments; (4) $300 per violation for failure to hold raisins in reserve; and (5) $1000 for the failure to allow access to records.

When determining whether fines are excessive, the Court first considers that "judgements about appropriate punishment for an offense belong in the first instance to the legislature." *Balice,* 203 F.3d at 699 (quoting *Bajakajian,* 524 U.S. at 336) (citing *Solem v. Helm,* 463 U.S.

277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). The USDA points out that the civil penalties imposed by the JO fall well below the level authorized by Congress. As set forth above, Congress authorized civil penalties up to $1,000 for each violation. In addition, Congress mandated that "[e]ach day during which such violation continues shall be deemed a separate violation." 7 U.S.C. § 608c(14)(B). The JO found 673 separate violations, spanning over a two year period of time. Thus, the JO was authorized by statute to impose a civil penalty of no less than $673,000. The potential civil penalty calculation would be substantially larger if the JO imposed the maximum penalty of $1,100, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, and/or considered that each violation occurred over multiple days.[6] Considering the fine in total, $202,600 is not an excessive fine to punish 673 separate violations of the Marketing Order, when the JO could have imposed a fine of $673,000 or more. The JO imposed a $300 fine for 672 violations, less than one-third of the amount authorized by statute. *C.f., Balice,* 203 F.3d 684 (finding that statutory maximum of $2,000 penalty for AMAA violation of almond marketing order was not an excessive fine for handler's failure to report, keep accurate records, and hold almonds in reserve). Accordingly, the Court finds that the $202,600 in civil penalties assessed on Plaintiffs by the JO pursuant to 7 U.S.C. § 608c(14)(B) is not "grossly disproportional to the gravity of the [plaintiffs'] offense[s]." *Bajakajian,* 524 U.S. at 334-35.

Plaintiffs contend that the fines are excessive because: (1) the USDA cannot demonstrate "harm" to anyone caused by Plaintiffs' activities; (2) Plaintiffs' actions complied with the Farmers to Consumers Direct Marketing Act; (3) Plaintiffs were not handlers and, therefore, not subject to the Marketing Act. Plaintiffs' second and third arguments have been discussed *infra,* and are unpersuasive and inapposite to this analysis. As to Plaintiffs' argument that would require the USDA to

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[6]As the JO noted, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, adjusted the civil monetary penalty that may be assessed under the AMAA. For each violation of a marketing order, the maximum civil penalty is $1,100. 7 C.F.R. § 3.91(b)(1)(vii).

demonstrate harm, the Ninth Circuit rejected this argument in a case similar to the one at bar.

In *Balice,* almond handlers challenged penalties imposed under 7 U.S.C. § 608c(14) as constitutionally excessive because the violations resulted in "no harm to the Government and no harm to the industry." 203 F.3d at 699. The *Balice* almond handlers committed offenses similar to those committed by Plaintiffs, and the USDA imposed fines on them pursuant to 7 U.S.C. § 608c(14) for violating the record keeping, reporting, and reserve requirements of the Almond Marketing Order, 7 C.F.R. § 981.1 et seq, a marketing order similar to the Marketing Order governing Plaintiffs. In *Balice,* the appellant almond handlers argued that the JO's decision to increase the fine from $1000 per violation to $2000 without requiring the USDA to demonstrate harm was arbitrary and capricious. In rejecting the appellant's argument, the Ninth Circuit looked at the language of the statute and found that to require the USDA to demonstrate harm "would contravene the express terms" of the statute. *Balice,* 203 F.3d at 694. Similarly, the express terms of 7 U.S.C. § 608c(14) require the USDA to demonstrate that a handler violated the marketing order, but do not require any further demonstration. Accordingly, this Court "declines to accept [Plaintiffs'] suggestion that the USDA was required to show harm to the government before the JO could" impose a penalty pursuant to 7 C.F.R. § 989.166(c).[7] *Balice,* 203 F.3d at 694.

Moreover, Plaintiffs' arguments misrepresent Plaintiffs' conduct and culpability. As set forth above, the JO did not err to find that Plaintiffs were subject to the Marketing Order as handlers that acquired raisins.

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[7]For this reason, the USDA was also not required to demonstrate harm before ordering Plaintiffs to compensate the RAC for the failure to hold the reserve raisins pursuant to 7 C.F.R. 989.166(c). Pursuant to the regulation, the USDA shall recover the amount of the loss from a handler who fails to deliver reserve tonnage raisins to the RAC. 7 C.F.R. § 989.166(c). No language in the regulation requires the USDA to demonstrate harm, and Plaintiffs point to no authority to construe the regulation in this way. Because Plaintiffs' suggestion that 7 C.F.R. § 989.166(c) requires the USDA to demonstrate "harm" contravenes the express terms of the regulation, this Court rejects it.

Although they were handlers, Plaintiffs filed inaccurate reports, failed to obtain inspections, failed to hold raisins in reserve, and failed to allow access to records. As the Ninth Circuit explained in *Balice,* 203 F.3d at 699, these actions threaten to cause severe consequences to the entire industry:

> Balice willfully failed to maintain records for important transactions ... That violation largely frustrated the USDA's attempts to ensure that Balice was complying with other provisions of the Almond Marketing Order, and it interfered with the Almond Board's ability to set its economic policy.
>
> Even worse, Balice unlawfully disposed of reserve almonds, which were lawfully salable at only $0.05 to $0.08 per pound, when the prevailing market price for the almonds was $1.40 per pound. That conduct not only resulted in an illegal profit of roughly $246,677, but it also undermined the Secretary's efforts to protect the stability of the almond market.

Similarly, the USDA has an important need to control the stability of the raisin market, as expressed in the AMAA and the Marketing Order. Like the actions of the *Balice* almond handlers, Plaintiffs' actions interfered with the RAC's ability to set its economic policy. Plaintiffs' introduction of the reserve raisins into the open market yielded illegal profits and could have resulted in market instability and a downward spiral in prices. Because of the serious nature of the Plaintiffs' conduct, with its severe and far-reaching effects, this Court finds that a $300 fine is not an excessive amount for each of Plaintiffs's violations, described above, and $1,000 is not an excessive fine for Plaintiffs' failure to allow access to their records. *See, Balice,* 203 F.3d 684; *Cole v. USDA,* 133 F.3d 803 (11th Cir.1998) (holding that a $400,000 penalty, representing a forfeiture of 75% of the sale price of over-quota tobacco, was not excessive given the legislative purpose of discouraging the over-supply

of tobacco in the marketplace).[8]

C. Whether the reserve requirements violate the Fifth Amendment as a physical taking without just compensation

Plaintiffs argue that the reserve raisin program of the Marketing Order, 7 C.F.R. §§ 989.65-98, constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment to the United States Constitution. Plaintiffs assert, without citation, that the "elements necessary for a takings claim are present if (1) private property, (2) is taken, (3) for public use, (4) without just compensation." Pl. Memo, 20:3-4. Without citation, Plaintiffs argue that they "routinely evidenced and argued all these elements." Plaintiffs assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year. Plaintiffs contend that although Congress may take actions to regulate the industry, "[n]o court has ever held that the Commerce Clause trumps, eliminates, or eviscerates the Takings Clause in a physical takings case." Thus, "[w]hile Congress may allow the permanent deprivation of a citizens [sic] physical property, the government must pay fair market value." Plaintiffs conclude: "The government can't have it both ways: it can't refuse to pay just compensation, and then penalize, monetarily, Plaintiffs for refusing to transfer title and possession to the government." *Id.* at 11. 14-16.

As introduced above, the Marketing Order creates the raisin reserve requirement program. The purpose of the reserve requirement program is to control the supply of raisins in the domestic market and, accordingly, to regulate the price of the commodity. "By regulating the amount of raisins in this market, the USDA can, in effect, regulate the price at which raisins are sold domestically." *Lion Raisins, Inc. v. U.S.,*

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[8]The instant action is distinguishable from the cases relied upon by the USDA in that the JO imposed both compensatory and civil penalties and assessments on Plaintiffs. In *Balice* and *Cole,* the JO imposed penalties pursuant to either one regulation or the other, but not both. Because Plaintiffs failed to raise this point, however, the Court need not address whether the distinction changes the Excessive Fines Clause analysis.

58 Fed. Cl. 391, 394 (2003). Accordingly, the "primary focus" of the market control program is to "maximize return to the grower." Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937,* 5 San Joaquin Agric. L.Rev. 3, 6 (1995).

The reserve requirement program is administered by the RAC. By February 15 of each crop year, the RAC must recommend to the USDA the portion of the crop that should be made available to sale without restrictions ("free tonnage") and the portion that should be withheld from the market ("reserve tonnage"). 7 C.F.R. §§ 989.54(d), 989.65. Based on the RAC's recommendations, and after obtaining the approval of two-thirds of California raisin producers, or of producers of two-thirds of raisins "produced for market, the USDA promulgates a regulation fixing the percentages of "reserve tonnage" and "free tonnage" raisins. 7 U.S.C. §§ 608c(8) (A)-(B), 9(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. In *Lion III,* the court explained the reserve requirement program as follows:

> Free-tonnage raisins may be disposed of by the handler in any marketing channel. Producers receive immediate payment from handlers, at the field market price, for the free-tonnage raisins. The market price for the free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations. Producers are not paid immediately for reserve raisins. Reserve-tonnage raisins are held by handlers for the account of the reserve pool, which is operated by the RAC. *Lion I,* 58 Fed.Cl. at 394. Reserve raisins are sold, as authorized by the RAC, in non-competitive outlets, such as school lunch programs. *Id.;* 7C.F.R. §§ 989.65-67. The statute provides for "the equitable distribution of the net return derived from the sale [of reserve pool raisins] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). The RAC is charged with selling the reserve raisins in a manner "intended to maxim[ize] producer

> returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. § 989.67(d)(1). Since the mid-1990's, the RAC has been using the reserve pool to support an industry export program that effectively blends down the cost of exported California raisins thereby allowing handlers to be price-competitive in export markets where prices are generally lower than the domestic market.

416 F.3d at 1360.

The Marketing Order requires handlers to separate raisins into two sets of bins-one for "free tonnage" and one for "reserve tonnage." 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2). "The reserve raisins are not warehoused in any central location, but rather stored by handlers on their own premises, and are released for sale per the instructions of the RAC." *Lion III,* 416 F.3d at 1360. Title to the "reserve tonnage" portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b) (1), (4). In exchange, "[p]roducers are entitled by regulation to an equitable distribution of the net proceeds from the RAC's disposition of the 'reserve tonnage' raisins." *Evans,* 74 Fed. Cl. at 557.

In crop year 2002-2003, the free tonnage was 53% and the reserve tonnage was set at 47% of a producer's crop. The RAC sold the 2002 reserve pool for $970 per ton in 2004. None of the money the RAC received was paid back to the raisin producers. For the 2003-2004 crop year, the reserve tonnage was set at 30%.[9]

It is undisputed that every year, through the reserve requirement program, the RAC takes title to a significant portion of a California raisin producer's crop. The Court must determine here whether, as Plaintiffs argue, this constitutes a "physical taking" of their property by the government that requires just compensation under the Fifth

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[9]The reserve tonnage percentage changes each year, sometimes radically. For example, the reserve tonnage portion was 62.5% in 1983 and 17.5% in 2005.

Amendment. The federal government is liable in a Taking Clause suit for the actions of the RAC, as its agent. *Lion III,* 416 F.3d 1356. The issue of what constitutes a "taking" is a federal question governed by federal law. *Johnson v. U.S.,* 202 Ct.Cl. 405, 479 F.2d 1383 (Fed.Cir.1973). To determine the meaning of "property," and what property rights exist under the Fifth Amendment, federal courts look to local state law. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir.1977).

The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). The Fifth Amendment is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking. *Id.* Here, the RAC takes title to Plaintiffs' reserve tonnage through the AMAA and the Marketing Order by operation of Congress's power to regulate the raisin industry through the Commerce Clause authority. *See United States v. Rock Royal Co-Op., Inc.,* 307 U.S. 533, 569, 572, 59 S.Ct. 993, 83 L.Ed. 1446 (1939) (upholding AMAA as constitutional under the Commerce Clause and rejecting Fifth Amendment due process and taking contentions, because "the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, [and therefore] it might permit the movement on terms of pool settlement here provided."); *see also, Evans,* 74 Fed. Cl. at 559 (discussing *Rock Royal*). Congress's power to regulate commerce, however, "does not immunize the federal government from a takings claim under the Fifth Amendment." *Evans,* 74 Fed. Cl. at 560. Thus, "the Commerce Clause may provide the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation." *Id.* (citing *Yancey v. United States,* 915 F.2s 1534, 1540 (Fed.Cir.1990)).

The question presented to this Court is whether the transfer of title on the reserve tonnage raisins is a *physical* taking that requires

compensation. The federal government may "take" private property, requiring just compensation, either by physical invasion or by regulation. *American Pelagic Fishing Co., L.P. v. U.S.,* 379 F.3d 1363 (Fed.Cir.), *cert. denied,* 545 U.S. 1139, 125 S.Ct. 2963, 162 L.Ed.2d 887 (2004). *Norman v. U.S.,* 63 Fed.Cl. 231 (2003), *aff'd,* 429 F.3d 1081, *cert. denied,* 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2003). The distinction between a "physical" taking and a "regulatory" taking is significant. *See, Brown v. Legal Foundation of Washington,* 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (payment of compensation is required whenever the government acquires private property for a public but the text of the Just Compensation Clause contains no comparable reference to a regulatory taking). Whereas an invasion of a person's physical property will be considered a physical taking, a "taking" is less likely to be found when a party challenges the government's interference with a property interest that arises from some public program that adjusts benefits and burdens of economic life to promote the common good. *Sadowsky v. City of New York,* 732 F.2d 312 (2nd Cir.1984). Moreover, while physical takings are compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), not all regulatory takings are. *See, Outdoor Graphics, Inc. v. City of Burlington,* 103 F.3d 690 (8th Cir.1996) (Whether particular restriction amounts to taking depends on economic impact of regulation on claimant, extent to which regulation has interfered with distinct, investment-backed expectations, and character of government regulation.). With this distinction in mind, this Court turns to Plaintiffs' argument that the reserve requirement constitutes a physical taking.

One other court has considered the issue at bar.[10] In *Evans,* 74 Fed. Cl. 554, the Court of Federal Claims considered whether the transfer of title to the reserve tonnage raisins constituted a physical taking. The *Evans* court noted that under California law, the plaintiffs "unquestionably held title to their raisins grown in their fields." 74 Fed.

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[10]For other takings claims related to the raisin Marketing Order, *see Lion Raisins v. U.S.,* 58 Fed. Cl. 391 (2003) (Lion I); *Lion Raisins v. U.S.,* 57 Fed. Cl. 435 (2003) (Lion II); and *Lion Raisins v. U.S.,* 416 F.3d 1356 (2005) (Lion III).

Cl. at 563. The court found that at the time the raisins become subject to regulation under the Marketing Order (when the handler acquires the raisins), "the producers acquired in exchange personal property consisting of cash (for the 'free tonnage' raisins) and an equitable interest in the net proceeds of the 'reserve tonnage' raisins." *Id.* The court understood this transfer, required under the Marketing Order, to render plaintiffs the following property interests: "Plaintiff producers retained a property interest in the raisins, and they retained a property interest in the proceeds from the raisins." The *Evans* court concluded that the transfer of reserve tonnage raisins was not a physical taking, because:

> although the RAC gains title to some of the raisins that plaintiffs grow, the transfer does not have the same consequences as, for example, entry by governmental officials upon their land for purposes of confiscating their rains would have. There is no physical invasion of property (citations omitted) ... nor is there any "direct appropriation of property." (citations omitted). Instead, the government is the recipient of a portion of the raisins that plaintiffs shipped to handlers subject to the marketing order.

74 Fed. Cl. at 563. In addition, the *Evans* court concluded that plaintiffs had no property interest in their reserve tonnage raisins. Without a property interest in the raisins, the Takings Clause was not implicated. The Court opined that "if plaintiffs have a takings claim, it would relate to their property interest, equitable in nature, in the net proceeds from the disposition of the 'reserve tonnage." ' *Id.* at 564. The court's conclusion that plaintiffs have no property interest in the reserve tonnage raisins is based on the following:

> In essence, plaintiffs are paying an admissions fee or toll-admittedly a steep one-for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admission ticket.

Id.

This Court agrees, in part, with the *Evans* ruling to find that the transfer of title to the reserve tonnage does not constitute a *physical* taking. A physical taking generally occurs occur when there is a physical occupation of a person's property by the government. *Norman v. U.S.,* 63 Fed.Cl. 231, *aff'd,* 429 F.3d 1081, *cert. denied,* 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2003); *Yee v. City of Escondido,* 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) physical taking occurs only where the government requires a landowner to submit to the physical occupation of his land). By contrast, a "regulatory taking" in violation of the Takings Clause may occur when government action, although not encroaching upon or occupying private property, goes too far and still amounts to a taking. *Anaheim Gardens v. U.S.,* 444 F.3d 1309 (Fed.Cir.2006); *Norman,* 63 Fed. Cl. 231 (a regulatory taking occurs when a regulation deemed necessary to promote the public interest so imposes on the owner's property rights that, in essence, it effectuates a taking); *Allain-Lebreton Co. v. Department of Army, New Orleans Dist., Corps of Engineers,* 670 F.2d 43 (5th Cir.1982) (Where there is no physical invasion of or physical damage to a plaintiff's property by the government, the government can be held responsible for a taking only when its own regulatory activity is so extensive or intrusive as to amount to taking.). Thus, while it is not necessary that the government actually take physical possession of property in order for there to be a "taking," a physical invasion must take place for there to be a physical taking, which includes a physical taking requires a "permanent physical occupation" on one's land. *Ridge Line, Inc. v. U.S.,* 346 F.3d 1346 (Fed.Cir.2003); *see also, e.g., Loretto,* 458 U.S. at 421 (cable televison company's installation of its cable facilities on plaintiff's property). In *Palazzolo v. Rhode Island,* 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), the Supreme Court explained the distinction:

> The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the

> Clause. *Loretto v. Teleprompter Manhattan CA TV Corp.,* 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.,* at 415, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322.

Id. at 617. According to the Palazzolo court, "government actions [that] do not encroach upon or occupy property yet still affect and limit" use of property are "regulatory taking[s]." *Id.*

Here, Plaintiffs do not demonstrate a physical taking of their raisins by the government. The RAC gains title of Plaintiffs' reserve tonnage raisins by operation of the federal regulation of the Marketing Order. The government does not physically invade Plaintiffs' land to take the raisins, nor does the government take physical possession of the raisins. The reserve tonnage remains in the possession of the handlers. Moreover, the transfer of title is not absolute. Plaintiffs retain an equity interest in their reserve tonnage raisins. Based on these considerations, this Court finds that Plaintiffs have failed to establish that reserve raisin program of the Marketing Order constitutes a physical taking. *See, Cienega Gardens v. U.S.,* 331 F.3d 1319 (Fed.Cir.2003) (Loss of 96% of possible rate of return on investment was "compensable regulatory taking" under Fifth Amendment, for precluding participants in government program from prepaying their mortgages after 20 years, and barring them from unregulated rental market and other more lucrative property uses); *c.f., Rose Acre Farms, Inc. v. U.S.* 559 F.3d 1260 (Fed.Cir.2009) (egg producer did not suffer a compensable regulatory taking when, due to USDA's salmonella regulations, approximately 43% of its table eggs were diverted to the breaker egg market, thus reducing

those eggs' market value by approximately 10%).[11] Because there is no physical taking, Plaintiffs' Fifth Amendment claim fails.[12]

D. Whether the JO's dismissal of Plaintiffs' administrative petition was arbitrary, capricious, and contrary to the law

Plaintiffs attempt to challenge the JO's February 8, 2007 order on Plaintiffs' administrative petition fails, as this Court lacks subject matter jurisdiction to consider Plaintiffs' claim. As a Court of limited jurisdiction, this Court must consider whether subject matter jurisdiction exists and dismiss an action if jurisdiction is lacking. *Southern Pacific Transportation Co. v. City of Los Angeles,* 922 F.2d 498, 502 (9th Cir.1990), *cert. denied,* 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *see also,* Fed.R.Civ.P. 12(h) (3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Plaintiffs' appeal of the JO's dismissal of Plaintiffs' administrative petition is barred by the statute of limitations. The statutory provision for judicial review of a ruling on a petition to modify a marketing order is 7 U.S.C. 608c(15)(B), which provides:

> The District Courts of the United States ... in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review

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[11]Although the USDA relies on rulings related to other marketing orders to argue that Plaintiffs have no property interest in their raisins, this Court notes the distinctions between the raisin Marketing Order and the marketing orders of other commodities. Unlike most of the other marketing orders, the raisin marketing order "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans,* 74 Fed. Cl. at 558. Thus, the government taking under the raisin Marketing Order is distinct and must be considered on its own facts.

[12]Although Plaintiffs do not establish a physical takings claim, Plaintiffs are not without recourse. In addition to a regulatory takings claim, and as fully explained in *Evans,* Plaintiffs have at least three other legal theories they could present to challenge the reserve requirement. 74 Fed. Cl. at 564-65.

> such ruling, *provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.*

This statute is jurisdictional. *See, Kingman Reef Atoll Investments, L.L.C. v. U.S.,* 541 F.3d 1189, 1996 (9th Cir.2008); *see also, John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 128 S.Ct. 750, 753-56, 169 L.Ed.2d 591,(2008). Thus, this Court only has jurisdiction to review a handler's 7 U.S.C. § 608c(15)(B) appeal if that appeal is filed within twenty days. The JO issued its decision on February 4, 2008. Plaintiffs initiated this action on October 14, 2008. Accordingly, Plaintiffs' untimely challenge is barred by the statute of limitations and this Court lacks jurisdiction to consider it. *See United States v. Bravo-Diaz,* 312 F.3d 995, 997 (9th Cir.2002) ("It is fundamental to our system of government that a court of the United States may not grant relief absent a constitutional or valid statutory grant of jurisdiction.").[13] Because this Court lacks jurisdiction over Plaintiffs' cause of action related to the 7 U.S.C. 608c(15)(B) petition, this Court must dismiss it, and cannot reach the merits of the parties' arguments.

VI. Conclusion and Order

For the foregoing reasons, the Court GRANTS defendant USDA's summary judgment motion and DENIES Plaintiffs' summary judgment motion. The clerk of court is DIRECTED to enter judgment in favor of defendant USDA and against Plaintiffs and to close this action.

IT IS SO ORDERED.

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[13] In addition, Plaintiffs' challenge to the JO's dismissal of Plaintiffs' administrative petition is the subject of a separate action. In that separate action, Plaintiffs' claims were dismissed as untimely. Plaintiffs appeal of that dismissal order is currently pending.

ANIMAL QUARANTINE ACT

DEPARTMENTAL DECISIONS

In re: ROY JOSEPH SIMON, d/b/a JOE SIMON ENTERPRISES, INC.
A.Q. Docket No. 07-0103.
Decision and Order.
Filed August 5, 2009.

AQ.

Thomas N. Bolick, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

In this decision, I find that Roy Joseph Simon committed numerous serious and other lesser violations of the Commercial Transportation of Equines for Slaughter Act and the regulations thereunder. I impose a civil penalty of $36,500.

Procedural Background

On May 4, 2007, Kevin Shea, Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) issued a complaint alleging that Roy Joseph Simon d/b/a Joe Simon Enterprises, Inc., committed numerous violations of the Commercial Transportation of Equines for Slaughter Act between August 2003 and October 2005. On June 7, 2007, Mr. Simon and his wife, Sharon Simon, filed an answer to the complaint. On October 16, 2007, Complainant moved that a hearing be scheduled in this matter, and on March 7, 2008 I conducted a telephone conference with the parties, wherein I set the matter for a hearing in Minneapolis, Minnesota.

I conducted a hearing in Minneapolis on October 21-22, 2008. Mr. Thomas N. Bolick, Esq. represented Complainant, while Ms. Sharon Simon, a non-attorney, represented Respondent Roy Joseph Simon.

Complainant called four witnesses: Joseph Astling, David Green, Leslie Vissage, and Dr. Timothy Cordes. Respondent testified on his own behalf, and also called Dr. J. Robert Davison and Jack Shirley as witnesses. I received over 100 exhibits from Complainant and 20 exhibits from Respondent.

Following the hearing, Complainant submitted an opening brief, with proposed findings of facts and conclusions of law, Respondent submitted a responsive brief, and Complainant submitted a reply brief.

Statutory and Regulatory Background

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

Among other things, the final rule defined an "owner/shipper" as someone who commercially transports more than 20 equines a year to slaughtering facilities. 9 C.F.R. § 88.1. An owner/shipper is subject to a number of regulations designed to prevent horses from suffering unduly while being transported to the slaughterhouse. Regulations include standards for constructing conveyances, so that horses can be safely loaded, unloaded, and transported, and rules for the care of horses before and during shipment. The regulations, which are generally performance standards, seek to assure that equines being transported to the slaughterhouse are fit to travel, in that they must be weight-bearing on all four legs, must not be blind in both eyes, must be able to walk unassisted, are older than six months of age, and are not about to give birth. They are to be transported in a manner so as not to cause injury, must be checked at least once every six hours while being transported, and must be offloaded and fed and watered on trips lasting over 28 hours.

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

Facts and Discussion

At the time of the events cited in the complaint, Respondent Roy Joseph Simon d/b/a Joe Simon Enterprises, Inc., was engaged in the business of purchasing unwanted horses and shipping them to the BelTex Corporation Processing Plant in Fort Worth, Texas for slaughter. Mr. Simon, who operates from a mailing address in Lakeville, Minnesota, has been in this business for over 30 years. CX 15, Tr. 517. He estimated that he or his business transports 3600 horses a year for slaughter. *Id*. Respondent buys horses at sales in his general geographic area. Tr. 696. He testified that with respect to the horses involved in the complaint, he was just the middleman for BelTex, and that BelTex would reimburse him for the cost of each horse that was delivered alive to their facility, and pay him a commission of $20 per horse. Tr. 659-661, 690-698. He stated that he did not directly employ most of the drivers of these loads, and that BelTex generally paid the drivers directly. Tr. 661. He contended that he was not truly an "owner/shipper" under the Act.

On the other hand, Respondent essentially stipulated that he was the owner/shipper of all the horses in question. Tr. 17-18. He stated that he bought the horses at auctions in the area, and that he made decisions as to which driver transported which horses to BelTex. Mrs. Simon, who did not testify directly but who was an employee of her husband's company, indicated in a number of affidavits that the horses sold for slaughter were purchased by Respondent and did not belong to BelTex until they were transported and successfully offloaded at BelTex. Further, the documents that accompanied each of the shipments of horses to BelTex that are the subject of this case uniformly list

Respondent as the owner/shipper of the horses[1].

Thus, Respondent's own stipulations and admissions, as well as the overwhelming weight of the evidence, establishes that he is an "owner/shipper" as defined in the regulations.

Generally, Complainant has demonstrated that Respondent committed numerous violations of the Act, ranging from extremely serious to fairly mundane paperwork violations.

1. The serious violations—Respondent committed a total of five serious violations of the Act.[2]

First, on November 2, 2004, Respondent committed two violations in that he transported horses in a conveyance that was not suitable for hauling horses, and that as a result at least one horse suffered severe injury while being transported. In particular, Respondent's driver, Sam Eveslage, told Leslie Vissage, an investigator with APHIS' Investigative and Enforcement Services, that this shipment of 47 horses "was the most non-sturdy load of horses he had transported for quite some time." Tr. 522-523, CX 82. The driver told Ms. Vissage that he had to stop twice in the first twenty miles and four times in the first 150 miles of his trip to BelTex because the horses were acting up, and that he noticed blood in the trailer while he was 100 miles from BelTex. *Id*. Animal Health Technician (AHT) Joseph Astling indicated that the trailer was designed for hauling hogs, not horses, and had "large holes towards the bottom." Tr. 38-39; CX 75, 81. One of the horses transported on this load, bearing USDA backtag # 9326, suffered severe cuts on its right hind leg. Tr. 37. Dr. Cordes testified that photographs of the wounded leg indicated active arterial bleeding over a six hour period and that the horse needed prompt veterinary assistance because it could have bled to death. Tr. 128-129. Dr. Cordes testified that the horse had a severe cut

[1]Respondent either signed as owner/shipper or had his wife or employee or driver sign on his behalf.

[2]While Complainant categorizes the violations of the regulation requiring segregation of stallions as "serious" I classify those violations as "moderate."

which could have been caused by the horse putting his leg through one of the holes in the bottom trailer and jerking it back. Tr. 129-130. AHT Astling's photographs vividly demonstrate the severity of the wounds suffered by this horse. CX 81.

By shipping a large load of horses in a trailer not-designed for the shipment of horses, and for taking no corrective action even though it was evident to the driver that there were significant problems in the ability of the trailer to safely contain the load, and by failing to take any corrective action even when blood was evident in the trailer, Respondent, on his own and through the actions of his driver, failed to handle the injured horse, and for that matter, all the horses in that shipment, as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma as required by the regulations.

The regulations also require that when, during the course of transport, an equine is in obvious physical distress, an equine veterinarian must be contacted. Even though the driver observed blood in the trailer, he did not make any attempt to contact a veterinarian as required by the regulations. Respondent appears to contend that the driver did not see the horse's injured leg because the trailer was so crowded, but given that the driver stopped more frequently than usual and observed blood in the trailer, this is hardly a valid excuse. Similarly, Respondent unpersuasively contended that his drivers did not know about the regulations, or how to contact a veterinarian when they were on the road. However, he admitted that he had received the guidebook issued by USDA, but did not recall whether he had ever looked at it. Tr. 700-701. He also said that BelTex generally kept him informed of the rules, and that he had called AHT Astling a few times and that Astling was always very helpful. *Id*.

Respondent also committed a serious violation of the Act and regulations on November 7, 2004, when a horse apparently died while in transit to BelTex. While the death of a horse enroute to a slaughter house is not in itself a violation, the regulations require that when a death occurs during transit, the driver must notify the nearest APHIS veterinarian and allow the veterinarian to examine the dead horse. While the driver variously told a number of people at different times that the horse died in Oklahoma, Kansas and Missouri, it was clear that when

the driver arrived and AHT Astling inspected the dead horse, that rigor mortis had already set in. Tr. 43, 46-47, CX 75. Astling testified that he palpated the dead horse's outer extremities and based on the degree of rigor, he believed that the horse had been dead for about six hours. Tr. 47-49. CX 75. Dr. Cordes, based on Astling's testimony and photographs, concurred with this estimate. Tr. 132-133. Dr. J. Robert Davison, a veterinarian called by Respondent, disagreed with Dr. Cordes on the amount of time that would transpire before rigor would set in, stating that it could occur between one and eight hours after death, Tr. 733, 738-739, while Dr. Cordes stated that it begins within two to three hours after death and may peak as late as twelve hours after death. Tr. 132-133. However, resolution of this point is not necessary, as it is undisputed that the horse died well before it reached what was to be its final destination, and that the driver did not call an APHIS veterinarian, as required by the regulations.

On February 15-16, 2005, another serious violation was committed when Respondent's driver was fully aware that a horse was in distress as early as Missouri, and continued to drive to BelTex rather than calling an equine veterinarian, as required by the regulations. In particular, the driver told AHT Astling that he noticed that the horse went down in Missouri, and then got back up, and then went down again in Oklahoma and did not get up again. Tr. 52-54, CX 119. This horse, a grey mare with USDA backtag number ASAS 3522, was euthanized by BelTex employees on the trailer in which it was transported. Tr. 58. As AHT Asling's photographs indicate, he was able to hold the horse's leg at an angle that was "unnatural." Tr. 62-63, CX 129. Dr. Cordes, upon looking at the photographs taken by Astling, stated that the injured horse had a compounded fracture, with "multiple fractures somewhere between the stifle and fetlock and perhaps even above. It's difficult to say, but that's a nasty fracture." Tr. 135. Given that the driver was aware that he was transporting a severely injured horse, Respondent has violated both the provisions regarding humane transport of equines for slaughter, and the requirement to call an APHIS veterinarian when he knew he had an injured horse, in violation of the act and the regulations, with regard to this load.

On May 11, 2005, a horse broke its leg while being off-loaded from

a conveyance at the Bel-Tex facility. The horse, which bore USDA backtag # 5304, apparently stepped into a gap between the trailer and the incline ramp as it was being transferred for unloading. Tr. 76-78. As the photographs by AHT Astling gruesomely illustrate, the horse's left hind leg was completely severed between the ankle and the hock. CX 146. David Green, a senior investigator with APHIS' Investigative and Enforcement Services, interviewed Danny Starnes, an employee of BelTex, who described how the horse's leg was wedged, and how he had to use a pipe to pry the leg out. Tr. 493-494, CX 147. When Astling saw the horse it was still alive but down in the pen. Tr. 77, CX 131. Astling testified, and his photographs support his testimony, that there was a gap at the side of the ramp that was unprotected in that a horse's leg could fit through. Tr. 76-78. Accordingly, APHIS contends that the existence of this gap was an unsafe condition that resulted in the horse suffering unnecessary physical harm or trauma.

While there is no argument from Respondent that the horse did not get injured as described, Respondent characterizes the incident as an accident and that the mere fact of an accident cannot establish liability for this regulatory violation. Respondent contended that this trailer had been used numerous times to haul horses without incident and that it was generally a safe trailer. Tr. 666. However, Respondent's driver acknowledged to AHT Astling that the conditions that caused the gap to exist were fixable, and it is self-evident that the existence of such a gap would be a danger to any horse being unloaded. Tr. 78-79. Accordingly, I find that a violation of the regulation was committed although, as I will discuss in the sanctions section of this decision, there is far less degree of knowledge for this violation than some of the other serious violations, which will be reflected in the penalty assessment.

On May 30, 2005, Respondent committed another serious violation of the Act by transporting a blind horse for slaughter. On May 31, AHT Astling was alerted to the presence of the blind horse by BelTex personnel, who noticed that they could not lead it to the scales unless it was closely following another horse. Tr. 90-92, 95, CX 151, 152. AHT Astling had the horse, which wore backtag # 5922, placed in a pen by itself and observed and examined the horse. *Id*. He videotaped the horse's actions. CX 136. The videotape, which was shown at the hearing, shows the horse bumping into the fence and banging its head

and the horse appeared agitated and disoriented when left alone. Astling testified that the horse had numerous scratches, scars and lacerations around his head and eyes, of varying age, that would further indicate that the horse was blind. Tr. 95. He also shined a pen light in the horse's eyes, and could not see a pupil in either eye, stating that each eye had a bluish haze and had no reaction to light. Tr. 95-97. He concluded that the horse was blind. Dr. Cordes confirmed the conclusion of Astling, confirming that the video demonstrated that the horse was blind in both eyes, and stating that a horse that could see would not repeatedly bang its head against the walls of the corral. Tr. 141-147. Dr. Davison, while indicating that a formal conclusion that a horse was blind could not be made unless a veterinarian gave the horse an ophthalmologic examination, essentially agreed with the conclusions of Astling and Dr. Cordes. He stated that "It's obvious that the horse cannot see correctly" and suggested that it might be 90-95% blind. Tr. 164-169. I conclude that the video and photographs amply demonstrate that this horse was blind within the meaning of the regulations and that its transport to BelTex was prohibited under the regulations.

On August 15, 2005, AHT Astling inspected a load of 41 horses delivered by one of Respondent's drivers. One of the horses was down in the trailer. Tr. 202-204, CX 169. Astling inspected the horse and determined that it was dead, had a broken right hind leg, and that based on the degree of rigor mortis, it had to have been dead for at least six hours. *Id*. The driver indicated to Astling that the horse had been up only around 60 miles before reaching its final destination, but Dr. Cordes indicated that the degree of rigor mortis discovered by Astling was inconsistent with that statement. Tr. 132-133, 203-204, CX 169, 170. There is no specific allegation concerning Respondent's responsibility for the death of this horse. While there is no specific evidence to support the time of death of this horse, I cannot make the connection, as suggested by Complainant, that the evidence demonstrates that Respondent failed to make the required checks on the condition of the horses every six hours, or that Respondent failed to contact an APHIS veterinarian when he had a dead horse in his shipment. There is simply not sufficient evidence, let alone a preponderance of evidence to support any conclusion that Respondent

violated the regulations with respect to this horse.

On October 5, 2005, AHT Astling inspected a load of 48 horses shipped by Respondent. He observed a horse with USDA backtag # 2246 which he determined could not bear weight on its left front leg. Tr. 108-115, CX 179, 180. Astling saw no evidence of any obvious physical injury, and believed that there was a pre-existing injury that rendered the horse lame. Tr. 109. Astling videotaped and photographed this horse and, based on these observations, Dr. Cordes concluded that the horse suffered from a paralysis of the radial nerve of the left front leg. Tr. 154-157, 770-773.. Dr. Cordes agreed with AHT Astling that there was no fresh injury evident, but noted several injuries that appeared to be more than two days old. He testified that any trauma which would have caused this paralysis had to have occurred "at least a couple of days" before the paralysis would have manifested itself. Tr. 770-773. Dr. Davison agreed that the horse was suffering from a radial paralysis, but differed as to when the injury causing the paralysis could have occurred. Tr. 174-179, 779-780. He testified that such an injury can occur spontaneously, and that such an injury could have occurred during the normal transportation of the horses to BelTex. Tr. 176. He also noted that the horse's mane bore evidence of a bridal path, indicating that some time in the not too distant past, the horse had been ridden (although the mane appeared to have been allowed to grow back for over a month). Tr. 177.

I find that, with respect to this particular count, Complainant has not sustained its burden of proving, by a preponderance of the evidence, that Respondent transported a horse that had a pre-existing injury that rendered it unable to be fully weight bearing on all four legs. Dr. Cordes speculated that the wounds causing the paralysis were "at least a couple of days old," and nearly two full days had elapsed between the time the horse was loaded and the time the injury was discovered. Although it is likely that the horse was injured before loading, I find it just as likely that the converse was true, and so I find no violation for this particular allegation.

2. The moderate violations—there were two types of violations that Complainant characterizes as serious, but for which he request significantly lesser penalties be assessed. Since the penalties sought,

and assessed, are significantly less than those violations classified as serious, I consider these moderate violations.

First, on seven different occasions, Respondent shipped stallions for slaughter without properly segregating them from either each other or from the rest of the equines in the shipment. Respondent indicated, through affidavits of Mrs. Simon, that he instructed drivers to separate stallions as required by the regulations. E.g., CX 118. Rather than denying that the stallions in these shipments were not separated, Respondent suggested that the stallions might have been mistaken for geldings because stallions sometimes suck their testicles into their body cavity when excited. Tr. 327, 329. This possibility was confirmed by Dr. Davison, who indicated that "it would not be difficult" to mistake a young stallion for a gelding "if somebody was in a hurry." Tr. 734-735. However, the likelihood of this happening with dozens of stallions spread over eight shipments is quite remote. Dr. Davison indicated that missing all eight stallions in one load would be unlikely. Tr. 744. Further, Respondent filled out the owner shipper form in four of the shipments indicating that stallions were present in the shipment, so it is obvious that he knew of the presence of the stallions. AHT Astling inspected the horses in each of the seven shipments and found stallions in each shipment—in five of these shipments he specifically noticed that stallions were present and were not segregated from each other or the other horses, and in two of the shipments he noted that the documentation indicated seven and eight stallions respectively and the conveyances used to ship the horses would not accommodate separation for that number of stallions.

Second, on two occasions cited in the complaint, Respondent delivered horses to BelTex outside of normal business hours, but neither waited for a USDA representative to examine the horses, nor returned to the premises to meet with the USDA representative[3]. On one of these occasions, after the May 11, 2005 delivery—the same delivery where a horse was severely injured during unloading from the trailer—AHT

[3] In Complainant's reply brief, he drops a third count concerning the October 3, 2005 delivery.

Astling was able to locate the driver when he realized that he had passed the trailer on the way to BelTex and was able to catch up with him and conduct an examination of the trailer. On the other occasion, July 13, 2005, Astling never did get an opportunity to talk with the driver or inspect the transport.

Respondent contends that no violation exists for either of the two remaining allegations. Respondent contends that since Astling was able to locate the driver on May 11, there was no violation, while Complainant contends that the fact that the driver left the premises and stopped at a business near the facility establishes a violation. The regulation states that when delivery is made during normal business hours, the driver must wait for the USDA inspector to examine the horses. Here, however, the inspector was not on the premises at the time of the unloading of the horses. The regulations presume that an inspector will be available during normal business hours, and if the inspector was not there when such a delivery was made, it is not unreasonable for the driver to briefly leave the premises—the regulations do not seem to require a driver who delivers horses during normal working hours to remain at the facility if no inspector is present. There is no evidence here that the driver was doing anything other than visiting a nearby business—AHT Astling indicated that the drivers was having some repairs made to his vehicle, Tr. 83—and there is no basis to conclude that he was not going to return to BelTex. The burden of proof is on Complainant, and given the fact that there was no inspector on site when the horses were unloaded during normal business hours, and that the driver had stopped close by and the inspector was able to examine the trailer, I find no violation on May 11, 2005.

With respect to the July 13, 2005 allegation, there appears to be no dispute that the facts are as alleged—that the driver dropped off a load of horses for slaughter and was not available to AHT Astling. Thus I find one violation of the failure to remain regulation.

3. The minor or paperwork violations.

There are numerous allegations concerning the paperwork required to be completed regarding the shipment of horses for slaughter. Every such shipment must be accompanied by an owner shipper certificate, VS

Form 10-13. This form requires the input of a good deal of information which is critical to the management of an effective program. In nearly three dozen instances cited in the complaint, Respondent left pertinent information off the forms, including descriptions of the horses being shipped, the time horses were loaded onto the conveyance, information about the conveyance, etc. None of these violations were seriously disputed, although, consistent with my decision in *In re: Overholt* (bench decision, June 5, 2009) I am vacating those counts where the only violation was the failure to give the complete phone number or address of BelTex, since BelTex was clearly identified in each of the forms as the recipient of the horses.

Findings of Fact and Conclusions of Law

1. Respondent Roy Joseph Simon d/b/a Joe Simon Enterprises, Inc., is a resident of the State of Minnesota with a mailing address of 9724 267th Street West, Lakeville, Minnesota 55044. Respondent is a knowledgeable horseman who has been buying slaughter horses for 30 years. At the time of the hearing, Respondent had been shipping approximately 300 horses to slaughter each month.

2. Respondent was the owner/shipper of horses being transported for slaughter for each of the shipments that are the subject of the complaint in this case. Each of the following findings involves horses that were shipped by Respondent to BelTex for slaughter.

3. On or about November 2, 2004, Respondent shipped a load of horses in a trailer that had been designed to haul hogs and had large holes in the bottom such that horses were in potential physical distress and one of the horses, USDA backtag # USAY 9326, developed severe cuts on its hind legs during transportation. Respondent thus failed to transport the horses in a conveyance that was designed, constructed, and maintained in a manner that at all times protected the well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1). Respondent's driver was aware that the horses were in physical distress early in the transportation and observed blood in the trailer while in transit, yet Respondent and/or his driver failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation

of 9 C.F.R. § 88.4(b)(2).

By transporting the horses in this manner, Respondent and/or his driver failed to handle them as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

4. On or about November 7, 2004, Respondent's driver became aware that one of the horses he was transporting, a stallion with USDA backtag # USBL 5013, died during transportation to the slaughter plant, yet Respondent and/or his driver did not contact the nearest APHIS office as soon as possible or allow an APHIS veterinarian to examine the dead equine. This constitutes a violation of 9 C.F.R. § 88.4(b)(2).

5. On or about February 15, 2005, Respondent's driver became aware that a grey mare with USDA backtag # USAS 3522, had gone down twice during transportation. This horse had a broken left hind leg above the hock. Even though this horse was in obvious physical distress, neither Respondent and/or his driver failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2). Likewise, by transporting the injured horse in this manner, Respondent and/or his driver failed to handle it as expeditiously and carefully as possible in a manner that did not cause the injured horse unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

6. On or about May 11, 2005, Respondent shipped a load of horses in a trailer that was not equipped with doors and ramps of sufficient size to allow the horses to be safely loaded and unloaded. As a result, one of the horses, a chestnut-colored horse with USDA backtag # USBL 5304, broke its left rear leg between the ankle and the hock as it was being unloaded at BelTex. Respondent thus failed to transport the horses in a conveyance that was designed, constructed, and maintained in a manner that at all times protected the well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1). This conduct also constituted a failure to handle the horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

7. On or about May 30, 2005, Respondent shipped a bay gelding quarterhorse with USDA backtag # USBM 5922, which was blind in both eyes such that it could not walk unless being led by another horse.

By transporting a horse that was blind in both eyes, Respondent failed to handle the blind horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

8. On or about August 15, 2005, Respondent shipped a bay quarterhorse gelding with USDA backtag # USBT 1997. The horse broke its right rear leg and died en route, but there is insufficient evidence to allow me to conclude that Respondent through his driver failed to check on the horses every six hours, or that he failed to timely contact an equine veterinarian.

9. On or about October 3, 2005, Respondent shipped a chestnut-colored quarterhorse gelding with USDA backtag # USBT 2246, which on arrival had an injury that rendered it lame in its left front leg and unable to bear weight on all four limbs. The preponderance of the evidence does not establish that this horse had a pre-existing injury which Respondent should have noticed before loading the horse.

10. On seven occasions: on or about October 10, 2004, on or about November 2, 2004, on or about November 7, 2004, on or about February 15, 2005, on or about March 13, 2005, on or about July 13, 2005 and on or about September 26, 2005, Respondent shipped loads of horses containing one or more stallions, but Respondent did not load the horses on the conveyance so that each stallion was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

11. On or about July 13, 2005, Respondent and/or his driver delivered a load of horses outside of BelTex's normal business hours and left the slaughtering facility, but did not return to Dallas Crown to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

12. Respondent committed the following paperwork violations:

(a). On an unknown date, Respondent did not sign or date the owner-shipper certificate for a shipment of 27 horses, in violation of 9 C.F.R. § 88.4(a)(3) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); there was no description of the conveyance used to transport the horses and

the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix); and there was no statement that the horses had been rested, watered, and fed prior to the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(b). On or about August 24, 2003, Respondent did not sign the owner-shipper certificate for a shipment of 38 horses, in violation of 9 C.F.R. § 88.4(a)(3); Respondent's address and telephone number were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(i); the form did not indicate the color, breed or type, and sex of any of the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); the prefix for each horse's USDA backtag number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than nine months later, in violation of 9 C.F.R. § 88.4(f).

(c). On or about September 14, 2003, Respondent did not indicate the name of the auction/market where a shipment of 31 horses were sold to him, in violation of 9 C.F.R. § 88.4(a)(3)(iii); and there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

(d). On or about October 11, 2003, Respondent did not sign the owner-shipper certificate for a shipment of 20 horses, in violation of 9 C.F.R. § 88.4(a)(3); the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix); and (4) there was no statement that the horses had been rested, watered, and fed prior to the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than seven months later, in violation of 9 C.F.R. § 88.4(f).

(e). On or about October 12, 2003, Respon dent did not record the prefix for the backtag numbers for a shipment of 28 horses, in

violation of 9 C.F.R. § 88.4(a)(3)(vi), nor did he maintain a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature of 9 C.F.R. § 88.4(f).

(f). On or about October 21, 2003, Respondent, for a shipment of 42 horses, did not describe the conveyance used to transport the horses and did not provide the license plate number of the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(iv); the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than seven months later, in violation of 9 C.F.R. § 88.4(f).

(g). On or about October 27, 2003, Respondent, for a shipment of 21 horses, did not describe the conveyance used to transport the horses and did not provide the license plate number of the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(h). On or about November 2, 2003, Respondent, for a shipment of 44 horses, did not describe the conveyance used to transport the horses and did not provide the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than six months later, in violation of 9 C.F.R. § 88.4(f).

(i). On or about December 2, 2003, Respondent, for a shipment of 36 horses, did not provide the name of the auction/market where the horses were sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii), and the prefix for each horse's USDA backtag number was incorrectly recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than five months later, in violation of 9 C.F.R. § 88.4(f).

(j). On or about December 6, 2003, Respondent, for a shipment of 38 horses did not provide a description of the conveyance used to transport the horses and did not provide the license plate number of the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(iv). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than five months later, in violation of 9 C.F.R. § 88.4(f).

(k). On or about January 20, 2004, Respondent shipped 31 horses without applying a USDA backtag to each horse in the shipment, in violation of 9 C.F.R. § 88.4(a)(2). The prefix and tag number for each horse's USDA backtag number were not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than six months later, in violation of 9 C.F.R. § 88.4(f).

(l). On or about March 21, 2004, Respondent shipped 18 horses for which he was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature. Less than two months later, he was unable to locate the form, in violation of 9 C.F.R. § 88.4(f).

(m). On or about March 28, 2004, Respondent shipped 20 horses but neglected to indicate on the form the color, breed or type, and sex of each horse, physical characteristics that could be used to identify the horses, in violation of 9 C.F.R. § 88.4(a)(3)(v). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than two months later, in violation of 9 C.F.R. § 88.4(f).

(n). On or about April 18, 2004, Respondent shipped 36 horses in commercial transportation to BelTex for slaughter but did not indicate on the form either the name of the auction/market where the horses were sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii); or the time when the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(o). On or about April 25, 2004, Respondent shipped 48 horses but omitted both the name of the auction/market where the horses were

sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii); and the time when the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(p). On or about May 26, 2004, Respondent shipped 27 horses without recording the prefix for each horse's USDA backtag number, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(q). On or about July 11, 2004, Respondent shipped 42 horses without listing the time that the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(r). On or about July 20, 2004, Respondent shipped 41 horses without providing: the name of the auction/market where the horses were sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii); the license plate number of the conveyance used to transport the horses, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and the place where the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(s). On or about August 1, 2004, Respondent shipped 21 horses without indicating the breed or type of each horse, one of the physical characteristics that could be used to identify each horse, in violation of 9 C.F.R. § 88.4(a)(3)(v); and four of the five boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

(t). On or about August 9, 2004, Respondent shipped 34 horses without indicating the breed or type of each horse, one of the physical characteristics that could be used to identify each horse, in violation of 9 C.F.R. § 88.4(a)(3)(v); and three of the five boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

(u). On or about August 18, 2004, Respondent shipped 26 horses without listing the name of the auction/market where the horses were sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii); and without specifying the time when the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(v). On or about September 7, 2004, Respondent shipped 17 horses but the prefix for each horse's USDA backtag number was not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(w). On or about October 10, 2004, Respondent shipped 45 horses without providing: the name of the auction/market where the horses were sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii); the time when the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix); and a statement that the horses had been rested, watered, and fed prior to the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(x). On or about November 5, 2004, Respondent shipped 34 horses without listing the license plate number of the conveyance used to transport the horses, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

(y). On or about November 7, 2004, Respondent shipped 46 horses in commercial transportation but failed to list a stallion with USDA backtag # USBL 5013 on the form, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(z). On or about November 8, 2004, Respondent shipped 34 horses without listing the license plate number of the conveyance used to transport the horses, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

(aa). On or about November 20, 2004, Respondent shipped 31 horses but did not indicate the time when the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix). Additionally, Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than six months later, in violation of 9 C.F.R. § 88.4(f).

(bb). On or about November 23, 2004, Respondent shipped 24 but did not indicate either the license plate number of the conveyance used to transport the horses, in violation of 9 C.F.R. § 88.4(a)(3)(iv); or the time when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(cc). On or about November 25, 2004, Respondent shipped without providing the license plate number of the conveyance used to transport the horses, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

(dd). On or about December 26, 2004, Respondent shipped 21 horses without providing the time when the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(ee). On or about February 15, 2005, Respondent shipped 38 horses but omitted the time when the horses were loaded onto the

conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(ff). On or about May 11, 2005, Respondent shipped 37 horses but omitted the name of the auction/market where the horses were sold, in violation of 9 C.F.R. § 88.4(a)(3)(iii); the form did not list any identifying physical characteristics for a chestnut-colored horse with USDA backtag # USBL 5304, in violation of 9 C.F.R. § 88.4(a)(3)(v); and there was no statement that the horses had been rested, watered, and fed prior to the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(gg). On or about May 30, 2005, Respondent shipped 34 horses. Respondent was responsible for maintaining a copy of the owner/shipper certificate, VS Form 10-13, for one year following the date of signature, but was unable to locate it less than two months later, in violation of 9 C.F.R. § 88.4(f).

(hh) On or about July 13, 2005, Respondent shipped 32 horses but incorrectly listed eight (8) stallions in the shipment as being geldings and thereby failed to list all of the physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(ii). On or about September 24, 2005, Respondent shipped 35 horses but failed to supply the license plate number of the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

(jj). On or about September 26, 2005, Respondent shipped 43 horses but did not list 11 of the horses in the shipment, in violation of 9 C.F.R. § 88.4(a)(3); and did not correctly specify the place where the horses were loaded onto the conveyance, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(kk). On or about September 27, 2005, Respondent shipped 27 horses in but omitted listing one horse with USDA backtag # USBT in violation of 9 C.F.R. § 88.4(a)(3); failed to list the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); incorrectly listed the color and sex of at least 13 horses, physical characteristics that could be used to identify each horse, in violation of 9 C.F.R. § 88.4(a)(3)(v); and prefixes of the USDA back tags for 23 horses were not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

Sanctions

While the Act only indicates that a maximum penalty of $5,000 per violation, and that each horse transported in violation of the regulations will be considered a separate violation, Complainant appears to agree, by his categorizing of the different types of violations shown here, that the more serious violations deserve the more serious civil penalties. Thus, Complainant recommends the maximum penalties only for those violations that he believes are the most serious, with more moderate penalties proposed for the violations of the stallion segregation requirement and the requirement that a driver either stay around or return during normal business hours when he drops off a load of horses outside normal business hours. Complainant likewise proposes penalties of approximately $25 for each violation of the paperwork requirements.

In looking at Respondent's history of violations, it is evident to me that Complainant put forth considerable effort in educating this industry on the impact of the Act and regulations, launching extensive efforts and publishing a guidebook that was widely distributed in the industry. Tr. 368-370. APHIS personnel were generally available to answer questions when issues arose. Respondent admitted to receiving at least one guidebook, although he was not sure of its whereabouts, and further admitted that whenever he called AHT Astling he was responsive to Respondent's questions. Tr. 700-701.

On the other hand, I am somewhat puzzled why Complainant let such a large number of violations accumulate before issuing a complaint against Respondent. Given the importance of the regulations, strongly emphasized by the testimony of Dr. Cordes and by Complainant's briefs, it is surprising that years elapsed between the commission of some violations and the issuance of the complaint. The earliest violations were alleged to have occurred in August 2003, with the first serious violation occurring in November 2004, yet the complaint was not issued until May 2007. Respondent testified, without dispute, that he has not been cited for any further violations since the issuance of the complaint in this case, indicating that waiting for the accumulation of 42 alleged violations before the issuance of a complaint rather than prosecuting promptly is not fully consistent with either the remedial or deterrent

aims of the Agency. Thus, Dr. Cordes statement that Respondent had far more violations than any other owner/shipper who had gone to hearing, is necessarily weighed against the fact that it is highly likely that there would have been far fewer violations if APHIS had taken action when the first violations were discovered.

The most serious violations:

The November 2, 2004 violations where Respondent transported horses in a conveyance not suitable for horse transport, and where the driver was aware that a horse was in physical distress and failed to take appropriate action is extremely serious. I assess the maximum penalty of $5,000 for the combined failure to transport the horses expeditiously and carefully as possible and for the failure to seek veterinary assistance. I also assess a penalty of $2,000 for using a conveyance not suitable for the transporting of horses.

The November 7, 2004 violation for failure to contact a veterinarian when a dead horse was discovered is likewise a serious violation. However, as I ruled in the Overholt decision at Tr. 357, this involves less harm as the horse was already dead, and contacting the veterinarian would not have prevented any harm to the horse. Accordingly, I assess a $2,000 penalty for this violation.

The February 15, 2005 violation where a gray mare went down twice during the transport and no veterinary attention was sought is on the high end of seriousness. The point of the Act and its regulations is to prevent needless suffering throughout this process, and the actions of Respondent, through his driver, are just the type of actions that the Act was most designed to prevent. Although the Act allows, as per the Judicial Officer in *In re. William Richardson,* the assessment of multiple penalties when the same horse is involved, here the failure to seek veterinary assistance and the failure to transport and handle a horse as expeditiously and carefully as possible are two acts that in my mind are inextricably intertwined. Accordingly I am assessing a combined penalty of $5,000 for these violations.

The May 11, 2005 violation, while easily the most gruesome in this case, appeared to be more of an accident due to negligence in the unloading process than a knowledgeable act. There is no evidence of

ignoring the condition of a horse or deliberate exposure of a horse to dangerous conditions. It appears that this was more of a negligent setting up of the unloading process. I impose a penalty of $3,000 for this violation.

The May 30, 2005 shipment of a horse that was blind in both eyes was a direct and knowing violation of the regulations. An owner/shipper is required to affirmatively state that horses are fit to travel, including not being blind in both eyes. The photographs, video and observations of Dr. Cordes and AHT Astling clearly establish that this horse was blind. A horseman with the over 30 years experience of Respondent could not help but notice that this horse was blind. I impose a civil penalty of $4,000 for this violation.

The moderately serious violations:

Although Complainant classifies the failure to segregate stallions and the failure to remain at the BelTex after dropping horses off outside business hours as serious violations, Complainant recognized, as he must, that these violations are significantly less serious in gravity than the violations just discussed.

Complainant seeks a penalty for $800 for each of the stallions that were not segregated as required. Respondent's defenses are particularly dubious—rather than denying that he committed these violations, he contended that his drivers could have mistaken the stallions for geldings because stallions occasion suck their external genitalia into their body cavities when excited. While this is theoretically possible, the likelihood of this happening in each of the cited incidents, particularly where a number of the owner/shipper statements (four) acknowledged the presence of stallions in the shipment[4], is extremely small. There is a significant potential for harm where stallions are not segregated (and in the November 7, 2004 shipment a stallion died in transit). Complainant demonstrated that 25 stallions were transported without proper segregation over seven different shipments. I am assessing a total of $7,500 for these violations.

I found one instance where Respondent's driver did not comply with the regulation requiring him either to wait for the USDA inspector or

[4]In a fifth shipment, the driver acknowledged the presence of stallions.

return during business hours. Of the 42 shipments of horses involved in this complaint, Respondent was cited for this violations of this provision, but Complainant dropped one and I found Respondent not culpable for another. For the remaining instance, I find that the proposed civil penalty of $500 is appropriate.

With respect to the numerous paperwork violations, it appears that Respondent had a somewhat cavalier attitude towards his obligations in this regard. He testified that the requirements were confusing but on the stand admitted that he could figure how to fill out the forms. On the other hand, perhaps Respondent would have taken his responsibilities in this area more seriously if Complainant gave him any sort of indication that he was improperly filling out the forms, rather than waiting until he accumulated a few years of violations before a complaint was issued. In any event, the alleged violations were clearly established, although I vacated the counts where the only violation was the omission of either BelTex's phone number or full address since the facility was clearly identified. In balancing the pervasive nature of these violations in the face of Respondent's personal knowledge of the regulations and the outreach program conducted by Complainant, but also factoring in the delay in notifying Respondent of his continued non-compliance, I assess a cumulative penalty of $7,500 for the recordkeeping violations.

Order

Respondent Roy Joseph Simon is assessed a civil penalty of thirty six thousand five hundred dollars ($36,500). Respondent shall send a certified check or money order for $36,500 payable to the Treasurer of the United States to

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

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

proceeding.

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

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.

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ANIMAL WELFARE ACT

DEPARTMENTAL DECISIONS

In re: LORENZA PEARSON, d/b/a L & L EXOTIC ANIMAL FARM.
AWA Docket No. 02-0020.
In re: LORENZA PEARSON.
AWA Docket No. D-06-0002.
Decision and Order.
Filed July 13, 2009.

AWA – Animal welfare – Burden of proof – Cease and desist order – Civil penalty – Exhibitor – Inspections – License revocation – License disqualification – Preponderance of the evidence – Sanction policy – Veterinary care – Willful.

Frank Martin, Jr., Nazina Razick, and Babak A. Rastgoufard, for the Administrator, APHIS.
William T. Whitaker, Akron, OH, for Respondent.
Initial decision issued by Victor W. Palmer, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PRELIMINARY STATEMENT

This consolidated proceeding includes a disciplinary Complaint (AWA Docket No. 02-0020) filed on June 14, 2002, and a First Amended Complaint filed on March 17, 2006, by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], and a Petition (AWA Docket No. D-06-0002) filed on October 28, 2005, by Lorenza Pearson, the respondent in the disciplinary action.[1] The First Amended Complaint alleges Mr. Pearson, a licensed exhibitor, willfully violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159)

[1]The instant proceeding is conducted in accordance with 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].

[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]. The Administrator seeks a cease and desist order, a civil penalty of at least $100,000, the revocation of Mr. Pearson's Animal Welfare Act license, and the permanent disqualification of Mr. Pearson from obtaining an Animal Welfare Act license. Mr. Pearson denies the allegations in the First Amended Complaint.

Mr. Pearson's Petition seeks a hearing to oppose the Administrator's intent, as expressed in an October 5, 2005, letter from the Animal and Plant Health Inspection Service [hereinafter APHIS], to terminate Mr. Pearson's Animal Welfare Act license.

Administrative Law Judge Leslie B. Holt [hereinafter ALJ Holt] conducted a hearing in Akron, Ohio, on September 24-25, 2003. The Administrator presented his case and Mr. Pearson cross-examined the Administrator's witnesses; however, Mr. Pearson did not have the opportunity to present a defense at that time. Before the hearing reconvened, ALJ Holt became unavailable and the case was reassigned to Administrative Law Judge Victor W. Palmer [hereinafter ALJ Palmer]. After ALJ Palmer was assigned the case, various events occurred that delayed the proceeding.

During teleconferences in April and May 2004, ALJ Palmer and counsel for the parties discussed the need for a new hearing. Counsel for Mr. Pearson stressed the need for ALJ Palmer to assess the credibility of the witnesses who testified at the 2003 hearing. Because of these concerns, ALJ Palmer scheduled a hearing for June 8-10, 2004, in Akron, Ohio. In order to accommodate the parties and their witnesses, the hearing was rescheduled twice. On March 31, 2005, 3 weeks before the scheduled date of the hearing, ALJ Palmer received information, during a teleconference, that a proceeding pertaining to Mr. Pearson's facility was pending before authorities for the State of Ohio that could resolve the issues in the instant proceeding. Because of this state proceeding, ALJ Palmer canceled the hearing at that time.

In a teleconference held on September 22, 2005, ALJ Palmer determined the state proceeding would not resolve the instant proceeding, and he further determined a hearing was necessary. ALJ Palmer scheduled the hearing for March 28-31, 2006, in Akron,

Ohio. On March 3, 2006, the Administrator moved to file an amended complaint. The First Amended Complaint included new allegations resulting from inspections of Mr. Pearson's facility conducted after the inspections that were the subject of the 2003 hearing. During a teleconference, on March 7, 2006, ALJ Palmer granted the Administrator's motion to amend the complaint. ALJ Palmer ordered the Administrator to send a new witness list and copies of the exhibits to counsel for Mr. Pearson. At a subsequent teleconference, on March 14, 2006, ALJ Palmer determined the number of allegations in the First Amended Complaint required additional time for Mr. Pearson to prepare for the hearing. ALJ Palmer rescheduled the hearing for June 20-23, 2006, and reserved additional hearing days on June 27-28, 2006, if needed.

On April 27, 2006, the Administrator filed a motion to limit the evidence Mr. Pearson would be allowed to introduce at the hearing. In a teleconference, on June 12, 2006, ALJ Palmer ruled, because the Administrator planned to call the same investigators who testified during the 2003 hearing, he could evaluate credibility without repeating testimony from the 2003 hearing. ALJ Palmer further ruled that Mr. Pearson would be allowed to cross-examine the Administrator's witnesses about the violations alleged by the Administrator in both the Complaint and the First Amended Complaint. Furthermore, Mr. Pearson's witnesses could testify about the violations originally alleged, as well as those added by the First Amended Complaint. ALJ Palmer ruled the June 2006 hearing was a continuation of the 2003 hearing.

On June 15, 2006, Mr. Pearson filed a request for a continuance of the scheduled hearing because his home, with papers, notes, and pictures, had been destroyed by a fire 2 weeks earlier. ALJ Palmer denied this motion on the following basis:

> This case involves a complaint initially filed on June 14, 2002, in respect to which a hearing was held on September 24-25, 2003. Judge Leslie B. Holt, who presided over this hearing, became unavailable to decide the case and it was reassigned to me on March 10, 2004. At that time, there was a discussion as to whether another hearing would be needed. It was decided to hold

> another hearing on the basis of Mr. Whitaker's request. However, time after time, the hearing was postponed and not held. It shall now go forward without further delay.
>
> It would be most inappropriate to grant a continuance in the present circumstances. If photos were destroyed in the fire, they cannot be restored; and witnesses who have lost their notes shall have to rely on their memory of the events when they testify, the same as they would if time were given to reconstruct the lost notes.

ALJ Palmer's June 15, 2006, Denial of Motion to Continue Hearing at 1-2.

At the hearing, counsel for Mr. Pearson again sought a continuance because of the fire. ALJ Palmer again denied the motion. (Tr. 2 at 18-26.)[2] Furthermore, during the hearing, counsel for Mr. Pearson moved to keep the hearing open in order to obtain testimony from Dr. Faust. Counsel for Mr. Pearson argued he learned, during the hearing, that Dr. Faust was the veterinarian who had, on Mr. Pearson's behalf, inspected his bears that were ultimately confiscated. ALJ Palmer denied this motion explaining his reasoning, as follows:

> In a hearing so long delayed and so difficult to schedule, it is expected that all potentially helpful witnesses will be identified in advance of the hearing to prevent surprise to opposing counsel and to allow for the issuance and service of any subpoeana [sic] needed to compel attendance.

ALJ Palmer's Decision and Order at 5.

ALJ Palmer presided over the hearing held in Akron, Ohio, on June 20-23, 2006. Attorneys employed by the Office of the General Counsel,

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[2]The transcript of the 2003 hearing is referred to as "Tr. 1 at__." The transcript of the 2006 hearing is referred to as "Tr. 2 at__." The Administrator's exhibits are referred to as "CX __." Mr. Pearson's exhibits are referred to as "EX __."

United States Department of Agriculture, represented the Administrator. Frank Martin, Jr., and Nazina Razick represented the Administrator at the 2003 hearing, and Frank Martin, Jr., and Babak A. Rastgoufard represented the Administrator at the 2006 hearing. William T. Whitaker of Akron, Ohio, represented Mr. Pearson.

On April 6, 2007, ALJ Palmer issued a Decision and Order finding Mr. Pearson violated the Animal Welfare Act and the Regulations. The ALJ entered an order requiring Mr. Pearson to cease and desist from violating the Animal Welfare Act and the Regulations, revoking Mr. Pearson's Animal Welfare Act license, and permanently disqualifying Mr. Pearson from obtaining an Animal Welfare Act license. ALJ Palmer declined to assess a civil penalty against Mr. Pearson.

On July 23, 2007, Mr. Pearson filed "Respondent's Appeal Petition" [hereinafter Appeal Petition] and "Respondent's Brief in Support of Appeal Petition" seeking to overturn ALJ Palmer's Decision and Order. On August 21, 2007, the Administrator filed his opposition to Mr. Pearson's Appeal Petition which included a cross-appeal, and on October 19, 2007, Mr. Pearson filed "Respondent's Opposition to Complainant's Cross-Appeal." On October 23, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a thorough examination of the record, I adopt ALJ Palmer's conclusion that Mr. Pearson repeatedly violated the Animal Welfare Act and the Regulations during the period May 12, 1999, through February 22, 2006. I also adopt ALJ Palmer's order that Mr. Pearson cease and desist from violations of the Animal Welfare Act and the Regulations, ALJ Palmer's revocation of Mr. Pearson's Animal Welfare Act license, ALJ Palmer's permanent disqualification of Mr. Pearson from obtaining an Animal Welfare Act license, and ALJ Palmer's denial of Mr. Pearson's petition opposing the Administrator's intent to terminate Mr. Pearson's Animal Welfare Act license. In addition, I find assessment of a civil penalty against Mr. Pearson warranted in law and justified by the facts.

DECISION

Findings of Fact

1. Mr. Pearson is an "exhibitor" as that term is defined in the Animal Welfare Act and the Regulations (Answer to First Amended Complaint).

2. Mr. Pearson holds Animal Welfare Act license number 31-C-0034, issued to: Lorenza Pearson, d/b/a L & L Animal Farm (Answer to First Amended Complaint).

3. Mr. Pearson does business as L & L Animal Farm, a/k/a L & L Exotic Animal Farm, an unincorporated association or partnership with a mailing address of 2060 Columbus Avenue, Akron, Ohio 44320 (Answer to First Amended Complaint).

4. On or about October 5, 2005, APHIS notified Mr. Pearson of its intent to terminate his Animal Welfare Act license pursuant to section 2.12 of the Regulations (9 C.F.R. § 2.12) (Answer to First Amended Complaint).

5. Mr. Pearson operates a medium-sized business. As shown by his applications to renew his Animal Welfare Act license, he has held the following number of animals. Between October 11, 1999, and October 11, 2000, Mr. Pearson held 59 animals, including 39 wild/exotic felines and 20 bears (CX 1). Between October 11, 2000, and October 11, 2001, Mr. Pearson held 82 animals, including 55 wild/exotic felines and 27 bears (CX 2). Between October 11, 2001, and October 11, 2002, Mr. Pearson held 74 animals, including 46 wild/exotic felines and 28 bears (CX 151). Between October 11, 2002, and October 11, 2003, Mr. Pearson held 75 animals, including 46 wild/exotic felines and 29 bears (CX 150). Between October 11, 2003, and October 11, 2004, Mr. Pearson held 58 animals, including 33 wild/exotic felines and 25 bears (CX 148). Between October 11, 2004, and October 11, 2005, Mr. Pearson held 26 bears (CX 147).

6. APHIS conducted the periodic inspections of Mr. Pearson's facility that are at issue in the instant proceeding during the period May 12, 1999, through February 22, 2006 (CX 5-CX 143, CX 153-CX 192, CX 202).

7. APHIS confiscated seven of Mr. Pearson's bears on May 17, 2005, pursuant to section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) and section 2.129 of the Regulations (9 C.F.R. § 2.129) for Mr. Pearson's failure to provide those bears requisite care (CX 194-

CX 195; Tr. 2 at 662).

8. On May 12, 1999, an APHIS inspector conducted the first inspection at issue in this proceeding, in which the inspector found a "non-compliant item" or "deficiency" (the terms APHIS inspectors alternately use to describe conditions or practices they believe are at variance with the Regulations). The May 12, 1999, inspection was a routine inspection of Mr. Pearson's facility in which Animal Care Inspector Joseph Kovach observed two lion cubs to have injuries to their noses that, in his opinion, could become infected, if untreated. Inspector Kovach directed Mr. Pearson to contact his attending veterinarian for treatment advice and to have the injuries treated (CX 5; Tr. 1 at 115-19). On September 9, 1999, Inspector Kovach conducted an inspection of Mr. Pearson's facility and found the injuries to the noses of the two lion cubs had been treated (CX 6; Tr. 1 at 119-20).

9. At the time of the September 9, 1999 inspection, Inspector Kovach observed new, non-compliant items. Wires were sticking out of the back wall of an enclosure housing two tigers; a bobcat enclosure had a hole in the roof; more shelter, such as a sleeping den box, was needed to protect a fox from bad weather; a trailer housing an adult tiger was too small for its permanent housing; and a transport trailer needed to be cleaned and sanitized. Inspector Kovach instructed Mr. Pearson to remove the wires from the wall of the tigers' enclosure; repair the roof of the bobcat's enclosure; provide the fox a sleeping box; and build a cage for the adult tiger. (CX 6; Tr. 1 at 120-24.)

10. On September 18, 1999, Dr. Norma Harlan, a veterinary medical officer employed by APHIS, inspected Mr. Pearson's traveling animal exhibit at a Heinz Corporation employee picnic. Mr. Pearson did not have records for two camels, seven tigers, and three lions. A camel pen, owned by an unlicensed facility, had several sharp wire edges that needed repair and animals owned by the unlicensed facility were not accompanied with a copy of their health records or a written program of veterinary care. Therefore, Dr. Harlan could not verify if the two lion cubs, owned by the unlicensed facility, that had scrapes on their faces and legs and appeared to be too thin, had received needed veterinary care and were being fed in accordance with a veterinarian approved regimen. In addition to the problems with the animals owned by the

unlicensed facility, pens on Mr. Pearson's trailer housing an adult lion and three tigers that he owned were, at 4 feet by 7 feet 11 inches by 5 feet tall, considered by Dr. Harlan to be too small for the animals to make needed postural adjustments; and the big cats did not have access to an exercise area. Mr. Pearson was instructed to have all required paperwork with future exhibitions; provide veterinary care to the two lion cubs and feed the lion cubs properly; repair the camel pen; and give the big cats adequate space and exercise when part of his traveling exhibit. (CX 7; Tr. 1 at 347-63, 403-04.)

11.On January 5, 2000, Inspector Kovach again inspected Mr. Pearson's permanent facility. Inspector Kovach found the enclosures housing the two tigers and the bobcat had been repaired, the fox had been provided adequate shelter, and the dirty transport trailer had been cleaned. Inspector Kovach also found that most of the items identified by Dr. Harlan as non-compliant in the inspection she conducted on September 18, 1999, had been corrected. The veterinary care program was reviewed and found to be up-to-date. The two lion cubs had been treated and later sold. The young camel was not on site and could not be evaluated. Handholds were now on transport cages, and a different transport vehicle was being used. However, Inspector Kovach found the enclosures housing three tigers identified on September 18, 1999, as too small for each animal to have adequate freedom of movement, were still being used. Mr. Pearson was given notice that these deficiencies had been documented on prior inspections, and Mr. Pearson was instructed to correct them. (CX 8; Tr.1 at 124-27, 354-55.)

12.On June 12, 2000, Inspector Kovach conducted a routine inspection of Mr. Pearson's facility and found two non-compliant items. The left side of the front gate needed repair to protect the animals from injury and to contain the animals. An enclosure for lions and tigers "had food on the floor with maggots crawling over it" (Tr. 1 at 128). Inspector Kovach characterized the presence of maggot-infested food in the enclosure as significant noncompliance with the Animal Welfare Act and the Regulations because "maggots could cause parasites" (Tr. 1 at 129). Inspector Kovach instructed Mr. Pearson that he should avoid this problem by only leaving food out for a limited period of time or giving the animals a feeding period and if they then chose not to eat the food,

to retrieve the food to prevent the animals from eating infested food. (CX 9; Tr. 1 at 128-29.)

13. On July 19, 2000, Inspector Kovach inspected Mr. Pearson's traveling animal exhibit at the Crawford County Fair Grounds. Inspector Kovach observed that the truck used to haul the animals had front tires with insufficient tread and a cracked windshield. Inspector Kovach believed that these defects violated 9 C.F.R. § 3.138(a); however, 9 C.F.R. § 3.138(a) concerns cargo space only, and I find the problems with the condition of the truck were not a violation of the Animal Welfare Act or the Regulations. Inspector Kovach found that the five pens on the trailer confining two adult lions, two adult tigers, and one adult jaguar were, at 4 feet by 8 feet by 5 feet tall, too small for the animals. The animals also were not provided with an exercise area. These violations were the same violations of 9 C.F.R. § 3.128 for which Mr. Pearson had been cited on September 18, 1999, and January 5, 2000. (CX 10; Tr. 1 at 130-34.)

14. On January 29, 2001, Inspector Kovach and Dr. Harlan performed a routine inspection of Mr. Pearson's facility. During this inspection, the facility housed 8 cougars, 18 lions, 2 lynx, 1 jaguar, 14 tigers, 14 bears, 5 bobcats, 1 fox, 1 goat, and 14 rabbits. Inspector Kovach and Dr. Harlan were accompanied by Inspector Carl LaLonde, Jr., who photographed conditions at Mr. Pearson's facility.

(a) Dr. Harlan testified that the facility lacked sufficient personnel to conduct an adequate care program for the number of animals it housed. Just two persons were at the facility when she and the inspectors arrived. The program of veterinary care was inadequate in that it did not include information concerning the veterinary care for the 14 bears, 1 fox, 1 goat, and 14 rabbits. One of the cougars was in a traveling enclosure that did not provide the cougar sufficient shelter from the wind and the elements; the cougar was wet and could not stay dry and clean; the cougar was ill and lame with an abscess on its left hind leg; and the cougar required immediate veterinary care to live. In a pen housing five lions, two male lions were dirty and wet and appeared thin. One male lion was lame. A female lion appeared thin and had very tender feet. The pen contained loose stools, indicating one of the lions had diarrhea. The lions, together with a rabbit with a swollen eye,

needed immediate veterinary care. On top of a shelter, APHIS employees found a dead badger that they were told had died sometime in December 2000. Mr. Pearson had no record of the death or cause of death of the badger or that of a llama, a black leopard, a bear, a lion and a jaguar, that had died in 2000. APHIS employees also found a dead tiger in one pen. None of the facility employees was sure when the tiger had died, but it was frozen and appeared to have been dead for a significant period of time and should have been removed. Female bears were housed inside hibernating boxes set within a large enclosure in which non-hibernating male bears were roaming around the caged female bears. The boxes did not allow the bears, which in this area of the country are partial hibernators, to be observed so as to determine their condition and to determine if they had come out of hibernation and needed food or water. The hibernating box housing one of the female bears was too small and gave her no room for postural adjustments. The storage of the feed and bedding was inadequate in that the hay and bales of straw were on the ground mixed with tires, lawnmowers, tarps, and pieces of wood and were exposed to moisture and contamination. In the food preparation area, a dead cow was hung up with half of its head missing; the band saw used to cut meat was covered with dried blood; and the food preparation area was extremely dirty. Animals were using snow or ice to quench their thirst. The 11 bears in the hibernating dens had not been given access to water since November 2000. The facility did not have a 6-foot-high perimeter fence keeping people at least 3 feet away from the enclosure housing four bobcats and an arctic fox. A lion cub and two cougars had not been provided sufficient shelter to protect them from the prevalent, cold, wet, and sleeting weather. The cougars were housed in a transport trailer and the lion cub in a smaller travel enclosure, each of which was inadequate as permanent housing because the animals did not have sufficient space to make normal postural adjustments. The food given the big cats and other carnivores was contaminated because butchering of cow carcasses was performed in a dirty area and then tossed into enclosures on top of old carpet, feces, and urine. The enclosures had not been cleaned often enough to prevent contamination of the animals and their feed as evidenced by an excessive buildup of wet bedding, feces, bones, feed, waste, and debris in all of the pens. A goat and 14 rabbits were housed in the same block

enclosure as a cougar, a predator. Rodent holes were found around the base of a lion shelter building. (CX 11; (photographs taken at time of the inspection: CX 12b-CX 16b, CX 17-CX 18, CX 19b-CX 51b); Tr. 1 at 364-94.)

(b) Barbara Brown, who supervises much of the work, including the recordkeeping, at the facility and who has lived with Mr. Pearson and is the mother of two of his children, addressed a number of the deficiencies found by APHIS employees during the January 29, 2001, inspection. The objects that were in piles in the pens had been covered and hidden by snow until it melted so this was a day when cleaning was probably not up to standards. Ms. Brown admitted there were only two employees at the facility when the inspection was made. However, she stated the inspection was conducted at 9:00 a.m. and six to eight more employees would have arrived during the rest of the day: "they didn't ask for a list of how many employees we had. They just said we didn't have enough." (Tr. 2 at 875.) Ms. Brown said the 14 bears were not listed on the program of veterinary care because Inspector LaLonde, the APHIS inspector who had previously been Mr. Pearson's inspector for many years, told them, since bears are a native species they need not be listed on their veterinary papers. The goat was not listed because it was a pet and the rabbits were either pets or food for a snake. In respect to written records respecting vaccinations and parasites, those records were kept at the offices of Mr. Pearson's veterinarian. Mr. Pearson did not know feeding records for the big cats and juvenile cats had to be kept until Dr. David Smith, an APHIS veterinary medical officer, who participated in the next inspection conducted 2 days later, on January 31, 2001, told them the records were needed; Mr. Pearson then started a log. As to the mountain lion that had been described as being wet, ill, and lame and housed in an enclosure that did not provide it sufficient shelter from the wind and rain, Ms. Brown said it had come to them battered, bruised, and looking like it had been hit by a truck. The shelter in which Mr. Pearson had placed the mountain lion had walls on both sides with a partial wall for its back. The front of the enclosure had a removable plywood door that had been removed to enable observation of the mountain lion that had been isolated in this enclosure in case it had any diseases. The semiannual inspection of the facility by the private

practice veterinarian employed by Mr. Pearson, Dr. Connie Ruth Barnes, was scheduled for January 30, 2001, and Ms. Brown believes she was told by Dr. Barnes to isolate and observe the animal until then. In Ms. Brown's opinion, the lions Dr. Harlan identified as too thin were not, and the female that was limping was 9 years old and had arthritis that was treated with aspirin when the arthritis acted up on rainy days. In corroboration, Dr. Barnes testified, when she went to the facility the animals appeared generally healthy and well-fed; she did not remember any malnourished animals and did not see any thin or starving animals (Tr. 2 at 728, 730). In addition, Dr. Harlan stated upon cross-examination that she had observed the tigers in winter and their winter coat camouflages whether or not they are thin (Tr. 1 at 412). Ms. Brown testified that the rabbit with the bad eye had been bought for feed for a snake. Mr. Pearson had a record of the dead badger that she later showed Dr. Smith who told her he would correct the report but she needed to begin to write a log of such incidents. The badger had been kept to be mounted for display with other mounted animals at the shows Mr. Pearson conducts. The dead badger had probably been left where the APHIS employees found it because it had become covered with snow and forgotten. The llama that had died had been a pet for 15 years and had never been shown on any of Mr. Pearson's records although the llama had been present when past inspections had been conducted. The other animals that had died in the year 2000, were on a list that recorded the dates of each animal's birth and death, but did not show the cause of deaths. Many of the animals were old when received at the facility and the list of their births and deaths was one of the records that had burned in the house fire. In respect to the absence of a record at the facility of the veterinary care given the animals, Ms. Brown did not know until then that she needed to keep a log containing this information. The dead tiger had died during the night and was in a back cage that was among the last ones scheduled to be cleaned that day. In respect to the hibernating bears, the facility had denned bears for 26 years. The boxes used had doors that could be lifted for viewing the hibernating bears and some of the doors had holes allowing observation of the bears without the doors being opened. When the personnel at the facility were outside on warm days, they did not necessarily open the doors to look at the hibernating bears, but they would observe them by listening for noises

indicating motion within the boxes. On cold days and when they did not hear such noises, "we wouldn't mess with them because also if you mess with the female bear and she has any babies, she'll kill them." (Tr. 2 at 891.) The tarps and other items mixed with hay for bedding had always been kept together in a storage shed; however, the shed did not contain any feed. The dead cow had been obtained from a farmer who assured them that the cow would not be harmful to the big cats. The cow was hung in the barn, which was a customary practice at the facility, because it is easier to cut a cow up for meat that way. When asked by the APHIS employees why the cow had died, Ms. Brown told them she did not know. In respect to the rodent holes, Ms. Brown testified that rats and weasels lived where the facility is located, and Mr. Pearson puts bait and poison down the holes and then tries to cover the holes. Mr. Pearson would change the poison used every 2 or 3 months to prevent the rodents from becoming immune to it. Ms. Brown explained that the water available to the animals was frozen because the temperature was around 20 degrees or colder. Mr. Pearson provides water to the animals during the day and before the facility employees leave at night, but the water freezes. Facility employees use steel poles to knock the ice out of the water receptacles and then replace the water. In respect to the absence of a perimeter fence around the enclosure housing bobcats and an arctic fox, Mr. Pearson did not know one was needed but installed a perimeter fence after being so instructed. The lion cub and the two cougars that Dr. Harlan found to have insufficient shelter were being isolated as newly acquired animals in temporary cages until Mr. Pearson was certain they were not sick. In respect to the dirty band saw, Mr. Pearson's practice was not to clean it until just before using it to ensure that it is clean when used. Ms. Brown admitted that the denned bears had not been given food since November 2000, but, according to articles by the American Bear Association that Mr. Pearson and Ms. Brown had read before they started their denning practices, hibernating bears can survive without food and water for up to 7 months. Prior to 2001, no one had told Mr. Pearson that food had to be put in the den with the hibernating bears or that the dens should have windows for observing the bears. In respect to old food, bones, and feces found in the cages, Ms. Brown claimed the cages were cleaned every day, but that

the animals often dragged their food around and they could have dragged feces into their cages since they are wild animals that do not care about eating neatly. Also, the filth and debris could have been buried and hidden under snow before the inspection. Ms. Brown did not believe that housing the rabbits next to a cougar was a problem because the rabbits were separated from the cougar by a wall. (Tr. 2 at 874-910.)

(c) Ms. Brown's testimony in explanation of what can only be described as appalling conditions and practices at Mr. Pearson's facility, is insufficient. Even after accepting every plausible explanation Ms. Brown provided, I find that on January 29, 2001, Mr. Pearson willfully violated numerous Regulations of critical importance to the health and well-being of the animals in his possession. Mr. Pearson had animals that needed immediate veterinary care that was unavailable. On January 29, 2001, Mr. Pearson, as had been the case on June 12, 2000, was not feeding his animals wholesome food, free from contamination, and Mr. Pearson was not making clean, potable water accessible to his animals. Mr. Pearson failed to provide several animals with adequate shelter from inclement weather.

15. On January 31, 2001, Inspector Kovach and Dr. David C. Smith, APHIS veterinary medical officer, inspected Mr. Pearson's facility and jointly prepared an inspection report. Dr. Smith testified that the program of veterinary care he was given to review, did not include the 14 bears and did not mention that the bears were receiving a heartworm preventative that bears housed outdoors need. Mr. Pearson was advised to consult with his veterinarian and revise the program to include the bears and the procedures needed for their care. A den housing two lions had a strong ammonia odor indicative of poor sanitation, and Mr. Pearson was advised to improve the ventilation and increase the frequency of the cleaning of the den. In Dr. Smith's opinion, the condition of the animals and the facilities established that Mr. Pearson had insufficient employees at the facility to provide adequate care for the animals. Throughout the north side of the facility old caging, railroad ties, tires, and miscellaneous junk had been allowed to accumulate that could harbor pests and contribute to the problem of disease control. All the pens were found to be excessively wet with puddles of water because the facility lacked an adequate drainage system. Mr. Pearson was instructed to improve the drainage by either providing a method by

which water would drain away from the pens or raising the surfaces of the pens. Water in the water receptacles was mostly frozen and all of the receptacles needed to be cleaned. Mr. Pearson was told to clean the receptacles frequently and to ensure the water is not frozen. The animal enclosures were not being cleaned and sanitized as frequently as needed and all but two pens had excessive amounts of wet bedding, feces, bones, feed waste, and debris. Many animals were wet and appeared uncomfortable due to the condition of the pens. The area for food preparation was not sufficiently clean. The band saw still had meat, bone, and blood residue caked on it and had not been cleaned after each use as it should have been. A dumpster next to the shed, where cattle are butchered to be fed to the big cats, was not closed and was overflowing with old carcasses and food waste providing rodents an ideal food supply. The ground of each enclosure in which the animals were fed, was extremely contaminated with old food, bones, and feces. Mr. Pearson was instructed that animals must be fed on clean surfaces and that the pens must be cleaned frequently to minimize the accumulation of feces. A cougar observed on January 29, 2001, to have inadequate bedding shelter and to be lame with an abscess on its left hind leg, now had adequate bedding and shelter. However, the cougar's ear margins were frostbitten and there was no record of it having been seen by a veterinarian on January 30, 2001, as it was supposed to have been. So too, there was no record showing that on January 30, 2001, a veterinarian had examined the pen of five lions identified as needing an examination by then. Mr. Pearson still had no appropriate way to monitor the denned bears daily to ensure they were in hibernation, in good condition, and not in need of food and water. (Tr. 2 at 187-244; CX 52-CX 69, CX 70b-CX 126b.)

16.On March 8, 2001, Inspector Kovach, Inspector LaLonde, and Dr. Smith inspected Mr. Pearson's facility. Dr. Smith testified respecting the inspection report that addressed the various previously identified non-compliant items (CX 127; Tr. 1 at 245-53). The following deficiencies had been corrected: (1) the 14 bears and the fox had been added to the program of veterinary care with a heartworm preventative being described in the program; (2) no rodent activity was observed and rodent baits were being used; (3) post-mortem reports

were being prepared by the attending veterinarian on all dead animals and records on animal deaths with written post-mortem reports were available for review; (4) records showing the attending veterinarian's observations were available; (5) the animal enclosures were being cleaned more frequently with no excessive buildups of debris and waste being found at the inspection; (6) animals were being fed in a more sanitary manner; (7) the old caging, railroad ties, tires, and junk had been removed; and (8) the cougar and five lions (two males and three females) were being seen by an attending veterinarian. The following non-compliant items found on January 31, 2001, still remained uncorrected: (1) a den housing two lions still had a very strong ammonia odor and Mr. Pearson had failed to improve its ventilation and the frequency of cleaning; (2) the 10 denned bears that had not been fed since November 2000, were still without food; (3) the water provided to the animals was still insufficient (four tigers, a Canadian Lynx, and a Siberian Lynx had water containers with ice covered with snow, and Mr. Pearson admitted they were not given fresh water the day before); (4) several water receptacles needed to be cleaned; (5) although drainage in some of the pens had improved, drainage was still a problem that was expected to worsen when the snow cover that was present, later melted; and (6) the eight denned bears still could not be observed on a daily basis and none of them could be given water or other care in an emergency. More than 2 months after Mr. Pearson received a written warning and instructions to remedy these conditions, animals were still without adequate drinking water and animals were in pens that were still wet and subject to flooding because of inadequate drainage.

17. Photographs (CX 128b-CX 133b) received at the hearing on the basis of Dr. Smith's testimony (Tr. 1 at 253-55) depicted other non-compliant items found at the time of the March 8, 2001, inspection. CX 130 shows the food preparation area was still contaminated with blood residue spread out all over the floor, and CX 131 shows that the band saw used for cutting meat was still covered with blood residue. These conditions had been left uncorrected since the written warning given to Mr. Pearson on January 29, 2001, over a month earlier.

18. On June 19, 2001, Inspector Kovach and Dr. Smith inspected Mr. Pearson's facility. They found a mountain lion with an abscess on the right side of its face and the animal was drooling excessively.

Dr. Smith believed it was either a superficial abscess or an abscessed tooth that in either event required action by the attending veterinarian. A bear was also found to have superficial cuts on her head and needed to be seen by the attending veterinarian to determine the necessary treatment. At the time of the inspection, no one working at the facility was aware of either problem indicating to Dr. Smith that the animals were not being observed daily to assess their health and well-being. In a follow-up visit on June 28, 2001 (CX 162), Dr. Smith verified that the mountain lion and the bear had been appropriately treated by a veterinarian. Two enclosures housing nine lions had damaged sections of plywood that needed repair or replacement to give the lions adequate shelter and to protect them from injury. The facility also had a section with high weeds that needed to be cut and had trash in the form of empty plastic buckets, barrels, and tires that needed to be removed. (CX 134-CX 142; Tr. 1 at 255-62.)

19. On April 23, 2002, Inspector Kovach inspected Mr. Pearson's facility and testified he found deficiencies with respect to structural strength, drainage, a perimeter fence, sanitation, separation of animals, and a primary conveyance. The structural deficiency concerned: (1) an unsecured beam across the ceiling of a lion pen that had become unstable from being chewed; (2) a hole in the guillotine door of another lion pen; (3) protruding wires in pens for lions or tigers; and (4) a damaged section of chain link used as a ceiling for a lion pen. The facility still lacked adequate drainage even though Mr. Pearson had been given written warnings by APHIS of the need to correct this deficiency more than a year before on January 31, 2001, and March 8, 2001. Inspector Kovach testified the lack of proper drainage gives rise to mosquitoes that carry diseases transmittable to the animals housed at the facility. The perimeter fence around the bears and leopards was not secure and could not adequately contain the animals. The separation between a male tiger and two female tigers in an adjacent enclosure was not adequate to prevent discomfort of the female tigers. Conveyances used to transport animals were deficient. Exhaust fumes could enter one trailer during the transportation of animals and the other trailer was heavily rusted and had sharp metal protruding into the interior of the animal cargo area. (CX 164-CX 165 at 1-11; Tr. 2 at 519-26.)

20.On August 27, 2002, and May 5, 2003, APHIS inspectors attempted to inspect Mr. Pearson's facility but were unable to conduct inspections because a responsible person was not available to accompany them (CX 167-CX 168).

21.On September 16, 2003, Inspector Kovach inspected Mr. Pearson's facility. Drainage of and about the pens was still inadequate. Conveyances used to transport animals were deficient. Exhaust fumes could enter one trailer during the transportation of animals and the other trailer was heavily rusted and had sharp metal protruding into the interior of the animal cargo area. (CX 169-CX 170.)

22.On January 30, 2004, APHIS inspected Mr. Pearson's facility and determined that Mr. Pearson began boarding animals at unlicensed and unapproved sites on January 18, 2004, without informing APHIS employees. Mr. Pearson boarded these animals at unlicensed and unapproved sites surreptitiously to prevent the animals from being confiscated. (CX 171-CX 172; Tr. 2 at 90-96, 100-01, 1143-46.)

23.On May 4, 2004, Randall Coleman, an APHIS inspector, conducted a routine inspection of Mr. Pearson's facility. He found two female lions and a tiger requiring veterinary treatment. One of the female lions had a wound that Mr. Pearson testified he failed to observe because the female lion was in heat and being protected by a very aggressive male lion who had kept her inside the den box at the back of the pen. The attending veterinarian was contacted during the inspection and gave treatment advice for this female lion. The other female lion was suffering from arthritis. The tiger had a swollen muzzle with fluid dripping from her nose. The office of the attending veterinarian dispensed antibiotics to the female lion with the wound and the tiger 2 days after the May 4, 2004, inspection. Based on the record before me, I do not find a violation of the Animal Welfare Act or the Regulations with respect to the veterinary care of the female lion suffering from arthritis. However, antibiotics should have been dispensed to the tiger a day earlier according to the testimony of Mr. Pearson's attending veterinarian and the female lion with the wound should have been attended to without prompting by Inspector Coleman. Inspector Coleman also noted nails protruding from the underside of a lions' nesting perch in an enclosure containing three lions. When Inspector Coleman brought the protruding nails to Mr. Pearson's

attention, Mr. Pearson stated he would correct the condition. (CX 173-CX 174; Tr. 2 at 102-09, 766-67.)

24. On May 12, 2004, Inspector Coleman returned to Mr. Pearson's facility and found that the animals that were the subject of his May 4, 2004, report had been examined by the attending veterinarian and they were under recommended treatment. The perch with the protruding nails had been repaired and the perch was structurally sound. (Tr. 2 at 110-12; CX 175.)

25. On July 16, 2004, Inspector Coleman inspected Mr. Pearson's facility and found nine bears did not have potable water accessible to them. The water receptacle for the bears was empty, and they eagerly drank water from a hose that was turned on during the inspection. The explanation Mr. Pearson gave for the absence of water was that the bears had not yet been let out to be fed and watered that day. (CX 176; Tr. 2 at 113-16.)

26. On July 22, 2004, Inspector Coleman found a macaque monkey with Mr. Pearson's traveling exhibit that was not included in the program of veterinary care and for which there was no program of environment enhancement to promote its psychological well-being (CX 177; Tr. 2 at 118-22). Mr. Pearson testified he had borrowed the monkey from a person who was trying to sell it to him, but he does not understand monkeys and only had it for the one show (Tr. 2 at 1141-42).

27. On May 11, 2005, Inspector Coleman was unable to inspect Mr. Pearson's facility because no one was present at the facility (CX 182; Tr. 2 at 124-25).

28. On May 12, 2005, Inspector Coleman returned to the facility and found that the program of veterinary care did not include two goats, a monkey, and a dog. He also found that six bear cubs were being fed 2% milk as their food source which he believed to be insufficient, and he instructed Mr. Pearson to contact his attending veterinarian for appropriate diet recommendations. Inspector Coleman also observed three bears that appeared to be thin with areas of hair loss indicative of health problems. Mr. Pearson was instructed to contact his attending veterinarian for the evaluation and treatment of these bears as well. Mr. Pearson had no record of acquisition for the monkey and Mr. Pearson refused to allow Inspector Coleman to see other primates at the

facility because Mr. Pearson did not own them. The enclosure housing the monkey had open garbage bags, miscellaneous clutter, surfaces that had not been adequately cleaned, and surfaces made of materials that could not be sanitized. In addition, no electricity was available for lighting and cooling. Mr. Pearson did not have a program of environment enhancement to promote the monkey's psychological well-being. No food or water was available for the monkey in the enclosure. Mr. Pearson and Ms. Brown testified that Mr. Pearson did not believe he had any responsibility for the monkeys at his facility because they did not belong to him (Tr. 2 at 1010, 1142-43). The primary enclosure for eight adult bears had a rotting, main support post, protruding wires, and rusted bars for the back wall of a den box. The perimeter fence around the enclosures for 14 bears had a door that was not secured. Two pygmy goats did not have a primary enclosure. A pup, which was either a wolf or a dog, was also inadequately housed, was without water, and looked as if it was not being fed adequately. Ms. Brown testified that the pup was a dog and that she and Mr. Pearson's daughter, Jennifer, owned it. Jennifer was also identified as the owner of the two pygmy goats. Ms. Brown and Mr. Pearson did not believe these animals were subject to the United States Department of Agriculture's jurisdiction (Tr. 2 at 1011-12). Inspector Coleman observed accumulations of trash, clutter, weeds, debris, and old piles of burnt materials throughout the facility. (CX 181; Tr. 2 at 126-60.)

29. On May 13, 2005, the date given to Mr. Pearson by which he was to have his attending veterinarian evaluate the care and feeding of three bears, Inspector Coleman returned to the facility accompanied by Dr. Harlan and Dr. Albert Lewandowski, the zoo veterinarian for the Cleveland Metro Park Zoo. Inspector Coleman found four bears in an enclosure with 4 or 5 pieces of bread on the floor, and all of the bears appeared thin and malnourished. Though Mr. Pearson told the inspector that the bears had been seen by the attending veterinarian who found no problems with them, attempts to contact the veterinarian were unsuccessful. The bears appeared to Inspector Coleman to be suffering. Their enclosure had an excessive buildup of excreta on the floor and one of the bears was eating bread that was on the excreta-covered floor. The enclosure for three other bears also had a buildup of excreta on its floor and the bears were eating cereal and dog food directly from the excreta-

covered floor (CX 183; Tr. 2 at 165-67). Dr. Steven Faust, a veterinarian at Sharon Veterinary Hospital employed by Mr. Pearson as attending veterinarian for the facility, examined an adult bear on May 13, 2005, and found it to have traumatic hair loss and recommended skin scraping if it did not improve (Tr. 2 at 777; EX AAAA at 2). Inspector Coleman also found that the wolf or dog pup was housed in an enclosure that did not protect it from sunlight or inclement weather and had excessive feces on the floor. The pup had feces in his hair from lying in feces, did not have potable water, and appeared malnourished (CX 183; Tr. 2 at 169-70). Inspector Coleman also found that two 1-year old bears were being housed with two older bears approximately 2-3 years of age, and that the older bears were chasing the younger bears keeping them from receiving their needed share of food and water. Only compatible animals may be housed together, and Mr. Pearson was instructed to separate the older bears from the younger bears. (CX 183; Tr. 2 at 171-72.)

30. Dr. Albert Lewandowski, who accompanied Inspector Coleman and Dr. Harlan when they inspected the facility on May 13, 2005, has been the zoo veterinarian for the Cleveland Metro Park Zoo since 1989. After graduating from Ohio State Veterinary College in 1978, Dr. Lewandowski was in private practice for 3 years. He then took a residency at the University of Pennsylvania and the Philadelphia Zoo from 1981 to 1983. From 1983 to 1989, he was chief veterinarian for the Detroit Zoological Parks. Dr. Lewandowski is a member of the accreditation team for the American Association of Zoological Parks and Aquariums and has routinely inspected zoos throughout the country. He is an eminently qualified expert on the veterinary care and nutrition of animals of the type housed at Mr. Pearson's facility (Tr. 2 at 416-22). Dr. Lewandowski set forth his observations that day in a document in which he concluded: "The facility is squalid." (CX 185.) He testified he would not expect that a facility licensed by the United States Department of Agriculture would "have facilities as bad as this" (Tr. 2 at 427). In his opinion, all three of the bear cubs that were at the facility appeared to be suffering from inadequate care and nutrition (CX 185; Tr. 2 at 440). Furthermore, the cages containing the bears were inadequate and did not adequately secure them (Tr. 2 at 442). He

testified what he meant when he used the term "squalid" to describe Mr. Pearson's facility, as follows:

> [BY MR. MARTIN:]
>
> Q. And would you explain for us what you meant by the term "squalid"?
>
> [BY DR. LEWANDOWSKI:]
>
> A. Dirty, unkept, uncared for, just general neglect, just a facility that had been neglected not just recently, but for a long period of time. The animals were living under conditions that just aren't appropriate for any type of animal.
>
> Bears are incredibly hardy species, but to maintain them under those conditions over an extended period of time is inappropriate.

Tr. 2 at 442-43.

31. Dr. Harlan prepared a report on her findings at the facility on May 13, 2005, which Dr. Lewandowski read and co-signed as an accurate summary of their observations that day (CX 188; Tr. 2 at 443-44).

32. On May 17, 2005, Inspector Coleman returned to the facility and found Mr. Pearson had not complied with the written warning he had been given and had not corrected the inadequate veterinary care and inadequate feeding of seven bears specified by Inspector Coleman on May 12, 2005, and May 13, 2005. Because these seven bears appeared to be suffering and needed immediate attention to address their nutritional needs and health status, Inspector Coleman confiscated the bears. After the confiscation, eight bears remained at the facility. Though Mr. Pearson had been given until May 16, 2005, to separate two 1-year-old bears from two older bears to protect the younger bears, they had not been separated. Inspector Coleman also found the primary enclosure used for three of the confiscated bear cubs needed to be replaced or fixed to be safe and secure. Mr. Pearson was still not

furnishing accessible, potable water to the bears, and though wood shavings had been placed over the floor of an enclosure used for three of the confiscated bears, feces was still on the floor. (CX 186; Tr. 2 at 348-50.)

33. The confiscated bears were examined and wormed on May 17, 2005, by Dr. Lewandowski who prepared health certificates that permitted them to be sent to various zoos and other facilities throughout the country. Dr. Lewandowski found, although the seven bears were in good enough condition to travel, they were undernourished and had suffered for an extended period of time from malnutrition. In his opinion, it was in the best interest of these animals to be moved to a facility that could take better care of them. (CX 189, CX 193; Tr. 2 at 445-49.)

34. On October 5, 2005, Inspector Coleman inspected Mr. Pearson's facility and found that his program of veterinary care only listed bears and did not include goats, a dog, a skunk, coatimundi, and hamsters at the facility. Also the program of veterinary care showed that should the need arise, the only means of euthanasia for the eight remaining black bears was a 22 caliber rifle which is an inadequate means of euthanizing bears. A dog at the facility was not properly documented as required by the Regulations. Loose wires protruded into the enclosure for the bears and the perimeter fence had a loose post needing repair. Mr. Pearson refused Inspector Coleman access to the part of the facility that had housed lions and tigers that were no longer at the facility. The outside enclosure did not provide adequate shade for a dog, the enclosures used to house dogs were not of proper construction, and the water receptacle for a dog was dirty and needed to be cleaned. Potable water was not available to a skunk and two pigmy goats. Two shoebox cages of hamsters were housed in an outdoor facility. Despite repeated prior written warnings, drainage of the bears' enclosure was again observed to be inadequate as evidenced by a large puddle of standing water. Excessive amounts of feces and dirt were in the enclosure. (CX 190; Tr. 2 at 400-02.)

35. On February 22, 2006, Inspector Coleman inspected Mr. Pearson's facility and found that the program of veterinary care only provided for bears. The program of veterinary care did not include a

cougar, a leopard, two lions, and six tigers that were at the facility. One female orange tiger was lame and the black leopard had a wound on its tail and scarring on both hips. Mr. Pearson had no records of either animal being examined by a veterinarian or receiving veterinary care or treatment. Mr. Pearson had no records showing where the tigers had been housed prior to February 22, 2006, and Mr. Pearson refused to provide any information other than that he had received them on April 26, 2005. The door of the primary enclosure housing the leopard needed repair to securely contain the leopard. The perimeter fence for six tigers had holes in it and was not strong enough to be a secondary containment for them. Eight bears were denned in forced hibernation in boxes that were not large enough for them to stand up on their hind legs, and an adequate supply of food was not available to them if they came out of their dens to eat. Additionally, the eight bears did not have access to water. A cow carcass evidently intended as food for the big cats was contaminated with hay, dirt, and feces attached to its hide, and Mr. Pearson's son stated the cause of the cow's death was unknown. The animals had no access to potable water as the water receptacles were either frozen solid or completely dry. (CX 191-CX 192, CX 202; Tr. 2 at 200-14, 393-95.)

36. Conditions at Mr. Pearson's facility were also of concern to local health authorities. Based on a September 28, 2001, inspection of the facility made in response to complaints about its stench, the Summit County Board of Health determined that the facility was "a public health nuisance" (CX 145 (copy of *Summit County Bd. of Health v. Pearson*, No. CV-2002-06-3473, slip op. at 5)). The decision was affirmed upon appeal to the Court of Common Pleas, Summit County, Ohio, and to the Court of Appeals of Ohio (CX 200; 809 N.E.2d 80 (Ohio App. 2004)). Based on those decisions, the Summit County Board of Health sought a court order to enter the property and remove the animals. The court order was granted but later vacated by the Ohio Appellate Court on jurisdictional grounds (CX 201; *Summit County Bd. of Health v. Pearson*, No. 22194, 2005 WL 1398847 (Ohio App. June 15, 2005)). The Summit County Board of Health sought to have Mr. Pearson take the necessary steps to bring his property into compliance with applicable laws and regulations and issued orders to him to abate nuisance conditions in October and December of 2001, and in February and

March of 2002, but little improvement was reported. Moreover, Mr. Pearson refused to permit inspections on April 8, 2002, May 6, 2002, and June 13, 2002 (CX 198-CX 200, slip op. at 2).

Conclusions of Law

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

2. On or about May 12, 1999, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for two lion cubs, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

3. On or about September 9, 1999, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and protect the animals from injury. Specifically, Mr. Pearson housed two adult tigers in an enclosure with a structurally unsound back wall that had protruding wires, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

4. On or about September 9, 1999, Mr. Pearson housed a bobcat in an enclosure with a damaged roof that did not provide the animal with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations (9 C.F.R. § 3.127(b)).

5. On or about September 9, 1999, Mr. Pearson failed to provide a fox with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations (9 C.F.R. § 3.127(b)).

6. On or about September 9, 1999, Mr. Pearson housed an adult male tiger in a trailer that was too small for the animal; therefore, depriving the animal of the ability to make normal postural and social adjustments with adequate freedom of movement, in willful violation of section 3.128 of the Regulations (9 C.F.R. § 3.128).

7. On or about September 9, 1999, Mr. Pearson failed to clean and sanitize a transport trailer, in willful violation of section 3.138(e) of the Regulations (9 C.F.R. § 3.138(e)).

8. On or about September 18, 1999, Mr. Pearson, who was without

a full-time attending veterinarian, failed to maintain any written program of veterinary care for seven tigers, three lions, two dromedary camels, one leopard, and one jaguar, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

9. On or about September 18, 1999, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for two 7-week-old lion cubs, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

10. On or about September 18, 1999, Mr. Pearson failed to make, keep, and maintain a record of acquisition for seven tigers, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

11. On or about September 18, 1999, Mr. Pearson failed to make, keep, and maintain a record of acquisition for three lions, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

12. On or about September 18, 1999, Mr. Pearson failed to make, keep, and maintain a record of acquisition for two camels, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

13. On or about September 18, 1999, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and protect the animals from injury. Specifically, Mr. Pearson housed two camels in an enclosure that contained several protruding sharp wire edges, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

14. On or about September 18, 1999, Mr. Pearson housed three tigers and one lion in pen enclosures that were too small for the animals; therefore, depriving each animal of the ability to make normal postural and social adjustments with adequate freedom of movement, in willful violation of section 3.128 of the Regulations (9 C.F.R. § 3.128).

15. On or about September 18, 1999, Mr. Pearson failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of

animals. Specifically, Mr. Pearson failed to provide minimally-adequate nutrition to two lion cubs that were excessively thin, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

16. On or about January 5, 2000, Mr. Pearson housed three tigers in enclosures that were too small for the animals; therefore, depriving each animal of the ability to make normal postural and social adjustments with adequate freedom of movement, in willful violation of section 3.128 of the Regulations (9 C.F.R. § 3.128).

17. On or about June 12, 2000, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and contain the animals. Specifically, Mr. Pearson failed to secure the front gate to his facility housing 59 animals, including dangerous animals such as 12 bears and 40 large felids, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

18. On or about June 12, 2000, Mr. Pearson failed to provide lions and tigers wholesome, palatable food, free from contamination. Specifically, Mr. Pearson's lion and tiger enclosure contained maggot-infested food, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

19. On or about July 19, 2000, Mr. Pearson housed two adult lions, two adult tigers, and one jaguar in five separate 4-feet by 8-feet by 5-feet enclosures that were each too small for the animals; therefore, depriving each animal of the ability to make normal postural and social adjustments with adequate freedom of movement, in willful violation of section 3.128 of the Regulations (9 C.F.R. § 3.128).

20. On or about January 29, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a cougar, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

21. On or about January 29, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care.

Specifically, Mr. Pearson failed to provide veterinary care for a male lion and a female lion, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

22. On or about January 29, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the daily observation of all animals to assess their health and well-being and, therefore, was unaware that one of his tigers had died, in willful violation of section 2.40(b)(3) of the Regulations (9 C.F.R. § 2.40(b)(3)).

23. On or about January 29, 2001, Mr. Pearson failed to store food and bedding so that they are protected from deterioration, molding, or contamination. Specifically, Mr. Pearson stored feed and bedding on the ground in an area with a dirty floor that contained various debris, in willful violation of section 3.125(c) of the Regulations (9 C.F.R. § 3.125(c)).

24. On or about January 29, 2001, Mr. Pearson failed to provide two cougars with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations (9 C.F.R. § 3.127(b)).

25. On or about January 29, 2001, Mr. Pearson failed to provide a juvenile lion with shelter from inclement weather, in willful violation of section 3.127(b) of the Regulations (9 C.F.R. § 3.127(b)).

26. On or about January 29, 2001, Mr. Pearson failed to provide food in a manner so as to minimize contamination. Specifically, Mr. Pearson placed food for animals directly on the ground contaminated with old carcasses and excessive feces and urine, in willful violation of section 3.129(b) of the Regulations (9 C.F.R. § 3.129(b)).

27. On or about January 29, 2001, Mr. Pearson failed to provide potable water, in receptacles that are clean and sanitary, as often as necessary for the health and comfort of 18 lions, 14 tigers, 14 rabbits, 8 cougars, 5 bobcats, 2 lynx, 1 jaguar, 1 fox, and 1 goat, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

28. On or about January 31, 2001, Mr. Pearson, who was without a full-time attending veterinarian, failed to maintain any written program of veterinary care for 14 black bears, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

29. On or about January 31, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of

appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a cougar, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

30. On or about January 31, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for two male and three female lions, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

31. On or about January 31, 2001, Mr. Pearson failed to construct and maintain housing facilities that were adequately ventilated. Specifically, Mr. Pearson failed to provide adequate ventilation inside an enclosure housing two lions, in willful violation of section 3.126(b) of the Regulations (9 C.F.R. § 3.126(b)).

32. On or about January 31, 2001, Mr. Pearson failed to provide a suitable method to rapidly eliminate excess water from enclosures housing animals, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)).

33. On or about January 31, 2001, Mr. Pearson failed to provide potable water, in receptacles that are clean and sanitary, as often as necessary for the health and comfort of animals at his facility, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

34. On or about January 31, 2001, Mr. Pearson failed to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals in the enclosures, in willful violation of section 3.131(a) of the Regulations (9 C.F.R. § 3.131(a)).

35. On or about January 31, 2001, Mr. Pearson failed to keep the premises clean and in good repair in order to protect animals from injury and to facilitate prescribed husbandry practices. Specifically, Mr. Pearson allowed the accumulation of old cages, railroad ties, tires, and miscellaneous junk on the premises, in willful violation of section 3.131(c) of the Regulations (9 C.F.R. § 3.131(c)).

36. On or about January 31, 2001, Mr. Pearson utilized an insufficient

number of adequately trained employees to maintain a professionally acceptable level of husbandry practices, in willful violation of section 3.132 of the Regulations (9 C.F.R. § 3.132).

37. On or about March 8, 2001, Mr. Pearson failed to construct and maintain housing facilities that were adequately ventilated. Specifically, Mr. Pearson failed to provide adequate ventilation inside an enclosure housing two lions, in willful violation of section 3.126(b) of the Regulations (9 C.F.R. § 3.126(b)).

38. On or about March 8, 2001, Mr. Pearson failed to provide a suitable method to rapidly eliminate excess water from animal enclosures, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)).

39. On or about March 8, 2001, Mr. Pearson failed to provide food that is wholesome, palatable and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, Mr. Pearson failed to provide any food to 10 bears, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

40. On or about March 8, 2001, Mr. Pearson failed to provide potable water, in receptacles that are clean and sanitary, as often as necessary for the health and comfort of four tigers, one Canadian lynx, and one Siberian lynx, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

41. On or about June 19, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a mountain lion, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

42. On or about June 19, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a bear, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

43.On or about June 19, 2001, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the daily observation of all animals to assess their health and well-being and, therefore, was unaware that a mountain lion and a bear were in need of veterinary care, in willful violation of section 2.40(b)(3) of the Regulations (9 C.F.R. § 2.40(b)(3)).

44.On or about June 19, 2001, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and protect the animals from injury. Specifically, Mr. Pearson housed four lions in an enclosure and five lions in a second enclosure each of which contained an interior wall with damaged plywood, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

45.On or about June 19, 2001, Mr. Pearson failed to remove excessive weeds, empty plastic and metal barrels, old tires, and plastic buckets from, in, and around his facility, in willful violation of section 3.131(c) of the Regulations (9 C.F.R. § 3.131(c)).

46.On or about April 23, 2002, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and protect the animals from injury. Specifically, Mr. Pearson housed lions in an enclosure that contained an unstable support beam across the ceiling, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

47.On or about April 23, 2002, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound to protect the animals from injury and contain the animals. Specifically, Mr. Pearson housed three lions in an enclosure that had damaged and unsecured sections of ceiling, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

48.On or about April 23, 2002, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound to protect the animals from injury and contain the animals. Specifically, Mr. Pearson housed a male tiger and female lion in an enclosure that had a damaged guillotine door with protruding wires, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

49.On or about April 23, 2002, Mr. Pearson failed to provide a suitable method to rapidly eliminate excess water from an enclosure housing several lions, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)).

50.On or about April 23, 2002, Mr. Pearson failed to construct and maintain a perimeter fence of sufficient height that restricts animals and unauthorized persons from going through or under the fence and that functions as a secondary containment system for the animals in the facility. Specifically, the perimeter fence around the enclosures for bears and leopards was not secure, in willful violation of section 3.127(d) of the Regulations (9 C.F.R. § 3.127(d)).

51.On or about April 23, 2002, Mr. Pearson failed to separate his animals from other animals that interfere with their health or cause them discomfort. Specifically, Mr. Pearson failed to separate a male tiger that exhibited aggressive behavior toward two female tigers in an adjacent enclosure, in willful violation of section 3.133 of the Regulations (9 C.F.R. § 3.133).

52.On or about April 23, 2002, Mr. Pearson failed to construct and maintain a primary conveyance designed to protect the health and safety of his animals. Specifically, Mr. Pearson had metal protrusions in his primary conveyance, in willful violation of section 3.138(a) of the Regulations (9 C.F.R. § 3.138(a)).

53.On or about April 23, 2002, Mr. Pearson failed to construct and maintain a primary conveyance that prevented the ingress of engine exhaust fumes and gases during transportation, in willful violation of section 3.138(b) of the Regulations (9 C.F.R. § 3.138(b)).

54.On or about August 27, 2002, a responsible person was not available to allow APHIS officials to inspect Mr. Pearson's animals and records, in willful violation of section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)).

55.On or about May 5, 2003, a responsible person was not available to allow APHIS officials to inspect Mr. Pearson's animals and records, in willful violation of section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)).

56.On or about September 16, 2003, Mr. Pearson failed to provide a suitable method to rapidly eliminate excess water from an area around his lion pens, in willful violation of section 3.127(c) of the Regulations

(9 C.F.R. § 3.127(c)).

57. On or about September 16, 2003, Mr. Pearson failed to construct and maintain a primary conveyance designed to protect the health and safety of his animals. Specifically, Mr. Pearson had sharp metal protrusions in the animal cargo area of his primary conveyance, in willful violation of section 3.138(a) of the Regulations (9 C.F.R. § 3.138(a)).

58. On or about September 16, 2003, Mr. Pearson failed to construct and maintain a primary conveyance that prevented the ingress of engine exhaust fumes and gases into the animal cargo area during transportation, in willful violation of section 3.138(b) of the Regulations (9 C.F.R. § 3.138(b)).

59. On or about January 18, 2004, Mr. Pearson housed no fewer than 15 animals at unapproved locations, in willful violation of section 2.5(d) of the Regulations (9 C.F.R. § 2.5(d)).

60. On or about January 30, 2004, Mr. Pearson housed no fewer than 18 animals at unapproved locations, in willful violation of section 2.5(d) of the Regulations (9 C.F.R. § 2.5(d)).

61. On or about January 30, 2004, Mr. Pearson failed to notify the Animal Care Regional Director by certified mail of additional sites at which Mr. Pearson housed animals, in willful violation of section 2.8 of the Regulations (9 C.F.R. § 2.8).

62. On or about May 4, 2004, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a female lion and a female tiger, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

63. On or about May 4, 2004, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and protect the animals from injury. Specifically, Mr. Pearson housed three lions in an enclosure that had a resting perch with numerous protruding nails, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

64. On or about July 16, 2004, Mr. Pearson failed to provide potable

water, in receptacles that are clean and sanitary, as often as necessary for the health and comfort of nine bears, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

65. On or about July 22, 2004, Mr. Pearson, who was without a full-time attending veterinarian, failed to maintain any written program of veterinary care for one macaque monkey, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

66. On or about July 22, 2004, Mr. Pearson failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of a macaque monkey that was held by Mr. Pearson, in willful violation of section 3.81 of the Regulations (9 C.F.R. § 3.81).

67. On or about May 11, 2005, a responsible person was not available to allow APHIS officials to inspect Mr. Pearson's animals and records, in willful violation of section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)).

68. On or about May 12, 2005, Mr. Pearson, who was without a full-time attending veterinarian, failed to maintain any written program of veterinary care for two pygmy goats, one snow macaque monkey, and one dog, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

69. On or about May 12, 2005, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for three bears, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

70. On or about May 12, 2005, Mr. Pearson failed to make, keep, and maintain a record of acquisition for a macaque monkey, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

71. On or about May 12, 2005, Mr. Pearson failed to maintain housing facilities for nonhuman primates in order to carry out generally-accepted husbandry standards. Specifically, Mr. Pearson housed a macaque monkey in an area that contained open garbage bags, empty feed bags, and other clutter, in willful violation of section 3.75(b) of the

Regulations (9 C.F.R. § 3.75(b)).

72. On or about May 12, 2005, Mr. Pearson failed to ensure that the surfaces of housing facilities for nonhuman primates were constructed of materials that allow them to be readily cleaned and sanitized, or removed or replaced. Specifically, Mr. Pearson housed a macaque monkey in a den box made of exposed wood and excessively rusted metal bars, in willful violation of section 3.75(c)(1) of the Regulations (9 C.F.R. § 3.75(c)(1)).

73. On or about May 12, 2005, Mr. Pearson failed to maintain the surfaces of the primary enclosure for a nonhuman primate on a regular basis. Specifically, Mr. Pearson failed to rake or spot-clean the floor of a primary enclosure housing a macaque monkey with sufficient frequency to prevent the build-up of excreta and urine, in willful violation of section 3.75(c)(3) of the Regulations (9 C.F.R. § 3.75(c)(3)).

74. On or about May 12, 2005, Mr. Pearson housed a macaque monkey in a facility that did not have electric power for lighting, cooling, or ventilation or for carrying out generally-accepted husbandry standards, in willful violation of section 3.75(d) of the Regulations (9 C.F.R. § 3.75(d)).

75. On or about May 12, 2005, Mr. Pearson housed a macaque monkey in a facility that did not have sufficient lighting to permit routine inspection and cleaning of the facility or observation of the animal, in willful violation of section 3.77(c) of the Regulations (9 C.F.R. § 3.77(c)).

76. On or about May 12, 2005, Mr. Pearson failed to develop, document, and follow an appropriate plan for environment enhancement to promote the psychological well-being of a macaque monkey, in willful violation of section 3.81 of the Regulations (9 C.F.R. § 3.81).

77. On or about May 12, 2005, Mr. Pearson failed to provide a macaque monkey with food, in willful violation of section 3.82 of the Regulations (9 C.F.R. § 3.82).

78. On or about May 12, 2005, Mr. Pearson failed to provide a macaque monkey with potable water in sufficient quantities as often as necessary to ensure the health and well-being of the animal, in willful violation of section 3.83 of the Regulations (9 C.F.R. § 3.83).

79. On or about May 12, 2005, Mr. Pearson failed to construct and

maintain housing facilities for his animals so that they are structurally sound to protect the animals from injury and contain the animals. Specifically, Mr. Pearson housed eight bears in an enclosure with structural support posts that were rotted with large holes completely through the support posts, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

80. On or about May 12, 2005, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound to protect the animals from injury and contain the animals. Specifically, Mr. Pearson failed to provide housing for two pygmy goats, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

81. On or about May 12, 2005, Mr. Pearson failed to construct and maintain a perimeter fence of sufficient height that restricts animals and unauthorized persons from going through or under the fence and that functions as a secondary containment system for the animals in the facility. Specifically, the perimeter fence around the enclosures for 14 bears had an unsecured door, in willful violation of section 3.127(d) of the Regulations (9 C.F.R. § 3.127(d)).

82. On or about May 12, 2005, Mr. Pearson failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, Mr. Pearson failed to provide minimally-adequate nutrition to six bear cubs, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

83. On or about May 12, 2005, Mr. Pearson failed to remove accumulated debris and trash from, in, and around his facility housing bears and goats, in willful violation of section 3.131(c) of the Regulations (9 C.F.R. § 3.131(c)).

84. On or about May 12, 2005, Mr. Pearson failed to provide potable water as often as necessary for the health and comfort of an animal and in receptacles that are clean and sanitary. Specifically, Mr. Pearson failed to provide potable water to one dog, in willful violation of section 3.10 of the Regulations (9 C.F.R. § 3.10).

85. On or about May 12, 2005, Mr. Pearson refused to allow APHIS officials to inspect and photograph his entire facility and all his animals, in willful violation of section 2.126(a)(4) of the Regulations (9 C.F.R.

§ 2.126(a)(4)).

86.On or about May 13, 2005, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for an adult bear, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

87.On or about May 13, 2005, Mr. Pearson failed to remove excessive excreta as often as necessary from a primary enclosure housing a dog, in willful violation of section 3.11(a) of the Regulations (9 C.F.R. § 3.11(a)).

88.On or about May 13, 2005. Mr. Pearson failed to provide a dog with shelter from the direct rays of the sun and the direct effect of wind, rain, and snow, in willful violation of section 3.4(b)(2) of the Regulations (9 C.F.R. § 3.4(b)(2)).

89.On or about May 13, 2005, Mr. Pearson failed to separate his animals from other animals that interfere with their health or cause them discomfort. Specifically, Mr. Pearson housed two young bears together with older bears that were interfering with the health and comfort of the younger bears, in willful violation of section 3.133 of the Regulations (9 C.F.R. § 3.133).

90.On or about May 13, 2005, Mr. Pearson failed to remove excessive excreta as often as necessary from two primary enclosures housing seven bears, in willful violation of section 3.131(a) of the Regulations (9 C.F.R. § 3.131(a)).

91.On or about May 17, 2005, Mr. Pearson failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, Mr. Pearson failed to provide minimally-adequate nutrition to seven bears, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

92.On or about October 5, 2005, Mr. Pearson, who was without a full-time attending veterinarian, failed to maintain any written program of veterinary care for two pygmy goats, one dog, one skunk, and one coatimundi, in willful violation of section 2.40(a)(1) of the Regulations

(9 C.F.R. § 2.40(a)(1)).

93. On or about October 5, 2005, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to have an appropriate method of euthanasia for eight bears, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1)).

94. On or about October 5, 2005, Mr. Pearson, failed to make, keep, and maintain a record of acquisition for one dog, in willful violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(a)(1) of the Regulations (9 C.F.R. § 2.75(a)(1)).

95. On or about October 5, 2005, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and protect the animals from injury. Specifically, Mr. Pearson housed eight adult black bears in an enclosure that contained protruding wires, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

96. On or about October 5, 2005, Mr. Pearson failed to provide a suitable method to rapidly eliminate excess water from an enclosure housing eight bears, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)).

97. On or about October 5, 2005, Mr. Pearson failed to construct and maintain a perimeter fence of sufficient height that restricts animals and unauthorized persons from going through or under the fence and that functions as a secondary containment system for the animals in the facility. Specifically, the left corner post of the perimeter fence around Mr. Pearson's facility was leaning and causing the perimeter fence to be loose, in willful violation of section 3.127(d) of the Regulations (9 C.F.R. § 3.127(d)).

98. On or about October 5, 2005, Mr. Pearson failed to provide potable water as often as necessary for the health and comfort of the animals and in receptacles that are clean and sanitary. Specifically, Mr. Pearson failed to maintain water receptacles for two pygmy goats and one skunk that were clean, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

99. On or about October 5, 2005, Mr. Pearson failed to provide a dog

with shelter from sunlight, in willful violation of section 3.4(b)(2) of the Regulations (9 C.F.R. § 3.4(b)(2)).

100. On or about October 5, 2005, Mr. Pearson used a metal barrel as a shelter for one dog, in willful violation of section 3.4(c) of the Regulations (9 C.F.R. § 3.4(c)).

101. On or about October 5, 2005, Mr. Pearson failed to provide potable water as often as necessary for the health and comfort of an animal and in receptacles that are clean and sanitary. Specifically, Mr. Pearson failed to maintain water receptacles for one dog that were clean, in willful violation of section 3.10 of the Regulations (9 C.F.R. § 3.10).

102. On or about October 5, 2005, Mr. Pearson refused to allow APHIS officials to inspect and photograph his entire facility, in willful violation of section 2.126(a)(4) of the Regulations (9 C.F.R. § 2.126(a)(4)).

103. On or about February 22, 2006, Mr. Pearson, who was without a full-time attending veterinarian, failed to maintain any written program of veterinary care for six tigers, two lions, one leopard, and one cougar, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

104. On or about February 22, 2006, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a female orange tiger that was lame in her hind leg, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

105. On or about February 22, 2006, Mr. Pearson failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries and the availability of emergency, weekend, and holiday care. Specifically, Mr. Pearson failed to provide veterinary care for a black leopard that was in need of care, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

106. On or about February 22, 2006, Mr. Pearson failed to make, keep, and maintain a record of acquisition for six tigers, in willful

violation of section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)).

107. On or about February 22, 2006, Mr. Pearson failed to construct and maintain housing facilities for his animals so that they are structurally sound and contain the animals. Specifically, Mr. Pearson housed one leopard in an enclosure that was not secure, in willful violation of section 3.125(a) of the Regulations (9 C.F.R. § 3.125(a)).

108. On or about February 22, 2006, Mr. Pearson failed to construct and maintain a perimeter fence of sufficient height that restricts animals and unauthorized persons from going through or under it and that functions as a secondary containment system for the animals in the facility. Specifically, the perimeter fence around the enclosures for dangerous animals, including six tigers, was compromised by holes, in willful violation of section 3.127(d) of the Regulations (9 C.F.R. § 3.127(d)).

109. On or about February 22, 2006, Mr. Pearson failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, the only source of food available for Mr. Pearson's 10 large cats came from a dead animal of unknown source that was contaminated with dirt, hay, and feces, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

110. On or about February 22, 2006, Mr. Pearson failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, Mr. Pearson failed to provide access to food for eight bears that were locked in a den, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

111. On or about February 22, 2006, Mr. Pearson failed to provide potable water, in receptacles that are clean and sanitary, as often as necessary for the health and comfort of three white tigers, three orange tigers, two lions, one black leopard, and one cougar, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

112. On or about February 22, 2006, Mr. Pearson failed to provide access to potable water to eight bears that were locked in a den, in willful violation of section 3.130 of the Regulations (9 C.F.R. § 3.130).

Discussion

Although Mr. Pearson sometimes followed instructions and corrected deficiencies at his facility, he often did not. The premises were filthy. Basic hygiene and sanitation was not practiced. Inadequate drainage of pens housing the animals was a chronic problem that was never fully remedied and the animals frequently had to endure the discomfort of staying wet. When water receptacles froze in the winter, the animals had no water to drink. In the summer when water was accessible, the water receptacles were dirty. If the hibernation of the bears was interrupted, no food or water was available to the bears. Moreover, some of those bears were kept, as were some lions and tigers, in enclosures that were too small for their comfort.

By way of defense, Mr. Pearson asserts his problems with APHIS started after Dr. Harlan became part of the team assigned to inspect his facility and his traveling exhibit. Mr. Pearson claims his refusal to cooperate with Dr. Harlan in her investigation of an unlicensed dealer, whose animals he included with the traveling exhibit he took to a Heinz Corporation employee picnic in September of 1999, caused Dr. Harlan and her APHIS colleagues to seek revenge. Mr. Pearson contends, when Dr. Harlan and Inspector Kovach subsequently inspected his facility, they were seeking ways to cite him for violations of the Regulations. Mr. Pearson asserts inspections by a previously assigned APHIS inspector never resulted in more than two or three citations. In contrast, when Dr. Harlan first visited his facility on January 29, 2001, he was cited for 15 violations. However, his defense of selective prosecution is belied by the appalling conditions that confronted Dr. Harlan and Inspector Kovach when they made the January 2001 inspection of Mr. Pearson's facility.

Two dead animals were found on the premises. The explanations given Dr. Harlan and Inspector Kovach were that one of the animals, a tiger, must have died suddenly during the night and that the other, a badger, though obviously dead for some time, had been kept to be skinned and was inadvertently forgotten when it became covered with snow. Dr. Harlan and Inspector Kovach also found that female bears were being kept in boxes in forced hibernation with non-hibernating

male bears roaming freely about the boxes. Mr. Pearson provided no practical way to observe the boxed bears to determine whether they needed food, water, or emergency care. The food preparation area for the big cats was dirty and contained a dead cow with half its head missing hung up for butchering. The band saw used for butchering carcasses was covered with dried blood. Animals were without drinking water and trying to quench their thirst by licking ice and eating snow. A mountain lion was housed in a cage that provided it no protection from the wind and snow, and the mountain lion was wet without any way to stay dry. Other animals were also wet and dirty. Some animals needed immediate veterinary care. This discussion is only a partial list of the odious conditions that Dr. Harlan and Inspector Kovach found when they made that inspection, but it is sufficient to show that Mr. Pearson was cited, not out of vindictiveness, but because of the deplorable conditions that existed at his facility.

Dr. Harlan and Investigator Kovach both impressed ALJ Palmer as highly credible witnesses (ALJ Palmer's Decision and Order at 45). The full details of their investigations on January 29, 2001, are set forth in their investigative report and testimony, together with corroborating photographs. Mr. Pearson has not met the burden of proving the requisite elements of a selective enforcement defense that are set forth in *In re Marilyn Shepard*, 57 Agric. Dec. 242, 278-80 (1998). APHIS' failure to cite Mr. Pearson for violations of the Animal Welfare Act and the Regulations prior to 1999, does not absolve Mr. Pearson from being held accountable for the violations that the inspections since 1999 show he has committed. *See In re John D. Davenport*, 57 Agric. Dec. 189, 209 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998).

Mr. Pearson also argues he should not be penalized for non-compliant items that he corrected. Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations. While Mr. Pearson's corrections of his Animal Welfare Act violations can be taken into account when determining the sanction to be imposed, Mr. Pearson's corrections of his

violations do not eliminate the fact that the violations occurred.[3]

The violations that I conclude Mr. Pearson committed and that are the basis for my order revoking Mr. Pearson's Animal Welfare Act license, are in every sense egregious, obvious violations of the Animal Welfare Act and the Regulations that substantially endangered the health and well-being of the animals Mr. Pearson kept at his facility for exhibition. Many of these egregious violations were often uncorrected and persistent; therefore, requiring, in addition to the issuance of a cease and desist order and assessment of a civil penalty, the revocation of Mr. Pearson's Animal Welfare Act license as the only effective way to prevent their future occurrence.

MR. PEARSON'S APPEAL PETITION

Mr. Pearson raises four issues in his Appeal Petition. First, Mr. Pearson contends ALJ Palmer's findings of fact are not supported by substantial evidence (Appeal Pet. at 1-4).

The standard of proof before both the ALJ and myself is preponderance of the evidence,[4] not substantial evidence, as Mr. Pearson

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[3] *In re Jewel Bond*, 65 Agric. Dec. 92, 109 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999).

[4] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Jerome Schmidt*, 66 Agric. Dec. 159, 178 (2007); *In re The Int'l Siberian Tiger Found.* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79 n.3 (2002); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996).

contends. Use of the higher preponderance standard[5] should, in theory, benefit Mr. Pearson. However, applying either standard, the overwhelming weight of the evidence convinces me that Mr. Pearson violated the Animal Welfare Act and the Regulations. Mr. Pearson challenges all of the ALJ's findings of fact. After a thorough review of the record, I find the ALJ's findings of fact supported by a preponderance of the evidence. The ALJ amply addressed his findings, and I adopt his findings with only minor modifications.

Second, Mr. Pearson asserts ALJ Palmer's failure to grant a continuance when fire destroyed many of his records, is error (Appeal Pet. at 4-5).

While the fire that destroyed Mr. Pearson's house shortly before the hearing surely was devastating to Mr. Pearson and to his business, Mr. Pearson's arguments for a continuance are unpersuasive. Management of the proceeding, including the timing and scheduling of the hearing, rests with the discretion of the administrative law judge. Even if I would have found differently than ALJ Palmer, had the decision been mine, absent an abuse of ALJ Palmer's discretion, I am reluctant to reverse his decision regarding scheduling and other case management issues. In the instant proceeding, I decline to reverse ALJ Palmer's denial of the motion for a continuance.

Mr. Pearson argues "continuance was necessary because all of the papers, notes, pictures and documents necessary to the defense of the USDA action were lost in the fire." (Respondent's Brief in Support of Appeal Pet. at 13.) This argument rings hollow. Mr. Pearson's failure to provide the Administrator with a list of, and copies of, exhibits he intended to enter into evidence, as ordered by ALJ Palmer, provides ample justification to deny the continuance. With no exhibit list filed by Mr. Pearson, I can, and do, infer Mr. Pearson did not intend to provide

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[5]*See Bobo v. U.S. Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995) (stating substantial evidence means more than a scintilla but less than a preponderance of the evidence); *Elliott v. Administrator, Animal and Plant Health Inspection, Serv.*, 990 F.2d 140, 144 (4th Cir.) (same), *cert. denied*, 510 U.S. 867 (1993).

exhibits during the hearing.[6] Furthermore, Mr. Pearson made no "offers of proof" during the proceeding in an effort to explain to ALJ Palmer the importance of the evidence that was crucial but missing as a result of the fire. (See 7 C.F.R. § 1.141(h)(7).) Therefore, I conclude Mr. Pearson did not intend to produce exhibits for admission into the record and Mr. Pearson suffered no prejudice resulting from the denial of the continuance. I decline to reverse ALJ Palmer's decision denying a continuation of the hearing.

Third, Mr. Pearson asserts ALJ Palmer erroneously refused to allow him to present the deposition testimony of Dr. Faust, a veterinarian who had seen and treated Mr. Pearson's animals (Appeal Pet. at 5).

Again, Mr. Pearson's argument is not persuasive. I am somewhat troubled that counsel for Mr. Pearson did not determine he needed the testimony of Dr. Faust until June 23, 2006, the last day of the 4-day 2006 hearing (Tr. 2 at 1196-98). On March 14, 2006, at Mr. Pearson's request, ALJ Palmer postponed the hearing from March 28-31, 2006, to June 20-23, 2006, in order to give Mr. Pearson additional time to prepare for the hearing (Summary of Telephone Conference; Exchange Deadline and Scheduling of Oral Hearing, filed Mar. 17, 2006). I agree with ALJ Palmer that further delay because of a lack of preparation is not justified.

Fourth, Mr. Pearson asserts testimony taken by another administrative law judge was improperly relied upon by ALJ Palmer when, as the trier of fact, he should have heard the testimony personally from all witnesses (Appeal Pet. at 5-6).

ALJ Palmer stated during the hearing "there is a lot of case law that says one Judge can take over from another Judge in administrative hearings." (Tr. 2 at 12.) The real issue is not whether a judge can take over for another judge – that happens frequently – the question is: must the new judge begin from the beginning or can the new judge continue

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[6]I note Mr. Pearson provided an exhibit list on August 21, 2003, to cover the first part of the hearing conducted in 2003. The only items identified on that list were USDA inspection reports. If Mr. Pearson's copies of the USDA inspection reports had been destroyed in the fire, he could have, and should have, requested copies from the Administrator.

the hearing from the point at which the new judge is assigned the proceeding. The Rules of Practice anticipate this issue.

> **§ 1.144 Judges.**
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> (d) *Who may act in the absence of the Judge.* In case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge.

7 C.F.R. § 1.144(d). I interpret this provision of the Rules of Practice to mean, absent an order from the Chief Administrative Law Judge, the case will proceed from the point at which the first administrative law judge became unavailable. The case would not start from the beginning and the record already established would be used by the new administrative law judge in rendering a decision.

THE ADMINISTRATOR'S CROSS-APPEAL

The Administrator raises six issues in his cross-appeal. First, the Administrator contends ALJ Palmer improperly failed to assess a civil penalty. The Administrator asserts Mr. Pearson committed around 600 violations of the Animal Welfare Act and the Regulations and requests that I assess a civil penalty of at least $100,000 for those violations. (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 24-29.)

Administrative law judges and the Judicial Officer have significant discretion when imposing a civil penalty under the Animal Welfare Act. The Animal Welfare Act provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each

violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)).

The Administrator correctly points out that 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.[7] I find the recommendation of "at least $100,000" for "around 600 violations" too vague to be relied upon.

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[7] *In re Amarillo Wildlife Refuge, Inc.,* 68 Agric. Dec. 77, 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).

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 violation, the person's good faith, and the history of previous violations.[8]

Mr. Pearson operates a medium-sized business (Decision and Order, *supra*). Mr. Pearson's violations during the period May 12, 1999, through February 22, 2006, reveal a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. An ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

I conclude Mr. Pearson committed 281 violations of the Animal Welfare Act and the Regulations. Mr. Pearson could be assessed a maximum civil penalty of $832,750 for his 281 violations. After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), and the remedial purposes of the Animal Welfare Act, I conclude revocation of Mr. Pearson's Animal Welfare Act license, permanent disqualification of Mr. Pearson from obtaining an Animal Welfare Act license, a cease and desist order, and assessment of a $93,975 civil penalty[9] are appropriate and necessary to ensure

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[8]See 7 U.S.C. § 2149(b).

[9]I assess Mr. Pearson a civil penalty of $275 for each violation committed on or before June 23, 2005, and $375 for each violation committed after June 23, 2005. Except that, I assess Mr. Pearson $1,000 for each failure to have a responsible person available to allow APHIS officials to inspect his facility, in violation of section 2.126(a) of the Regulations (9 C.F.R. § 2.126(a)) (August 27, 2002, May 5, 2003, and May 11, 2005); $2,000 for housing animals at unapproved locations on January 18, 2004, in violation of section 2.5(d) of the Regulations (9 C.F.R. § 2.5(d)); $2,000 for housing animals at unapproved locations on January 30, 2004, in violation of section 2.5(d) of the Regulations (9 C.F.R. § 2.5(d)); $2,000 for the January 30, 2004, failure to notify the Animal Care Regional Director of additional sites at which Mr. Pearson housed animals, in violation of section 2.8 of the Regulations (9 C.F.R. § 2.8); and $2,000 for each refusal to allow APHIS officials to inspect his entire facility, in violation of section 2.126(a)(4) of the Regulations (9 C.F.R. § 2.126(a)(4)) (May 12, 2005, and October 5,

(continued...)

Mr. Pearson's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Second, the Administrator contends ALJ Palmer erroneously conflated the limitations in the Administrative Procedure Act on the imposition of a sanction (5 U.S.C. § 558(b)) and the limitations in the Administrative Procedure Act on the revocation of a license (5 U.S.C. § 558(c)) (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 29-32).

I do not find ALJ Palmer conflated the limitations in the Administrative Procedure Act on the imposition of a sanction (5 U.S.C. § 558(b)) and the limitations in the Administrative Procedure Act on the revocation of a license (5 U.S.C. § 558(c)), as the Administrator asserts. I cannot locate any statement by ALJ Palmer indicating the requirements in 5 U.S.C. § 558(c) necessary for the withdrawal, suspension, revocation, or annulment of a license are also necessary for the assessment of a civil penalty. Therefore, I reject the Administrator's assertion that ALJ Palmer erroneously conflated the limitations in the Administrative Procedure Act on the imposition of a sanction (5 U.S.C. § 558(b)) and the limitations in the Administrative Procedure Act on the revocation of a license (5 U.S.C. § 558(c)). However, I note that I agree with the Administrator's position that a finding of willfulness is not required under 5 U.S.C. § 558 for assessment of a civil penalty.

Third, the Administrator asserts ALJ Palmer incorrectly concluded 5 U.S.C. § 558(c) provides that a license may only be suspended or revoked for a non-willful violation if the violator is given written notice and an opportunity to demonstrate or achieve compliance with all lawful requirements (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 32-38).

ALJ Palmer, relying on *Hodgins v. U.S. Dep't of Agric.*, 238 F.3d 421 (Table), 2000 WL 1785733 (6th Cir. 2000), indicates that, under the

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[9](...continued)
2005). I find these violations are extremely serious because they thwart the Secretary of Agriculture's ability to enforce the Animal Welfare Act.

Administrative Procedure Act, a license can be suspended for a non-willful violation only if the violator is given written notice and an opportunity to demonstrate or achieve compliance with all lawful requirements (ALJ Palmer's Decision and Order at 7). The Administrative Procedure Act limits an agency's authority to withdraw, suspend, revoke, or annul a license to: (1) cases of willfulness; (2) cases in which public health, interest, or safety requires withdrawal, suspension, revocation, or annulment; and (3) cases in which the licensee has been given (a) notice by the agency in writing of the facts or conduct which warrant license withdrawal, suspension, revocation, or annulment and (b) an opportunity to demonstrate or achieve compliance with all valid requirements (5 U.S.C. § 558(c)). Therefore, I do not adopt ALJ Palmer's statement that a license can be suspended or revoked for a non-willful violation only if the violator is given written notice of the facts or conduct which warrant license suspension or revocation and an opportunity to demonstrate or achieve compliance with all valid requirements. Mr. Pearson's violations were willful and Mr. Pearson was given notice of many of the violations and an opportunity to achieve compliance with the Animal Welfare Act and the Regulations, but failed thereafter to continuously comply with the Animal Welfare Act and the Regulations. Therefore, ALJ Palmer's revocation of Mr. Pearson's Animal Welfare Act license comports with the requirements in the Administrative Procedure Act (5 U.S.C. § 558(c)).

Fourth, the Administrator contends "countless findings of fact are made" establishing that Mr. Pearson committed "various violations"; however, "a large number of these violations are unaccompanied by any conclusions of law or mention of sanctions" (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 38). The Administrator specifically addresses ALJ Palmer's finding of fact number 29 and ALJ Palmer's failure to provide appropriate conclusions of law corresponding to finding of fact number 29. The Administrator concludes "[t]his [failure by ALJ Palmer to provide a conclusion of law corresponding to finding of fact number 29] is improper and all such similar inconsistencies should be corrected" (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 40 (footnote omitted)).

I agree with the Administrator that, generally, a finding of fact supporting a conclusion that a respondent has violated the Animal Welfare Act or the Regulations should be mirrored by an appropriate conclusion of law. Therefore, I have modified the conclusions of law to mirror ALJ Palmer's finding of fact number 29. The Administrator's request that I correct "similar inconsistencies" is vague. Nonetheless, in this Decision and Order, *supra*, I set forth conclusions of law that I conclude are supported by ALJ Palmer's other findings of fact.

Fifth, the Administrator contends ALJ Palmer's grounds for his failure to impose a sanction, are error. Specifically, the Administrator asserts ALJ Palmer declined to impose a sanction in instances in which Mr. Pearson subsequently corrected the violations, in instances in which Mr. Pearson's violations were of unknown duration, and in instances in which ALJ Palmer found Mr. Pearson's violations were de minimis (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 40-43).

Each Animal Welfare Act licensee must always be in compliance in all respects with the Animal Welfare Act and the Regulations. While Mr. Pearson's corrections of his violations of the Animal Welfare Act and the Regulations can be taken into account when determining the sanction to be imposed, Mr. Pearson's corrections of his violations do not eliminate the fact that the violations occurred.[10] Similarly, the seriousness of a violation and the duration of a violation can be taken into account when determining the sanction to be imposed;[11] however, a finding that a violation is de minimis or of short duration, does not eliminate the fact that a violation occurred.

Sixth, the Administrator contends, during the hearing, ALJ Palmer erroneously refused to allow testimony regarding events that took place after the filing of the First Amended Complaint and erroneously allowed the testimony of one of Mr. Pearson's witnesses using notes she had

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[10]See note 3.

[11]*See In re Jerome Schmidt*, 66 Agric. Dec. 159, 206-07 (2007) (declining to assess a civil penalty for a minor violation of the Regulations, but imposing a cease and desist order).

prepared as reference (Complainant's Reply Brief in Opposition to Respondent's Appeal Pet. and Cross-Appeal at 43-46).

Without discussing the merits of each of these issues, I decline to overturn ALJ Palmer's rulings. Even if I were to grant the Administrator's request and remand the proceeding to ALJ Palmer, the disposition of the instant proceeding would not change.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lorenza Pearson, d/b/a L & L Exotic Animal Farm, his agents, employees, successors, and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

Paragraph 1 of this Order shall become effective 1 day after service of this Order on Mr. Pearson.

2. Animal Welfare Act license number 31-C-0034 issued to Lorenza Pearson, d/b/a L & L Animal Farm, is revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on Mr. Pearson.

3. Mr. Pearson 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. Pearson.

4. Mr. Pearson is assessed a $93,975 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Frank

Martin, Jr., within 60 days after service of this Order on Mr. Pearson. Mr. Pearson shall state on the certified check or money order that payment is in reference to AWA Docket No. 02-0020.

5. Mr. Pearson's petition opposing APHIS' intent to terminate Mr. Pearson's Animal Welfare Act license is denied.

Paragraph 5 of this Order shall become effective immediately upon service of this Order on Mr. Pearson.

RIGHT TO JUDICIAL REVIEW

Mr. Pearson 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. Pearson must seek judicial review within 60 days after entry of the Order in this Decision and Order.[12] The date of entry of the Order in this Decision and Order is July 13, 2009.

In re: ZOOCATS, INC., A TEXAS CORPORATION; MARCUS COOK, a/k/a MARCUS CLINE-HINES COOK, AN INDIVIDUAL; AND MELISSA COODY, a/k/a MISTY COODY, AN INDIVIDUAL, JOINTLY DOING BUSINESS AS ZOO DYNAMICS AND ZOOCATS ZOOLOGICAL SYSTEMS; SIX FLAGS OVER TEXAS, INC., A DELAWARE CORPORATION; AND MARIAN BUEHLER, AN INDIVIDUAL.
AWA Docket No. 03-0035.
Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody.
Filed July 27, 2009.

AWA – Animal welfare – Cease and desist order – Class C license – Exhibitor – General viewing public – Handling of animals – License revocation – The public – Willful.

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[12] 7 U.S.C. § 2149(c).

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.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint on September 30, 2003. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

On May 8, 2007, the Administrator filed an Amended Complaint alleging that, during the period December 5, 2000, through February 23, 2007, ZooCats, Inc., Marcus Cook, Melissa Coody, Six Flags Over Texas, Inc., and Marian Buehler violated the Animal Welfare Act and the Regulations by the methods they used to exhibit animals to the public and by failing to provide animals with proper care and treatment. ZooCats, Inc., Marcus Cook, Melissa Coody, Six Flags Over Texas, Inc., and Marian Buehler filed answers denying the material allegations of the Amended Complaint. Six Flags Over Texas, Inc., and Marian Buehler agreed to the disposition of the proceeding by consent decision, and on February 5, 2008, Administrative Law Judge Victor W. Palmer [hereinafter ALJ Palmer] issued a "Consent Decision and Order as to Respondents Marian Buehler and Six Flags Over Texas, Inc." [hereinafter Consent Decision].[1]

On January 28, 2008, through February 1, 2008, ALJ Palmer conducted a hearing in Dallas, Texas. Colleen A. Carroll, Office of the

[1]ALJ Palmer erroneously states he issued the Consent Decision on the "5th day of February, 2007" (Consent Decision at 3).

General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Bryan L. Sample, Dallas, Texas, represented ZooCats, Inc., Mr. Cook, and Ms. Coody [hereinafter Respondents]. On September 24, 2008, after the Administrator and Respondents filed post-hearing briefs, ALJ Palmer issued a Decision and Order in which ALJ Palmer: (1) concluded ZooCats, Inc., is not a "research facility," as that term is defined in the Animal Welfare Act and the Regulations; (2) concluded Respondents violated the Animal Welfare Act and the Regulations; (3) ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) revoked ZooCats, Inc.'s Animal Welfare Act license.

On January 5, 2009, Respondents appealed to, and requested oral argument before, the Judicial Officer.[2] On January 26, 2009, the Administrator filed Complainant's Response to Petition for Appeal. On April 30, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I adopt, with minor changes, ALJ Palmer's September 24, 2008, Decision and Order as the final Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody.

DECISION

Findings of Fact

1. ZooCats, Inc., is a Texas non-profit corporation that does business as ZooCats, Zoo Dynamics, and ZooCats Zoological Systems (CX 3 at 2; Tr. 495, 1265-66).[3]

2. Marcus Cook, Janice Cook, and Melissa Coody were the directors of ZooCats, Inc. (CX 3 at 2, 16; Tr. 1265, 1566-67).

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[2]"Respondent's [sic] Notice of Appeal and Brief in Support" [hereinafter Appeal Petition].

[3]The Administrator's exhibits are referred to as "CX _." Respondents' exhibits are referred to as "R _." The transcript is referred to as "Tr. _."

3. Bryan L. Sample, 25 Highland Park Village, Suite 100, Dallas, Texas 75205-2726, is ZooCats, Inc.'s registered agent for service of process (CX 3 at 3).

4. At all times relevant to the instant proceeding, ZooCats, Inc., operated as an "exhibitor," as that term is defined in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations (9 C.F.R. § 1.1), and held a class "C" Animal Welfare Act exhibitor license (number 74-C-0426) that is required by the Regulations for all persons showing or displaying animals to the public (CX 3 at 17-23; Tr. 1267-72).

5. ZooCats, Inc., is a moderately-large business exhibiting wild and exotic animals (CX 28 at 2).

6. ZooCats, Inc., was registered as a research facility and held registration number 74-R-0172 (CX 3 at 24, CX 13 at 1-3). However, from approximately April 15, 2004, to the date the Administrator filed the Amended Complaint, ZooCats, Inc., was not a school, institution, or organization that uses or intends to use live animals in research, tests, or experiments; ZooCats, Inc., did not purchase or transport live animals to conduct research, tests, or experiments; and ZooCats, Inc., did not receive funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of conducting research, tests, or experiments (CX 2 at 27, CX 7; Tr. 506, 775, 792-93, 959-67, 1006).

7. At all times relevant to the instant proceeding, Marcus Cook was the operations director of ZooCats, Inc., and was the primary person involved in ZooCats, Inc.'s day-to-day operations (Tr. 493-95, 1265-66).

8. Janice Cook is Marcus Cook's mother. Janice Cook did not participate in the exhibition of animals by ZooCats, Inc., Marcus Cook, or Melissa Coody (Tr. 1265).

9. Marcus Cook and Melissa Coody contributed substantial funds to ZooCats, Inc. (Tr. 1280).

10. Melissa Coody attends ZooCats, Inc.'s annual board of director meetings (Tr. 1281).

11. Marcus Cook trained Melissa Coody to work with big cats, and, since that training, Melissa Coody has had a history of working with big cats (Tr. 1282-83).

12. On May 23, 2002, ZooCats, Inc., and Marcus Cook exhibited a tiger at a photographer's studio. While the tiger was being posed and

photographed, Mr. Cook and other animal handlers used cattle prods in an attempt to control the tiger. (CX 17 at 1, 3-4, CX 17A; Tr. 15-21, 28-29, 587-89, 615-18.)

13. Respondents exhibited tigers and other animals, during the period June 8, 2002, through July 19, 2002, at Six Flags Over Texas, Inc., Arlington, Texas, where children were allowed to handle, and have their pictures taken with, tiger cubs for a fee. On June 22, 2002, many children were photographed while holding tiger cubs as they bottle-fed milk to the tiger cubs. The children followed instructions from teenage animal handlers employed by Respondents. The purpose of the bottle-feeding was to distract the tiger cubs and keep them calm. Some people, including a child, were scratched by tiger cubs during these exhibitions. (CX 19, CX 19F at 7-19; Tr. 1569.)

14. During the period February 10, 2003, through February 14, 2003, Respondents posed a small tiger with groups of children for class photographs that included kindergarten and first grade classes, at Prestonwood Christian Academy, 6801 West Park Boulevard, Plano, Texas. During these photography shoots, children, including kindergartners, were allowed to touch the tiger which was being held by an animal handler who was bottle-feeding the tiger. (CX 24 at 1-47.)

15. On February 21, 2003, Respondents exhibited adult tigers at the Westin Galleria Hotel, Dallas, Texas, and photographed spectators for a fee, while the spectators fed a tiger raw meat that they pressed through the upper, metal bars of its cage to induce the tiger to stand on its hind legs and take the meat from their hands. (CX 24 at 1, 47-56.)

16. On November 4, 2003, a juvenile, 16-to-20-week-old, male lion cub, owned by Respondents, was observed by Dr. Doris Hackworth, an Animal and Plant Health Inspection Service [hereinafter APHIS] veterinary medical officer, being exhibited in the retail area of a pet store at Animal Jungle, 4218 Holland Road, Virginia Beach, Virginia. The lion was in a room with a large viewing window on two sides from which the lion was periodically taken out on a leash by an animal handler who would distract the lion with a toy, while spectators petted the lion. Numerous children surrounded the lion without any kind of crowd control or any physical barrier to prevent the children from

coming in contact with the lion. (CX 27; Tr. 48-54.)

17. During the period June 20, 2004, through June 27, 2004, Respondents exhibited two tigers at the Red River Valley Fair in Fargo, North Dakota, and photographed spectators for a fee while the spectators fed one of the tigers raw meat on a stick that they pressed through the metal bars of the tiger's cage to induce the tiger to stand on its hind legs and eat the meat off the stick. The evidence includes a photograph of a young boy standing next to Mr. Cook as the boy pressed raw meat on a stick into the open mouth of a caged tiger. (CX 28, CX 28A; Tr. 918-20.)

18. On February 12, 2005, Respondents exhibited a 15-week-old tiger cub at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida, where the tiger cub was photographed with spectators. There were no barriers between the tiger and the spectators and the only control in place was that the tiger cub was on a leash held by an animal handler. A spectator tried to pet the tiger cub's head and the tiger nipped her with its teeth. The Florida Fish and Wildlife officer, who investigated the incident, would have had the tiger tested for rabies if the spectator, who had been bitten, had not signed a waiver. (CX 35; Tr. 137-48, 723-29.)

19. On various occasions during the period December 5, 2000, through February 23, 2007, APHIS inspected facilities in which Respondents exhibited animals or housed animals they exhibited and found instances of noncompliance with the Regulations. Many of Respondents' violations concerned inadequate records or minor infractions that Respondents remedied and were no longer found upon return visits by APHIS inspectors. Respondents' more serious violations of the Regulations are set forth in findings of fact numbers 20 through 32.

20. On July 5, 2002, Respondents did not comply with sanitation and employee standards in that cages containing prairie dogs and a bear contained excessive fecal material and urine, and only one unsupervised employee, untrained in animal husbandry practices, cared for three wolves, two cougars, a bear, and a tiger (CX 17 at 4, CX 19; Tr. 593-95, 756-57).

21. On June 12, 2003, Respondents housed tigers at Respondents' Kaufman, Texas, facility, in primary enclosures that were not adequately drained. The enclosures contained pools of water and five tigers were

observed to be soiled, wet, and standing in mud. (CX 25; Tr. 155.)

22. On February 9, 2006, some tigers were housed in enclosures with clay surfaces to which some large rocks had been added for better drainage, but, though it had not rained for a week, all but one of those tigers had dried mud caked to their hair on their legs and abdomens. One tiger had chewed off its hair to rid itself of the caked mud. (CX 36.)

23. On February 23, 2007, the enclosures housing a lion and two tigers had visible signs of drainage problems (CX 38 at 2; Tr. 239).

24. On July 28, 2004, Respondents were found to have been feeding animals every other day, and the appearance of a number of young tigers indicated that their diet was insufficient and required evaluation by a veterinarian (CX 29; Tr. 219-23, 687).

25. On August 30, 2004, though Respondents were now feeding the animals daily, a veterinarian had still not been contacted to evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal (CX 30; Tr. 226-29).

26. At an inspection of the Kaufman, Texas, facility, on October 22, 2004, an APHIS inspector ascertained that a diet plan for the animals had still not been developed by an attending veterinarian, even though Respondents were previously instructed that the diet plan was required (CX 31; Tr. 234-35).

27. On February 9, 2006, Dr. Laurie Gage, a veterinarian employed by APHIS, with expertise in the care and feeding of lions, tigers, and other big cats, accompanied Donnovan Fox, an APHIS inspector, to Respondents' Kaufman, Texas, facility. Dr. Gage found tiger cubs with misshapen rear legs indicative of metabolic bone disease caused by a poor diet having been fed either to the tiger cubs or to the cubs' mother. On the basis of the types of food found at the facility and admissions by Mr. Cook and an attendant at the facility, Dr. Gage concluded that Respondents were not following the prescribed dietary recommendations of the attending veterinarian Respondents employed. (CX 36; Tr. 84-126.)

28. On June 12, 2003, Respondents failed to provide veterinary care

for two tiger cubs suffering from alopecia (hair loss). Instead, Mr. Cook was erroneously treating the tigers with a medication for ringworm based on his own incorrect, uninformed diagnosis. (CX 25; Tr. 151-54.)

29. On August 27, 2004, an APHIS inspector determined that a veterinarian had last visited Respondents' Kaufman, Texas, facility, on June 30, 2003, contrary to the requirement that Respondents arrange for regularly scheduled visits by a veterinarian (CX 30 at 1).

30. On August 27, 2004, two young tigers and a small lion displayed protruding hip bones, dull coats of hair, and less vigor than other animals at the facility. Respondents had not undertaken to have the cause of their condition evaluated by a veterinarian as instructed by APHIS inspectors at a prior inspection when the condition of these animals was first observed. (CX 30 at 4-8.)

31. On February 9, 2006, Respondents had not obtained veterinary care for a tiger that had re-injured a leg a few days earlier (CX 36 at 6-7; R 6 at 35; Tr. 95-99).

32. On February 23, 2007, a tiger requiring veterinary evaluation due to its excessive hair loss and weight loss was observed by an APHIS inspector who determined from the records maintained by Respondents at the Kaufman, Texas, facility, that the tiger had last been seen by a veterinarian on July 6, 2006 (R 6 at 6).

Conclusions of Law

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

2. Respondents are "exhibitors," as that term is defined in section 2(h) of the Animal Welfare Act (7 U.S.C. § 2132(h)) and section 1.1 of the Regulations (9 C.F.R. § 1.1).

3. ZooCats, Inc., presently registered as a research facility holding registration 74-R-0172, is not a "research facility," as that term is defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and section 1.1 of the Regulations (9 C.F.R. § 1.1).

4. On May 23, 2002, ZooCats, Inc., and Marcus Cook failed to handle a tiger as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. Specifically, Mr. Cook and other animal handlers used cattle prods to control a tiger during a

photography shoot, in willful violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2004)).[4]

5. On May 23, 2002, ZooCats, Inc., and Marcus Cook used physical abuse to train, work, or otherwise handle a tiger. Specifically, Mr. Cook and other animal handlers used cattle prods to control a tiger during a photography shoot, in willful violation of section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2004)).

6. During the period June 8, 2002, through July 19, 2002, Respondents failed, during public exhibition, to handle tigers so there was minimal risk of harm to the animals and 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. Specifically, on multiple occasions, during the period June 8, 2002, through July 19, 2002, Respondents, at Six Flags Over Texas, Inc., Arlington, Texas, during public exhibition, exhibited tigers without any distance or barriers between the tigers and the public, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

7. On June 22, 2002, at Six Flags Over Texas, Inc., Arlington, Texas, Respondents failed to handle tiger cubs as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort, in willful violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2004)). Specifically, Respondents allowed children to hold and bottle-feed the tiger cubs, causing the tiger cubs trauma and behavioral stress, resulting in the tiger cubs scratching a number of people.

8. During the period February 10, 2003, through February 14, 2003, Respondents failed, during public exhibition, to handle a tiger so there was minimal risk of harm to the tiger and the public, with sufficient distance and/or barriers between the tiger and the general viewing

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[4]Effective August 13, 2004, 9 C.F.R. § 2.131(a), (b), (c), and (d) were redesignated 9 C.F.R. § 2.131(b), (c), (d), and (e) respectively. (See 69 Fed. Reg. 42,089-42,102 (July 14, 2004).)

public, so as to assure the safety of the tiger and the public. Specifically, Respondents, at Prestonwood Christian Academy, 6801 West Park Boulevard, Plano, Texas, posed a small tiger with groups of children for class photographs and, during these photography shoots, children were allowed to touch the tiger, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

9. On February 21, 2003, Respondents failed, during public exhibition, to handle a tiger so there was minimal risk of harm to the tiger and the public, with sufficient distance and/or barriers between the tiger and the general viewing public, so as to assure the safety of the tiger and the public. Specifically, Respondents, at the Westin Galleria Hotel, Dallas, Texas, photographed spectators for a fee, while the spectators fed a tiger meat that the spectators pressed through the upper, metal bars of the tiger's cage to induce the tiger to stand on its hind legs and take the meat from their hands, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

10.On November 4, 2003, Respondents failed, during public exhibition, to handle a lion so there was minimal risk of harm to the lion and the public, with sufficient distance and/or barriers between the lion and the general viewing public, so as to assure the safety of the lion and the public. Specifically, Respondents, in the retail area of a pet store, Animal Jungle, 4218 Holland Road, Virginia Beach, Virginia, exhibited a male lion cub to the public without any crowd control or physical barrier to prevent the public from coming in contact with the lion, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

11.During the period June 20, 2004, through June 27, 2004, Respondents failed, during public exhibition, to handle tigers so there was minimal risk of harm to the tigers and the public, with sufficient distance and/or barriers between the tigers and the general viewing public, so as to assure the safety of the tigers and the public. Specifically, Respondents, exhibited two tigers at the Red River Valley Fair in Fargo, North Dakota, and photographed spectators for a fee while they fed one of the tigers raw meat on a stick that the spectators pressed through the metal bars of the tiger's cage to induce the tiger to stand on its hind legs and eat the meat off the stick, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

12.On February 12, 2005, Respondents failed, during public exhibition, to handle a tiger so there was minimal risk of harm to the tiger and the public, with sufficient distance and/or barriers between the tiger and the general viewing public, so as to assure the safety of the tiger and the public. Specifically, Respondents exhibited a 15-week-old tiger cub at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida, where the tiger cub was photographed with spectators without barriers between the tiger and the spectators and the only control in place was that the tiger cub was on a leash held by an animal handler, in willful violation of section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1)).

13.On February 12, 2005, at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida, Respondents failed to handle tiger cubs as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). Specifically, Respondents allowed spectators to pet the tiger cubs and a spectator who tried to pet a tiger cub caused the tiger cub trauma and behavioral stress, resulting in the tiger cub's nipping the spectator with its teeth.

14.On July 5, 2002, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals contained in the enclosures, in willful violation of section 3.131(a) of the Regulations (9 C.F.R. § 3.131(a)). Specifically, cages located at Six Flags Over Texas, Inc., Arlington, Texas, containing prairie dogs and a bear contained excessive fecal material and urine.

15.On July 5, 2002, Respondents utilized an insufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices, in willful violation of section 3.132 of the Regulations (9 C.F.R. § 3.132). Specifically, Respondents employed only one unsupervised employee, untrained in animal husbandry practices, to care for three wolves, two cougars, a bear, and a tiger.

16.On June 12, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water from enclosures housing tigers, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. §

3.127(c)). Specifically, Respondents housed tigers at the Respondents' Kaufman, Texas, facility, in primary enclosures that were not adequately drained; the enclosures contained pools of water and five tigers were soiled, wet, and standing in mud.

17. On February 9, 2006, Respondents failed to provide a suitable method to rapidly eliminate excess water from enclosures housing animals, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)). Specifically, Respondents housed tigers in enclosures with clay surfaces to which some large rocks had been added for better drainage, but, though it had not rained for a week, all but one of those tigers had dried mud caked to their hair on their legs and abdomens and one tiger had chewed off its hair to rid itself of the caked mud.

18. On February 23, 2007, Respondents failed to provide a suitable method to rapidly eliminate excess water from an enclosure housing animals, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)). Specifically, Respondents housed a lion and two tigers in an enclosure with visible signs of drainage problems.

19. On July 28, 2004, Respondents failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, Respondents failed to provide minimally-adequate nutrition to a number of young tiger cubs, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

20. On and about July 28, 2004, Respondents failed to feed animals at least once a day, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)). Specifically, Respondents fed animals every other day rather than once a day.

21. On August 30, 2004, Respondents failed to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a)).

22. On October 22, 2004, Respondents failed to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal, in willful violation of section 2.40(a) of the Regulations

(9 C.F.R. § 2.40(a)).

23. On February 9, 2006, Respondents failed to follow the prescribed dietary recommendations of Respondents' attending veterinarian, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

24. On June 12, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for two tiger cubs suffering from alopecia (hair loss), in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

25. On August 27, 2004, Respondents failed to have formal arrangements for regularly scheduled visits to their premises by a veterinarian, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

26. On August 27, 2004, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for two young tigers and the smallest lion that all displayed protruding hip bones, dull coats of hair, and less vigor than other animals at the facility, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

27. On February 9, 2006, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for a tiger that had re-injured a leg, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

28. On February 23, 2007, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for a tiger suffering from excessive hair loss and weight loss, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. §

2.40(b)(2)).

Discussion

In 1984, Mr. Cook began his training as an animal handler when he was 19 years old. Mr. Cook worked for a company in South Texas, L&W Exotics, which was an exhibitor/breeder of lions, tigers, leopards, cougars, servals, bobcats, and lynx. Mr. Cook continued working for the company on weekends through 1992 or 1993 and handled its animals at promotions for corporations conducting television photography shoots and conventions. In 1989, Mr. Cook purchased a black leopard that he still owns. In the early 1990's, Mr. Cook became an animal control officer for Colony, Texas, and held that position for several years.

In 1994 or 1995, Mr. Cook obtained an Animal Welfare Act license to exhibit animals and, with his parents, purchased property in Kaufman County, Texas, for an animal facility. Mr. Cook then started to exhibit animals to school children and to conduct photography shoots with film studios. As an animal exhibitor, Mr. Cook has operated under various firm names. Before operating as ZooCats, Inc., he operated as Leopard One Zoological Center and published an "Operations Policy" that forbade any contact between animals and the public (CX 11 at 8), and also stated:

> The Center does not approve of the use of exotic animals in off-site circumstances for the following reason[]:
> . . . .
> 2) it is our belief that naturalistic habitats are created for the educational benefit of exhibiting exotic animals to the public. When an animal is removed from that naturalistic habitat, that educational benefit is lost and cannot be replaced.

CX 11 at 17-18.

On June 18, 2001, Mr. Cook filed a complaint with APHIS against another animal exhibitor for photographing children for a fee with baby tigers. He made the complaint on the letterhead of the "American Association of Zoological Facilities," which he signed as its president,

stating:

> This organization was providing baby Tigers, on display, for a fee, and allowing small children to have there [sic] photo taken with these animals. As you know, this type of activity is a very dangerous one, as evidenced by past attacks and injuries to these small children placed in such close proximity to these cats. Once this was reported to us, we found several sections of violations and non-compliant issues we wish to report.
>
> Our main concerns were that these children were allowed so close to these cats, which had no control or restraint devices on them, (the cats), no physical barrier or trained barrier or trained personal [sic] between the animal and the child, and the children were allowed unrestricted access to the cat(s) while on the photo stage.

CX 42 at 1. Attached to the complaint was the affidavit of the member of the American Association of Zoological Facilities who reported the event, Ms. Coody (CX 42 at 3).

In 2002, despite his protestations against exotic animals being exhibited at off-site locations with contact between the animals and children, Mr. Cook started doing just that. That year he accepted an arrangement with Six Flags Over Texas, Inc., for ZooCats, Inc., to exhibit animals at the Six Flags Over Texas site from June 8, 2002, to July 19, 2002. As part of the animal exhibition, Mr. Cook employed teenage animal handlers who posed and photographed children holding tiger cubs that the children bottle-fed. One child was scratched by one of the cubs. In 2003, at the Prestonwood Christian Academy, Mr. Cook posed groups of children for class photographs with a small tiger that the children were allowed to touch while the only control over the tiger was an animal handler holding a bottle of milk. Also, in 2003, for a fee, Mr. Cook photographed spectators feeding his adult tigers by pressing raw meat into their cages. That year Mr. Cook also lent a male lion cub to a pet store in Virginia Beach, Virginia, that anyone, including

children, could pet, as the lion was walked about on a leash. In 2004, again for a fee, Mr. Cook photographed spectators feeding raw meat through the bars of a cage to one of his tigers while it was standing on its hind legs. In 2005, Mr. Cook exhibited a 15-week-old tiger cub at an auto mall in Tampa, Florida, where a spectator was nipped when she petted the tiger while its handler walked the tiger on a leash through the spectators.

Section 2.131(c)(1) and (d)(3) of the Regulations governing the handling of animals specifically prohibits these practices, 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 animal and the general viewing public so as to assure the safety of animals and the public.
>
> . . . .
>
> (d) . . . .
>
> (3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. § 2.131(c)(1), (d)(3).

Just as there are numerous cases of humans being terrorized or injured by animals when there is insufficient distance or barriers between them,[5] there are cases demonstrating that the safety of the animals, which the Animal Welfare Act was enacted to protect, is also

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[5]Complainant's Post-Hearing Brief at 21, n.60, lists 13 cases in which close contact with animals resulted in humans being injured or terrorized, including two final decisions by the Secretary of Agriculture: *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000) (tigers), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (tiger).

compromised.[6]

In addition to the lack of precaution taken by Respondents to protect the public and the animals from harm, Respondents also often failed to feed their animals properly or provide them with veterinary and other requisite care.

The entry of a cease and desist order by itself would probably not deter future violations by Respondents. Nor, in my opinion, would the imposition of civil penalties, even in combination with a cease and desist order, be sufficient. I conclude revocation of ZooCats, Inc.'s Animal Welfare Act exhibitor license, together with a cease and desist order, as authorized by 7 U.S.C. § 2149(a) and (b), is necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Respondents have repeatedly endangered the lives of the viewing public, as well as the lives of their animals. Mr. Cook has a history of deceiving law enforcement agencies.[7] To allow Mr. Cook or Ms. Coody to have an Animal Welfare Act exhibitor license in either of their names, or through a corporation or other entity, would subject both the animals they would exhibit and the public, to an unacceptable level of risk of harm. The Animal Welfare Act license under which Respondents operate is, therefore, revoked.

Respondents' Request for Oral Argument

Respondents' request for oral argument, which the Judicial Officer

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[6]Complainant's Post-Hearing Brief at 21, n.61, lists cases in which close contact with the public resulted in animals being treated violently and sometimes killed.

[7]The evidence shows instances of Respondents' customers being scratched by tiger cubs at the Six Flags Over Texas exhibition in 2002, yet, on February 15, 2005, Mr. Cook told a Florida law enforcement officer that "in his fifteen years of experience with adult and juvenile tigers this is the first time he has ever had a customer injured." (CX 35 at 15.)

may grant, refuse, or limit,[8] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Respondents' Appeal Petition

Respondents raise six issues in their Appeal Petition. First, Respondents assert the Administrator failed to file the Amended Complaint and a list of exhibits and witnesses within the time ordered by Administrative Law Judge Peter M. Davenport [hereinafter ALJ Davenport];[9] consequently, the Amended Complaint, the testimony of witnesses on the witness list, and exhibits on the exhibit list, must be stricken (Appeal Pet. at 2-3).

On March 13, 2007, ALJ Davenport issued an order requiring that any motion to amend the Complaint must be filed on or before April 13, 2007, and that the Administrator file a list of exhibits and anticipated witnesses and send Respondents copies of the exhibits, a list of the exhibits, and a list of anticipated witnesses, no later than April 26, 2007.[10] The Administrator did not comply with ALJ Davenport's March 13, 2007, Order. Instead, the Administrator filed an Amended Complaint on May 8, 2007. The Hearing Clerk served Respondents with the Amended Complaint on May 31, 2007.[11] On June 5, 2007, Respondents filed "ZooCats, Inc., Marcus Cook and Melissa Coody's First Amended Original Answer," and the hearing commenced on January 28, 2008, 7 months 28 days after the Hearing Clerk served Respondents with the Amended Complaint.

Respondents raise the issue of the timeliness of the Administrator's Amended Complaint for the first time on appeal to the Judicial Officer, more than 1 year 7 months after the Hearing Clerk served Respondents

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[8]7 C.F.R. § 1.145(d).

[9]The instant proceeding had been assigned to ALJ Davenport, but, due to ALJ Davenport's imminent deployment to Iraq, the case was reassigned to ALJ Palmer.

[10]ALJ Davenport's Order of March 13, 2007.

[11]United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7198 0346.

with the Amended Complaint. It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[12] Therefore, I find Respondents' arguments regarding the timeliness of the Administrator's Amended Complaint come too late for me to consider. Moreover, under the circumstances in the instant proceeding, I find Respondents were not prejudiced by the timing of the Administrator's filing of the Amended Complaint.

The Administrator's failure to comply with ALJ Davenport's March 13, 2007, Order regarding exhibits and lists of exhibits and anticipated witnesses is somewhat more circuitous. On April 13, 2007, the Administrator requested that ALJ Davenport's March 13, 2007, Order be continued without date.[13] On May 8, 2007, ALJ Palmer issued an Order stating ALJ Davenport's March 13, 2007, Order "shall in general continue to apply"[;] however, ALJ Palmer also set forth a schedule for the Administrator's exchange of exhibits, the Administrator's list of the exhibits, and the Administrator's list of anticipated witnesses, as follows:

> **November 9, 2007**. On or before this date, Complainant's counsel shall send a copy of all supplemental exhibits that complainant intends to introduce at the hearing, together with a list of the exhibits, and a list of any additional anticipated witnesses containing a summary of the testimony that each witness is expected to give.

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[12] *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).

[13] Complainant's Response to March 13, 2007, Order and Request to Amend Deadlines.

ALJ Palmer's Order of May 8, 2007. The Administrator did not comply with ALJ Palmer's May 8, 2007, Order, but, instead, sent copies of his exhibits and a list of exhibits to Respondents on December 11, 2007, and sent a list of anticipated witnesses to Respondents on December 19, 2007 (Complainant's Response to Pet. for Appeal at 7). On December 19, 2007, the Administrator requested an extension to December 19, 2007, to provide Respondents with copies of exhibits, a list of exhibits, and a list of anticipated witnesses (Complainant's Request to Extend Time to Exchange Exhibits and Witness List). On December 20, 2007, ALJ Palmer granted the Administrator's request for an extension of time, stating:

> In respect to complainant's late filing of lists of witnesses and exhibits, the late filings shall be allowed. However, if respondents are caused insurmountable difficulties in being ready for the hearing because of the late filings, they are to request another telephone conference by contacting my secretary Trible Greaves at (202) 720-8423 or by e-mail at Trible.Greaves@usda.gov.

Amended Notice of Hearing Location and Summary of Telephone Conference at 1-2. The record contains no indication that Respondents requested a telephone conference based upon difficulties in preparing for hearing, and the hearing commenced on January 28, 2008, as scheduled by ALJ Palmer. Under these circumstance, I find the Administrator's time for providing copies of exhibits, a list of exhibits, and a list of anticipated witnesses was extended by ALJ Palmer and the Administrator timely provided copies of exhibits, a list of exhibits, and a list of anticipated witnesses to Respondents. Moreover, I do not find Respondents were prejudiced by the timing of the Administrator's provision of the copies of exhibits, list of exhibits, and list of anticipated witnesses to Respondents. Therefore, I reject Respondents' request that I strike the exhibits on the Administrator's December 11, 2007, list of exhibits and the testimony of witnesses on the Administrator's December 19, 2007, list of anticipated witnesses.

Second, Respondents argue ALJ Palmer's conclusion that ZooCats, Inc., is not a "research facility," as defined in the Animal Welfare Act

(7 U.S.C. § 2132(e)) and the Regulations (9 C.F.R. § 1.1), is error. Respondents assert ZooCats, Inc., is an organization that intends to conduct research and has for several years been purchasing animals in commerce to conduct research; therefore, ZooCats, Inc., qualifies as a "research facility," as that term is defined in the Animal Welfare Act. (Appeal Pet. at 3-5).

The term research facility is defined in section 2(e) of the Animal Welfare Act, as follows:

§ 2132 Definitions.

. . . .

(e) The term "research facility" means any school (except an elementary or secondary school), institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports such animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons, is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of this chapter.

7 U.S.C. § 2132(e). See also 9 C.F.R § 1.1.

I find nothing in the record supporting Respondents' assertion that ZooCats, Inc., intends to conduct research and has for several years been purchasing animals in commerce to conduct research. To the contrary, the history of ZooCats, Inc.'s registration as a research facility

establishes that ZooCats, Inc., is not a research facility.

ZooCats, Inc., originally registered as a research facility in March 2001 (CX 13 at 1). In February 2003, APHIS wrote ZooCats, Inc., stating that, according to APHIS records, ZooCats, Inc., was not using any regulated animals for research and no longer satisfied the criteria for registration as a research facility under the Animal Welfare Act. APHIS requested that ZooCats, Inc., respond with a letter either requesting termination of registration as a research facility or explaining why APHIS should not terminate registration of ZooCats, Inc., as a research facility. (CX 13 at 4.)

ZooCats, Inc., responded stating its "research program has undergone some major changes at the end of 2002" and referring to "planned programs of research" and future "studies" (CX 13 at 5-6). APHIS sent a reply continuing ZooCats, Inc.'s registration as a research facility, as follows:

> Thank you for your letter of March 17, 2003, responding to our request for information concerning animal use at your institution. No evidence was presented in that letter that *bona fide* research has been conducted at ZooCats Zoological Systems. However, you have expressed the intent to conduct animal research in the near term. For this reason, your registration will be continued in force at the present time.

CX 13 at 7.

On April 15, 2004, Dr. Earnest Johnson, an APHIS veterinary medical officer, inspected ZooCats, Inc., and prepared an inspection report containing his observations regarding the lack of evidence of ZooCats, Inc.'s research activities, as follows:

> With respect to activities involving animals, the IACUC, as an agent of the research facility shall review at least every six months, the research facility's program for humane care and use of animals. Mr. Cook indicated that he does not have any research protocol nor minutes of IACUC meeting to be reviewed. He stated that he has not performed any research involving the

> covered animals yet but has plans to begin next month. He stated that his attorney has his records. It was explained to Mr. Cook that he should always keep a copies [sic] of records at his facility for any APHIS official during routine inspection. Mr. Cook did have paperwork on his research operation titled "Guidelines for ethical conduct in the care and use of animals."
>
> . . . .
>
> With respect to activities involving animals, the IACUC, as an agent of the research facility shall inspect at least every six months all of the research facility's animal facilities, including animal study areas. No semiannual facility inspection records were available upon request during the routine inspection. Mr. Cook stated that his attorney has his records.

CX 7 at 1. During Dr. Johnson's April 15, 2004, inspection, ZooCats, Inc., produced no records indicating it had ever engaged in animal research, testing, or experimentation. Mr. Cook disputed Dr. Johnson's inspection report, but testified he was not able to produce records of research, testing, or experimentation during the April 15, 2004, inspection, or any other inspection, of ZooCats, Inc. (Tr. 1579-83).

The Regulations require that research facilities appoint an Institutional Animal Care and Use Committee that is qualified through experience and expertise of its members to assess the research facility's animal program, facilities, and procedures (9 C.F.R. § 2.31(a)). The Institutional Animal Care and Use Committee is required every 6 months to review the research facility's program for humane care and use of animals, inspect all of the research facility's animal facilities, and prepare reports of its evaluations (9 C.F.R. § 2.31(c)(1)-(3)). The record contains no indication that an Institutional Animal Care and Use Committee for ZooCats, Inc., had ever been appointed. The Regulations require that research facilities maintain records for at least 3 years and that those records be available for inspection and copying by APHIS officials during business hours (9 C.F.R. §§ 2.35(a), (f), .38(b)). ZooCats, Inc., failed to maintain any of the requisite records.

Moreover, I find no credible evidence that ZooCats, Inc., intended to

conduct research. The absence of evidence of any research, testing, or experimentation since March 2001, when ZooCats, Inc., was first registered as a research facility, refutes Respondents' assertion that ZooCats, Inc., intends to conduct research. Therefore, I reject Respondents' contention that ALJ Palmer's conclusion that ZooCats, Inc., is not a "research facility," as defined in the Animal Welfare Act (7 U.S.C. § 2132(e)) and the Regulations (9 C.F.R. § 1.1), is error.

Third, Respondents argue ALJ Palmer's revocation of ZooCats, Inc.'s Animal Welfare Act license, is error (Appeal Pet. at 5-15).

Section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) authorizes the Secretary of Agriculture to revoke an exhibitor's Animal Welfare Act license, if, after notice and opportunity for hearing, the Secretary determines the exhibitor has violated or is violating any provision of the Animal Welfare Act or the Regulations. I conclude Respondents committed numerous willful violations of the Animal Welfare Act and the Regulations; thus, revocation of ZooCats, Inc.'s Animal Welfare Act license is warranted in law.

Many of Respondents' violations affected the health and well-being of Respondents' animals and some of Respondents' violations resulted in harm to persons viewing Respondents' animals. Respondents' violations were not isolated incidents, but extended over a significant period of time, December 5, 2000, through February 23, 2007, indicating a pattern of conduct. Therefore, based upon the number of violations, the seriousness of the violations, and the extended period of time over which the violations occurred, I find revocation of ZooCats, Inc.'s Animal Welfare Act license is also justified by the facts.

Moreover, revocation of ZooCats, Inc.'s Animal Welfare Act license comports with the United States Department of Agriculture's sanction policy, which states, 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). The administrative officials who are responsible for administering the Animal Welfare Act have recommended revocation of ZooCats, Inc.'s Animal Welfare Act license or, in the alternative, assessment of a civil penalty of $100,000 (Tr. 951-54, 991-93; Complainant's Post-Hearing Brief at 48). I conclude revocation of ZooCats, Inc.'s Animal Welfare Act license is warranted in law, justified by the facts, and in accord with the United States Department of Agriculture's sanction policy; therefore, I reject Respondents' contention that ALJ Palmer's revocation of ZooCats, Inc.'s Animal Welfare Act license, is error.

Fourth, Respondents contend ALJ Palmer erroneously found that on February 9, 2006, Respondents did not provide veterinary care for a tiger that had re-injured a leg a few days prior to February 9, 2006. Respondents cite the testimony of Dr. Laurie Gage, an APHIS veterinary medical officer, as support for their contention that ALJ Palmer erred. (Appeal Pet. at 15.)

On February 9, 2006, Dr. Laurie Gage and Inspector Fox inspected ZooCats, Inc.'s Kaufman, Texas, facility and each prepared a report of the inspection. Both Dr. Gage and Inspector Fox reported observing an immobile 7-month-old, white tiger cub acting in a manner indicating it was in pain. Melissa Coody informed Dr. Gage and Inspector Fox that the tiger cub had previously suffered a broken leg, had apparently re-injured the leg 2 or 3 days prior to the February 9, 2006, inspection, and had received no veterinary care since the re-injury. (CX 36 at 6-7; R 6 at 35.) I conclude ALJ Palmer's finding that on February 9, 2006, Respondents failed to provide veterinary care to this tiger (ALJ Palmer's Decision and Order at 8) is amply supported by the evidence, and I reject Respondents' contention that ALJ Palmer erred. Moreover, I find Dr. Gage's testimony does not support Respondents' contention that ALJ Palmer erred. To the contrary, Dr. Gage's testimony lends further support to ALJ Palmer's finding, as follows:

[BY MS. CARROLL:]

Q. Okay. Looking at the next photograph, is that the same cub?

[BY DR. GAGE:]

A. That is the cub that was laying against the railroad tie that we saw.

Q. Okay. Did you observe any problem with its legs?

A. Its legs were misshapen. It refused to move, even though its sibling came over to play. And it appeared to wince, it would wince its face as if it, it seemed to be suffering to me.

Q. And did you investigate what the problem was with that animal?

A. We asked the woman showing us around, how long the cub had been in this condition? And she wasn't sure, but she said --

Q. You're talking about the lying down animal?

A. The little one lying down. How long has it been laying down, how long has it been suffering?

Q. And what did she say?

A. She thought maybe two or three days.

Q. And did anyone at that facility offer an explanation of the cub, the animal's condition?

A. She told me it had a broken leg. And it had been laying there.

Q. And, according to her, had any veterinary care been obtained for that animal?

A. She said it had not been seen by a Veterinarian recently.

Tr. 95-96.

Fifth, Respondents contend ALJ Palmer erroneously found that on February 23, 2007, Respondents failed to provide veterinary care for a tiger with hair loss. Respondents assert "[t]here was absolutely no testimony, evidence, exhibits, or otherwise presented on this issue." (Appeal Pet. at 15.)

On February 23, 2007, Inspector Fox inspected ZooCats, Inc.'s Kaufman, Texas, facility and prepared a report of his observations during the inspection. Inspector Fox reported observing a tiger named Apollo which had a great amount of hair coat loss, skin irritation, and weight loss. Inspector Fox stated in his report that Apollo needed to be seen for evaluation and treatment of these conditions, but, according to ZooCats, Inc.'s records, Apollo had not been seen by a veterinarian since July 6, 2006. (CX 38 at 1; R 6 at 6.) ALJ Palmer's finding regarding Respondents' February 23, 2007, failure to provide veterinary care to Apollo is consistent with Inspector Fox's report of his observations (CX 38 at 1; R 6 at 6); therefore, I reject Respondents' contention that ALJ Palmer's finding is not supported by any evidence.

Sixth, Respondents argue, because 18 U.S.C. § 2511 permits recording of telephone conversations so long as one party involved in the conversation is aware of the recording, ALJ Palmer erroneously excluded a recording (R 13) of a telephone conversation between Mr. Cook and Dr. Daniel Jones of APHIS (Appeal Pet. at 16).

Respondents never laid a proper foundation for the admission of the tape of the conversation. Mr. Cook never testified as to when the tape was made, who made the tape, or how the tape was made. Mr. Cook merely offered a description of a telephone conversation he had with Dr. Daniel Jones in March 2007 (Tr. 1468-70) and did not offer evidence that R 13 contained a recording of that conversation. Based upon the lack of foundation, R 13 would be given no weight; therefore, I find ALJ Palmer's exclusion of R 13 harmless error.

ALJ Palmer's Cease and Desist Order

ALJ Palmer ordered Respondents to "cease and desist from publicly exhibiting lions and tigers or other dangerous animals that are not under the direct control and supervision of a knowledgeable, experienced handler who must be at least twenty-one years of age." (ALJ Palmer's Decision and Order at 16.) Section 2.131(d)(3) of the Regulations requires only that dangerous animals must be under the direct control and supervision of a knowledgeable and experienced animal handler, as follows:

> **§ 2.131 Handling of animals.**
>
> . . . .
>
> (d) . . . .
>
> (3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. § 2.131(d)(3). While the Regulations require that a person must be 18 years of age or older to obtain an Animal Welfare Act license,[14] the Regulations impose no minimum age requirement for animal handlers. Nonetheless, ALJ Palmer states 9 C.F.R. § 2.131(d)(3) "is not met when the trainer is a teenager regardless of how much natural talent the teenager might appear to possess." (ALJ Palmer's Decision and Order at 15.) ALJ Palmer may in fact be correct that, during public exhibition, dangerous animals should be under the direct control and supervision of an animal handler, who is at least 21 years old; however, I do not find the record supports such a conclusion.[15]

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[14]9 C.F.R. § 2.1(a)(1).

[15]Moreover, even ALJ Palmer's reasoning (that persons 13 through 19 years of age, by virtue of their youth, cannot be knowledgeable and experienced animal handlers) does not support a conclusion that dangerous animals should be under the direct control and supervision of a person who is at least 21 years old. Instead, applying ALJ Palmer's

(continued...)

In light of the dearth of evidence in the record establishing that an animal handler must be at least 21 years of age, I do not adopt ALJ Palmer's order requiring Respondents to cease and desist from publicly exhibiting animals that are not under the control and supervision of an animal handler who is at least 21 years of age. However, the Administrator may wish to review the Regulations to determine if a rulemaking proceeding should be initiated proposing the amendment of 9 C.F.R. § 2.131(d)(3) to add a minimum, and perhaps a maximum, age requirement for animal handlers.

Similarly, the ALJ ordered Respondents to adopt measures that would "completely preclude any member of the public from touching or coming in contact with any part of the animal. To fully effectuate this provision, special attention shall be given to the safety of children to eliminate any contact between them and the animals, their teeth, claws, fur or feces." (ALJ Palmer's Decision and Order at 16.) ALJ Palmer states the requirement of 9 C.F.R. § 2.131(c)(1) "that there be sufficient distance and/or barriers between an animal and the public is not met when members of the public are allowed to hold or come close to a dangerous animal's teeth and claws, or, in the case of children, are so close that they also become susceptible to the transmission of diseases or parasites." (ALJ Palmer's Decision and Order at 15.) Again, ALJ Palmer may in fact be correct that, during public exhibition, no member of the public should be allowed to touch, or come close to, animals; however, I do not find the record supports such a conclusion. To the contrary, the Administrator's witnesses indicated that, under certain circumstances, public contact with animals is allowed (Tr. 532-35, 972-84). Moreover, section 2.131(c)(3), (c)(4), (d)(2), and (d)(4) of the Regulations places conditions on public contact with animals, but presumes some public contact with animals, as follows:

§ 2.131 Handling of animals.

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[15](...continued)
reasoning, such a person should be at least 20 years of age.

. . . .

(c) . . . .

(3) Young or immature animals shall not be exposed to rough or excessive *public handling* or be exhibited for periods of time which would be detrimental to their health or well-being.

(4) Drugs, such as tranquilizers, shall not be used to facilitate, allow, or provide for *public handling* of the animals.

(d) . . . .

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of *public contact*.

. . . .

(4) If *public feeding* of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet.

9 C.F.R. § 2.131(c)(3)-(c)(4), (d)(2), (d)(4) (emphasis added). Therefore, I am reluctant to adopt ALJ Palmer's absolute prohibition on all public contact with animals. Again, the Administrator may wish to review the Regulations to determine if a rulemaking proceeding should be initiated proposing the amendment of 9 C.F.R. § 2.131 to prohibit contact between members of the public and certain animals or to require members of the public to be kept a sufficient distance from animals to ensure that no disease or parasite could be transmitted from members of the public to the animals or from the animals to members of the public.

For the foregoing reasons, the following Order is issued.

ORDER

1. ZooCats, Inc., Marcus Cook, and Melissa Coody, their 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) failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, overheating, excessive cooling, behavioral stress, physical harm, or

unnecessary discomfort;

(b) using physical abuse to train, work, or otherwise handle animals;

(c) failing, during public exhibition, to handle animals so there is minimal risk of harm to the animals and 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;

(d) failing to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals contained in the enclosures;

(e) utilizing an insufficient number of adequately-trained employees to maintain a professionally acceptable level of husbandry practices;

(f) failing to provide a suitable method to rapidly eliminate excess water from enclosures housing animals;

(g) failing to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals;

(h) failing to feed animals at least once a day, except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices;

(i) failing to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal;

(j) failing to follow the prescribed dietary recommendations of Respondents' attending veterinarian;

(k) failing to establish and maintain a program of adequate veterinary care that includes the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries; and

(l) failing to have formal arrangements for regularly scheduled veterinary visits to Respondents' premises.

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

2. Animal Welfare Act license number 74-C-0426 issued to ZooCats, Inc., is permanently revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on ZooCats, Inc.

RIGHT TO JUDICIAL REVIEW

ZooCats, Inc., Marcus Cook, and Melissa Coody have the right to seek judicial review of the Order in this Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. ZooCats, Inc., Marcus Cook, and Melissa Coody must seek judicial review within 60 days after entry of the Order in this Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody.[16] The date of entry of the Order in this Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody is July 27, 2009.

In re: MARTINE COLETTE, AN INDIVIDUAL; WILDLIFE WAYSTATION, A CALIFORNIA CORPORATION; AND ROBERT H. LORSCH, AN INDIVIDUAL.
AWA Docket No. 03-0034.
Decision and Order as to Martine Colette and Robert H. Lorsch.
Filed August 21, 2009.

AWA – Civil penalty – Cease and desist order – Consent decision – Dismissal – Exhibitor – License suspension.

Colleen A. Carroll, for the Administrator, APHIS.
Robert M. Yaspan, Woodland Hills, CA, for Robert H. Lorsch.
Rosemarie S. Lewis, Los Angeles, CA, for Martine Colette.
Sara Pikofsky, Washington, DC, for Wildlife Waystation.
Initial decision issued by Marc R. Hillson, Chief Administrative Law.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On August 15, 2003, Peter Fernandez, Administrator, Animal and Plant and Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159)

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[16] 7 U.S.C. § 2149(c).

[hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Complaint alleges Martine Colette and Wildlife Waystation violated the Animal Welfare Act and the Regulations. On September 22, 2003, the Administrator filed a First Amended Complaint, alleging additional violations of the Animal Welfare Act and the Regulations by Ms. Colette and Wildlife Waystation and adding Robert H. Lorsch as a respondent. On March 15, 2004, the Administrator filed the Second Amended Complaint, the operative pleading in the instant proceeding, which Ms. Colette, Wildlife Waystation, and Mr. Lorsch timely answered.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Los Angeles, California, on February 5-9, February 12-16, June 11-15, and June 25-28, 2007. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Robert M. Yaspan, Law Offices of Yaspan & Thau, Woodland Hills, California, represented Mr. Lorsch. Rosemarie S. Lewis, Law Offices of Borton Petrini, LLP, Los Angeles, California, represented Ms. Colette. Sara Pikofsky, Thelen, Reid, Brown, Raysman & Steiner, LLP, Washington, DC, represented Wildlife Waystation. The parties called 29 witnesses and the Chief ALJ admitted over 75 exhibits into evidence. On September 14, 2007, the Chief ALJ entered a Consent Decision and Order as to Respondent Wildlife Waystation resolving all claims with regard to Wildlife Waystation.

The Administrator, Ms. Colette, and Mr. Lorsch completed all briefing by March 3, 2008. On August 4, 2008, the Chief ALJ issued a Decision: (1) concluding Martine Colette did not exhibit animals during the period that the alleged violations occurred; (2) concluding Robert H. Lorsch did not commit violations of the Animal Welfare Act or the Regulations; and (3) dismissing the case against Martine Colette and Robert H. Lorsch.

On October 27, 2008, the Administrator filed "Complainant's Appeal of Initial Decision and Order" [hereinafter Appeal Petition]. On

December 2, 2008, Robert H. Lorsch filed a response to the Administrator's Appeal Petition. On February 19, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a review of the record: (1) I dismiss the case against Mr. Lorsch; (2) I find Ms. Colette violated the Animal Welfare Act and the Regulations; (3) I order Ms. Colette to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) I assess Ms. Colette a $2,000 civil penalty.

DECISION

Statutory and Regulatory Background

One of the objectives of the Animal Welfare Act is to insure that animals intended for use for exhibition purposes are provided humane care and treatment. In order to be subject to the Animal Welfare Act, the animals must be in, or substantially affect, interstate or foreign commerce. (7 U.S.C. § 2131.)

The Animal Welfare Act defines the term "person" as including any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity (7 U.S.C. § 2132(a)). An "exhibitor" is any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary of Agriculture, and the term "exhibitor" includes carnivals, circuses, and zoos exhibiting animals whether operated for profit or not (7 U.S.C. § 2132(h)). The act, omission, or failure of any person acting for, or employed by, an exhibitor or a person licensed as an exhibitor is deemed the act, omission, or failure of the exhibitor, as well as of the act omission, or failure of the person (7 U.S.C. § 2139.)

The Animal Welfare Act requires the Secretary of Agriculture to issue standards to govern the humane handling, care, treatment, and transportation of animals by exhibitors (7 U.S.C. § 2143(a)). Compliance with the Animal Welfare Act and the Regulations is accomplished by an enforcement program which includes inspections and investigations by United States Department of Agriculture

[hereinafter USDA] personnel (7 U.S.C. § 2146(a)). When violations of the Animal Welfare Act or the Regulations are discovered, the Secretary of Agriculture may order the violator to cease and desist the violations, assess civil penalties, and suspend or revoke an exhibitor's Animal Welfare Act license. Parties cited by the Secretary of Agriculture have the right to notice and opportunity for hearing. (7 U.S.C. § 2149(a)-(b).)

Background of Regulatory Problems

The Wildlife Waystation is a last resort for animals that would otherwise likely be euthanized. Undisputed testimony established that USDA and various state agencies frequently asked Ms. Colette for assistance with animals. In September 1995, USDA requested that Ms. Colette assist in the retrieval of animals from a closed facility—Liger Town—after a number of animals had escaped from that facility and had been shot (Tr. 2121-23).[1] Although the facility was located in Idaho, Ms. Colette acceded to the USDA request to move the animals to Wildlife Waystation, a number of which still live at Wildlife Waystation (Tr. 2121-23, 4215-17). Ms. Colette testified that she accepted animals at the request of numerous organizations, public and private, including Wyoming Fish and Game (Tr. 2124), the Los Angeles County animal control agency, and the Michigan Humane Society.

In the mid-1990's, when the dismantling of a biomedical lab in New York necessitated the placement of many primates in other facilities, Ms. Colette agreed to house approximately 50 chimpanzees at Wildlife Waystation (Tr. 4039-42). Dr. Conrad Mahoney, who was the head of the biomedical lab, initiated the contact with Ms. Colette and has returned to Wildlife Waystation approximately twice a year since then to conduct physical examinations of the chimps (Tr. 4047-50). At the time the chimps arrived, Wildlife Waystation did not have the proper facilities to care for that number of chimps. The chimps were originally housed in Q1, the original quarantine facility, and Q2, an old barn,

[1]Transcript references are designated "Tr._." Exhibits entered by the Administrator are designated "CX _." Exhibits entered by Robert H. Lorsch are designated "RLX _."

where 32 or 33 of the chimps were temporarily housed. The intention was that the chimps, many of which were not fully grown, would stay in these two structures until a new suitable building could be constructed (Tr. 4109-21).

Also, in the mid 1990's, Ms. Colette and Wildlife Waystation accepted from another source, a self-mutilating chimp known as Sammy (Tr. 4897-4900). Ms. Colette accepted Sammy knowing he was self-mutilating because she thought she would be able to provide proper care for him and because she felt sorry for him (Tr. 4902-03). Dr. Mahoney saw Sammy regularly beginning in 1996 and stated he was the worst self-mutilating chimp he had ever seen. He testified about the difficulty of determining the triggers for self-mutilating behavior; how even finding a trigger does not mean that another trigger will not turn up. Dr. Mahoney further testified that medications, which frequently have to be adjusted, are a critical part of treatment and that a self-mutilating chimp can never be assumed to be fully cured. (Tr. 4070-73.) Dr. Mahoney felt the attempts by Ms. Colette and Wildlife Waystation to find the proper therapeutic treatment for Sammy were "robust." (Tr. 4089.)

The attempts to get the appropriate permits to construct proper housing for the chimps led to a multi-year imbroglio. Extensive testimony demonstrated that, for example, the California State Fish and Game Commission would not issue certain permits and Los Angeles County, because of zoning issues, would not consent to the building of the new enclosure for the chimps. Furthermore, Wildlife Waystation had issues with water and waste regulations, as well as other regulatory problems. (Tr. 2190-95.) In order to find resolutions to many of these issues, the Los Angeles County Board of Supervisors created a task force to assist Wildlife Waystation to comply with Los Angeles County ordinances and regulations (Tr. 1372-74). At Ms. Colette's request, Mr. Lorsch agreed to deal with the various government agencies on behalf of Wildlife Waystation (Tr. 2186-91).

Facts

Martine Colette has a long history of caring for animals. While not formally trained in animal care, Ms. Colette was exposed to, and cared

for, exotic animals from her youth. (Tr. 4187, 4194.) After moving to the United States, Ms. Colette began caring for unwanted animals when she was living in Hollywood. Ms. Colette eventually established Wildlife Waystation on property she purchased in the foothills of the San Fernando Valley outside Los Angeles. (Tr. 4197.) Wildlife Waystation has tended to the needs of many thousands of animals since it was created in the mid-1970's, having as many as 1,200 animals on the premises at a time (Tr. 4212). Wildlife Waystation has been a resource for the government, both state and federal. These government agencies, including USDA, have called on Wildlife Waystation when there has been a need to provide for animals when another facility has closed or wild animals are in need of rescue. (Tr. 4191, 4215-16.) At the time of the hearing, Wildlife Waystation cared for approximately 250 to 300 animals (Tr. 4219).

Ms. Colette has held an Animal Welfare Act exhibitor license for Wildlife Waystation in her name since the license was first issued in 1976. Ms. Colette has held various positions with Wildlife Waystation during its existence. (Tr. 4183-85.) Her personal residence is on property adjacent to Wildlife Waystation. Typically, visitors to Ms. Colette's residence must traverse portions of Wildlife Waystation's property. (Tr. 4205.) Wildlife Waystation is supported through "memberships, animal sponsor programs, donations, fund raising activities, bequests, donations." (Tr. 4207.)

Mr. Lorsch is a successful businessman and a philanthropist (Tr. 2164-80). Mr. Lorsch has been a contributor to Wildlife Waystation for a number of years and became more involved with Wildlife Waystation in an attempt to resolve governmental compliance issues (Tr. 2181-2202). Mr. Lorsch has never been an employee of Wildlife Waystation, but has served at various times as "best friend" and advocate.

While this Decision and Order as to Martine Colette and Robert H. Lorsch is confined to whether Ms. Colette and Mr. Lorsch committed violations, or are liable for violations, as alleged in the Second Amended Complaint, familiarity with events that preceded the inspections that are the subject of the Second Amended Complaint is helpful to understand the context of the instant proceeding. On October 31, 2002, Wildlife

Waystation and Martine Colette agreed to the entry of a Consent Decision as to Wildlife Waystation and Martine Colette (CX 2) [hereinafter the October 31, 2002, Consent Decision] that resolved numerous allegations against Martine Colette and Wildlife Waystation for violations of the Animal Welfare Act. Martine Colette and Wildlife Waystation admitted 299 violations of the Animal Welfare Act and the Regulations. The October 31, 2002, Consent Decision did not assess a civil penalty but suspended the Animal Welfare Act license issued under the name "Martine Colette d.b.a. Wildlife Waystation" for 30 days, with the suspension to continue until the Animal and Plant Health Inspection Service [hereinafter APHIS] determined that Martine Colette and Wildlife Waystation were in compliance with the Animal Welfare Act and the Regulations. The October 31, 2002, Consent Decision directed that Martine Colette and Wildlife Waystation "shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required."

The inspections and other activities that are the subject of the instant proceeding all occurred during the period before Ms. Colette's Animal Welfare Act license was reinstated. The suspension of Ms. Colette's Animal Welfare Act license could not, by the terms of the October 31, 2002, Consent Decision, be lifted until APHIS made a determination that Ms. Colette and Wildlife Waystation were in compliance with the Animal Welfare Act and the Regulations. During the summer of 2003, Ms. Colette requested that APHIS conduct an inspection of Wildlife Waystation so that the suspension of Ms. Colette's Animal Welfare Act license could be lifted. (Tr. 308-09.) The inspections that are the subject of this Decision and Order as to Martine Colette and Robert H. Lorsch were not "routine" unannounced inspections, rather, the inspections were scheduled at Ms. Colette's request in order to have the suspension of her Animal Welfare Act license lifted (Tr. 3535-36).

Apparently, unbeknownst to Ms. Colette at the time she requested the inspection to determine if her Animal Welfare Act license should be reinstated, the Administrator had filed a Complaint alleging that, between the date of the October 31, 2002, Consent Decision and the date of the Complaint (August 15, 2003), Ms. Colette and Wildlife Waystation had exhibited animals without a valid Animal Welfare Act license. The Hearing Clerk served Ms. Colette and Wildlife Waystation

with the Complaint on August 23, 2003.[2]

The initial inspection occurred approximately a week after Ms. Colette's request and lasted from August 19-21, 2003. The APHIS inspection team, comprised of Jeanne Lorang, Dr. Kathleen Garland, Sylvia Taylor, and Dr. Alexandra Andricos, informed Wildlife Waystation personnel that Wildlife Waystation was not fully compliant with the Regulations (CX 3). The APHIS inspection team conducted an exit interview with Wildlife Waystation personnel, including Ms. Colette, at which time the alleged deficiencies were discussed (Tr. 201-02). Mr. Lorsch also participated in the exit interview, via telephone (CX 36; Tr. 3252-53).

APHIS conducted a follow-up inspection on September 16, 2003. At this inspection, Ms. Lorang and Dr. Garland were generally accompanied by A.J. Durtschi, Wildlife Waystation's operations manager. At the close of the inspection, Mr. Durtschi insisted that the exit conference include, via telephone, Mr. Lorsch (CX 36; Tr. 250). When Ms. Lorang began to explain the problems she and Dr. Garland found, Mr. Lorsch became upset (Tr. 252-53). In particular, when Ms. Lorang discussed the condition of a chimpanzee named Sammy, a long-time resident of Wildlife Waystation with a long history of self-mutilation,[3] Mr. Lorsch frequently interrupted, referred to the findings of the APHIS inspectors as "stupid," and made sarcastic comments.

The September 16, 2003, inspection report (CX 4) does not indicate that the inspectors had any problems with Mr. Lorsch. Ms. Lorang testified at the hearing that, although she never felt intimidated by Mr. Lorsch's conduct, she considered his actions abusive (Tr. 676, 681). Dr. Garland, who did not speak during the exit interview, testified she was most troubled by the condescending tone of Mr. Lorsch's comments

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[2]United States Postal Service Domestic Return Receipt for article number 7001 2510 0002 0111 4906 (Wildlife Waystation) and United States Postal Service Domestic Return Receipt for article number 7099 3400 0014 4581 6232 (Ms. Colette).

[3]Sammy's condition previously had never been mentioned as a basis for a violation, and, in fact, had not even been mentioned at the August 19-21, 2003, inspection.

(Tr. 3592-93). The APHIS inspectors each testified that they felt Mr. Lorsch was acting in an abusive manner, but they did not raise the issue during the exit interview with Mr. Lorsch or Mr. Durtschi (Tr. 680-81, 2627-28). Ms. Lorang testified that she and Dr. Garland, on returning to their car, mentioned to each other that they had thought of stopping the exit interview and leaving the premises. They testified that Mr. Durtschi apologized to them and that Mr. Lorsch telephoned Ms. Lorang the next day and apologized to her. (Tr. 251-53.) Although the APHIS inspectors testified they discussed Mr. Lorsch's conduct with APHIS management personnel, no formal memorandum was written concerning Mr. Lorsch's conduct until many months after the event allegedly took place. APHIS guidance required that alleged abuse be documented in a memorandum written within 24 hours of the abuse.[4]

The following day, September 17, 2003, counsel for the Administrator signed the First Amended Complaint, which was filed with the Hearing Clerk on September 22, 2003. In addition to the violations that were the subject of the Complaint, the First Amended Complaint added Mr. Lorsch as a respondent, and added allegations based on the inspections of August 19-21, 2003, and September 16, 2003.

Inspector Lorang reinspected the facility on October 14, 2003, accompanied by Dr. Alexandra Andricos. Mr. Durtschi represented Wildlife Waystation during this reinspection. In the inspection report presented to Mr. Durtschi, violations were again cited for environment enhancement and for lack of sufficient numbers of experienced employees, particularly with regard to the "special needs" of Sammy. These alleged violations were included in the Second Amended Complaint, filed March 15, 2004. A reinspection on November 3, 2003, revealed no violations, and APHIS lifted the suspension of Ms. Colette's Animal Welfare Act license.

Discussion

The Chief ALJ's Decision is thorough and well-reasoned. The Chief

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[4]Research Facilities Inspection Guide (RLX 128); Exhibitor Inspection Guide (RLX 130).

ALJ found the various on-site and off-site activities cited by APHIS, including fund-raising, recruitment of volunteers, and invitations to prospective donors to visit Wildlife Waystation did not constitute "exhibiting" under the Animal Welfare Act and the Regulations; therefore, in the Chief ALJ's view, the Administrator failed to demonstrate by a preponderance of the evidence that Martine Colette and Robert H. Lorsch exhibited while Ms. Colette's Animal Welfare Act license was suspended pursuant to the October 31, 2002, Consent Decision. The Chief ALJ also found, although Mr. Lorsch was rude during the September 16, 2003, exit conference, Mr. Lorsch's conduct did not constitute "abuse" under the Animal Welfare Act and the Regulations. Finally, the Chief ALJ found the Administrator failed to demonstrate violations by Ms. Colette and Mr. Lorsch for noncompliance with the attending veterinarian regulations, for adequacy and appropriate documentation of environment enhancement, and for exposed food, control of insects, structural integrity, and the presence of hand-washing facilities.

I agree with most, but not all, of the Chief ALJ's holdings. The Administrator's appeal was limited and focused on whether Ms. Colette and Mr. Lorsch were "exhibitors." I only discuss the issues raised on appeal by the Administrator. I need not, and do not, discuss items in the Chief ALJ's decision that were not raised by the Administrator, as these issues have been waived.

The Administrator states "[a] person operating a 'zoo' is, by definition, an 'exhibitor.'" (Appeal Pet. at 5.) To support this proposition, the Administrator cites 7 U.S.C. § 2132(h) and 9 C.F.R. § 1.1. As noted by the Administrator, the two definitions are "nearly identical." (Appeal Pet. at 4.) The relevant part of the definition states:

§ 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[.]

7 U.S.C. § 2132(h). Therefore, a zoo is by definition an exhibitor and must be licensed under the Animal Welfare Act.

Robert H. Lorsch

The Administrator's position is that Mr. Lorsch "violated the Regulations by virtue of his actions both as an exhibitor himself and as agent of the other two respondents." (Appeal Pet. at 28 (emphasis in the original).) The Administrator's argument in support of this position is unpersuasive.

The Administrator's primary argument is that "Mr. Lorsch is an exhibitor because he operated a zoo." (Appeal Pet. at 28-29.) I interpret the Administrator's meaning of "operate" to be "manage," "supervise," "be in charge of" or some similar definition suggesting that Mr. Lorsch was a principal decision-maker relating to the day-to-day function of the organization. While there is no dispute that Mr. Lorsch actively participated in certain aspects of Wildlife Waystation, the Administrator failed to demonstrate that Mr. Lorsch "operated" Wildlife Waystation. The Administrator relies on a 12-item list of areas in which Mr. Lorsch participated at Wildlife Waystation (Appeal Pet. at 31-33) to demonstrate that Mr. Lorsch "was guiding the overall operations of the Wildlife Waystation." (Appeal Pet. at 33.) This list includes:

- being the "best friend" of Wildlife Waystation,
- working as an unpaid representative of Wildlife Waystation in dealing with city and county officials,
- fund-raising for Wildlife Waystation,
- inviting potential Wildlife Waystation donors to events at Ms. Colette's house,

- writing a column in the Wildlife Waystation newsletter,

- attending board of director meetings, even though he was not on the board, and making recommendations to the board regarding web functions, telephone service, and the hiring of an operations manager,

- leading efforts to resolve Wildlife Waystation's regulatory problems, including attempts to get APHIS to reinstate Wildlife Waystation's Animal Welfare Act license, and

- participating in two exit conferences with APHIS inspectors.

Neither the list nor other evidence in the record convinces me that Mr. Lorsch operated Wildlife Waystation. Therefore, the Administrator failed to demonstrate that Mr. Lorsch was an exhibitor because he "operated" a zoo. Moreover, none of these activities are prohibited by the Animal Welfare Act. Therefore, the Administrator failed to demonstrate that Mr. Lorsch violated the Animal Welfare Act by his own actions.

Furthermore, the Administrator relies on 7 U.S.C. § 2139 to impute the actions of an organization (Wildlife Waystation) to a person affiliated with that organization (Robert H. Lorsch). However, the Animal Welfare Act imputes the actions of an individual to an organization (licensee), not the other way around, as argued by the Administrator (Appeal Pet. at 28).

§ 2139. Principal-agent relationship established

> When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor pursuant to the second sentence of section 2133 of this title . . ., within the scope of his employment or office, shall be deemed the act, omission, or failure of such . . . exhibitor [or] licensee . . ., as

well as of such person.

7 U.S.C. § 2139. This provision does not state that the actions of the organization are deemed the actions of an individual. Therefore, if any action by Wildlife Waystation demonstrates that Wildlife Waystation violated the Animal Welfare Act, that violation may not be imputed to Mr. Lorsch. Mr. Lorsch is responsible for the violation if he personally committed the act that violated the Animal Welfare Act or the Regulations.

Before I finish the discussion of Mr. Lorsch, I must discuss his participation in the September 16, 2003, inspection exit interview with the APHIS inspectors. The Administrator alleges that statements Mr. Lorsch made during his telephonic participation in the exit interview were abusive and in violation of section 2.4 of the Regulations, which provides, as follows:

§ 2.4 Non-interference with APHIS officials.

> A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

9 C.F.R. § 2.4. Mr. Lorsch's interrupting all speakers during the exit interview was clearly impolite. However, I do not find the interruptions a violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). One indication whether Mr. Lorsch's behavior during the exit interview was abuse is the reaction of the APHIS inspectors. Although the APHIS inspectors testified that they thought Mr. Lorsch was verbally abusive, they did not end the interview early and did not memorialize the alleged abuse until months after the interview, even though APHIS guidance provides a procedure for handling abuse during inspections. This procedure includes documentation of the abuse within 24 hours after the abuse takes place (RLX 130 at 51-53). If the APHIS inspectors felt abused, they should have followed the procedure in a timely fashion. While this lack of reaction by Ms. Lorang and Dr. Garland is not conclusive that no abuse took place, combine it with the testimony by Ms. Lorang that Mr. Lorsch was "nondiscriminatory" in who he

interrupted (Tr. 632-33) and the testimony by Dr. Garland that the negative adjectives were directed at the findings, not the inspectors (Tr. 3260), leads me to conclude that Mr. Lorsch's statements were not "abuse," as that term is used in section 2.4 of the Regulations (9 C.F.R. § 2.4).

Therefore, I hold that Mr. Lorsch did not violate the Animal Welfare Act or the Regulations, and I dismiss the Second Amended Complaint as it applies to Mr. Lorsch.

Martine Colette

The Administrator argues that the off-site fund-raising events that benefitted Wildlife Waystation were events at which Ms. Colette exhibited animals (Appeal Pet. at 15). The Administrator disagreed with the Chief ALJ's position stating "[f]ocusing on the respondents' ultimate purpose (money) does not alter the central fact that they (like many other exhibitors) were simply offering animals for viewing to members of the public with the expectation of a benefit. This is the quintessence of 'exhibiting,' and it is no different than any other exhibitor's animal displays." (Appeal Pet. at 16.) This argument would have merit, except that the person who brought the animals to the off-site fund-raising event was an exhibitor with its own valid Animal Welfare Act license and, therefore, was responsible for compliance with the Animal Welfare Act (Chief ALJ's Decision at 25).

The Administrator's argument that Ms. Colette should be found to have exhibited animals without an Animal Welfare Act license without regard to who owns the animals is a strawman. While it is true that who owns the animals is immaterial to whether the animals were exhibited by Ms. Colette, the Administrator disregards the fact that exhibitors with valid Animal Welfare Act exhibitor licenses were responsible for the animals at these events. I hold that at any off-site exhibition of animals, if one or more Animal Welfare Act licensed exhibitors is responsible for the exhibition of the animals, the statutory license requirements for exhibiting are met.

Ms. Colette argues that bringing the llamas to the Safari for Life program on November 3, 2002, did not violate the Animal Welfare Act

because the llamas were not "regulated" animals. The Animal Welfare Act defines the term "animal," as follows:

> **§ 2132. Definitions**
>
> When used in this chapter—
>
> . . . .
>
> (g) The term "animal" means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.

7 U.S.C.§ 2132(g). Ms. Colette does not explain her justification for claiming the llamas were not "regulated." All creatures that meet the definition of "animal" are governed by the Animal Welfare Act. Llamas are warmblooded; therefore, llamas fall within the definition of the term "animal" in the Animal Welfare Act. These particular llamas were transported to the Safari for Life event and exhibited to the attendees. This activity brings the llamas under the purview of the Animal Welfare Act. Ms. Colette admits she brought llamas to the Safari for Life (Martine Colette's Response to Complainant's Proposed Findings of Fact at 12). Therefore, Ms. Colette exhibited these llamas at the Safari for Life.

In order to demonstrate the *prima facie* case that Ms. Colette violated the Animal Welfare Act when she brought the llamas to the Safari for Life, the Administrator has the burden to present evidence:

1. that Ms. Colette did not possess a valid Animal Welfare Act license;
2. that the llamas were "animals," as defined in the Animal Welfare Act; and
3. that the llamas were exhibited.

All parties acknowledge that Ms. Colette's Animal Welfare Act license was suspended when the Safari for Life took place. The llamas meet the definition of the term "animal." Finally, allowing the public to see the llamas at the Safari for Life is within the meaning of the term "exhibited." The evidence presented by the Administrator meets the burden of proof allowing me to conclude the Administrator proved his *prima facie* case. However, proving the *prima facie* case only shifts the burden, allowing Ms. Colette to rebut the Administrator's case. Ms. Colette contends the llamas were not "regulated" animals without presenting any legal or factual support for her theory. Therefore, Ms. Colette failed to overcome the *prima facie* case.

Because on November 3, 2002, Ms. Colette did not hold a valid Animal Welfare Act license when she exhibited the llamas, which I find are "animals," as defined under the Animal Welfare Act, I find Ms. Colette violated the Animal Welfare Act.

A similar analysis applies to determine if Ms. Colette violated the Animal Welfare Act when the "orientation tours" were conducted at Wildlife Waystation and when the press visited Wildlife Waystation on Chimp Independence Day. The Administrator has the burden to demonstrate a *prima facie* case for each of these allegations.

Regarding the volunteer recruitment orientation tours, the Administrator must show Ms. Colette did not have a valid Animal Welfare Act license, the animals were exhibited, and those to whom the animals were exhibited were "the public," not individuals affiliated with Wildlife Waystation. The Administrator's effort to prove a *prima facie* case that Ms. Colette violated the Animal Welfare Act by conducting the orientation tours fails because there is no evidence that animals were exhibited. I reviewed the testimony and affidavits discussing these tours. (*See, e.g.*, CX 13.) While the record contains ample evidence that the tours took place, and, without deciding, I will assume for the

purposes of this argument that at least some of the individuals on the tours were members of the public without any connection to Wildlife Waystation, I find no evidence that any animals were "made available for viewing" by members of the public. Without this evidence, the Administrator failed to make a *prima facie* case that Ms. Colette violated the Animal Welfare Act when volunteer recruitment orientation tours of Wildlife Waystation were conducted.

On July 2, 2003, "Chimp Independence Day" at Wildlife Waystation, Ms. Colette held a press conference to open the new chimpanzee housing facilities. Invited to the festivities were members of the press, as well as local and state officials. Members of the press are generally considered "the public" for Animal Welfare Act purposes. Therefore, if animals were exhibited on Chimp Independence Day, Ms. Colette violated the Animal Welfare Act because she did not have a valid Animal Welfare Act license. The evidence whether animals were exhibited during Chimp Independence Day is limited to the testimony of Jerry Brown, publicist for Wildlife Waystation, who testified, as follows:

> [BY MS. CARROLL:]
>
> Q. Okay. Did you attend an event around July 2, 2003 where the media was invited to the Waystation to view the new chimpanzee enclosures?
>
> [BY MR. BROWN:]
>
> A. Yes.
>
> . . . .
>
> Q. Okay. And was the media present at that event?
>
> A. Yes.
>
> Q. And you attended?

A. Yes.

. . . .

Q. And were there animals there, too?

A. Well, there were the animals that call Wildlife Waystation home, yes.

Q. In the area where the gathering occurred?

A. The chimpanzee were in their enclosure always away from where we were, but don't believe we exhibited anything or the Waystation.

Q. You mean took it out of its cage?

A. Yes. It was a press conference basically to announce.

Q. Okay. Were the animals visible to the people who attended?

A. Yes.

Tr. 1497-99. This testimony is all the evidence that indicates that animals were exhibited on Chimp Independence Day. However, I find the evidence is sufficient for the Administrator to make a *prima facie* case that Ms. Colette violated the Animal Welfare Act by exhibiting[5]

[5]Although the Animal Welfare Act and the Regulations do not define the term "exhibiting," I hold that the definition is sufficiently broad to encompass a situation in which members of the public are at a facility where captive animals could be expected to be present, such as a zoo, and animals are visible to the public. Conversely, if the facility invites the public to an event and animals are not available for viewing because of some positive action by the facility, such as moving the animals from the area where the public will be present or holding the event in an area of the facility without animals, (continued...)

animals without a license on Chimp Independence Day. Ms. Colette had the opportunity to rebut this evidence, yet failed to do so. Therefore, I find that Ms. Colette violated the Animal Welfare Act by exhibiting animals without a license on Chimp Independence Day.

Sanctions

The Administrator seeks an order that Martine Colette cease and desist from violating the Animal Welfare Act and the Regulations. The Administrator further seeks to revoke Ms. Colette's Animal Welfare Act license. Finally, the Administrator seeks two civil penalties, one for $15,780 for 58 violations of the Animal Welfare Act and the Regulations and the other for $14,025 for failing to obey the cease and desist order in the October 31, 2002, Consent Decision. (Complainant's Proposed Finding of Fact; Proposed Conclusions of Law; Proposed Order; and Brief in Support Thereof as to Respondent Martine Colette at 16-17.)

USDA'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

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[5](...continued)
then the facility did not "exhibit" animals under the Animal Welfare Act.

recommended by administrative officials.[6] I find the Administrator's recommendation is based on many more violations than I conclude Ms. Colette committed; therefore, I do not rely on the Administrator's recommendation.

I find two violations of the Animal Welfare Act, each for exhibiting animals without an Animal Welfare Act license. Each violation also violates the October 31, 2002, Consent Decision. I agree with the Administrator that the issuance of a cease and desist order is appropriate, and I also agree that assessment of a civil penalty is appropriate. With respect to the monetary civil penalty, the Animal Welfare Act requires the Secretary of Agriculture to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of pervious violations.[7]

Based on the number of animals at Wildlife Waystation, I find Ms. Colette operates a large business. While Ms. Colette's violations of the Animal Welfare Act and the Regulations (exhibiting animals without a valid Animal Welfare Act license) are serious, I only find two violations. Moreover, I do not find Ms. Colette's violations posed a threat to the health and well-being of the animals. As evidenced by the October 31, 2002, Consent Decision, Ms. Colette has a history of previous violations. Ms. Colette could be assessed a maximum civil penalty of $5,500 for her two violations of the Animal Welfare Act and the Regulations.[8] After examining all the relevant circumstances in the

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[6]*In re Lorenza Pearson*, 68 Agric. Dec. ___, slip op. at 69 (July 13, 2009); In re Amarillo Wildlife Refuge, Inc.68 Agric. Dec. 77, 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).

[7]See 7 U.S.C. § 2149(b).

[8]The Animal Welfare Act provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act or (continued...)

instant proceeding, in light of USDA's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), I conclude a cease and desist order and assessment of a $2,000 civil penalty are appropriate and necessary to ensure Ms. Colette's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Findings of Fact

1. Martine Colette is an individual residing at Wildlife Waystation, Los Angeles, California. During the time period relevant to the instant proceeding, Ms. Colette operated a "zoo," as that term is defined in the Regulations, known as Wildlife Waystation. Ms. Colette holds Animal Welfare Act license number 93-C-0295, issued to "Martine Colette d.b.a. Wildlife Waystation."

2. On October 31, 2002, Administrative Law Judge Jill S. Clifton issued a Consent Decision in *In re Martine Colette*, AWA Docket No. 00-0013. In the October 31, 2002, Consent Decision, Ms. Colette and Wildlife Waystation admitted to the commission of 299 violations of the Animal Welfare Act and the Regulations. The October 31, 2002, Consent Decision suspended the Animal Welfare Act exhibitor license issued to Martine Colette d.b.a. Wildlife Waystation, until an APHIS inspection supported the lifting of the suspension.

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[8](...continued)
the Regulations (7 U.S.C. § 2149(b)). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). Ms. Colette's violations occurred in 2002 and 2003; therefore, the maximum civil penalty that may be assessed for each violation is $2,750.

3. Robert H. Lorsch is a businessman and philanthropist who has been a financial contributor to Wildlife Waystation. Mr. Lorsch has held various positions with Wildlife Waystation, but has never been involved in the day-to-day management of Wildlife Waystation.

4. Mr. Lorsch volunteered to act as a representative of, and an advocate for, Wildlife Waystation in its dealings with federal, state, and local governments. In this capacity, Mr. Lorsch attended numerous meetings, presented and negotiated various positions to resolve the numerous pending issues, and acted as Wildlife Waystation's agent for those purposes.

5. Mr. Lorsch also took actions to increase donations to Wildlife Waystation. In particular, Mr. Lorsch invited potential donors to fund-raisers, both off-site and at Ms. Colette's home.

6. At several off-site fund-raisers, animals not owned by Wildlife Waystation were exhibited by other Animal Welfare Act licensees for the benefit of Wildlife Waystation. On at least one occasion, Ms. Colette brought llamas to a fund-raiser. The llamas were exhibited to the individuals in attendance at the event.

7. On numerous occasions, potential volunteers were invited to Wildlife Waystation and taken on orientation tours. After the tours, some volunteers withdrew their applications. I find no evidence that animals were exhibited on these orientation tours.

8. In early August 2003, Ms. Colette requested that APHIS conduct an inspection of Wildlife Waystation to determine whether the Animal Welfare Act license suspension should be lifted. On August 15, 2003, shortly after the inspection was requested, but before the inspection was conducted, the Administrator issued a Complaint against Ms. Colette and Wildlife Waystation charging that they had violated the Animal Welfare Act by exhibiting without an Animal Welfare Act license.

9. Even though Ms. Colette and Wildlife Waystation presumed the inspection was simply to determine whether APHIS would lift the Animal Welfare Act license suspension, APHIS inspectors were prepared to cite Ms. Colette and Wildlife Waystation for any violations they believed existed.

10. At the inspection conducted August 19-21, 2003, APHIS inspectors found Wildlife Waystation was not in compliance with the

Animal Welfare Act and the Regulations. The August 15, 2003, Complaint had not been served on Ms. Colette and Wildlife Waystation at the time of this 3-day inspection. The inspectors discussed the alleged noncompliance areas in an exit conference on August 21, 2003. Mr. Lorsch attended the exit conference via telephone. The inspectors did not inform Wildlife Waystation, Ms. Colette, or Mr. Lorsch that the areas of noncompliance presented the possibility that a disciplinary action would be instituted against Wildlife Waystation and Ms. Colette.

11. APHIS conducted a follow-up inspection on September 16, 2003. At this inspection, APHIS inspectors found that a number of the alleged noncompliant areas discussed after the first inspection were still in noncompliance. The APHIS inspectors also cited a number of alleged noncompliances involving the condition of Sammy, a chimp that had been self-mutilating since before he was moved to Wildlife Waystation nearly a decade earlier.

12. At the September 16, 2003, exit conference, Mr. Lorsch, who was again participating by telephone, became angry and spoke disparagingly about many of the observations of the inspectors. The APHIS inspectors did not advise Mr. Lorsch that he was being abusive, and Inspector Lorang stated she did not feel intimidated. Following the exit conference, A.J. Durtschi, the manager of Wildlife Waystation who attended the exit conference in person, apologized for Mr. Lorsch's conduct. The following day, Mr. Lorsch telephoned Inspector Lorang and likewise apologized.

13. Less than a week after the September 16, 2003, exit conference, the First Amended Complaint was filed, alleging violations based upon the August and September 2003 inspections, and, for the first time, naming Mr. Lorsch as a respondent.

14. On October 14, 2003, APHIS conducted an additional follow-up inspection, and additional alleged violations were documented. These alleged violations were included in the Second Amended Complaint filed March 15, 2004.

15. On November 3, 2003, APHIS reinspected the facility and found no further violations. As a result of this inspection, the suspension of the Animal Welfare Act license issued to Martine Colette d.b.a. Wildlife Waystation, was lifted.

16. At the September 2003 inspection, APHIS inspectors observed

that the chimp, Sammy, who had been a self-mutilator prior to the time he had come to Wildlife Waystation, exhibited a number of open wounds that were the result of self-mutilation. Sammy had never been exhibited nor was there any indication that Sammy would ever be exhibited. Wildlife Waystation had undertaken significant efforts to rehabilitate Sammy. Shortly after the September 2003 inspection, Wildlife Waystation hired a consultant who worked with Sammy with dramatic positive results.

Conclusions of Law

1. On November 3, 2002, llamas were brought to the Safari for Life event. Llamas are "animals," as that term is defined in the Animal Welfare Act. The act of transporting the animals to the event and showing the animals at the Safari for Life event is sufficient to bring the animals under the purview of the Animal Welfare Act. Such activity requires me to find that Ms. Colette exhibited the llamas at the Safari for Life event on November 3, 2002. Because Ms. Colette's Animal Welfare Act license was suspended on that date, pursuant to the October 31, 2002, Consent Decision, Ms. Colette violated the Animal Welfare Act by exhibiting the llamas.

2. Because there is no credible evidence that animals were exhibited during the volunteer orientation tours conducted at Wildlife Waystation, these tours did not violate the Animal Welfare Act.

3. On July 2, 2003, "Chimp Independence Day" at Wildlife Waystation, a press conference was held to announce the completion of the new chimpanzee facilities. The only people invited were local officials and the press. For this purpose, the press is considered the "public" under the Animal Welfare Act. Because there was testimony that animals were visible, Ms. Colette exhibited animals without an Animal Welfare Act license, in violation of the Animal Welfare Act.

4. During the September 16, 2003, telephone exit conference with, among others, Inspector Lorang and Dr. Garland, Robert H. Lorsch was impolite. However, Mr. Lorsch's conduct during the telephone call did not rise to the level which would constitute "abuse" under the Animal Welfare Act and the Regulations.

5. Issues that were not raised by the Administrator on appeal are waived. Any issues that were raised by the Administrator and not addressed in this Decision and Order as to Martine Colette and Robert H. Lorsch were considered and found to be without merit.

For the foregoing reasons, the following Order is issued.

ORDER

1. Martine Colette, her 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 exhibiting animals without a valid Animal Welfare Act license. Paragraph 1 of this Order shall become effective 1 day after the Order is served on Ms. Colette.

2. Martine Colette 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Ms. Colette. Ms. Colette shall state on the certified check or money order that payment is in reference to AWA Docket No. 03-0034.

RIGHT TO JUDICIAL REVIEW

Martine Colette has the right to seek judicial review of the Order in this Decision and Order as to Martine Colette and Robert H. Lorsch in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Ms. Colette must seek judicial review within

60 days after entry of the Order in this Decision and Order as to Martine Colette and Robert H. Lorsch.[9] The date of entry of the Order in this Decision and Order as to Martine Colette and Robert H. Lorsch is August 21, 2009.

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In re: 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.
Decision and Order.
Filed September 29, 2009.

AWA.

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

This action was initiated on June 22, 2009 by the Administrator of the Animal and Plant Health Inspection Service by the filing of an Order to Show Cause as to Why Animal Welfare Act License 41-B-0159 Should Not Be Terminated. The Respondent, through her counsel filed an Answer styled as "Return to Order to Show Cause as to Why Animal Welfare Act License Should Not Be Terminated" on July 15, 2009.

On August 13, 2009, the Administrator filed a Motion for Summary Judgment and on September 15, 2009, the Respondent responded with "Respondent's Return to Complainant's Motion for Summary Judgment."

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 order revocation of the Respondent's license with a period of disqualification as set forth in the Order which is a part of this Decision.

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[9] 7 U.S.C. § 2149(c).

Discussion

The Animal Welfare Act (the Act) 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 terminate a license and 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) has alleged that the Respondent is unfit to be licensed as a dealer under the Animal Welfare Act based upon evidence that the Respondent (the individual) was found guilty by Minnesota courts on two occasions of criminal charges, the first being pursuant to an *Alford* plea to a single misdemeanor count of practicing veterinary medicine without a license or temporary permit[2] and the second, a jury conviction of four misdemeanor counts of animal cruelty or torture.[3]

In her Answer, the Respondent has admitted being convicted on both occasions,[4] but asserts that her *Alford* plea in the first case did not pertain to animal cruelty or ownership, neglect or welfare of animals and seeks to avoid responsibility in the second case by alleging that she was the victim of exogenous artifice and trick, fraud and misrepresentation of a malicious employee of the Respondent who was also acting as an agent and employee of Companion Animal Protection Society and who deliberately, intentionally and cruelly deprived an English Mastiff of food and water for the purpose of the destruction of the Pick of the Litter Kennel business. Even assuming *pro arguendo* that the conviction pursuant to her *Alford* plea did not pertain either to animal cruelty or to

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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]*State of Minnesota v. Kathy Jo Bauck,* 56-CR-08-1131.

[3]*State of Minnesota v. Kathy Jo Bauck,* 56-CR-08-2271.

[4]Respondent's Return ¶ 14-17; 21-25.

transportation, ownership, neglect or welfare of animals, the second case presents an insurmountable obstacle for the Respondent to overcome.

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:
>
> (4) Has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty, within one year of application, or after one year if the Administrator determines that the circumstances render the applicant unfit to be licensed.
> ....
>
> (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.

As the second conviction clearly comes within either, if not both, of the above provisions, it is necessary to examine whether the Respondent may: (a) pretermit her obligation to supervise her employees and avoid liability by passing the responsibility onto another more directly culpable of misconduct or, (b) whether strict liability should be imposed

using the doctrine of *respondeat superior*. One has to look no further than Section 2139 of the Animal Welfare Act (AWA) to find those answers.

Section 2139 (7 U.S.C. §2139) provides:

> When construing or enforcing the provisions of this chapter, the act, omission, failure of any person acting for or employed by ….a dealer…within the scope of his employment or office, shall be deemed the act, omission, failure of such …dealer…as well as such person.

The Respondent questions the appropriateness of a motion for summary judgment and insists that a hearing is clearly mandated by the Regulation cited as it indicates that a license may be terminated "after a hearing in accordance with the applicable rules of practice." 9 C.F.R. §2.12. The Petitioner's argument, while ostensibly logical, is without merit as despite what is argued 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 based upon prior criminal convictions. *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 Kathy Jo Bauck is an individual who has a mailing address in New York Mills, Minnesota.

2. The Respondent operates a regulated business as a dealer under the Animal Welfare Act and has been licensed under the Act and Regulations for many years, holding Animal Welfare License No. 41-B-

0159.

3. The Respondent does or has done business under the names of "Puppy's on Wheels" and "Pick of the Litter" or "Pick of the Litter Kennels."

4. On or about May 19, 2008, the Respondent was 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. Attachment B, OSC.

5. On or about March 29, 2009, the Respondent was 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-CR-08-2271. Attachment D, OSC. 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. Attachment E, OSC.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Respondent, having been found guilty of a single criminal misdemeanor count of torturing a Mastiff between the dates of May 14 and May 24, 2008 by the Otter Tail District Court, Criminal Division, Seventh Judicial District of the State of Minnesota in 56-CR-08-2271 is found to be unfit to hold an Animal Welfare Act license. 7 C.F.R. §2.11(a)(4) and (6); and §2.12.

3. The Respondent, 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 a misdemeanor count pertaining to animal cruelty and torture in the case of *State of Minnesota v. Kathy Jo Bauck,* 56-CR-08-2271 is found to be unfit to hold an Animal Welfare Act license. 7 C.F.R. §2.11(a)(4) and (6); and §2.12.

Order

1. Respondent's Animal Welfare Act License No. 41-B-0159 is terminated.

2. The Respondent is disqualified for a period of 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

3. 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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In re: D&H PET FARMS, INC.
AWA Docket No. 07-0083.
Decision and Order.
Filed October 19, 2009.

AWA – Animal welfare – Cease and desist order – Civil penalty – Dealer – Food and bedding storage – Impervious surfaces – Housing facilities – License suspension – Noncompliant – Sanitation – Veterinary care – Willful.

Frank Martin, Jr., for the Administrator, APHIS.
Susin Tippie, Plant City, FL, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On March 16, 2007, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a Complaint alleging that on seven occasions during the period October 12, 2005, through January 25, 2007, D&H Pet Farms, Inc. [hereinafter D&H], violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards promulgated under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]. The Administrator sought assessment of a civil penalty against D&H, issuance of an order that D&H cease and desist from violating the Animal Welfare Act and the Regulations, and suspension or revocation of D&H's Animal Welfare Act license. D&H filed a timely answer denying it willfully violated the Regulations.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing in Tampa, Florida, on December 4, 2007. Frank Martin, Jr., and Heather M. Pichelman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Susin Tippie, one of the owners of D&H, represented D&H. The Administrator called three witnesses. Ms. Tippie was the only witness for D&H. The Chief ALJ received into evidence the Administrator's exhibits (CX 1-CX 97) and D&H's exhibits (RX 1-RX 82).

On November 26, 2008, the Chief ALJ issued a Decision and Order: (1) finding D&H committed numerous violations of the Animal Welfare Act and the Regulations; (2) assessing D&H a $10,000 civil penalty; (3) suspending D&H's Animal Welfare Act license for 3 months; and (4) providing, if D&H takes certain corrective actions, the civil penalty assessed against D&H would be reduced to $2,500 and the suspension of D&H's Animal Welfare Act license would not be implemented.

On February 5, 2009, the Administrator filed a Status Report Concerning Respondent's Continued Noncompliance With The Animal Welfare Act's Regulations and Standards [hereinafter the Status Report]. Copies of inspection reports are attached to the Status Report. The Administrator failed to seek permission to file the Status Report. Absent permission to file the Status Report, I find the filing of the Status Report an inappropriate effort to supplement the record. Therefore, the Status

Report and its attachments are stricken from the record.

On April 13, 2009, D&H appealed the Chief ALJ's Decision and Order. On May 26, 2009, the Administrator responded to D&H's appeal petition and filed a cross-appeal. On July 22, 2009, D&H filed its opposition to the Administrator's cross-appeal. On July 30, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

DECISION

Statutory and Regulatory Background

The Animal Welfare Act includes among its purposes "to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment[.]" (7 U.S.C. § 2131(1).) The Animal Welfare Act also authorizes the Secretary of Agriculture to license dealers of regulated animals and gives the Secretary of Agriculture authority to issue regulations (7 U.S.C. §§ 2133, 2151). The Secretary of Agriculture can deny a license if a dealer does not demonstrate that its facilities comply with the Secretary of Agriculture's standards (7 U.S.C. § 2133). The Regulations include standards for the humane handling, treatment, and transportation of hamsters and guinea pigs (9 C.F.R. §§ 3.25-.41). Failure to comply with these Regulations may lead to suspension or revocation of a dealer's Animal Welfare Act license, the issuance of an order to cease and desist violations of the Animal Welfare Act and the Regulations, and the assessment of a civil penalty in the amount of up to $3,750 for each violation (7 U.S.C. § 2149(a)-(b); 7 C.F.R. § 3.91(b)(2)(ii)).

Factual Background

D&H is a Florida corporation located in Plant City, Florida. D&H is a licensed dealer under the Animal Welfare Act. D&H breeds and sells regulated animals—guinea pigs and hamsters—for use as pets. (CX 1-CX 3.) Susin A. Tippie and her husband, Gaynor L. Tippie, operate D&H. Ms. Tippie served as manager of D&H from 1998 until she purchased the facility with her husband in January 2003. (Tr.

151-52.) D&H is a family-run enterprise that employs between 10 and 17 individuals (Tr. 163-64).

Carol Porter, an animal care inspector for the Animal and Plant Health Inspection Service [hereinafter APHIS], testified with respect to seven inspections of D&H that she conducted during the period October 12, 2005, through January 25, 2007. She had conducted approximately 600 inspections by the date of the hearing, including 12 inspections involving D&H, four of which occurred after the time period that is the subject of this Decision and Order. Ms. Porter characterized D&H as "chronically noncompliant." (Tr. 22-26.) However, Ms. Porter also testified about the many corrections D&H made after violations were cited and about D&H's attempts to take corrective action with respect to other violations (Tr. 79-81, 89-90, 93-94).

During the October 12, 2005, inspection, Ms. Porter observed a variety of violations. In her inspection report (CX 5), Ms. Porter cited D&H for noncompliances in the areas of veterinary care, storage of supplies, construction of interior surfaces, and sanitation. The veterinary care citation was triggered by the finding of a guinea pig that was sick; and the storage of supplies citation was triggered by a bag of food which had split open and spilled onto the floor and leaking brake fluid from a tractor near the stacked bags of animal feed. In addition, the inspection report indicated that paint was peeling away from the floors in the main building, preventing the floors from being impervious to moisture and preventing proper cleaning and sanitation of the floors. Finally, the inspection report cited numerous problems with pest control.

During the February 13, 2006, inspection, Ms. Porter found approximately 200-250 dead hamsters in plastic buckets used as hamster cages in the main building. Many of the dead hamsters were cannibalized (apparently hamsters tend to devour their first litters). The inspection took place on a Monday. Employees told Ms. Porter the practice of D&H was only to check water bottles over the weekend and the buckets in which the hamsters reside did not get checked. Ms. Porter stated in her inspection report (CX 17) that the facility needed to have daily observations of the animals. Ms. Porter also documented a number of holes in various parts of the facility, the use of soiled bedding, a

repeat failure to comply with the regulation concerning impervious surfaces (the paint was peeling off the floors), a violation of the feeding requirements, as evidenced by wet and moldy food pellets, a variety of sanitation violations, and an inadequate pest control program.

At the next inspection, on April 5, 2006, Ms. Porter again observed peeling paint on the floors and an ineffective pest control program, with numerous stray cats "wandering in and around the facility." (CX 41.)

At the June 21, 2006, inspection, Ms. Porter again cited D&H for the peeling paint on the floors, pest control issues (particularly rodents, house flies, and roaches), an open bag of feed, and oats spilled on the feed room floor (CX 43).

Ms. Porter returned again on November 14, 2006, and cited D&H for additional violations (CX 51). Ms. Porter found two guinea pigs that appeared to be sick or injured and concluded that this finding meant that animals should be observed more frequently. She also, once again, cited D&H for failing to have floors impervious to moisture as evidenced by the paint peeling away from the concrete, for an inadequate pest control program as evidenced by cobwebs, fruit flies, and rodent droppings, and for not providing food consistent with the Regulations, since numerous hamster enclosures contained wet and moldy food. Ms. Porter observed black mold on the inside of numerous water bottles in the main hamster building. Ms. Porter also observed that buckets containing hamsters were stacked one inside another which she stated could cause crushing, impaired ventilation, or restricted movement of the hamsters.

On December 19, 2006, Ms. Porter observed a disoriented guinea pig and determined there was insufficient frequency of observation of animals and inadequate veterinary care (CX 72). Once again, Ms. Porter observed pest control violations, including substantial rodent droppings, cobwebs, and living and dead rodents, and she observed that the floors in the main building had areas where the paint had peeled away from the concrete. She also observed mold growing on the inside of numerous water bottles, the stacking of occupied hamster cages, and out-of-place tubes of antibiotic ointment and suntan lotion.

The final inspection that is the subject of the instant proceeding occurred on January 25, 2007. Ms. Porter, once again, observed peeling paint on the floor of the main building, wet and moldy hamster food, rodent droppings, and a large concentration of fruit flies (CX 90).

Ms. Porter testified that, with respect to many of the alleged violations, D&H took prompt corrective action, including frequently repainting the floor. She also indicated that whenever she discovered a hole in the ceiling, the ceiling was repaired by the time of her next inspection. (Tr. 79-81, 89-90, 93-94.) With respect to the high number of dead hamsters during the February 2006 inspection, Ms. Porter stated that, even though she had been told by Ms. Tippie that hamsters frequently eat their first litters, she believed that the mortality rate was still unusually high. (Tr. 88-89.) Ms. Porter also had observed workers sanitizing the water bottles and believes the situation with respect to that violation had improved considerably, but she was still finding problems (Tr. 107).

Dr. Elizabeth Goldentyer, a veterinarian who is the Eastern Regional Director for APHIS, testified as the sanction witness. She classified the case against D&H as "serious," pointing out that APHIS viewed D&H as a "chronic" non-complier, with two previous Consent Decisions with which D&H had not fully complied.[1] (Tr. 131-35.) She testified that many animals were impacted by D&H's continued noncompliance with the Animal Welfare Act and the Regulations (Tr. 132).[2] Accordingly, Dr. Goldentyer recommended assessment of a $10,000 civil penalty against D&H, issuance of a cease and desist order, and the suspension of D&H's Animal Welfare Act license for 3 years (Tr. 137). Dr. Goldentyer testified that her sanction recommendation was based on the size of D&H's business, the seriousness of D&H's violations, D&H's good faith (or lack of good faith), and D&H's history of compliance with the Animal Welfare Act and the Regulations (Tr. 135).

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[1]The record contains two Consent Decisions in which D&H agreed to pay a civil penalty and to comply with the Animal Welfare Act and the Regulations in the future. Administrative Law Judge Dorothea A. Baker issued a Consent Decision on July 19, 2001, which was signed on behalf of D&H by former owner, Chris A. Vorderburg (CX 97). Administrative Law Judge Victor W. Palmer issued a Consent Decision on August 23, 2005, which was signed by Ms. Tippie (CX 4).

[2]Ms. Porter had indicated that at the time of the November 14, 2006, inspection, D&H's inventory included 6,975 hamsters and 109 guinea pigs, as well as over 1,000 nonregulated gerbils (CX 51).

Ms. Tippie testified the facility was already old when she purchased it and the previous owner had not been willing to commit to repairs (Tr. 151-52). She described several unfortunate personal circumstances, including the need to have surgery, being involved in an automobile accident, and being "out of it" for the year after the car accident due to medications. Ms. Tippie insisted D&H was trying to be compliant and D&H's violations of the Regulations were not "willful." (Tr. 152-57.)

The record contains little dispute as to the existence of the facts to support the allegations regarding pest control. With respect to the floors, Ms. Tippie testified that repair of the floors was impossible without tearing down the facility. Ms. Tippie stated that by scrubbing the floors with bleach, the floors would be sanitized. (Tr. 178-79.) D&H uses between 150 and 350 gallons of bleach per month for cleaning purposes (RX 75). Ms. Tippie cited a letter from D&H's veterinarian, who was not available to testify, as support that bleaching would suffice and that painting the floors would not matter as long as the floors were vigorously scrubbed on a regular basis. (Tr. 175-79; RX 71.) However, Dr. Goldentyer testified on rebuttal that disinfection of a facility with peeling paint over concrete would be impossible (Tr. 252).

D&H also submitted a large number of receipts, dated both before and after the dates of the inspections at issue, indicating D&H had been involved in an ongoing effort to comply with the Regulations. In addition to the receipts for bleach, D&H submitted evidence of expenditures for paint, a water pump with chlorination system, water bottles, and other materials used for repairs. (RX 72-73, RX 75, RX 78.)

D&H also submitted a report of an on-site visit conducted by Dr. William White at APHIS' request. Dr. White is a recognized expert in husbandry and health of the type of animals D&H raises. (RX 77; Tr. 254-55.)

Discussion

Veterinary Care

Section 2.40(b)(3) of the Regulations requires dealers to assess the health and well-being of their animals, as follows:

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

. . . .

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

. . . .

(3) Daily observation of all animals to assess their health and well-being; *Provided, however*, That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further*, That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian[.]

9 C.F.R. § 2.40(b)(3). On October 12, 2005, Ms. Porter observed an adult guinea pig that was very thin, was blind in the left eye, was unable to move properly, and had a hair coat in poor condition (CX 5 at 3; Tr. 29-30). On November 14, 2006, Ms. Porter observed an adult guinea pig that refused to move and appeared to have paralyzed hind legs and a juvenile guinea pig that was lying on its back and exhibited labored breathing (CX 51 at 1, CX 52-CX 53; Tr. 57-58). On December 19, 2006, Ms. Porter observed a guinea pig that appeared to be disoriented, had an unsteady gait, and was reluctant to move (CX 72 at 1, CX 73; Tr. 67-68). I infer, based upon the descriptions of these four guinea pigs, that the condition of each of the guinea pigs did not develop immediately prior to the relevant inspection and that D&H did not observe the guinea pigs to assess their health and well-being on a daily basis. I find the Administrator established that D&H did not provide adequate veterinary care, in that D&H failed to observe these four guinea pigs daily, in violation of 9 C.F.R. § 2.40(b)(3).

On February 13, 2006,[3] Ms. Porter inspected D&H discovering approximately 200-250 dead hamsters (CX 17). Ms. Tippie argued that the death of these hamsters was caused by the adult hamsters who have

[3]The inspection report (CX 17) is signed and dated on February 14, 2006, but indicates that the inspection took place on February 13, 2006.

a propensity to devour their first litters. The February 13, 2006, inspection occurred on a Monday. The record establishes that D&H did not observe its guinea pigs and hamsters over the weekend. (Tr. 87-89, 215-16, 220.) I hold D&H's failure to conduct daily observations of its guinea pigs and hamsters to assess their health and well-being over the weekend violates 9 C.F.R. § 2.40(b)(3). Ms. Tippie's explanation of the cause of death of the hamsters is not relevant to D&H's failure to observe its animals daily.

Housing Facilities

Section 3.25(a) of the Regulations requires that housing facilities for guinea pigs and hamsters be structurally sound and maintained in good repair, as follows:

§ 3.25 Facilities, general.

(a) *Structural strength*. Indoor and outdoor housing facilities for guinea pigs or hamsters shall be structurally sound and shall be maintained in good repair, to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

9 C.F.R. § 3.25(a). On February 13, 2006, Ms. Porter observed two holes in the ceiling in the gerbil and dwarf hamster room, both of which leaked water during storms. In addition, Ms. Porter observed a hole in the bottle-washing room directly over the tub used to wash water bottles and another hole in the back of the gerbil and dwarf hamster room around the HVAC duct work. (CX 17 at 1, CX 27-CX 30; Tr. 38-39, 45-46.) The evidence clearly establishes that D&H violated 9 C.F.R. § 3.25(a) on February 13, 2006. D&H failed to rebut the evidence of its violations of 9 C.F.R. § 3.25(a).

Food and Bedding Storage

Section 3.25(c) of the Regulations requires storage of food and bedding in a manner that protects the food and bedding against spoilage

or deterioration and infestation or contamination, as follows:

> **§ 3.25 Facilities, general.**
>
> . . . .
>
> (c) *Storage*. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against spoilage or deterioration and infestation or contamination by vermin. Food supplies shall be stored in containers with tightly fitting lids or covers or in original containers as received from commercial sources of supply. Refrigeration shall be provided for supplies of perishable food.

9 C.F.R. § 3.25(c). On October 12, 2005, and June 21, 2006, Ms. Porter observed opened bags of food in the feed room (CX 5 at 3, CX 8-CX 9, CX 43 at 1, CX 44, CX 46; Tr. 30-31, 34, 54-55), and, during the February 13, 2006, inspection, Ms. Porter found pine shavings used for hamster, gerbil, and guinea pig bedding opened and littered with cat feces (CX 17 at 2; Tr. 39-40). The evidence clearly establishes that D&H violated 9 C.F.R. § 3.25(c) on October 12, 2005, June 21, 2006, and February 13, 2006. D&H failed to rebut the evidence of its violations of 9 C.F.R. § 3.25(c).

Substantially Impervious Surfaces

Section 3.26(d) of the Regulations requires interior building surfaces to be substantially impervious to moisture, as follows:

> **§ 3.26 Facilities, indoor.**
>
> . . . .
>
> (d) *Interior surfaces*. The interior building surfaces of indoor housing facilities shall be constructed and maintained so that they are substantially impervious to moisture and may be readily sanitized.

9 C.F.R. § 3.26(d). The Regulations do not define the key operative term "substantially impervious to moisture." The Regulations do not

require an "impervious surface" but rather a "substantially impervious" surface. The Administrator did not address whether the floors at D&H were "substantially impervious" to moisture as 9 C.F.R. § 3.26(d) requires. Instead, the testimony and the inspection reports lead to the conclusion that the surfaces are not totally impervious to moisture. (Tr. 31, 252; CX 5 at 4, CX 17 at 2, CX 41, CX 43 at 1, CX 51 at 1, CX 72 at 1, CX 90.)

The Administrator treats the absence of paint on the concrete floor as evidence that the floor violates 9 C.F.R. § 3.26(d). I found no evidence that, absent paint, a concrete floor is not substantially impervious to moisture. Furthermore, the Regulations do not require cement floors to be painted. In order to prove this violation against D&H, the Administrator must show this particular floor was not substantially impervious to moisture. The Administrator did not present any evidence concerning whether the floor at D&H was substantially impervious to moisture, all he showed is that some areas of the floor no longer had paint. Therefore, I hold the Administrator failed to meet his burden of proof to show that D&H violated 9 C.F.R. § 3.26(d).

Stacked Containers

Section 3.28(a)(1) of the Regulations requires primary enclosures for guinea pigs and hamsters be structurally sound and maintained in good repair, as follows:

> **§ 3.28 Primary enclosures.**
>
> All primary enclosures for guinea pigs and hamsters shall conform to the following requirements:
>
> (a) *General.* (1) Primary enclosures shall be structurally sound and maintained in good repair to protect the guinea pigs and hamsters from injury. Such enclosures, including their racks, shelving and other accessories, shall be constructed of smooth material substantially impervious to liquids and moisture.

9 C.F.R. § 3.28(a)(1). On November 14, 2006, and December 19, 2006, Ms. Porter cited D&H for stacking hamster containers in a manner that

could cause the hamsters to be injured (CX 51, CX 72). Ms. Porter testified that this stacking of hamster containers violated 9 C.F.R. § 3.28(a)(1) because of "the possibility of these buckets falling in on each other, they could crush live animals in them, and also they were restricting ventilation." (Tr. 59.) This testimony creates a prima facie case for the Administrator. Ms. Tippie testified that these buckets contained "hamsters to be retired out." (Tr. 217.) In other words, these hamsters were no longer going to breed and were scheduled to be euthanized. Ms. Tippie further testified that:

> The reason we leave them in their individual buckets until it's actually time to euthanize them is to keep them from getting stressed anymore than they will be when they're actually euthanized.
>
> When they're stacked on top of each other there is no chance of that bucket dropping down and hitting the animal inside. Those buckets are made, the shape of them, there is at least four inches head room, plus when the water bottle is still on there, there's almost seven inches of headroom between the bucket that's stacked inside and the next bucket down.
>
> There's a wire opening on the front for breeding them so they get air. They're not being stressed out by other animals, and we feel this is the best way to handle it, to keep them from getting stressed, to keep them from getting hurt until they're euthanized.

Tr. 217-18. Ms. Tippie's testimony shows that the stacked buckets would not injure the hamsters, even if the buckets fell in on each other. Ms. Tippie's testimony overcame the Administrator's prima facie case and the Administrator did not rebut her testimony. Therefore, the Administrator failed to meet his burden of proof with respect to the allegations that D&H violated 9 C.F.R. § 3.28(a)(1) on November 14, 2006, and December 19, 2006.

Food Contamination

Section 3.29(a) of the Regulations sets forth feeding requirements for guinea pigs and hamsters, as follows:

> **§ 3.29 Feeding.**
>
> (a) Guinea pigs and hamsters shall be fed each day except as otherwise might be required to provide adequate veterinary care. The food shall be free from contamination, wholesome, palatable and of sufficient quantity and nutritive value to meet the normal daily requirements for the condition and size of the guinea pig or hamster.

9 C.F.R. § 3.29(a). On February 13, 2006, November 14, 2006, and January 25, 2007, Ms. Porter observed numerous hamster enclosures that contained wet and moldy food pellets (CX 17 at 2, CX 33-CX 36, CX 51 at 2, CX 59-CX 61, CX 90). Ms. Tippie indicated hamsters like to moisten their food. However, Ms. Porter observed that many of the pellets she saw were moldy. (Tr. 46-47, 64.) If the food had just been wet, I would have given more consideration to Ms. Tippie's argument. However, because the food was moldy, I find D&H violated 9 C.F.R. § 3.29(a).

Sanitized Watering Receptacles

Section 3.30 of the Regulations requires that watering receptacles must be sanitized when dirty, follows:

> **§ 3.30 Watering.**
>
> Unless food supplements consumed by guinea pigs or hamsters supply them with their normal water requirements, potable water shall be provided daily except as might otherwise be required to provide veterinary care. Open containers used for dispensing water to guinea pigs or hamsters shall be so placed in or attached to the primary enclosure as to minimize contamination from excreta. All watering receptacles shall be sanitized when dirty: *Provided, however*, That such receptacles shall be sanitized

at least once every 2 weeks.

9 C.F.R. § 3.30. During the November 14, 2006, and December 19, 2006, inspections, Ms. Porter observed numerous water bottles located in the main hamster building had mold or algae growing on the inside of the bottles (CX 51 at 2, CX 62-CX 63, CX 72 at 2, CX 79-CX 80; Tr. 60, 64). D&H has taken substantial steps to eliminate mold or algae from the inside of water bottles, including the purchase of a water pump with chlorination system and establishing a regular program of cleaning water bottles. The fact that these violations were corrected does not nullify the existence of the violations. Therefore, I hold D&H violated 9 C.F.R. § 3.30 on November 14, 2006, and December 19, 2006.

Care of Premises

Section 3.31(b) of the Regulations requires the premises to be clean and in good repair, follows:

> **§ 3.31 Sanitation.**
>
> . . . .
>
> (b) *Housekeeping*. Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in [9 C.F.R. §§ 3.25-.41]. Premises shall remain free of accumulations of trash.

9 C.F.R. § 3.31(b). On February 13, 2006, Ms. Porter observed that the office, in which animal medications and supplements are kept, contained a large fish aquarium filled with soiled shavings and that a cat had been using the aquarium as a litter box. In addition, Ms. Porter observed that the cabinets, in which animal medications, supplements, unused syringes, and unused needles are kept, contained cobwebs and were littered with rodent droppings. (CX 17 at 2-3, CX 37-CX 38; Tr. 41-42.) The evidence clearly establishes that D&H violated 9 C.F.R. § 3.31(b) on February 13, 2006. D&H failed to rebut the evidence of its violation of 9 C.F.R. § 3.31(b).

Pest Control

Section 3.31(c) of the Regulations requires dealers to establish and maintain an effective pest control program, as follows:

> **§ 3.31 Sanitation.**
>
> . . . .
>
> (c) *Pest control.* An effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

9 C.F.R. § 3.31(c). The evidence demonstrates the presence of rat and mice droppings and a general pest infestation (CX 5, CX 90); spiders, fruit flies, and cobwebs (CX 17, CX 51); numerous feral cats (CX 41); and excessive numbers of houseflies and a large concentration of roaches (CX 43). D&H argues that "by act of nature we are unable to completely eradicate every and all pest [sic] at all given times." (Respondent's Petition for Appeal at 10.) Perfection is not the standard and all agreed that the surrounding environment made pest control difficult. However, photographic evidence entered into the record indicates a level of infestation that demonstrated that the pest control program was not effective at the time of the inspections. (CX 11-CX 16, CX 34, CX 38-CX 40, CX 45-CX 46, CX 48-CX 50, CX 60, CX 64-CX 71, CX 82-CX 89, CX 92-CX 96.) D&H offered evidence, with which the Administrator agreed, that D&H has attempted to improve its pest control program. These efforts include hiring a professional pest control company. These efforts to improve pest control are commendable and should continue. However, post-violation correction efforts do not negate the fact that a violation occurred. Therefore, I hold that D&H violated 9 C.F.R. § 3.31(c) on October 12, 2005, February 13, 2006, April 5, 2006, June 21, 2006, November 14, 2006, and January 25, 2007.

Willfulness

D&H argues that its violations of the Animal Welfare Act and the Regulations were not willful (Tr. 231-32). However, that argument

ignores my long-held position that a willful act is an act in which the violator "(1) intentionally does an act which is prohibited,–irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd sub nom. Arab Stock Yard v. United States*, 582 F.2d 39 (5th Cir. 1978). Therefore, I hold that D&H's violations of the Animal Welfare Act and the Regulations were willful.

Sanctions

The Administrator seeks an order: (1) requiring D&H to cease and desist from violating the Animal Welfare Act and the Regulations; (2) suspending D&H's Animal Welfare Act license for a period of 3 years; and (3) assessing D&H a $10,000 civil penalty (Tr. 135-37; Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 15).

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).

I find D&H committed 20 violations of the Regulations. Each violation also violates the July 19, 2001, Consent Decision and the August 23, 2005, Consent Decision in each of which D&H agreed to the entry of an order requiring D&H to comply with the Animal Welfare Act and the Regulations (CX 4, CX 97). Under the circumstances, I agree with the Administrator that the issuance of a cease and desist

order, the assessment of a $10,000 civil penalty against D&H, and a 3-year suspension of D&H's Animal Welfare Act license are appropriate.

With respect to the monetary civil penalty, the Animal Welfare Act requires the Secretary of Agriculture to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.[4] The regulated aspects of D&H's business generated gross income of over $386,000 in 2003, over $420,000 in 2004, and over $443,000 in 2005, as stated in D&H's applications for renewal of its Animal Welfare Act dealer's license (CX 1-CX 3). In 2005, D&H sold over 211,000 animals, although that figure appears to include all animals it sold rather than just regulated animals.[5] Based on the number of animals at D&H and D&H's gross income, I find D&H operates a large business. Moreover, I find a large number of D&H's 20 violations of the Regulations posed a threat to the health and well-being of D&H's animals and are, therefore, grave violations of the Regulations. An ongoing pattern of violations, as displayed by D&H, establishes a history of previous violations. D&H's efforts to comply with the Regulations indicate some level of good faith, and I have taken those efforts into account with regard to the amount of the civil penalty. D&H could be assessed a maximum civil penalty of $75,000 for its 20 violations of the Regulations.[6]

After examining all the relevant circumstances in the instant proceeding, in light of the United States Department of Agriculture's

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[4]See 7 U.S.C. § 2149(b).

[5]D&H raises and sells unregulated animals including gerbils, rats, mice, lizards, and snakes (RX 77 at 1).

[6]The Animal Welfare Act provides that the Secretary of Agriculture may assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations 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)).

sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), I conclude a cease and desist order, assessment of a $10,000 civil penalty, and a 3-year suspension of D&H's Animal Welfare Act license are appropriate and necessary to ensure D&H's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Findings of Fact and Conclusions of Law

1. D&H is a Florida corporation located in Plant City, Florida.

2. During the time period material to the instant proceeding, D&H has been licensed as a dealer under the Animal Welfare Act. D&H holds Animal Welfare Act license number 58-B-0406.

3. D&H raises and sells guinea pigs and hamsters, which are regulated animals under the Animal Welfare Act, as well as several types of non-regulated animals.

4. D&H has been operating for more than 35 years.

5. Susin A. Tippie had been manager of D&H, under its previous owner, from 1998 until Ms. Tippie and her husband, Gaynor L. Tippie, purchased D&H.

6. Since 2003, D&H has been owned by Susin Tippie and Gaynor Tippie.

7. On seven occasions during the period October 12, 2005, through January 25, 2007, APHIS inspector Carol Porter inspected D&H. At the conclusion of each of these seven inspections, Ms. Porter issued an inspection report stating D&H had violated the Regulations.

8. On and about October 12, 2005, D&H failed to provide adequate veterinary care to an adult guinea pig that was very thin, was blind in the left eye, was unable to move properly, and had a hair coat in poor condition, in willful violation of 9 C.F.R. § 2.40(b)(3).

9. On and about February 13, 2006, D&H failed to observe all of its hamsters and guinea pigs daily to assess their health and well-being, in willful violation of 9 C.F.R. § 2.40(b)(3).

10. On and about November 14, 2006, D&H failed to provide

adequate veterinary care to an adult guinea pig that refused to move and appeared to have paralyzed hind legs, in willful violation of 9 C.F.R. § 2.40(b)(3).

11.On and about November 14, 2006, D&H failed to provide adequate veterinary care to a juvenile guinea pig that was lying on its back and exhibited labored breathing, in willful violation of 9 C.F.R. § 2.40(b)(3).

12.On and about December 19, 2006, D&H failed to provide adequate veterinary care to a guinea pig that appeared to be disoriented, had an unsteady gait, and was reluctant to move, in willful violation of 9 C.F.R. § 2.40(b)(3).

13.On February 13, 2006, D&H's facility had two holes in the ceiling in the gerbil and dwarf hamster room, both of which leaked water during storms, a hole in the bottle-washing room directly over the tub used to wash water bottles, and a hole in the back of the gerbil and dwarf hamster room around the HVAC duct work, in willful violation of 9 C.F.R. § 3.25(a).

14.On October 12, 2005, D&H maintained opened bags of food in the feed room, in willful violation of 9 C.F.R. § 3.25(c).

15.On June 21, 2006, D&H maintained opened bags of food in the feed room, in willful violation of 9 C.F.R. § 3.25(c).

16.On February 13, 2006, D&H maintained pine shavings used for hamster, gerbil, and guinea pig bedding, opened and littered with cat feces, in willful violation of 9 C.F.R. § 3.25(c).

17.On February 13, 2006, D&H maintained numerous hamster enclosures that contained wet and moldy food pellets, in willful violation of 9 C.F.R. § 3.29(a).

18.On November 14, 2006, D&H maintained numerous hamster enclosures that contained wet and moldy food pellets, in willful violation of 9 C.F.R. § 3.29(a). 19.On January 25, 2007, D&H maintained numerous hamster enclosures that contained wet and moldy food pellets, in willful violation of 9 C.F.R. § 3.29(a).

20.On November 14, 2006, D&H failed to sanitize numerous water bottles located in the main hamster building that had mold or algae growing on the inside of the bottles, in willful violation of 9 C.F.R. § 3.30.

21.On December 19, 2006, D&H failed to sanitize numerous water

bottles located in the main hamster building that had mold or algae growing on the inside of the bottles, in willful violation of 9 C.F.R. § 3.30.

22. On February 13, 2006, D&H's office, in which animal medications and supplements are kept, contained a large fish aquarium that a cat had been using as a litter box, and D&H's cabinets, in which animal medications, supplements, unused syringes, and unused needles are kept, contained cobwebs and rodent droppings, in willful violation of 9 C.F.R. § 3.31(b).

23. On October 12, 2005, rat and mice droppings, spiders, and cobwebs were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

24. On February 13, 2006, rodent droppings, spiders, fruit flies, cobwebs, and numerous feral cats were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

25. On April 5, 2006, numerous feral cats were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

26. On June 21, 2006, excessive numbers of house flies, rodents, and roaches were present throughout the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

27. On November 14, 2006, an excessive amount of cobwebs, fruit flies, and rodent droppings were present at the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

28. On January 25, 2007, an excessive amount of fruit flies and rodent droppings were present at the D&H facility, in willful violation of 9 C.F.R. § 3.31(c).

For the foregoing reasons, the following Order is issued.

ORDER

1. D&H shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

a. failing to observe all animals daily to assess their health and well-being;

b. failing to provide housing facilities for guinea pigs and hamsters that are structurally sound and maintained in good repair;

c. failing to store food and bedding in facilities that adequately protect the food and bedding against spoilage or deterioration and infestation or contamination by vermin;

d. failing to provide guinea pigs and hamsters food that is free from contamination;

e. failing to sanitize watering receptacles when dirty;

f. failing to keep premises clean to protect guinea pigs and hamsters from injury and to facilitate the husbandry practices prescribed in 9 C.F.R. §§ 3.25-.41; and

g. failing to establish and maintain an effective program for the control of insects, ectoparasites, and avian and mammalian pests.

Paragraph 1 of this Order shall become effective 1 day after service of this Order on D&H.

2. Animal Welfare Act license number 58-B-0406 issued to D&H is suspended for 3 years.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on D&H.

3. D&H is assessed a $10,000 civil penalty. The civil penalty shall be paid by certified check or money order and made payable to the Treasurer of the United States and sent to:

Frank Martin, Jr.
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, SW
Mail Stop 1417 South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Mr. Martin within 60 days after service of this Order on D&H. D&H shall state on the certified check or money order that payment is in reference to AWA Docket No. 07-0083.

RIGHT TO JUDICIAL REVIEW

D&H 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. D&H must seek judicial review within 60 days after entry of the Order in this Decision and Order.[7] The date of entry of the Order in this Decision and Order is October 19, 2009.

In re: CRAIG A. PERRY, AN INDIVIDUAL; PERRY'S WILDERNESS RANCH & ZOO, INC., AN IOWA CORPORATION; LEANN SMITH, AN INDIVIDUAL; AND JEFF BURTON AND SHIRLEY STANLEY, INDIVIDUALS DOING BUSINESS AS BACKYARD SAFARI.
AWA Docket No. 05-0026.
Decision and Order as to Only Jeff Burton and Shirley Stanley, individuals doing business as Backyard Safari.
Filed November 16, 2009.

AWA.

Colleen A. Carroll, for APHIS.
Respondents Jeff Burton & Shirley Stanley, Pro se.
Decision and Order 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, 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 1.142(c) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.142(c).

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

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[7]28 U.S.C. § 2344.

for exhibition are treated humanely and carefully.[1] In its 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 answers denying the material allegations of the complaint.

On November 16, 2008, I presided over an oral hearing in this matter in Chicago, Illinois. Complainant was represented by Colleen Carroll, Office of the General Counsel, U.S. Department of Agriculture. Respondents Jeff Burton and Shirley Stanley dba backyard Safari were *pro se*. Neither of the aforementioned respondents appeared at the oral hearing. Both were duly notified of the hearing. Neither had good cause not to appear at the hearing. Said respondents are deemed to have waived their right to an oral hearing and are deemed to have admitted any facts that may have been presented at the hearing. Such failure by respondents Jeff Burton and Shirley Stanley shall also constitute an admission of all of the material allegations of fact contained in the complaint.

The complainant has orally moved for issuance of a decision pursuant to section 1.141(e) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.141(e).

I granted complainant's motion, and issue this initial decision and order on November 16, 2009.

Findings of Fact

1. Respondent Jeff Burton is an individual doing business as Backyard Safari, and whose business mailing address is 23397 Gutman Road, Wapakoneta, Ohio 45895. On or about February 18, 2003, said respondent was a dealer, as that term is defined in the Act and the Regulations, and held AWA license No. 31-B-0101.

2. Respondent Shirley Stanley is an individual doing business as

[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

Backyard Safari, and whose business mailing address is 23397 Gutman Road, Wapakoneta, Ohio 45895. On or about February 18, 2003, said respondent was a dealer, as that term is defined in the Act and the Regulations, and held AWA license No. 31-B-0101.

3. From approximately February 11, 2003, through February 19, 2003, respondent Jeff Burton failed to have a veterinarian provide adequate veterinary care to three unweaned infant tigers, born February 11, 2003, and instead, on or about February 19, 2003, "donated" them to respondent Perry's Wilderness Ranch, and transported them by truck from Ohio to Iowa.

4. On or about February 19, 2003, respondent Jeff Burton failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, "donated" three 8-day-old infant tigers to respondent Perry's Wilderness Ranch, and caused the transportation of the three infants by truck from Ohio to Iowa, for use in exhibition.

Conclusions

1. From approximately February 11, 2003, through February 19, 2003, respondent Jeff Burton failed to have a veterinarian provide adequate veterinary care to three unweaned infant tigers, born February 11, 2003, and instead, on or about February 19, 2003, "donated" them to respondent Perry's Wilderness Ranch, and transported them by truck from Ohio to Iowa, in willful violation of section 2.40(a)(1) of the Regulations. 9 C.F.R. § 2.40(a)(1).

2. On or about February 19, 2003, respondent Jeff Burton failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, and specifically, "donated" three 8-day-old infant tigers to respondent Perry's Wilderness Ranch, and transported the three infants by truck from Ohio to Iowa, for use in exhibition, in willful violation of the Regulations. 9 C.F.R. § 2.131(b)(1)[formerly 2.131(a)(1)].

3. Respondents Jeff Burton and Shirley Stanley, dba Backyard

Safari, have admitted the facts set forth herein.

Order

1. Respondents Jeff Burton and Shirley Stanley, doing business as Backyard Safari, 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.

2. AWA license No. 31-B-0101 is hereby revoked.

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

In re: SAM MAZZOLA, AN INDIVIDUAL D/B/A WORLD ANIMAL STUDIOS, INC., A FORMER OHIO DOMESTIC CORPORATION AND WILDLIFE ADVENTURES OF OHIO, INC., A FORMER FLORIDA DOMESTIC STOCK CORPORATION CURRENTLY LICENSED AS A FOREIGN CORPORATION IN OHIO.
AWA Docket No. 06-0010.
and
In re: SAM MAZZOLA.
AWA Docket No. D-07-0064
Decision and Order.
Filed November 24, 2009.

AWA – Animal welfare – Bench decision – Cease and desist order – Civil penalty – Dealer – License disqualification – Exhibitor – License revocation – Operating without a license – Veterinary care – Sanction policy – Handling of animals.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the

Administrator], instituted this proceeding by filing a Complaint and Order to Show Cause (AWA Docket No. 06-0010) on February 27, 2006. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). On December 8, 2006, the Administrator filed an Amended Complaint, and on January 8, 2008, the Administrator filed a Second Amended Complaint, which is the operative pleading in the instant proceeding.[1] The Administrator alleges, during the period December 13, 2003, through December 18, 2007, Mr. Mazzola willfully violated the Animal Welfare Act and the Regulations (Second Amended Compl. ¶¶ 17-51). On February 12, 2008, Mr. Mazzola filed an Answer in which he denied the allegations in the Second Amended Complaint.

Animal Welfare Act license number 31-C-0065 had been issued to World Animal Studios, Inc., in its capacity as a corporation (CX 1 at 1-8).[2] On October 10, 2006, Mr. Mazzola submitted a license renewal application for Animal Welfare Act license number 31-C-0065 as an individual in the name of World Animal Studios (CX 1 at 9). On October 27, 2006, the Animal and Plant Health Inspection Service [hereinafter APHIS] denied Mr. Mazzola's renewal application because such a renewal would constitute a transfer of Animal Welfare Act license number 31-C-0065 from World Animal Studios, Inc., to World Animal Studios, in violation of 9 C.F.R. § 2.5(d) (CX 1 at 11). On November 1, 2006, Mr. Mazzola applied for a new Animal Welfare Act license as an individual (CX 55 at 5; RX 1A). On December 5, 2006,

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[1]The Administrator filed two corrections to the Second Amended Complaint: (1) Notice of Correction to Second Amended Complaint filed February 29, 2008; and (2) Errata to Second Amended Complaint filed July 10, 2008.

[2]The Administrator's exhibits are designated "CX"; Mr. Mazzola's exhibits are designated "RX"; and transcript references are designated "Tr."

pursuant to 9 C.F.R. § 2.11(a), APHIS denied Mr. Mazzola's application for a new Animal Welfare Act license on the ground that he was unfit to be licensed (CX 55 at 1-2). On February 7, 2007, Mr. Mazzola filed a Petition (AWA Docket No. D-07-0064) requesting a hearing to show he is fit to be licensed. On March 15, 2007, Administrative Law Judge Peter M. Davenport ordered consolidation of the disciplinary proceeding instituted by the Administrator (AWA Docket No. 06-0010) and the Animal Welfare Act licensing proceeding instituted by Mr. Mazzola (AWA Docket No. D-07-0064).

Administrative Law Judge Peter M. Davenport became unavailable due to his deployment to Iraq, and, on July 10, 2007, Chief Administrative Law Judge Marc R. Hillson reassigned the case to Administrative Law Judge Jill S. Clifton [hereinafter the ALJ]. The ALJ conducted 19 days of hearings in Cleveland, Ohio, between March 3, 2008, and July 31, 2008. Bernadette Juarez and Babak A. Rastgoufard, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Mazzola appeared pro se.

On June 12, 2008, the parties filed a joint request for an oral decision from the bench at the close of the hearing. On June 26, 2008, the ALJ granted the parties' request. On July 31, 2008, the ALJ received the Administrator's and Mr. Mazzola's post-hearing briefs and issued an oral decision from the bench (Notice of Publication of Oral Decision and Order Contained in Enclosed Corrected Transcript Excerpt, filed August 22, 2008 [hereinafter the ALJ's Decision]). The ALJ: (1) concluded Mr. Mazzola violated the Animal Welfare Act and the Regulations by operating as an exhibitor and a dealer without an Animal Welfare Act license, by interfering with, threatening, abusing, and harassing APHIS officials, by refusing to allow APHIS officials to conduct an inspection, by failing to have a written program of veterinary care available for inspection, by failing to assure the safety of animals and the public, and by housing animals in enclosures that lacked structural integrity and height to contain the animals; (2) ordered Mr. Mazzola to cease and desist from violating the Animal Welfare Act and the Regulations; (3) revoked Animal Welfare Act license number 31-C-0065; (4) permanently disqualified Mr. Mazzola from obtaining an Animal Welfare Act license; (5) assessed Mr. Mazzola a

$13,950 civil penalty; and (6) affirmed APHIS' denial of Mr. Mazzola's November 1, 2006, application for an Animal Welfare Act license.

On December 29, 2008, Mr. Mazzola filed a timely "Appeal to the Judicial Officer" [hereinafter Appeal Petition]. On March 13, 2009, the Administrator filed a response to Mr. Mazzola's Appeal Petition and a cross-appeal. On May 11, 2009, Mr. Mazzola filed a response to the Administrator's cross-appeal. On May 13, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a thorough examination of the record, I affirm the ALJ's Decision, except I increase the civil penalty assessed against Mr. Mazzola by the ALJ from $13,950 to $21,000. As the ALJ's Decision was orally announced from the bench, I restate the ALJ's findings of fact and conclusions of law. Moreover, I provide additional citations to the record that support the ALJ's findings of fact, as restated. Finally, in order to provide a reviewing court with a guide, I cite to the pages of the ALJ's Decision from which the restated findings of fact are derived.

DECISION

Findings of Fact

1. Sam Mazzola is an individual doing business as World Animal Studios, Inc., Wildlife Adventures of Ohio, Inc., and Animal Zone, and whose mailing address is 9978 N. Marks Road, Columbia Station, Ohio 44028 (CX 1 at 9, 11).

2. At all times material to the instant proceeding, Mr. Mazzola operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations (CX 1 at 1-9).

3. At all times material to the instant proceeding, Mr. Mazzola held himself out as the president of World Animal Studios, Inc., a former Ohio domestic corporation (CX 1 at 1, 3).

4. On February 20, 1999, the Ohio Secretary of State notified World Animal Studios, Inc., through its registered agent, Mr. Mazzola, that the

articles of incorporation (or license to do business in Ohio) for World Animal Studios, Inc., have been canceled, effective February 20, 1999, and that continuation of business as a corporation after February 20, 1999, would be a violation of Ohio law (CX 3 at 10).

5. Despite receiving the notice described in Finding of Fact number 4, Mr. Mazzola, on behalf of World Animal Studios, Inc., continued to renew Animal Welfare Act exhibitor's license number 31-C-0065 issued to World Animal Studios, Inc., during the period 1999 through 2005 (CX 1 at 1-8).

6. Animal Welfare Act license number 31-C-0065 is, and, since February 21, 1999, has been, invalid because the license is issued to a corporation, World Animal Studios, Inc., that ceased to exist.

7. On October 12, 2006, the Administrator received from Mr. Mazzola 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).

8. By letter dated October 27, 2006, APHIS notified Mr. Mazzola that 9 C.F.R. § 2.5(d) prohibits the transfer of Animal Welfare Act licenses and returned the license renewal application to Mr. Mazzola (CX 1 at 11).

9. On October 27, 2006, and November 1, 2006, Mr. Mazzola submitted additional information to support the renewal of Animal Welfare Act license number 31-C-0065. Specifically, with regard to box 12 on the renewal form pertaining to "social security or tax identification number," Mr. Mazzola stated the "federal tax id number is my personal federal tax id number." Mr. Mazzola also stated he had dissolved World Animal Studios, Inc. (CX 1 at 13-14.)

10. 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).

11. APHIS personnel conducted inspections or attempted to conduct inspections of Mr. Mazzola's facilities, records, and animals for the purpose of determining Mr. Mazzola's compliance with the Animal Welfare Act and the Regulations on numerous occasions during the

period material to the instant proceeding, December 13, 2003, through December 18, 2007 (CX 8, CX 12-CX 15, CX 17, CX 20, CX 22-CX 23, CX 115, CX 122, CX 133, CX 138).

12. Mr. Mazzola has a medium-sized business under the Animal Welfare Act (Tr. 5592-93, 8021-22).

13. The gravity of Mr. Mazzola's violations is great. Specifically, Mr. Mazzola repeatedly handled and housed animals in a manner that risked the safety of the animals and members of the public and failed to comply with the Regulations after having been repeatedly advised of deficiencies. Mr. Mazzola interfered with, threatened, verbally abused, and harassed APHIS officials in the course of carrying out their duties, despite receiving notice that such behavior was unacceptable from the United States Department of Agriculture, Office of the Inspector General. Mr. Mazzola operated as an exhibitor and as a dealer without an Animal Welfare Act license.

14. Although Mr. Mazzola has no history of previous litigated violations, on March 14, 1994, APHIS issued to Mr. Mazzola a warning for Animal Welfare Act violations documented in connection with investigation OH 94-003 AC (Tr. 8042, 8062-64). Moreover, Mr. Mazzola's violations over the period August 19, 2004, through December 18, 2007, reveal a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Such an ongoing pattern of violations establishes a "history of previous violations" for the purposes of 7 U.S.C. § 2149(b) and lack of good faith.

15. During the period January 8, 2007, through January 11, 2007, Mr. Mazzola operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and transported animals for exhibition at the Ohio Fair Managers Convention, Columbus, Ohio, without an Animal Welfare Act license (Tr. 5545, 5707, 7995-8006; CX 107 at 5, CX 108 at 3, CX 171; ALJ's Decision at 51-53; 7 U.S.C. §§ 2132(h), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

16. On May 18, 2007, and May 19, 2007, Mr. Mazzola operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and transported animals for exhibition at Vito's Pizza,

Toledo, Ohio, without an Animal Welfare Act license (Tr. 3172-83, 3298-3303, 3309-19; CX 115-CX 116, CX 118, CX 164 at 1; ALJ's Decision at 61-62; 7 U.S.C. §§ 2132(h), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

17. On July 26, 2007, Mr. Mazzola operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and transported animals for exhibition at the Fayette County Fair, Washington Court House, Ohio, without an Animal Welfare Act license (Tr. 3319-23; CX 122-CX 123; ALJ's Decision at 62; 7 U.S.C. §§ 2132(h), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

18. During the period July 31, 2007, through August 5, 2007, Mr. Mazzola operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations and transported animals for exhibition at the Hamilton County Fair, Cincinnati, Ohio, without an Animal Welfare Act license (Tr. 3324-32; CX 124-CX 132; ALJ's Decision at 62; 7 U.S.C. §§ 2132(h), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

19. On September 27, 2007, Mr. Mazzola operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations and offered to sell two skunks (a black and white skunk and an albino skunk) at Animal Zone pet store, Midway Mall, Elyria, Ohio, without an Animal Welfare Act license (Tr. 3334-38; CX 133-CX 134; ALJ's Decision at 62-63; 7 U.S.C. §§ 2132(f), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

20. On October 23, 2007, Mr. Mazzola operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations and sold a black and white skunk at Animal Zone pet store, Midway Mall, Elyria, Ohio, without an Animal Welfare Act license (Tr. 1685-95; CX 135-CX 136; ALJ's Decision at 62-63; 7 U.S.C. §§ 2132(f), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

21. During the period December 16, 2007, through December 18, 2007, Mr. Mazzola intended to operate and/or operated as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations at Animal Zone pet store, Midway Mall, Elyria, Ohio, without an Animal Welfare Act license (Tr. 3339-47; CX 137-CX 139; ALJ's Decision at 64-72; 7 U.S.C. §§ 2132(h), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

22. On December 18, 2007, Mr. Mazzola operated as a "dealer," as

that term is defined in the Animal Welfare Act and the Regulations and offered to sell an albino skunk at Animal Zone pet store, Midway Mall, Elyria, Ohio, without an Animal Welfare Act license (Tr. 3346; CX 138-CX 139 at 1-3; ALJ's Decision at 72-73; 7 U.S.C. §§ 2132(f), 2134; 9 C.F.R. §§ 1.1, 2.1(a)(1)).

23. On December 13, 2003, Mr. Mazzola threatened APHIS officials while they were carrying out their duties under the Animal Welfare Act. For example, during the December 13, 2003, inspection, Mr. Mazzola stated, he should beat [Dr. Kirsten's][3] brains out with a baseball bat. (CX 10 at 1-6; ALJ's Decision at 45-47; 9 C.F.R. § 2.4.)

24. On January 14, 2004, in response to Mr. Mazzola's behavior described in Finding of Fact number 23, the United States Department of Agriculture, Office of the Inspector General, advised Mr. Mazzola that such behavior was unacceptable (CX 10 at 7-9; ALJ's Decision at 45-47; 9 C.F.R. § 2.4).

25. During an attempted APHIS inspection, on August 3, 2006, Mr. Mazzola called an APHIS animal care inspector "incompetent" and an "imbecile" that was too "dumb" to conduct an inspection and stated he was suing the United States Department of Agriculture and "would have" the jobs of both the animal care inspector and his supervisor (Tr. 3239-44, 3247-50; CX 22 at 1, CX 54 at 14-17; ALJ's Decision at 45; 9 C.F.R. § 2.4).

26. On August 3, 2006, Mr. Mazzola failed and refused to make his facilities, animals, and records available to APHIS officials for inspection (Tr. 3238-41, 5374-75; CX 22 at 1, CX 54 at 14-17; ALJ's Decision at 38-39; 9 C.F.R. § 2.126(a)).

27. On August 8, 2006, Mr. Mazzola filed a complaint with the United States Department of Agriculture, Office of the Inspector General, charging that Randall Coleman, an APHIS animal care inspector, solicited a bribe during an inspection when, in fact, the inspector had not solicited a bribe from Mr. Mazzola. The Office of the Inspector General determined Mr. Mazzola's complaint was baseless. (CX 54 at 1-13; ALJ's Decision at 39-45; 9 C.F.R. § 2.4.)

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[3]Dr. Kirsten is an APHIS supervisory animal care specialist (CX 10 at 3).

28. On February 11, 2004, APHIS notified Mr. Mazzola, in writing, of his failure to maintain and make available for inspection a written program of veterinary care and provided Mr. Mazzola with an opportunity to demonstrate or achieve compliance (Tr. 3119-27; CX 12; ALJ's Decision at 35, 37; 9 C.F.R. § 2.40(a)(1)).

29. On March 18, 2006, Mr. Mazzola had no written program of veterinary care available for inspection (Tr. 3207-09; CX 20 at 1; ALJ's Decision at 37-38; 9 C.F.R. § 2.40(a)(1)).

30. On August 8, 2006, Mr. Mazzola had no written program of veterinary care available for inspection (CX 23 at 1; ALJ's Decision at 35, 37-38; 9 C.F.R. § 2.40(a)(1)).

31. On December 13, 2003, APHIS notified Mr. Mazzola, in writing, that, during public exhibition, animals must be handled so there is minimal risk of harm to the animals and the public with sufficient distance and/or barriers between the animals and the public so as to assure the safety of the animals and the public and provided Mr. Mazzola with an opportunity to demonstrate or achieve compliance (CX 8-CX 9, CX 162; ALJ's Decision at 34; 9 C.F.R. § 2.131(b)(1) (2004)).[4]

32. On August 19, 2004, Mr. Mazzola, during public exhibition at the Holmes County Fairgrounds in Millersburg, Ohio, allowed customers to enter the primary enclosure containing an adult black bear without sufficient distance or barriers between the animal and the public (Tr. 3134-40; CX 14, CX 53; ALJ's Decision at 32-34; 9 C.F.R. § 2.131(c)(1)).

33. On March 18, 2005, Mr. Mazzola, during public exhibition at the IX Center in Cleveland, Ohio, allowed customers to enter the primary enclosures containing an adult black bear and two adult tigers without sufficient distance or barriers between the animals and the public (Tr. 3140-42, 3184-88; CX 15 at 1, CX 16; ALJ's Decision at 31-32; 9 C.F.R. § 2.131(c)(1)).

34. On August 16, 2005, Mr. Mazzola, during public exhibition at the Holmes County Fairgrounds in Millersburg, Ohio, allowed customers to enter the primary enclosures containing an adult black bear and an adult

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[4] 9 C.F.R. § 2.131(b)(1) (2004) was redesignated 9 C.F.R. § 2.131(c)(1) effective August 13, 2004. See 69 Fed. Reg. 42,089, 42,102 (July 14, 2004).

tiger without sufficient distance or barriers between the animals and the public (Tr. 3188-99; CX 17-CX 18; ALJ's Decision at 30-31; 9 C.F.R. § 2.131(c)(1)).

35. On March 18, 2006, Mr. Mazzola, during public exhibition at the IX Center in Cleveland, Ohio, allowed the public to enter the primary enclosures containing an adult black bear and an adult tiger without sufficient distance or barriers between the animals and the public (Tr. 3199-3202, 3206-07, 3210-15, 3218-26; CX 20 at 2-3, CX 21; ALJ's Decision at 24-30; 9 C.F.R. § 2.131(c)(1)).

36. On May 12, 2006, Mr. Mazzola, during public exhibition at the Posh Nite Club in Akron, Ohio, allowed customers to enter the primary enclosure containing an adult black bear with no distance or barriers between the animal and the public. Specifically, Mr. Mazzola allowed no fewer than seven customers to wrestle the bear and attempt to pin the bear for a prize of $1,000. (Tr. 425-35, 440, 593-94; CX 31-CX 33, CX 44-CX 45; ALJ's Decision at 20-22; 9 C.F.R. § 2.131(c)(1).)

37. On May 19, 2006, Mr. Mazzola, during public exhibition at the Posh Nite Club in Akron, Ohio, allowed customers to enter the primary enclosure containing an adult black bear with no distance or barriers between the animal and the public. Specifically, Mr. Mazzola allowed no fewer than nine customers to wrestle the bear and attempt to pin the bear for a prize of $1,000. (Tr. 103-20; CX 34-CX 36, CX 46, CX 102; ALJ's Decision 20-22; 9 C.F.R. § 2.131(c)(1).)

38. On May 19, 2006, Mr. Mazzola allowed members of the public to have their photographs taken with an adult black bear with no distance or barriers between the animal and the public (CX 36 at 45-48; ALJ's Decision at 22-24; 9 C.F.R. § 2.131(c)(1)).

39. On May 26, 2006, Mr. Mazzola, during public exhibition at the Posh Nite Club in Akron, Ohio, allowed customers to enter the primary enclosure containing an adult black bear with no distance or barriers between the animal and the public. Specifically, Mr. Mazzola allowed no fewer than eight customers to wrestle the bear and attempt to pin the bear for a prize of $1,000. (CX 37; ALJ's Decision at 20-22; 9 C.F.R. § 2.131(c)(1).)

40. On August 19, 2004, APHIS notified Mr. Mazzola, in writing, of

structural deficiencies in the primary enclosures in which Mr. Mazzola housed animals and provided Mr. Mazzola with an opportunity to demonstrate or achieve compliance (Tr. 3147; CX 14 at 2; ALJ's Decision at 15; 9 C.F.R. § 3.125(a)).

41. On March 18, 2005, Mr. Mazzola housed two adult tigers in open-top enclosures at IX Center in Cleveland, Ohio, that lacked adequate structural integrity and height to contain the animals (Tr. 3146-47, 3185; CX 15 at 2, CX 16 at 4; ALJ's Decision at 16-20; 9 C.F.R. §§ 2.100(a), 3.125(a)).

42. On August 16, 2005, Mr. Mazzola housed an adult black bear and two adult tigers in open-top enclosures at the Holmes County Fairgrounds in Millersburg, Ohio, that lacked adequate structural integrity and height to contain the animals (Tr. 3188-90; CX 17 at 2, CX 18 at 6-7; ALJ's Decision at 16-20; 9 C.F.R. §§ 2.100(a), 3.125(a)).

43. On March 18, 2006, Mr. Mazzola housed an adult black bear and an adult tiger in open-top enclosures at the IX Center in Cleveland, Ohio, that lacked adequate structural integrity and height to contain the animals (Tr. 3199-3201; CX 20 at 4; ALJ's Decision at 16-20; 9 C.F.R. §§ 2.100(a), 3.125(a)).

Conclusions of Law

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

2. During the period January 8, 2007, through January 11, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and by transporting animals for exhibition at the Ohio Fair Managers Convention, Columbus, Ohio, without a valid Animal Welfare Act license.

3. On May 18, 2007, and May 19, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and by transporting animals for exhibition at Vito's Pizza, Toledo, Ohio, without a valid Animal Welfare Act license.

4. On July 26, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and by transporting animals for exhibition at the Fayette County Fair,

Washington Court House, Ohio, without a valid Animal Welfare Act license.

5. During the period July 31, 2007, through August 5, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, and by transporting animals for exhibition at the Hamilton County Fair, Cincinnati, Ohio, without a valid Animal Welfare Act license.

6. On September 27, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and offering to sell two skunks (a black and white skunk and an albino skunk) at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid Animal Welfare Act license.

7. On October 23, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and selling a black and white skunk at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid Animal Welfare Act license.

8. During the period December 16, 2007, through December 18, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by intending to operate and/or operating as an "exhibitor," as that term is defined in the Animal Welfare Act and the Regulations, at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid Animal Welfare Act license.

9. On December 18, 2007, Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) by operating as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and offering to sell an albino skunk at Animal Zone pet store, Midway Mall, Elyria, Ohio, without a valid Animal Welfare Act license.

10. On August 3, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.4 when he called an APHIS animal care inspector "incompetent" and an "imbecile" that was too "dumb" to conduct an inspection and stated he was suing the United States Department of Agriculture and "would have" the jobs of both the APHIS animal care inspector and the

inspector's supervisor.

11.On August 3, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.126(a) by failing and refusing to make his facilities, animals, and records available to APHIS officials for inspection.

12.On August 8, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.4 by filing a complaint with the United States Department of Agriculture, Office of the Inspector General, charging that Randall Coleman, an APHIS animal care inspector, solicited a bribe during an inspection when, in fact, the inspector had not solicited a bribe from Mr. Mazzola.

13.On March 18, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.40(a)(1) by failing to have a written program of veterinary care available for inspection.

14.On August 8, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.40(a)(1) by failing to have a written program of veterinary care available for inspection.

15.On August 19, 2004, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the Holmes County Fairgrounds in Millersburg, Ohio, by allowing customers to enter the primary enclosure containing an adult black bear without sufficient distance or barriers between the animal and the general viewing public; thereby failing to assure the safety of the animal and the public.

16.On March 18, 2005, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the IX Center in Cleveland, Ohio, by allowing customers to enter the primary enclosures containing an adult black bear and two adult tigers without sufficient distance or barriers between the animals and the general viewing public; thereby failing to assure the safety of the animals and the public.

17.On August 16, 2005, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the Holmes County Fairgrounds in Millersburg, Ohio, by allowing customers to enter the primary enclosures containing an adult black bear and an adult tiger without sufficient distance or barriers between the animals and the general viewing public; thereby failing to assure the safety of the animals and the public.

18.On March 18, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the IX Center in Cleveland, Ohio, by allowing the public to enter the primary enclosures containing an

adult black bear and an adult tiger without sufficient distance or barriers between the animals and the general viewing public; thereby failing to assure the safety of the animals and the public.

19.On May 12, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the Posh Nite Club in Akron, Ohio, by allowing customers to enter the primary enclosure containing an adult black bear with no distance or barriers between the animal and the general viewing public; thereby failing to assure the safety of the animal and the public.

20.On May 19, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the Posh Nite Club in Akron, Ohio, by allowing customers to enter the primary enclosure containing an adult black bear with no distance or barriers between the animal and the general viewing public; thereby failing to assure the safety of the animal and the public.

21.On May 19, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) by allowing members of the public to have their photographs taken with an adult black bear with no distance or barriers between the animal and the general viewing public; thereby failing to assure the safety of the animal and the public.

22.On May 26, 2006, Mr. Mazzola willfully violated 9 C.F.R. § 2.131(c)(1) during public exhibition at the Posh Nite Club in Akron, Ohio, by allowing customers to enter the primary enclosure containing an adult black bear with no distance or barriers between the animal and the general viewing public; thereby failing to assure the safety of the animal and the public.

23.On March 18, 2005, Mr. Mazzola willfully violated 9 C.F.R. §§ 2.100(a), 3.125(a) by housing two adult tigers in open-top enclosures at IX Center in Cleveland, Ohio, that lacked adequate structural integrity and height to contain the animals.

24.On August 16, 2005, Mr. Mazzola willfully violated 9 C.F.R. §§ 2.100(a), 3.125(a) by housing an adult black bear and two adult tigers in open-top enclosures at the Holmes County Fairgrounds in Millersburg, Ohio, that lacked adequate structural integrity and height to contain the animals.

25.On March 18, 2006, Mr. Mazzola willfully violated 9 C.F.R. §§ 2.100(a), 3.125(a) by housing an adult black bear and an adult tiger in open-top enclosures at the IX Center in Cleveland, Ohio, that lacked adequate structural integrity and height to contain the animals.

26.Mr. Mazzola is unfit to hold an Animal Welfare Act license and the issuance of an Animal Welfare Act license to Mr. Mazzola would be contrary to the purposes of the Animal Welfare Act.

Mr. Mazzola's Appeal Petition

Mr. Mazzola raises nine issues in his Appeal Petition. First, Mr. Mazzola asserts the ALJ's finding that he exhibited animals at the Ohio Fair Managers Convention during the period January 8, 2007, through January 11, 2007, without an Animal Welfare Act license, is error. Mr. Mazzola asserts APHIS did not provide him notice that his application for an Animal Welfare Act license had been denied prior to the convention and the ALJ found that he first learned of APHIS' denial of his application after the Ohio Fair Managers Convention took place. Mr. Mazzola also claims his appearance at the Ohio Fair Managers Convention was booked when he had an Animal Welfare Act license. (Appeal Pet. at the 3rd and 4th unnumbered pages.)

The ALJ found APHIS provided Mr. Mazzola with written notice and Mr. Mazzola's claim that he was "out of town" for each of the United States Postal Service's attempted deliveries of the notice denying his application for an Animal Welfare Act license, not credible (ALJ's Decision at 51). Moreover, contrary to Mr. Mazzola's assertion, the ALJ found that APHIS animal care inspector Randall Coleman provided Mr. Mazzola with notice that APHIS denied his license application in advance of Mr. Mazzola's appearance at the Ohio Fair Managers Convention, as follows:

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

ALJ's Decision at 51-52. Finally, whether or not Mr. Mazzola booked

his appearance at the Ohio Fair Managers Convention while Animal Welfare Act license number 31-C-0065 was issued to World Animal Studios, Inc., is not relevant. The evidence establishes that Mr. Mazzola did not have an Animal Welfare Act license when he operated as an exhibitor at the Ohio Fair Managers Convention (Tr. 5545, 5707, 7995-8006; CX 54 at 12, CX 55, CX 107 at 5, CX 108 at 3, CX 171). Therefore, I reject Mr. Mazzola's assertion that the ALJ's finding that he operated as an exhibitor without an Animal Welfare Act license during the period January 8, 2007, through January 11, 2007, at the Ohio Fair Managers Convention, is error.

Second, Mr. Mazzola asserts the ALJ's finding that he violated the Animal Welfare Act by intending to exhibit animals and transporting animals for exhibition purposes, at the Cleveland Sport, Travel & Outdoor Show, Cleveland, Ohio, on March 14, 2007, without an Animal Welfare Act license, is error (Appeal Pet. at the 4th and 5th unnumbered pages).

The ALJ made no such finding; instead, the ALJ found the Administrator did not prove that Mr. Mazzola violated the Animal Welfare Act on March 14, 2007 (ALJ's Decision at 59-61).

Third, Mr. Mazzola asserts the ALJ's finding that he exhibited animals at Vito's Pizza, on May 18, 2007, and May 19, 2007, without an Animal Welfare Act license, is error. Mr. Mazzola argues Steve Clark admitted he was the exhibitor. Mr. Mazzola also argues the Administrator never introduced a check issued to Mr. Mazzola by Vito's Pizza, and an APHIS investigator instructed Steve Clark on how to conduct this exhibit and remain in compliance with the Animal Welfare Act. (Appeal Pet. at the 5th unnumbered page.)

The ALJ correctly found Mr. Mazzola was at Vito's Pizza and Steve Clark was "merely a cover" for Mr. Mazzola's own exhibition, as follows:

> I also understand, particularly from Dr. Goldentyer's testimony why when it is Mr. Mazzola's animals, and I remember the photograph showing Mr. Mazzola's truck with Mr. Mazzola's company names and the like, that the use of Mr. Clark's privilege

> to exhibit was merely a cover, I'll call it, for Mr. Mazzola to exhibit.

ALJ's Decision at 61.

Moreover, Mr. Mazzola's claim that the Administrator did not introduce checks that Vito's Pizza issued to him, is not accurate. The Administrator introduced a 3-page document, CX 164, which included a cover sheet stating, "3 pages of FAX regarding copies of checks for hiring the bear through Sam Mazzola and Steve Clark" (CX 164 at 1); a check dated May 19, 2007 issued to "Billy West III" described by Mr. Mazzola as his "frontman" (CX 138, CX 164 at 2); and a check dated April 21, 2007, issued to "Sam Mazzola" (CX 164 at 3). Mr. Mazzola objected to the admission of CX 164 at 2-3 not because he denied receiving payment from Vito's Pizza, but because the checks he received from Vito's Pizza "were handwritten checks" rather than electronically produced (Tr. 3161). Although, the ALJ admitted into evidence only the cover sheet (Tr. 3176-77; CX 164 at 1), she correctly drew an adverse inference from Mr. Mazzola's refusal to comply with a subpoena she issued requiring Mr. Mazzola to produce documents related to his exhibition of animals:

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

ALJ's Decision at 62. Even if I were to find the record contained no evidence that Mr. Mazzola received checks from Vito's Pizza (which I do not so find), Mr. Mazzola still violated the Animal Welfare Act because the term "exhibitor" includes animal acts like Mr. Mazzola's

animal act, regardless of "whether operated for profit or not."[5]

Moreover, I find no credible evidence to support Mr. Mazzola's claim that an APHIS investigator instructed Steve Clark on how to exhibit animals at Vito's Pizza in compliance with the Animal Welfare Act. Mr. Mazzola testified about a conversation between Steve Clark and Carl LaLonde, an APHIS investigator, to which Mr. Mazzola was not privy (Tr. 5610-11). Mr. Mazzola failed to call Steve Clark as a witness to corroborate his testimony, and Carl LaLonde testified that he advised Steve Clark against "employing" Mr. Mazzola in order to exhibit Mr. Mazzola's animals (Tr. 4048-49). Even if APHIS investigator Carl LaLonde had provided erroneous advice to Mr. Mazzola (and Mr. Mazzola admits that Carl LaLonde provided no advice directly to him), such advice would not absolve Mr. Mazzola of his violations.[6] In any event, the record establishes that APHIS provided written notice to Mr. Mazzola, Steve Clark, and Vito's Pizza, in advance of the Vito's Pizza exhibition, regarding APHIS' concern that Mr. Mazzola sought to exhibit animals unlawfully (CX 113, CX 142 at 35, 38-39; Tr. 2269-74). Nevertheless, Mr. Mazzola continued with his animal exhibition at Vito's Pizza (Tr. 3172-83, 3298-3303, 3309-19; CX 115-CX 116, CX 118, CX 164 at 1).

Fourth, Mr. Mazzola asserts the ALJ's findings that he exhibited animals at the Fayette County Fair on July 26, 2007, and the Hamilton County Fair during the period July 31, 2007, through August 5, 2007, without an Animal Welfare Act license, are error. Mr. Mazzola admits

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[5]9 C.F.R. § 1.1. Mr. Mazzola's exhibition of animals also meets the definition of "zoo" and, thus, is regulated under the Animal Welfare Act regardless of compensation (9 C.F.R. § 1.1; 7 U.S.C. § 2132(h)). *See also In re James Petersen,* 53 Agric. Dec. 80, 90-91 (1994) (explaining that "zoos are regarded as exhibitors, regardless of compensation" and citing the 1970 Animal Welfare Act amendments, which expanded the coverage of the Animal Welfare Act to include exhibitors such as circuses, zoos, carnivals, and road shows).

[6]*See In re John D. Davenport,* 57 Agric. Dec. 189, 227 (1998) (stating a respondent acts at his peril if he relies on erroneous advice from a federal employee; it is well settled that individuals are bound by federal statutes and regulations irrespective of advice of federal employees) (citing *FCIC v. Merrill,* 332 U.S. 380, 382-86 (1947)).

he did exhibit at these two venues, but argues his filing a motion for reinstatement of Animal Welfare Act license number 31-C-0065 demonstrates a "true attempt to stay within compliance." Mr. Mazzola also states the ALJ never ruled on his motion for reinstatement of Animal Welfare Act license number 31-C-0065. (Appeal Pet. at the 5th and 6th unnumbered pages.)

As an initial matter, Mr. Mazzola did not file the "Motion to Order Reinstatement of 31-C-0065" until February 19, 2008, more than 6 months after the Fayette County Fair and the Hamilton County Fair. Therefore, I conclude Mr. Mazzola's February 19, 2008, filing cannot be a "true attempt to stay in compliance" with the Animal Welfare Act and the Regulations on July 26, 2007, and during the period July 31, 2007, through August 5, 2007. Moreover, a "true attempt to stay in compliance" with the Animal Welfare Act and the Regulations is not "compliance" with the Animal Welfare Act and the Regulations. Therefore, even if I were to conclude that Mr. Mazzola's filing the Motion to Order Reinstatement of 31-C-0065 constitutes a "true attempt to stay in compliance," I would not find his filing the motion a defense to his violations of the Animal Welfare Act and the Regulations.

I note the ALJ treated Mr. Mazzola's Motion to Order Reinstatement of 31-C-0065, which was filed 13 days prior to the commencement of the hearing, as an opening brief (Order Treating Mazzola Motion as Opening Brief, filed Feb. 21, 2008). I do not find the ALJ's treatment of Mr. Mazzola's Motion to Order Reinstatement of 31-C-0065, error.

Fifth, Mr. Mazzola asserts the ALJ's findings that he unlawfully operated as a dealer by offering to sell and by selling skunks and exhibiting tigers at Animal Zone, are error. Specifically, Mr. Mazzola argues he holds an "Ohio propagator permit to sell native Ohio wildlife"; Bill Coburn (who holds an Animal Welfare Act license) owned the skunks; and Billy West owned Animal Zone. (Appeal Pet. at the 6th and 7th unnumbered pages.)

Mr. Mazzola presented no evidence (aside from his own testimony) to support his claims that Mr. Coburn owned the skunks and Mr. West owned Animal Zone. Mr. Mazzola did not call Mr. Coburn or Mr. West as witnesses, did not introduce any documentary evidence regarding his arrangements with Mr. Coburn or Mr. West, and did not produce documents in response to the ALJ's subpoena regarding these activities.

Even if he had, nothing in the Animal Welfare Act limits the definition of "dealer" or "exhibitor" to persons who "own" animals. (7 U.S.C. § 2132(f), (h).) Moreover, Mr. Mazzola cites no law or regulation that exempts him from the Animal Welfare Act's licensing requirements because he holds an Ohio propagator permit, and I am unable to find any such law or regulation.

The evidence supports the ALJ's finding that Mr. Mazzola operated as a dealer and exhibitor at Animal Zone. Beginning in November 2006, APHIS repeatedly notified Mr. Mazzola that he could not exhibit animals without an Animal Welfare Act license (CX 1 at 31, CX 54 at 12-13, CX 55-CX 57, CX 115, CX 122, CX 126, CX 142 at 35, 42) and, in July 2007, notified Mr. Mazzola that he may not sell skunks at his pet store without an Animal Welfare Act license (CX 122). Nevertheless, on September 27, 2007, Mr. Mazzola offered skunks for sale at his pet store (Tr. 3334-38; CX 133-CX 134) and later, on October 23, 2007, sold one of the skunks to Mike Summers (Tr. 1685-95; CX 135-CX 136). The Exotic Animal Sales Agreement for this skunk expressly identifies "World Animal Studios, Inc (Sam Mazzola)" as the breeder (not Mr. Coburn)—belying Mr. Mazzola's claim that the skunk was on consignment (CX 135). Moreover, Mr. Mazzola does not deny that a skunk was available for sale and that tigers were on exhibit at his pet store in December 2007.

Seventh, Mr. Mazzola asserts the ALJ's finding that he refused to allow an APHIS official to inspect his animals, facilities, and records, is error. Specifically, Mr. Mazzola asserts there is no evidence of this violation, argues he was "within my rights to refuse inspector Randy Coleman to inspect," states APHIS animal care inspector Randall Coleman solicited a bribe from him, and contends the violation is "null and void" because he "signed papers with [the Office of the Inspector General]" stating that he "would not be held liable for offering money or any other part of investigation." (Appeal Pet. at the 7th through 9th unnumbered pages.)

Mr. Mazzola does not deny that he refused to allow APHIS animal care inspector Randall Coleman to inspect his animals on August 3, 2006. Instead, Mr. Mazzola argues, without citation to any authority,

that he was within his rights to refuse to allow Randall Coleman to inspect and that the inspection was never refused because he asked Dr. Harlen to inspect instead of Randall Coleman (Appeal Pet. at the 8th unnumbered page). I have long held that a dealer's or an exhibitor's refusal to allow inspection by a particular APHIS official constitutes a refusal of inspection in violation of 9 C.F.R. § 2.126(a), even if the dealer or exhibitor is willing to allow another APHIS official to conduct the inspection.[7] Moreover, the ALJ's finding that Mr. Mazzola refused to allow APHIS animal care inspector Randall Coleman to conduct an inspection on August 3, 2006 (ALJ's Decision at 38-39), is fully supported by the evidence (Tr. 3238-41, 5374-75; CX 22 at 1, CX 54 at 14-17). Therefore, I reject Mr. Mazzola's assertion that the ALJ's conclusion that he violated 9 C.F.R. § 2.126(a) on August 3, 2006, is error.

Moreover, Mr. Mazzola cites nothing in the record (aside from his own testimony) to support his claim that Randall Coleman solicited a bribe from him during the attempted inspection on August 3, 2006. Although Mr. Mazzola claims there were "two witnesses to this conversation" (Appeal Pet. at the 8th unnumbered page), Mr. Mazzola failed to call either one of them as a witness during the hearing. The Office of the Inspector General investigated Mr. Mazzola's claim of soliciting a bribe and found the claim baseless (CX 54 at 1-13). After a review of the record, I find no basis for reversing the ALJ's finding that Mr. Mazzola's claim that Randall Coleman solicited a bribe from Mr. Mazzola, is false (ALJ's Decision at 39-45).

Further still, nothing in the record supports Mr. Mazzola's claim that this violation is "null and void" because he "signed papers with [the Office of the Inspector General]" stating that he "would not be held liable for offering money or any other part of investigation" (Appeal Pet. at the 9th unnumbered page). Mr. Mazzola introduced no evidence from the Office of the Inspector General even though he identified an Office of the Inspector General inspector as a potential witness (Respondent's

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[7]*See In re Judie Hansen,* 57 Agric. Dec. 1072, 1122-23 (1998), (stating, since a respondent may not choose her inspector, the respondent's refusal to allow a particular APHIS official to inspect is a violation of 9 C.F.R. § 2.126, even if the respondent had been willing to allow another APHIS official to conduct the inspection).

List of Witnesses and Exhibits, filed Jan. 18, 2007). Even if Mr. Mazzola had introduced an agreement stating that he "would not be held liable for offering money or any other part of investigation," such agreement would not exculpate him from violations of the Animal Welfare Act and the Regulations.

Eighth, Mr. Mazzola asserts the ALJ's findings that he failed to make his written program of veterinary care available to APHIS officials for inspection, are error. Specifically, Mr. Mazzola argues he had a "hard cover book . . . at each and every inspection" and that during "[o]ne inspection its [sic] fine the next the same book is not." (Appeal Pet. at the 9th and 10th unnumbered pages.)

The record supports the ALJ's findings that Mr. Mazzola violated the Regulations by failing to make a written program of veterinary care available for inspection on March 18, 2006, and August 8, 2006 (Tr. 3207-09; CX 20 at 1, CX 23 at 1). Mr. Mazzola cites no evidence supporting his theory that APHIS officials alternately accepted and rejected his written program of veterinary care. Therefore, I reject Mr. Mazzola's contention that the ALJ's conclusions that he violated 9 C.F.R. § 2.40(a)(1) on March 18, 2006, and August 8, 2006, are error.

Ninth, Mr. Mazzola asserts the ALJ's findings that he violated the handling regulations when he allowed members of the public to wrestle his bear and allowed members of the public to be photographed with his adult black bear and adult tiger without any distance or barriers, are error. Specifically, Mr. Mazzola argues that the ALJ's decision is inconsistent with her decision in another case, that 9 C.F.R. § 2.131 refers to two separate "publics" and allows "touching an animal," that numerous people have wrestled his bear "without serious injury" and have been photographed "with bears, lions, tigers, and other animals without any injuries," that he never received an official warning from any APHIS supervisor that APHIS wanted his business to change or close, and that the ALJ was wrongly influenced by Ms. Juarez, who coached witnesses. (Appeal Pet. at the 10th through 12th unnumbered pages.)

Mr. Mazzola's reliance on the ALJ's decision in *In re Bridgeport Nature Center, Inc.,* AWA Docket No. 00-0032, is misplaced. I issued

an order directing the ALJ to "issue a complete decision addressing all the issues in the proceeding, including the question of violations." *In re Bridgeport Nature Center, Inc.* (Remand Order), 67 Agric. Dec. ___, slip op. at 4 (Jan. 18, 2008). The ALJ has not yet issued a decision in *Bridgeport* following my issuance of the Remand Order. In any event, in her Decision in the instant proceeding, the ALJ acknowledges that she previously "misunderstood" APHIS' interpretation of the handling regulations:

> . . . I looked at the phrase "public" as it is contained in Section 2.131(c)(1) of Title 9 of the Code of Federal Regulations; and the other phrase, "general viewing public," and I assumed that because they were different, that they were meant to refer to different subsets. I now know otherwise. I know now that APHIS uses them interchangeably and with good reason.

ALJ's Decision at 11-13. Thus, regardless of what the ALJ may have tentatively found in *Bridgeport*, here she found that Mr. Mazzola repeatedly violated the handling regulations by failing to provide sufficient distance and/or barriers between his animals and the public (ALJ's Decision at 20-35).

Mr. Mazzola's interpretation of the handling regulations to require distance and/or barriers between animals and the "general viewing public," but not the "public" who are the "people participating in the [e]vent by touching an animal," is inconsistent with the evidence and case law. (Appeal Pet. at 10th unnumbered page.) In 1989, when APHIS proposed the current version of 9 C.F.R. § 2.131(c)(1), APHIS expressly stated that exhibitors have "no right" to allow direct contact between dangerous animals (like large felids and adult bears) and "the public." (49 Fed. Reg. 10,835, 10,880 (Mar. 15, 1989); CX 169.) Thus the regulatory history, the testimony of APHIS officials, and United States Department Agriculture decisions show that APHIS treats "public" and "general viewing public" synonymously for purposes of

interpreting and enforcement of 9 C.F.R. § 2.131(c)(1).[8] Moreover, contrary to Mr. Mazzola's assertion that the "public" is exempt from the requirements of 9 C.F.R. § 2.131(c)(1), 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 customers 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) (CX 150).

Moreover, whether or not Mr. Mazzola's customers sustained injuries in connection with his exhibitions is not relevant to determining whether Mr. Mazzola violated 9 C.F.R. § 2.131(c)(1). Injuries sustained by members of the public who have direct contact with dangerous animals

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[8]49 Fed. Reg. at 10,880 (Mar. 15, 1989); Tr. 1023-25, 1029-31; *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 78 (2002) ("Respondents' lions and tigers are simply too large, too strong, too quick, and too unpredictable for a person (or persons) to restrain the animal or for a member of the public in contact with one of the lions or tigers to have the time to move to safety. . . . Given the size, quickness, strength, and unpredictability of Respondents' animals, Respondents should have known that some distance or barrier between Respondents' animals and the general viewing public is necessary so as to assure the safety of Respondents' animals and the public."); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 154 (1996) ("The record clearly demonstrates that Respondent, in willful violation of 9 C.F.R § 2.131(b)(1), failed to handle Sarang so that there was minimal risk of harm to Sarang, Ms. Revella, and other members of the public").

are the consequences of an exhibitor's failure to comply with 9 C.F.R. § 2.131(c)(1) and are not the basis for finding violations of 9 C.F.R. § 2.131(c)(1). *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 86 (2002).

Mr. Mazzola also claims he never received a warning from any APHIS supervisor that APHIS wanted his business to change or close.[9] As an initial matter, because Mr. Mazzola's violations of 9 C.F.R. § 2.131 were willful and involved public safety and health, Mr. Mazzola's disqualification from obtaining an Animal Welfare Act license (based on these violations) is excepted from the Administrative Procedure Act's requirement that notice and opportunity to demonstrate or achieve compliance be provided (5 U.S.C. § 558(c)). Even if I were to find that APHIS was required to provide Mr. Mazzola with notice and opportunity to demonstrate compliance, Mr. Mazzola cites no law or regulation requiring that an APHIS supervisory official provide such notice. In any event, the record establishes that APHIS provided Mr. Mazzola notice of its interpretation of 9 C.F.R. § 2.131(c)(1) and an opportunity to demonstrate compliance (CX 8, CX 14-CX 15, CX 17, CX 20, CX 42, CX 87-CX 88, CX 106, CX 166; Tr. 3113-17, 6394-97, 6723-24), including written notice from a supervisory official: Dr. Kay Carter-Corker, Animal Care, Assistant Regional Director — Eastern Region (CX 162).

I find no basis in the record that supports Mr. Mazzola's claim that the ALJ was wrongly influenced by Ms. Juarez and that Ms. Juarez was "coaching" witnesses.

Mr. Mazzola's Motion To Reinstate Animal Welfare Act License Number 31-C-0065

On December 30, 2008, Mr. Mazzola filed a motion to reinstate World Animal Studios, Inc.'s Animal Welfare Act license number 31-

[9]On at least six occasions, Mr. Mazzola acknowledged receiving the Regulations, including 9 C.F.R. § 2.131(c)(1), which has remained unchanged since 1989, 54 Fed. Reg. 36,123 (Aug. 31, 1989), and represented that he was in compliance with them (CX 1 at 1-5, 9) ("I hereby acknowledge receipt of and certify to the best of my knowledge I am in compliance with all the regulations and standards in 9 CFR, Subpart A, Parts 1, 2 and 3.").

C-0065, which expired November 15, 2006 (CX 1 at 12). The Ohio Secretary of State canceled the articles of incorporation (or license to do business in Ohio) for World Animal Studios, Inc., effective February 20, 1999, and informed Mr. Mazzola that continuation of business as a corporation after February 20, 1999, would be in violation of the law (CX 3 at 10). Mr. Mazzola admits that he dissolved World Animal Studios, Inc. (CX 1 at 13), and Mr. Mazzola failed to provide APHIS with the license renewal application and renewal fee before the expiration of Animal Welfare Act license number 31-C-0065. Therefore, I deny Mr. Mazzola's motion that I reinstate World Animal Studios, Inc.'s Animal Welfare Act license number 31-C-0065.

The Administrator's Cross-Appeal

The Administrator raises three issues in "Complainant's Opposition to Respondent's Appeal Petition, Response to Respondent's Motion to the Judicial Officer Seeking Reinstatement of Animal Welfare Act License 31-C-0065 and Cross-Appeal" [hereinafter Cross-Appeal]. First, the Administrator contends the ALJ erroneously failed to find that Mr. Mazzola operated as an exhibitor on March 14, 2007, and that Mr. Mazzola transported animals for exhibition on March 14, 2007, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1), as alleged in paragraph 19 of the Second Amended Complaint (Cross-Appeal at 23-28).

I have reviewed the Administrator's evidence that Mr. Mazzola willfully violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) on March 14, 2007, and, while I find some evidence to support the Administrator's allegation, I do not find the evidence strong enough to justify reversal of the ALJ's dismissal of paragraph 19 of the Second Amended Complaint.

Second, the Administrator contends the ALJ erroneously excluded from evidence CX 165, a compact disc containing a television broadcast concerning Mr. Mazzola's involvement in the exhibition and transportation of animals on March 14, 2007, as alleged in paragraph 19 of the Second Amended Complaint (Cross-Appeal at 28).

The ALJ excluded CX 165 (Tr. 3060-72) because it "muddies my case rather than assists it." (Tr. 3071.) I have reviewed CX 165 and find it relevant, material, and not unduly repetitious. Therefore, I reverse the ALJ and admit CX 165 into evidence. However, even with the admission of CX 165, I do not find the evidence of the violation alleged in paragraph 19 of the Second Amended Complaint sufficient to reverse the ALJ's dismissal of paragraph 19 of the Second Amended Complaint.

Third, the Administrator contends the ALJ's assessment of only a $13,950 civil penalty against Mr. Mazzola, is error (Cross-Appeal at 28-44).

Administrative law judges and the Judicial Officer have significant discretion when imposing a civil penalty under the Animal Welfare Act. The Animal Welfare Act provides that the Secretary of Agriculture may assess a civil penalty of not more than $3,750 for each violation of the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)).[10] 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.

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[10]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, 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 $2,750 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)).

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991). The Administrator recommended the assessment of a $35,000 civil penalty against Mr. Mazzola (Tr. 8047). 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.[11]

With respect to the civil 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 violation, the person's good faith, and the history of previous violations.[12]

Mr. Mazzola operated a medium-sized business (Tr. 5592-93, 8021-22). Mr. Mazzola's violations during the period August 19, 2004, through December 18, 2007, reveal a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Mr. Mazzola's ongoing pattern of violations establishes a "history of previous violations" for the purposes of 7 U.S.C. § 2149(b) and a lack of good faith. Moreover, many of Mr. Mazzola's violations of the Animal Welfare Act and the Regulations are serious violations. Mr. Mazzola's operation as a dealer and exhibitor without an Animal Welfare Act license; Mr. Mazzola's interference with APHIS officials carrying out duties under the Animal Welfare Act; and Mr. Mazzola's refusal to make his facilities, animals, and records available to APHIS officials for inspection are particularly egregious

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[11] *In re Lorenza Pearson*, 68 Agric. Dec. ___, slip op. at 69 (July 13, 2009); *In re Amarillo Wildlife Refuge, Inc.,* 68 Agric. Dec. 77, 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).

[12] See 7 U.S.C. § 2149(b).

violations because they thwart the ability of the Secretary of Agriculture to carry out the purposes of the Animal Welfare Act.

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), and the remedial purposes of the Animal Welfare Act, I conclude assessment of a $21,000 civil penalty is appropriate and necessary to ensure Mr. Mazzola's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act. Specifically, I assess Mr. Mazzola a civil penalty of: (1) $2,000 for each of the five periods during which he operated as an exhibitor without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) (Conclusion of Law number 2 - January 8, 2007, through January 11, 2007; Conclusion of Law 3 - May 18, 2007, and May 19, 2007; Conclusion of Law number 4 - July 26, 2007; Conclusion of Law number 5 - July 31, 2007, through August 5, 2007; and Conclusion of Law number 8 - December 16, 2007, through December 18, 2007); (2) $500 for each instance in which Mr. Mazzola sold or offered to sell skunks without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) (Conclusion of Law number 6 - September 27, 2007; Conclusion of Law number 7 - October 23, 2007; and Conclusion of Law number 9 - December 18, 2007); (3) $2,000 for one of the two instances in which Mr. Mazzola interfered with an APHIS official carrying out his duties under the Animal Welfare Act, in violation of 9 C.F.R. § 2.4 (Conclusion of Law number 10 - August 3, 2006); (4) $2,000 for Mr. Mazzola's failure to make his facility, animals, and records available to APHIS officials for inspection, in violation of 9 C.F.R. § 2.126 (Conclusion of Law number 11 - August 3, 2006); (5) $300 for each instance in which Mr. Mazzola had no written program of veterinary care available for inspection, in violation of 9 C.F.R. § 2.40(a)(1) (Conclusion of Law number 13 - March 18, 2006; and Conclusion of Law number 14 - August 8, 2006); (6) $500 for each day during which Mr. Mazzola allowed members of the public to enter a primary enclosure with animals, in violation of 9 C.F.R. § 2.131(c)(1) (Conclusion of Law number 15 - August 19, 2004; Conclusion of Law number 16 - March 18, 2005; Conclusion of

Law number 17 - August 16, 2005; Conclusion of Law number 18 - March 18, 2006; Conclusion of Law number 19 - May 12, 2006; Conclusion of Law number 20 - May 19, 2006; and Conclusion of Law number 22 - May 26, 2006); (7) $500 for each instance in which Mr. Mazzola allowed members of the public to be photographed with an animal with no distance or barriers between the animal and the members of the public, in violation of 9 C.F.R. § 2.131(c)(1) (Conclusion of Law number 21 - May 19, 2006); and (8) $300 for each instance in which Mr. Mazzola housed an animal in an enclosure that lacked structural integrity and height to contain the animal, in violation of 9 C.F.R. § 3.125(a) (Conclusion of Law number 23 - March 18, 2005; Conclusion of Law number 24 - August 16, 2005; and Conclusion of Law number 25 - March 18, 2006). I did not assess Mr. Mazzola a civil penalty for his filing a complaint with the United States Department of Agriculture, Office of the Inspector General, because I do not want to impose a sanction that would in any way discourage the public from reporting fraud, waste, abuse, or criminal activity to the United States Department of Agriculture, Office of the Inspector General. Instead, my Order instructs Mr. Mazzola to cease and desist from 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.

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.[13] The date of entry of the Order in this Decision and Order is November 24, 2009.

In re: KATHY JO BAUCK, AN INDIVIDUAL, d/b/a PUPPY'S ON WHEELS, a/k/a "PUPPIES ON WHEELS" AND "PICK OF THE LITTER."
AWA Docket No. D-09-0139.
Decision and Order.
Filed December 2, 2009.

Babak A. Rastgoufard, for the Administrator, APHIS.
Zenas Bear & Associates, Hawley, MN, for Respondent.
Initial decision issued by Peter M. Davenport, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator],

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[13] 7 U.S.C. § 2149(c).

instituted this proceeding on June 22, 2009, by filing an "Order to Show Cause as to Why Animal Welfare License 41-B-0159 Should Not Be Terminated" [hereinafter Order to Show Cause]. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges: (1) Ms. Bauck operates as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations; (2) Ms. Bauck holds Animal Welfare Act license 41-B-0159; (3) on May 19, 2008, Ms. Bauck pled guilty to practicing veterinary medicine without having first secured a veterinary license or temporary permit, in violation of Minn. Stat. § 156.10;[1] and (4) on March 24, 2009, a jury found Ms. Bauck guilty on four counts of engaging in animal torture and animal cruelty, in violation of Minn. Stat. § 343.21 subdivs. 1 and 7[2] (Order to Show Cause ¶¶ 10, 14, 23-24). The Administrator seeks an

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[1]Minn. Stat. § 156.10 provides, as follows:

§ 156.10 Unlawful practice without license or permit; gross misdemeanor

It is a gross misdemeanor for any person to practice veterinary medicine in the state without having first secured a veterinary license or temporary permit, as provided in this chapter.

[2]Minn. Stat. § 343.21 subdivs. 1 and 7 provide, as follows:

§ 343.21 Overworking or mistreating animals; penalty

Subdivision 1. Torture. No person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal, or cruelly work any animal when it is unfit for labor, whether it belongs to that person or another person.

. . . .

Subdivision 7. Cruelty. No person shall willfully instigate or in any way further any act of cruelty to any animal or animals, or any act tending to produce cruelty to animals.

order terminating Ms. Bauck's Animal Welfare Act license and disqualifying Ms. Bauck from obtaining an Animal Welfare Act license for no less than 2 years (Order to Show Cause at 8).

On July 15, 2009, Ms. Bauck filed "Kathy Jo Bauck's Return to Order to Show Cause as to Why Animal Welfare Act License Should Not Be Terminated" [hereinafter the Answer] in which she: (1) requested a hearing; (2) raised the defense of estoppel based upon inspections of her facility by the Animal and Plant Health Inspection Service [hereinafter APHIS] in which her facility was found in compliance with the Animal Welfare Act; (3) admitted she pled guilty, on an *Alford* basis, to practicing veterinary medicine without having first secured a veterinary license or temporary permit, in violation of Minn. Stat. § 156.10; and (4) admitted she was convicted of one count of animal torture, in violation of Minn. Stat. § 343.21 subdiv. 1 (Answer ¶¶ 1-3, 17, 23).

On August 13, 2009, the Administrator filed "Complainant's Motion for Summary Judgment" [hereinafter Motion for Summary Judgment] in which the Administrator argued Ms. Bauck's request for a hearing should be denied because the Animal Welfare Act license termination and disqualification from becoming licensed sought by the Administrator are based upon Ms. Bauck's prior criminal convictions, which she has admitted, and there is no issue of material fact upon which to hold a hearing. On September 15, 2009, Ms. Bauck filed "Respondent's Return to Complainant's Motion for Summary Judgment" [hereinafter Response to Motion for Summary Judgment] opposing the Motion for Summary Judgment.

On September 29, 2009, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order: (1) granting the Motion for Summary Judgment; (2) terminating Ms. Bauck's Animal Welfare Act license; and (3) disqualifying Ms. Bauck from becoming licensed under the Animal Welfare Act for a period of 2 years.

On October 29, 2009, Ms. Bauck appealed the ALJ's Decision and Order to the Judicial Officer, and on November 18, 2009, the Administrator filed a response to Ms. Bauck's appeal petition. On

November 20, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Decision and Order.

DECISION

Discussion

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application for a license in such form and manner as the Secretary of Agriculture may prescribe (7 U.S.C. § 2133). The power to require and issue a license under the Animal Welfare Act includes the power to terminate a license and to disqualify a person from becoming licensed.[3] The Regulations specify the bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide that an initial application for an Animal Welfare Act license will be denied if the applicant has been found to have violated state laws pertaining to the neglect or welfare of animals and the Administrator determines the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
>
> . . . .
>
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws

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[3] *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).

> or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

> **§ 2131. Congressional statement of policy**
>
> The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—
>
> (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
>
> (2) to assure the humane treatment of animals during transportation in commerce; and
>
> (3) to protect owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.
>
> The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. § 2131.

The Administrator alleged that Ms. Bauck is unfit to be licensed under the Animal Welfare Act based upon Ms. Bauck's having been found guilty by a Minnesota court on two occasions of criminal charges, the first being pursuant to an *Alford* plea to practicing veterinary medicine without a license or temporary permit, in violation of Minn. Stat. § 156.10[4] and the second, a jury conviction of animal torture and animal cruelty, in violation of Minn. Stat. § 343.21 subdivs. 1 and 7.[5] Ms. Bauck admits being convicted in both cases (Answer ¶¶ 14-17, 21-25).

Ms. Bauck's Appeal Petition

Ms. Bauck raises eight issues in her "Petition for Judicial Review of Summary Judgment Decision and Order Dated September 29, 2009" [hereinafter Appeal Petition]. First, Ms. Bauck contends she was denied a hearing conducted in accordance with the Rules of Practice (Appeal Pet. at 1-2 ¶¶ 2, 7).

I have repeatedly held summary judgment appropriate in cases involving the termination of an Animal Welfare Act license and disqualification from becoming licensed under the Animal Welfare Act based upon prior criminal convictions.[6] Hearings are futile where, as in

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[4]*State of Minnesota v. Bauck*, 56-CR-08-1131 (Order to Show Cause Attach. B).

[5]*State of Minnesota v. Bauck*, 56-CR-08-2271 (Order to Show Cause Attach. D-Attach. E).

[6]*See In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (2009) (rejecting Animals of Montana's contention that summary judgment is inappropriate in Animal Welfare Act license termination and disqualification proceedings based upon prior convictions); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 81 (2009) (affirming the administrative law judge's initial decision granting the administrator's motion for summary judgment to terminate an Animal Welfare Act license based on the conviction of Amarillo Wildlife Refuge, Inc.'s president, director, and agent for violations of the Endangered Species Act notwithstanding Amarillo Wildlife Refuge, (continued...)

the instant proceeding, there is no factual dispute of substance.[7] Thus, I reject Ms. Bauck's contention that she is entitled to an oral hearing under the Rules of Practice.

Second, Ms. Bauck argues the Administrator failed to conduct an investigation prior to the institution of the instant proceeding, as required by 7 C.F.R. § 1.133(a)(3) (Appeal Pet. at 1 ¶ 3).

The Administrator asserts he instituted the instant proceeding pursuant to 7 C.F.R. § 1.133(b), not 7 C.F.R. § 1.133(a) (Complainant's Opposition to Respondent's Appeal Pet. at 6). Ms. Bauck does not cite anything in the record indicating the Administrator instituted the instant proceeding pursuant to 7 C.F.R. § 1.133(a), and I find nothing in the record indicating the Administrator instituted the proceeding pursuant to 7 C.F.R. § 1.133(a). Section 1.133(b) of the Rules of Practice (7 C.F.R. § 1.133(b)) does not require that the Administrator conduct an investigation prior to filing a complaint.[8] Therefore, I reject Ms. Bauck's contention that the Administrator was required to conduct an investigation prior to the institution of the instant proceeding.

Third, Ms. Bauck argues the Administrator failed to provide her

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

[7]*In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (2009) (stating hearings are futile where there is no factual dispute of substance); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations).

[8]The Rules of Practice define the term "complaint" to include an "order to show cause." (7 C.F.R. § 1.132.)

written notice of the facts and a reasonable time to demonstrate compliance, prior to the institution of the instant proceeding, as required by the Rules of Practice (Appeal Pet. at 1-2 ¶ 4).

The Rules of Practice require the Administrator to provide written notice of the facts or conduct concerned and an opportunity to demonstrate or achieve compliance, prior to instituting a proceeding that may affect a license, as follows:

> **§ 1.133 Institution of proceedings.**
>
> . . . .
>
> (b) *Filing of complaint or petition for review*.
>
> . . . .
>
> (3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3). In the instant proceeding, the Administrator seeks to terminate Ms. Bauck's Animal Welfare Act license as a result of her willful acts; thus, the Administrator was not required to give Ms. Bauck prior written notice of the facts or conduct concerned and an opportunity to demonstrate or achieve compliance with the Animal Welfare Act and the Regulations.

A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous

advice, or acts with careless disregard of statutory requirements.[9] Generally, a criminal act involves at least a careless disregard of statutory requirements. In a number of proceedings, I have terminated an Animal Welfare Act license based upon a licensee's criminal conviction without any written notice or opportunity to demonstrate or achieve compliance prior to the institution of the proceeding.[10] The United States Court of Appeals for the District of Columbia Circuit has also held that criminal convictions fall within the willfulness exception of 5 U.S.C. § 558(c) and, thus, has upheld license terminations based on criminal convictions, without any prior written notice and opportunity to demonstrate or achieve compliance.[11]

Ms. Bauck has been the defendant in two criminal prosecutions instituted by the State of Minnesota. In *State of Minnesota v. Bauck*, 56-CR-08-1131, Ms. Bauck pled guilty (in response to six charges against her) to practicing veterinary medicine without having first secured a veterinary license or temporary permit, in violation of Minn. Stat. § 156.10 (Order to Show Cause Attach. A-Attach. B). In the second action, *State of Minnesota v. Bauck*, 56-CR-08-2271, a jury convicted Ms. Bauck on four counts of animal torture and animal cruelty, in violation of Minn. Stat. § 343.21 subdivs. 1 and 7. The Otter

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[9] *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. ____, slip op. at 19 (Oct. 19, 2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc*., 37 Agric. Dec. 293, 306 (1978), *aff'd mem*., 582 F.2d 39 (5th Cir. 1978).

[10] *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 (2006).

[11] *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 691 (D.C. Cir. 2007) (upholding revocation of license without first providing notice and an opportunity to demonstrate compliance on the basis of the violator having pled guilty to bribing a United States Department of Agriculture inspector), *cert. denied sub nom. Hirsch v. Dep't of Agric.*, 128 S.Ct. 1748 (2008); *Coosemans Specialties, Inc. v. U.S. Dep't of Agric.*, 482 F.3d 560, 567-68 (D.C. Cir.) (same), *cert. denied*, 128 S.Ct. 628 (2007).

Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, vacated three of the four counts, but found Ms. Bauck guilty of torturing a Mastiff, in violation of Minn. Stat. § 343.21 subdiv. 1. (Order to Show Cause Attach. C-Attach. E.) Thus, I conclude Ms. Bauck's criminal acts were willful, and the termination of her Animal Welfare Act license falls within the willfulness exception of 5 U.S.C. § 558(c) and 7 C.F.R. § 1.133(b)(3). Accordingly, I reject Ms. Bauck's argument that she must be "give[n] written notice" and a "reasonable time to demonstrate compliance" prior to the institution of the instant proceeding.

Fourth, Ms. Bauck argues a material issue of fact exists which requires a hearing in the instant proceeding. Specifically, Ms. Bauck states the cause of her conviction in *State of Minnesota v. Bauck*, 56-CR-08-2271, for torturing a Mastiff, in violation of Minn. Stat. § 343.21 subdiv. 1, is at issue. Ms. Bauck asserts she was convicted as a result of conduct by an animal rights infiltrator, who was seeking to fabricate evidence sufficient to result in Ms. Bauck's prosecution. (Appeal Pet. at 2 ¶¶ 5, 8-9.)

The Regulations provide that an Animal Welfare Act license may be terminated if an Animal Welfare Act licensee has been found to have violated any state law pertaining to the neglect or welfare of animals (9 C.F.R. §§ 2.11(a)(6), .12). Ms. Bauck admits she pled guilty to violating Minn. Stat. § 156.10 and was convicted of violating Minn. Stat. § 343.21,[12] two state laws that, on their face, pertain to animal neglect and welfare. Ms. Bauck's conviction in *State of Minnesota v. Bauck*, 56-CR-08-2271, for violating Minn. Stat. § 343.21 subdiv. 1, is a material fact in the instant proceeding; the cause of Ms. Bauck's conviction is not a material fact in the instant proceeding. Ms. Bauck cannot relitigate her past criminal convictions in this Animal Welfare Act license termination and disqualification proceeding.[13] If Ms. Bauck wishes to contest her conviction in *State of Minnesota v.*

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[12]Answer ¶¶ 14-17, 21-25.

[13]*See In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 88 (2009) (rejecting Amarillo Wildlife's attempt to relitigate a prior criminal conviction in an Animal Welfare Act license termination proceeding).

Bauck, 56-CR-08-2271, she must turn to the State Courts of Minnesota, as that is proper forum in which to direct her arguments.

Fifth, Ms. Bauck argues the Administrator is barred from instituting the instant proceeding inasmuch as APHIS has inspected her facility and found the facility in compliance with the Animal Welfare Act (Appeal Pet. at 2 ¶ 6).

The only issues in the instant proceeding relate to Ms. Bauck's conviction of Minnesota laws regarding neglect or welfare of animals and the reasonableness of the Administrator's determination that Ms. Bauck's retention of an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act. The condition of Ms. Bauck's facility, as it relates to the requirements of the Animal Welfare Act and the Regulations, is irrelevant.

Sixth, Ms. Bauck argues the termination of her Animal Welfare Act license deprives her of property without due process, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States (Appeal Pet. at 2 ¶ 7).

Sixth Amendment rights are explicitly confined to criminal prosecutions and the Sixth Amendment does not include a provision protecting against the deprivation of property, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. amend. VI.

The instant proceeding is not a criminal prosecution. Instead, the instant proceeding is a disciplinary administrative proceeding conducted under the Animal Welfare Act, in accordance with the Administrative

Procedure Act. It is well settled that the Sixth Amendment to the Constitution of the United States is only applicable to criminal proceedings and is not applicable to civil proceedings.[14] Thus, I conclude Ms. Bauck's rights under the Sixth Amendment to the Constitution of the United States are not implicated in this administrative proceeding.

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;[15] it is not a state. Therefore, as a matter of law, the Administrator could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Ms. Bauck contends.[16]

Seventh, Ms. Bauck argues the Secretary of Agriculture has unlawfully delegated authority to entities not under the control of the Secretary of Agriculture. Specifically, Ms. Bauck contends, by providing that an Animal Welfare Act license may be terminated if a licensee has violated state or local laws or regulations, the Secretary of Agriculture has unlawfully delegated authority to the states and local governments to set the standards for termination of Animal Welfare Act licenses. (Appeal Pet. at 2-3 ¶¶ 10-11.)

Congress explicitly authorized the Secretary of Agriculture to cooperate with state and local governments in carrying out the purposes of the Animal Welfare Act, as follows:

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[14]*See Austin v. United States*, 509 U.S. 602, 609 (1993) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *United States v. Ward*, 448 U.S. 242, 248 (1980) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature).

[15]See 5 U.S.C. §§ 101, 551(1).

[16]*In re Glenn Mealman* (Order Denying Pet. to Reconsider), 64 Agric. Dec. 1987, 1990 (2005); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 303-04 (2005).

§ 2145. Consultation and cooperation with Federal, State, and local governmental bodies by Secretary of Agriculture

. . . .

(b) The Secretary is authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject.

7 U.S.C. § 2145(b). I find 9 C.F.R. § 2.11(a)(6) entirely consistent with 7 U.S.C. § 2145(b), and I reject Ms. Bauck's contention that the Secretary of Agriculture has unlawfully delegated authority to state and local governments.

Eighth, Ms. Bauck argues the Regulations are unconstitutionally void for vagueness. Based upon Ms. Bauck's Appeal Petition, I infer her argument relates to the provision in 9 C.F.R. § 2.11(a)(6) upon which the termination of her Animal Welfare Act license is based; namely, the provision that her license may be terminated if she "has been found to have violated any . . . State . . . law[] . . . pertaining to the transportation, ownership, neglect, or welfare of animals[.]" (Appeal Pet. at 3 ¶ 11.)

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or required or that it encourages arbitrary and discriminatory enforcement.[17] I do not find 9 C.F.R. § 2.11(a)(6) so unclear that ordinary people cannot understand what is prohibited or so unclear that it encourages arbitrary and discriminatory enforcement by the Secretary of Agriculture.

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[17] *Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

Findings of Fact

1. Ms. Bauck is an individual who has a mailing address in New York Mills, Minnesota.

2. Ms. Bauck operates as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations.

3. Ms. Bauck holds Animal Welfare Act license number 41-B-0159.

4. On May 19, 2008, Ms. Bauck was found guilty, pursuant to an *Alford* plea, by the Otter Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, of practicing veterinary medicine without a veterinary license or temporary permit, in violation of Minn. Stat. § 156.10. *State of Minnesota v. Bauck*, 56-CR-08-1131 (Order to Show Cause Attach. B).

5. On March 24, 2009, Ms. Bauck was found guilty by a jury verdict in Otter Tail County District Court, Criminal Division, Seventh Judicial District of the State of Minnesota, of animal torture and animal cruelty, in violation of Minn. Stat. § 343.21 subdivs. 1 and 7. *State of Minnesota v. Bauck*, 56-CR-08-2271 (Order to Show Cause Attach. D).

6. On May 1, 2009, Ms. 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 (Order to Show Cause Attach. E).

7. On May 1, 2009, three of the four counts for which Ms. Bauck was found guilty in *State of Minnesota v. Bauck*, 56-CR-08-2271, were vacated, leaving only Count 5, which involved Ms. Bauck's torture of a Mastiff on or between May 14, 2008, and May 24, 2008, in Otter Tail County, Minnesota, in violation of Minn. Stat. § 343.21 subdiv. 1 (Order to Show Cause Attach. E).

Conclusions of Law

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

2. Based on the Findings of Fact, I conclude Ms. Bauck is unfit to

be licensed under the Animal Welfare Act, within the meaning of 9 C.F.R. § 2.11(a)(6).

3. Based on the Findings of Fact, I conclude the Administrator's determination that Ms. Bauck's retention of an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.

For the foregoing reasons, the following Order is issued.

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.

ADMINISTRATIVE WAGE GARNISHMENT

DEPARTMENTAL DECISIONS

In re: LEE FRENCH.
AWG Docket No. 09-0054.
Decision and Order.
Filed August 17, 2009.

AWG.

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

1. On August 12, 2009, 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, who testified for Respondent, were both duly sworn. Respondent proved the existence of the debt owed by Petitioner Lee French and his wife, Candice French, to Respondent for its payment of a loss sustained by JP Morgan Chase Bank, N.A., Loan number 1082681762, on the $67,300.00 home mortgage loan the bank had made to Petitioner, on April 3, 2006, for property located at 103 Godfrey, Howard City, MI 49329. There were foreclosure proceedings and the property was resold after the eviction of Petitioner and his family. The present amount owed is $55,421.23. The house was sold for considerably less than Petitioner had paid for it due to diminished economic conditions in the State of Michigan. Those conditions continue to prevail and Petitioner who has a wife and three children is unemployed. He presently receives monthly unemployment benefits of $774.00, or $630.00 after taxes. Though he was able to secure one week of work out of State, he had to return home because his mother was found to have cancer. Since his return, he was employed for only six days and has no employment prospects in the foreseeable future. Obviously, 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.

2. Accordingly, the Petition is granted and the pending wage garnishment proceedings are hereby dismissed. Though this decision does not preclude the debt's collection by the offset of Federal payments, such as tax refunds, through the action of the Treasury Department, it is recommended that the Treasury Department withhold such action and undertake to settle the claim in a manner that recognizes Petitioner's financial circumstances.

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In re: PAMELA MEYER.
AWG Docket No. 09-0143.
Decision and Order.
Filed September 11, 2009.

AWG.

Gene Elkin and Mary E. Kimball, 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, Pamela Meyer, a/k/a Pamela K. Meyer, Pamela Preston, Pamela Kim, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against Petitioner. On July 6, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the nature of the debt and the ability of Petitioner to repay all or part of the debt, if established.

I conducted a telephone hearing with the parties on September 10, 2009. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Mary Kimball testified on behalf of the RD agency. The witnesses were sworn in. Ms. Kimball stated that she had phone conversations with the Petitioner since the Pre-Hearing Order.

Additionally, OALJ Secretary M. Kennedy documented three attempts to contact Petitioner during normal business hours prior to the hearing date at the phone number listed in her Petition. M. Kennedy did leave voice-mail messages, but received no return calls. Petitioner did

not make herself available to be contacted via telephone on the date and time set for the hearing. RD had filed a copy of a Narrative along with exhibits on August 6, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner submitted no documents or exhibits pursuant to the Pre-Hearing Order.

Petitioner owes $23, 404.81 on the USDA RD loan as of September 9, 2009, and in addition, fees due the US Treasury of $6,967.59 pursuant to the terms of the Promissory Note.

Findings of Fact

1. On May 1, 1996, Petitioner Pamela Meyer (and her then husband, Jay Meyer) obtained a USDA Rural Development home mortgage loan for property located at 900 7th Avenue, Lemon, SD 57638. Petitioners jointly and severally signed a promissory note for $31,400.00 RX-1 .

2. On May 24, 2005 Petitioner was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. RX 3. At the time of the Default Notice, the balance due on the note was $31,783.03 and unpaid interest was $685.42.

3. The borrowers sold the home in a "short sale" which was approved by USDA RD. However, USDA did not release the borrowers from the remaining debt. At the time of sale, borrowers owed additional accrued interest and fees for a total debt of $36,622.37.

USDA received a sale proceeds check for $11,750.00 on 06/27/2006. RX-4. After applying these funds, borrowers owed $24,872.37. Sale proceeds included $1,567.17 which was later returned since it was the costs of the sale.

4. After the foreclosure proceeds were applied to the debt owed at the time of the sale, the amount due USDA from Petitioner was $23,629.76. RX 5.

5. USDA has received additional payments from Treasury after their fees were deducted. USDA applied this amount and an insurance refund to borrowers' account. The balance due USDA as of September 9, 2009 is $23,404.81. (M. Kimball testimony).

6. Although Petitioner's stated reason for her petition for hearing was that the proposed garnishment would create a hardship, she

presented no evidence to that end even though she was afforded an opportunity to do so.

7. There was no evidence that Petitioner has not been continuously employed by her current employer for 12 continuous months or whether she had been involuntarily terminated from her prior employer. 31 C.F.R.§ 285.11(j).

7. Pamela Meyer is jointly and severally liable for the debt with her prior husband, Jay Meyer, under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Pamela Meyer is indebted to USDA's Rural Development program in the amount of $23,404.81.

2. In addition, Petitioner is indebted for fees to the US Treasury which are currently $6,967.59.

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

4. 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, Pamela Meyer, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R.§ 285.11(i)

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

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In re: RASHON CARRUTHERS.
AWG Docket No. 09-0102.
Decision and Order.
Filed October 1, 2009.

AWG.

Esther McQuaid, for RD.
Petitioner, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

1. The hearing was held on August 19, 2009 and on September 30, 2009. Rashon Carruthers, the Petitioner ("Ms. Carruthers") 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 Esther McQuaid.

2. Both parties are thanked for their excellent presentations of evidence and their full cooperation, and for their helpfulness in suggesting ideas for future progress in repayment. I STRONGLY RECOMMEND and USDA Rural Development does not object, that the collection agency work with Ms. Carruthers to **establish a repayment schedule** rather than immediately proceeding with garnishment, even though this Decision authorizes garnishment, up to 15% of Ms. Carruthers' disposable pay.

Summary of the Facts Presented

3. Ms. Carruthers owes to USDA Rural Development a balance of **$5,377.00** (as of July 16, 2009) in repayment of unauthorized rental assistance which totaled $10,085.00 ("the debt") at Pinecrest Apartments for 21 months from October 1, 2005 through June 30, 2007 (*see* USDA Rural Development Exs., esp. Ex. 3, p. 1).

4. Potential Treasury fees in the amount of 28% (the collection agency keeps 25% of what it collects) on $5,377.00 would increase the current balance to $6,882.56.

5. Ms. Carruthers' fellow lessee (co-tenant) Robert Butler, also known as Robert Butler, Jr. ("Mr. Butler"), is not a party to this case, but the evidence shows that Mr. Butler was and is jointly liable for the $10,085.00 debt plus potential Treasury fees in the amount of 28%, and by notarized document dated July 21, 2009, Mr. Butler took "sole responsibility for the debt amount $8,807.68 or the outstanding balance owed to the originating agency, Rural Development - United States Department of Agriculture (USDA) . . ." (*see* Ms. Carruthers' Exs., esp. PX 1, p. 1).

6. Ms. Carruthers' and Mr. Butler's joint liability (for the $10,085.00 debt plus collection costs such as the 28% Treasury fees) does not impede collection of the full amount from only one of the lessees (co-tenants), even when more than half, or even all, is collected from that one.

7. Ms. Carruthers may be able to recover all or a portion from Mr. Butler of what she has paid and will pay (in repayment of the debt plus collection costs such as the 28% Treasury fees).

8. Ms. Carruthers' disposable pay supports garnishment, up to 15% of Ms. Carruthers' disposable pay. *See* Ms. Carruthers' Pay Stubs for May, June, and July 2009, filed August 28, 2009, plus Ms. Carruthers' testimony.

Findings, Analysis and Conclusions

9. The Secretary of Agriculture has jurisdiction over the parties, Ms. Carruthers and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

10. Ms. Carruthers owes the debt described in paragraphs 3 and 4.

11. Ms. Carruthers' disposable pay described in paragraph 8 supports garnishment, up to 15% of Ms. Carruthers' disposable pay (within the meaning of 31 C.F.R. § 285.11); and Ms. Carruthers has no

circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Order

12. Until the debt is fully paid, Ms. Carruthers 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).

13. USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Ms. Carruthers' disposable pay.

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

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In re: CHRISTIE L. MURPHY.
AWG Docket No. 09-0152.
Decision and Order.
Filed October 2, 2009.

AWG.

Gene Elkin and Mary E. Kimball, 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, Christie L. Murphy, for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against Petitioner. On July 23 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the nature of the debt and the ability of Petitioner to repay all or part of the debt, if established.

I conducted a telephone hearing with the parties on October 1, 2009.

Ms. Murphy was self-represented. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Mary Kimball testified on behalf of the RD agency. The witnesses were sworn in.

Petitioner had previously submitted PX-1 thru PX-12 (Narrative and financial forms). The financial forms were signed under oath. RD acknowledged that they were in possession of Petitioner's exhibits.

RD had filed a copy of a Narrative along with exhibits on August 28, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner owes $31,309.91 on the USDA RD loan as of August 26, 2009, and in addition, fees due the US Treasury of $8,766.78 pursuant to the terms of the Promissory Note.

Findings of Fact

1. On February 12, 1999, Petitioner Christie L. Murphy obtained a USDA Rural Development home mortgage loan for a property located at 713 Windy Hill Celeste, Texas 76423. Petitioner signed a promissory note for $66,815.00. RX-1 .

2. On April 7, 2006 Petitioner was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. RX 3. At the time of the Default Notice, the balance due on the note was $59,475.28 and unpaid interest was $9,496.72.

3. USDA acquired the property at a foreclosure sale on May 1, 2007. At the time of sale, Petitioner owed additional accrued interest and fees for a total debt of $86,413.03. RX-4.

4. USDA purchased the property for $52,640.58. After applying these funds, borrowers owed $33,772.45. Post-sale Fees were $56.00. RX-4.

5. USDA has received additional payments (total $2,518.54) from Treasury after their fees were deducted. USDA applied this amount to borrowers' account. The balance due USDA as of August 26, 2009 is $31,309.91. (M. Kimball testimony).

6. Additionally, under the terms of the Promissory Note, the U.S. Treasury fees due as a result of the foreclosure are $8,766.78.

7. Petitioner's stated reason for her petition for hearing was that the

proposed garnishment would create a hardship and she presented sworn financial statements PX-3 thru PX-12 to that end.

8. RD conducted a limited cross-examination of Ms. Murphy, but generally did not disagree that Petitioner's resulting Net Monthly Income statement of approximately $56.00 (plus occasional and non-guaranteed performance bonuses) was very low. PX-4.

9. Petitioner has been continuously employed by her current employer for more than 12 continuous months. 31 C.F.R.§ 285.11(j).

10.Christie L. Murphy is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Christie L. Murphy is indebted to USDA's Rural Development program in the amount of $31,309.91.

2. In addition, Petitioner is indebted for fees to the US Treasury which are currently $8,766.78.

3. Based upon Petitioner's sworn financial and oral testimony, administrative wage garnishment of her wages would cause her financial hardship.

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

5. RD may review Petitioner's hardship grounds at least annually and may reinstate administrative wage garnishment if it receives information that the Petitioner's financial condition has materially improved.

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

Order

For the foregoing reasons, administrative wage garnishment of Petitioner Christie L. Murphy's wages is not authorized at this time, without prejudice to re-institute garnishment proceedings should there be a material improvement in Petitioner's financial condition.

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

In re: SHARONDA L. BROWN a/k/a SHONDA BROWN.
AWG Docket No. 09-0153.
Decision and Order.
Filed October 5, 2009.

AWG.

Gene Elkin and Esther McQuaid, 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, ShaRonda L. Brown a/k/a Shonda Brown for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against Petitioner. On July 23, 2009, I issued a Pre-hearing Order requiring the parties to exchange information concerning the nature of the debt and the ability of Petitioner to repay all or part of the debt, if established.

I conducted a telephone hearing at the established time on October 1, 2009. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Esther McQuaid testified on behalf of the RD agency. The witnesses were sworn in. Ms. McQuaid stated that she was unable to make phone contact because no phone number was provided by Petitioner in her July 8, 2009 request for hearing. Ms. McQuaid also received no replies from emails sent to the email address (sharonda60@*****.com[1]) provided by Petitioner. Also Ms. McQuaid attempted to further contact Petitioner at her stated address and was able to complete delivery via a Federal Express envelope (Tracking # 7978792814##)[2], but again no reply was received from Petitioner.

Petitioner did not make herself available to be contacted via telephone on the date and time set for the hearing. RD had filed a copy of a Narrative along with exhibits on August 27, 2009 with the OALJ

[1]Complete address maintained in USDA files.

[2]Complete FedEx number maintained in USDA files.

Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner submitted no documents or exhibits pursuant to the Pre-Hearing Order.

Petitioner owes $3,179.93 on the USDA RD Rental Assistance Program as of August 18, 2009, and in addition, fees due the US Treasury of $890.38 pursuant to the terms of the repayment agreement.

Findings of Fact

1. On February 14, 2005, Petitioner ShaRonda Brown (and her then roommate, Claude Harrison) obtained USDA Rural Development Rental Assistance for an apartment located at Indian Hills Apartments, Apt # 128 ***, SC 29###[3]. Both Petitioner and Mr. Harrison made affidavits as to their income and employment status.

2. Upon reliable information, RD determined on October 29, 2007 that Petitioner received unauthorized (Rental) Assistance. RD-6.

3. On May 18, 2009 Petitioner was sent a Notice of Intent to Garnish her wages.

4. Petitioner requested an Oral Hearing on July 8, 2009 which included an email address (see above) but no phone number and a new address in Smyrna, DE 19977.

5. The amount of unauthorized rent was $4,319.00. RX-6. USDA has received $1,139.07 in payments from Treasury after their fees were deducted. USDA applied this amount to tenant's account. The balance due USDA as of August 18, 2009 is $3,179.93 on the USDA RD Rental Assistance Program, and in addition, fees due the US Treasury of $890.38 pursuant to the terms of the repayment agreement. (Ms. McQuaid testimony).

6. Although Petitioner's written request for hearing complained that Mr. Harris was not being pursued for the funds, she was not only individually liable, but she certified information about Mr. Harris that was materially false upon which the government relied. Sec. 1001 of Title 18 U.S.C.

7. ShaRonda L. Brown is jointly and severally liable for the unauthorized rental assistance under the terms of the repayment

[3]Complete address maintained in USDA files.

agreement.

Conclusions of Law

1. Petitioner ShaRonda L. Brown is indebted to USDA's Rural Development program in the amount of $3,179.93.

2. In addition, Petitioner is indebted for fees to the US Treasury which are currently $890.38.

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

4. 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, ShaRonda L. Brown, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R.§ 285.11(i)

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

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In re: LISA RICKERS.
AWG Docket No. 09-0154.
Decision and Order.
Filed October 9, 2009.

AWG.

Gene Elkin and Mary E. Kimball, 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, Lisa

Rickers for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. On July 23, 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 October 8, 2009. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Mary Kimball testified on behalf of the RD agency. Mr. Don Weaver acted as an observer for RD, but did not testify.

Petitioner did not make herself available to be contacted via telephone on the date and time set for the hearing.

The witnesses were sworn in. Ms. Kimball stated that she had no alternate phone numbers and knew of no other address for Petitioner other than the ones given by Petitioner in her written request for hearing on July 9, 2009. Ms. Kimball stated that none of the properly addressed mail sent by RD to Petitioner were returned by the U.S. Postal Service as a "bad address."

RD had filed a copy of a Narrative along with exhibits RX-1 through RX-6 on August 5, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner submitted no documents or exhibits pursuant to the Pre-Hearing Order.

Petitioner owes $20,653.12 on the USDA RD loan as of August 3, 2009, and in addition, potential fees due the US Treasury of $5,782.87 pursuant to the terms of the Promissory Note.

Findings of Fact

1. On July 17, 2003, Petitioner Lisa Rickers obtained a USDA Rural Development home mortgage loan for property located at #### Highland Drive Carroll, IA 514##.[4] Petitioner signed a promissory note for $65,000 and a Rural Development Loan Guarantee RX-2.

2. On January 1, 2006 Petitioner was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $62,274.98 plus unpaid interest.

[4]Complete address maintained in USDA records.

3. The total debt attributed to Petitioner at the time of the foreclosure was $73,981.85 which included the costs of sale. RX-3.

4. The lender (J. P. Morgan - Chase) acquired the property at the foreclosure sale on March 20, 2007 for a bid price of $58,650.00. RX-2. P. 3 of 7.

5. The lender was unable to make final sale of the property within RD's six month marketing requirement, therefore on/about October 26, 2007, the lender engaged an R.H.S. appraiser who appraised the property for $38,000. RX-2 P. 4 of 7.

6. An actual sale to a new purchaser did occur on December 28, 2007 for a price of $40,000.[5] RX-2 P. 3 of 7.

7. Petitioner was credited the R.H.S. appraisal price of $38,000 plus $375.71 (RX-2 P. 5 of 7) plus $1803.60 (RX-2 P 7 of 7) plus $1928.42 (RX-3)[6] for a net loss amount due of $31,874.12. RX-3.

8. Because the marketing period was exceeded, Petitioner was given an additional credit of $1,598.00. RX-3.

9. After the final sale, the Petitioner's debt is $30,276.12. RX-3.

10. RD received $9,623.00 in additional payments from U.S. Treasury after their fees were deducted. The balance due USDA RD as of October 8, 2009 is $20,653.12. RX-3, RD Narrative.

11. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement is $5,782.87. Ms. Kimball's testimony.

12. Although Petitioner's stated reason for her petition for hearing was that she did not receive a proper offset for the initial price of $58,600.00 paid by the lender (J. P. Morgan Chase) at the foreclosure sale on March 20, 2007, she presented no evidence to that end even though she was afforded an opportunity to do so.

13. There was no evidence that Petitioner has not been continuously employed by her current employer for 12 continuous months or whether she had been involuntarily terminated from her prior employer. 31 C.F.R.§ 285.11(j).

14. Lisa Rickers is liable for the debt under the terms of the

[5]The property was sold "as is."

[6]Ms. Kimball's testimony was the $1928.42 was derived by $12,856.14 less $10,927.72. See RX-2 P. 6 of 7.

Promissory Note.

Conclusions of Law

1. Petitioner Lisa Rickers is indebted to USDA's Rural Development program in the amount of $20,653.12.

2. In addition, Petitioner is indebted for potential fees to the US Treasury which are currently $5,782.87.

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

4. 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, Lisa Rickers, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R.§ 285.11(i)

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

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In re: CYNTHIA MALDANADO.
AWG Docket No. 09-0100.
Decision and Order.
Filed October 9, 2009.

AWG.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

1. The hearing was held on Wednesday, August 19, 2009, as scheduled. Ms. Cynthia Maldanado, the Petitioner ("Ms. Maldanado") failed to

appear, as follows: her telephone number was repeatedly busy, for ten minutes or longer, when we attempted to include her in the hearing. 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. Ms. Maldanado had requested the hearing, writing that she prefers to repay the debt through ***offset*** of her **income tax refunds** for the next five years, rather than undergo garnishment of up to 15% of her disposable pay (within the meaning of 31 C.F.R. § 285.11).

4. I encourage **Ms. Maldanado 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. Maldanado's disposable pay. Ms. Maldanado, obviously, will have to make herself available to the collection agency if she wants to negotiate.

5. This is Ms. Maldanado's case (she filed the Petition), and in addition to failing to be available for the hearing, Ms. Maldanado failed to file with the Hearing Clerk copies of Ms. Maldanado's proposed exhibits, a list of proposed exhibits, and a list of anticipated witnesses with a short statement as to the nature of the testimony of each witness. Ms. Maldanado's deadline for that was August 5, 2009, which was also the deadline for Ms. Maldanado to notify us if she wanted to be reached at

a different telephone number than the one we have for her.

Summary of the Facts Presented

6. Ms. Maldanado owes to USDA Rural Development a balance of **$19,575.87** (as of July 15, 2009). *See* USDA Rural Development Exhibits, esp. RX-4).

7. Potential Treasury fees in the amount of 28% of $19,575.87 ($5,481.24 in potential Treasury fees; the collection agency keeps 25% of what it collects) would increase the current balance to $25,057.11.

8. Ms. Maldanado's disposable pay supports garnishment, up to 15% of Ms. Maldanado's disposable pay.

9. USDA Rural Development pursues **both** income tax offset and wage garnishment and is authorized and encouraged to do so.

Findings, Analysis and Conclusions

10. The Secretary of Agriculture has jurisdiction over the parties, Ms. Maldanado and USDA Rural Development; and over the subject matter, which is administrative wage garnishment.

11. Ms. Maldanado owes the debt described in paragraphs 6 and 7.

12. Ms. Maldanado's disposable pay supports garnishment, up to 15% of Ms. Maldanado' disposable pay (within the meaning of 31 C.F.R. § 285.11); and Ms. Maldanado has no circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11).

Order

13. Until the debt is fully paid, Ms. Maldanado 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).

14.USDA Rural Development, and those collecting on its behalf, are authorized to proceed with garnishment, up to 15% of Ms. Maldanado' disposable pay.

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

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In re KATHY MOSER.
AWG Docket No. 09-0119.
Decision and Order.
Filed October 29, 2009.

AWG.

Mary E. Kimball, for RD.
Dale Theurer, for Petitioner.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of the Petitioner, Kathy Moser, 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 29, 2009, a Prehearing Order was entered to facilitate a meaningful conference with the parties as to how the case will be resolved and to direct the exchange of information and documentation concerning the existence of the debt.

The Respondent complied with that Order and a Narrative was filed, together with supporting documentation on June 12, 2009. The Petitioner failed to file anything further with the Hearing Clerk and repeated efforts to reach her by telephone were unsuccessful.[1] At 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 she provided on at least two (continued...)

time she requested a hearing, the Petitioner indicated that "After foreclosure, Chase Bank indicated that I owed nothing. My tax refunds were then taken for two years and no one has explained what debt I owe. I want a full accounting and a full hearing. There is no reason to schedule this hearing until I have been furnished with the full accounting and have had time for my lawyer and CPA to review it." On September 18, 2009, an Order was entered directing the Petitioner to provide a working telephone number so that a hearing could be scheduled; however, the time set forth in the Order expired without the Petitioner's compliance. Nothing further having been received from the Petitioner, the request for hearing will be considered waived and the 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 $32,963.16 for accrued interest, protective advances, liquidation costs and property sale costs. The amount due has been reduced by six Treasury Offsets amounting to $6,877.07 leaving $26,086.09 due at this time.

On the basis of the record before me, nothing further having been received from the Petitioner, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. On July 14, 2005, the Petitioner, Kathy Moser, 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 September 27, 2005 obtained a home mortgage loan for property located at 113 Miles Drive, Lancaster, Kentucky 40444 from

[1](...continued)
occasions.

J.P. Morgan Chase Bank, N.A. (Chase) for $69,992.00 (Loan Number 1082572257).

2. In 2006, the Petitioner defaulted on the mortgage loan and foreclosure proceedings were initiated. RX-3.

3. Chase purchased the secured property at the foreclosure sale on December 1, 2006 for $60,350.00. 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 $32,963.16 for accrued interest, protective advances, liquidation costs and property sale costs. RX-3, 4.

4. Treasury offsets totaling $6,877.07 have been received. Narrative, p 2.

5. The remaining unpaid debt is in the amount of $26,086.09.

Conclusions of Law

1. The Petitioner, Kathy Moser, is indebted to USDA Rural Development in the amount of $26,086.09 for the mortgage loan guarantee extended to her, further identified as Loan account number 1082572257. 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 the Petitioner, Kathy Moser, 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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In re: SHANE WELLER.
AWG Docket No. 09-0080.
Decision and Order.
Filed November 13, 2009.

AWG.

Petitioner Pro Se.
Gene Elkin and Mary Kimball for RD.
Decision and Order by James P. Hurt, Hearing Official.

Decision and Order

This matter is before me upon the request of the Petitioner, Shane Weller for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. On July 7, 2009, Administrative Law Judge Jill Clifton issued a Pre-hearing Order requiring the parties to exchange information concerning the amount of the debt. On August 25, 2009, Judge Clifton issued an AMENDED Notice of Hearing and Prehearing Filing Deadlines.
The case was assigned to me on September 29, 2009.

I conducted a telephone hearing at the scheduled time on October 2, 2009. USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Mary Kimball 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 July 14, 2009 with the OALJ Hearing Clerk and certified that it mailed a copy of the same to Petitioner.

Petitioner submitted documents or exhibits (Seven pages plus a Fax cover page) to Ms. Kimball on/about September 29, 2009 and she forwarded them to the OALJ Hearing Clerk.

Petitioner owes $51,913.65 on the USDA RD loan as of October 2, 2009, and in addition, potential fees due the US Treasury pursuant to the terms of the Promissory Note.

Findings of Fact

1. On January 17, 2005, Petitioner Shane Weller obtained a USDA Rural Development home mortgage loan for property located at #### Lafayette Ionia, MI 488##.[1] Petitioner signed a promissory note for $89,900 and a Rural Development Loan Guarantee. RX-1.
2. On July 1, 2006 Petitioner was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. RX-3 and Ms. Kimball's testimony. At the time of the Default Notice, the balance due on the note was $88,380.06 plus unpaid interest. RX-2 @ P. 2 of 7, RX-3.
3. The total debt attributed to Petitioner at the time of the foreclosure was $98,788.84 which included the costs of sale. RX-2 @ p. 5 of 7.
4. The lender (Country-Wide Home Loans Inc.) acquired the property at the foreclosure sale on December 21, 2006 for a bid price of $91,920.43. RX-2. P. 3 of 7.
5. The lender listed the property for sale on August 29, 2007 and was able to sell it a new purchaser for $48,000 on October 5, 2007. RX-2 @ P. 4 of 7.
6. A Broker's opinion (Coldwell Banker) completed on August 16, 2007 opined that poor economy contribute to the low re-sale price. RX-6.
7. The Net proceeds of the Sale after foreclosure costs, protective advances, accrued interest was $41, 425.20 (RX-2 @ p. 5 of 7) for a net amount due of $57,363.64.
8 After the final sale, an additional recovery (treasury offset) of $777.86 was received bringing the Petitioner's debt to $51,913.65. RX-3 & Narrative.
9. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement were unknown.
10. There was oral testimony from Petitioner that he has not been continuously employed by his current employer for 12 continuous months or/alternately he had been involuntarily terminated from his prior employer.
11. Without objection from RD, Petitioner submitted employment records after the hearing, indicating that he may be excused from

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[1]Complete address maintained in USDA rrecords.

immediate enforcement of the garnishment action pursuant to 31 C.F.R. §285.11(j).
12. Shane Weller is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Shane Weller is indebted to USDA's Rural Development program in the amount of $51,913.65, but garnishment proceedings are suspended at this time.
2. In addition, Petitioner is indebted for potential fees to the US Treasury.
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 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, Shane Weller, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R.§ 285.11(i)
Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk's office.

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In re: JOHN DUCKWORTH.
AWG Docket No. 09-0132.
Decision and Order.
Filed November 18, 2009.

AWG.

Gene Elkin, John Weaver and Mary Kimball, for RD.
Petitioner, Pro se.
Decision and Order issued by Victor W. Palmer, Administrative Law Judge.

1. Pursuant to a Hearing Notice issued on October 27, 2009, I held a hearing by telephone preceded by a teleconference, on November 17, 2009, at 11 AM 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 either the hearing or the teleconference. Respondent participated through its representatives, Gene Elkin and John Weaver, Legal Liaisons, and Mary Kimball, Accountant for the New Initiatives Branch, USDA Rural Development.
2. In addition to his noncompliance with my order of October 27, 2009 to be present at this hearing by telephone, Petitioner did not provide my secretary, Diane Green with a telephone number where he could be reached on the day of the scheduled hearing as the Order instructed. Furthermore, Petitioner also failed to comply with a prior Prehearing Order, issued on June 17, 2009, that required him to file, by August 13, 2009, lists of exhibits and witnesses, and a narrative describing why he cannot pay the alleged debt and indicating what portion of the alleged debt he is able to pay through wage garnishment.

Before the hearing commenced, Ms. Green advised me that she called his listed home telephone and spoke to Petitioner's wife who stated Petitioner was at work and had not received notice of this hearing or any other Orders I have issued. During the teleconference Ms. Green and the Hearing Clerk, Leslie E. Whitfield, reviewed their efforts to make Petitioner aware of this scheduled hearing. Mr. Whitfield stated that the official records his office maintains show that the Hearing Notice was sent by regular mail on October 27, 2009, to Petitioner, John Duckworth, 4507 Pine Drive, Benton, Arkansas 72019. The mailed Notice of Hearing was not returned by the U.S. Post Office and was presumably delivered. Ms. Green stated that she had telephoned

Petitioner at least three times and spoke on each occasion to Petitioner's wife. Each time Mrs. Duckworth was requested to instruct her husband to call our office to set a time for a teleconference and hearing. Mr. Duckworth never did. Prior to the November 17, 2009 hearing, Ms. Green again called the only phone number in our possession and again spoke to Mrs. Duckworth who stated her husband was at work, and that they had never received notice of the hearing because it was probably sent to the wrong address.

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 November 17, 2009, to decide petitioner's challenge to the wage garnishment so that I might hear his concerns. In that Petitioner never advised the Hearing Clerk, the Respondent, or this office that he had moved, that he could only be personally contacted on a different telephone number which he failed to provide, and that all mail sent to his only listed address was never returned as undeliverable by the U. S. Post Office, I proceeded with the scheduled hearing without his presence, and took evidence on the existence of the debt that his Petition challenged.

Ms. Kimball testified for Respondent, and was duly sworn. Respondent proved the existence of the debt owed by Petitioner John W. Duckworth, to Respondent for its payment of a loss sustained by Country Wide Home Loans, Inc., Loan number 065170739, on a $90,00.00 home mortgage loan the bank had made to Petitioner, on August 13, 2004, for property located at 607 Bryant Meadow, Bryant, AR 72022. There were foreclosure proceedings and the property was resold. The present amount owed on the debt to Respondent is $5,857.79 plus collection fees owed to the United States Treasury Department which, added together, currently total $7,497.97. Inasmuch as Petitioner is presently employed there is no evidence 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 his disposable income.

Ms. Kimball has advised, however, that if Mr. Duckworth telephones the private agency engaged by Treasury to pursue the debt's collection, he might be able to settle the debt at a lower amount with lower payments. He is advised to therefore immediately call Pioneer Credit Recovery, Inc. at 1-877-907-1820.

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In re: ADAM OLSON.
AWG Docket No. 09-0181.
Decision and Order.
Filed November 24, 2009.

AWG.

Gene Elkin and Mary Kimball for RD.
Charles W. Balsiger, for Petitioner.
Decision and Order issued by James P. Hurt, Hearing Official.

This matter is before me upon the request of the Petitioner, Adam Olson for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against him. In response to Petitioner's timely Request for a Hearing, I issued on September 3, 2009 a Pre-hearing Order requiring the parties to exchange information concerning the existence and amount of the debt. On October 2, 2009, I issued an Amended Pre-hearing Order changing the date of the oral hearing to November 12, 2009 at 1:00 PM CST. Due to confusing language in the Pre-hearing Order, the hearing was held on November 19, 2009 at 1:00 PM CST with the agreement of all parties.

Petitioner was represented by Charles W. Balsiger, Esq. Petitioner was not available for the hearing due to family medical issues, however, upon Mr. Balsiger's assurance that his client concurred, the case proceeded as scheduled.

USDA Rural Development Agency (RD) was represented by Gene Elkin, Esq. and Mary Kimball on behalf of the RD agency.

Petitioner was represented by Mr. Balsiger who advised that he had

received the narrative and exhibits from RD.

Mr. Balsiger advised that his client wishes to withdraw his request for hearing. Although Ms Kimball did summarize the present monies due based on the exhibits there was no testimony. RD had filed a copy of a Narrative along with exhibits RX-1 through RX-5 on September 3, 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 $21,872.36 on the USDA RD loan as of November 19, 2009, and in addition, potential fees due the US Treasury in the amount of $6,124.26 pursuant to the terms of the Promissory Note.

Findings of Fact

1. On October 21, 2005, Petitioner Adam Olson obtained a USDA Rural Development home mortgage loan for property located at #### West Walnut Street Albion, NE 686##.[1] Petitioner signed a promissory note for $72,600 and a Rural Development Loan Guarantee. RX-1.

2. On January 1, 2006 Petitioner was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. RD Narrative. At the time of the Default Notice, the balance due on the note was $72,428.05 plus unpaid interest. RX-2 @ P. 6 of 8, RX-3.

3. The total debt attributed to Petitioner at the time of the foreclosure was $80,554.17 which included the costs of sale. RX-2 @ p. 6 of 8, RX-3.

4. The lender (US Bank) acquired the property at the foreclosure sale on March 20, 2007 for a bid price of $59,500. RX-2. p. 3 of 8, Narrative correction of 11/16/2009.

5. The lender (US Bank) ordered two appraisals: (a) Appraisal on May 17, 2007 by Camass Appraisals ($66,000) and; (b) Appraisal on May 4, 2007 by ERA Premiere Team ($60,000). Narrative.

6. The lender listed the property for sale at $65,900 on June 4, 2007 and was able to sell it a new purchaser for $62,600 on July 6, 2007. Narrative, RX-2 @ p. 3 of 8, 4 of 8.

7. The Net proceeds of the Sale after foreclosure costs, protective

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[1]Complete address maintained in USDA records.

advances, accrued interest was $54,718.10 (RX-2 @ p. 6 of 8).

8. After the final sale, three additional recovery (treasury offsets) of $3,484.28 was received bringing the Petitioner's debt to $21,872.36 RX-3, RX-5, Narrative.

9. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement were $6,124.26. RX-5.

10. There was no oral testimony or documentation from Petitioner that he has not been continuously employed by his current employer for 12 continuous months or/alternately he had been involuntarily terminated from his prior employer.

11. Adam Olson is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Adam Olson is indebted to USDA's Rural Development program in the amount of $21,872.36.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $6,124.26.

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

4. During the term of this Wage Garnishment Order, Petitioner is under a duty to inform USDA's Rural Development of his 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, Adam Olson, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R.§

285.11(i)

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

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In re: SHANNON SWAIN, a/k/a SHANNON HALBERT.
AWG Docket No. 09-0179.
Decision and Order.
Filed November 20, 2009.

AWG.

Mary E. Kimball, 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, Shannon Swain for a hearing in response to efforts of Respondent to institute a federal administrative wage garnishment against her. In response to Petitioner's timely Request for a Hearing, I issued on September 8, 2009 a Pre-hearing Order requiring the parties to exchange information concerning the existence and amount of the debt. On October 2, 2009, I issued an Amended Pre-hearing Order changing the date of the oral hearing to November 12, 2009 at 1:00 PM CST. Due to confusing language in the Pre-hearing Order, the hearing was held on November 19, 2009 @ 2:00 PM CST with the agreement of all parties.
Petitioner was self represented.

USDA Rural Development Agency (RD) was represented by Mary Kimball. John Weaver for the RD was also present.

Petitioner advised that she had received the Narrative and exhibits from RD.

Petitioner further advised that she no longer contested the debt or the amount of the debt, but merely wished to work out a payment arrangement in lieu of garnishment. Although Ms Kimball did summarize the present monies due based on the RD Exhibits, there was

no testimony.

Petitioner did not submit any documents or exhibits.

Petitioner owes $20,694.87 on the USDA RD loan as of November 19, 2009, and in addition, potential fees due the US Treasury in the amount of $5,794.57 pursuant to the terms of the Promissory Note.

Findings of Fact

1. On January 31, 2003, Petitioner Shannon Swain a/k/a Shannon Halbert obtained a USDA Rural Development home mortgage loan for property located at #### Woodland Park Drive, Lindale, TX 757##.[1] Petitioner signed a promissory note for $67,000 and a Rural Development Loan Guarantee. RX-1.

2. On February 16, 2007 Petitioner was sent a Notice of Acceleration and Demand for Payment (Default) on the Promissory Note. Narrative, RX-3 @ p.3 of 5. At the time of the Default Notice, the balance due on the note was $96,361.62 including unpaid interest. RX-4 @ p. 1 of 2.

3 The property was sold for $80,000 on August 9, 2007 in a short sale (meaning that the lender approved the sale, but the Petitioner would be held liable for the monies due under the terms of the guarantee note). Narrative.

4. The net funds received as a result of the short sale was $74,716.50. Narrative, RX-4 @ p. 1 of 2.

5. After the application of the net proceeds of the short sale, fees prior to the sale, and accrued interest the amount due to RD was $21,645.12. RX-4 @ p. 1 of 2

6. After the final sale, two additional recoveries, treasury offsets of $921.00, and a insurance fund rebate of $29.95, were received bringing the Petitioner's debt to $20,694.87. RX-4 @ p. 2 of 2, Narrative.

7. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement were $5,794.57. RX-5.

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[1]Complete address maintained in USDA records.

8. There was no oral testimony or documentation from Petitioner that she has not been continuously employed by her current employer for 12 continuous months or/alternately she had been involuntarily terminated from her prior employer.

9. Shannon Swain a/k/a Shannon Halbert is liable for the debt under the terms of the Promissory Note.

Conclusions of Law

1. Petitioner Shannon Swain is indebted to USDA's Rural Development program in the amount of $20,694.87.

2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $5,794.57.

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

4. During the term of this Wage Garnishment Order, Petitioner is under a duty to inform USDA's Rural Development of her 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, Shannon Swain, shall be subject to administrative wage garnishment at the rate of 15% of disposable pay, or such lesser amount as specified in 31 C.F.R. § 285.11(i)

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

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In re: STANLEY MAURICE FLOYD.
AWG Docket No. 10-0003.
Decision and Order.
Filed December 4, 2009.

AWG.

Petitioner Pro se.
Gene Elkin and Mary Kimball for RD
Decision and Order by James P. Hurt, Hearing Official.

Final Decision and Order

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, 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, a two page hand-written narrative dated 7/14/08. 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 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 hearing by way of teleconference with Mary Kimball of RD.

Petitioner owes $11,316.85 on the USDA RD loan as of December 3, 2009, and in addition, potential fees of $3,168.73 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.

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[1]Complete address maintained in USDA records.

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. 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 recovery (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. Ms. Kimball testimony, RX-3 & Narrative, Narrative # 2.

9. The potential fees due U.S. Treasury pursuant to the Loan Guarantee Agreement are $3,168.73. Ms. Kimball testimony, RX-8.

10. 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.

11. The Petitioner raised issues of financial hardship resulting from the garnishment process. Petitioner's employer provided wages for the 4th quarter of 2009. Petitioner's Expenses were provided in a follow-up teleconference were evaluated using the Financial Hardship Calculation Program. The result is that RD is entitled to garnish $240.73 per month (10.3%) of Petitioner's wages at this time. The financial hardship Calculation Worksheet is attached[2] to this Order.

Because Petitioner's housing expense was less than the "Standard applicable" for that county and because the part III portion of the calculation does not account for child support and medical costs, Petitioners garnishment was temporarily reduced from 15% to 10.3% for one year after which time, the calculation may be reviewed for the purposes of calculating an appropriate garnishment under the regulations 31 C.F.R.§ 285.11(j).

12. Stanley Maurice Floyd is liable for the debt under the terms of the

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[2]The Financial Hardship Calculation is not posted online.

Promissory Note.

Conclusions of Law

1. Petitioner Stanley Maurice Floyd is indebted to USDA's Rural Development program in the amount of $11,316.85.
2. In addition, Petitioner is indebted for potential fees to the US Treasury in the amount of $3,168.73.
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 10.3% 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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In re: CHRISTOPHER SHOUP.
AWG Docket No. 09-0166.
Decision and Order.
Filed December 8, 2009.

AWG.

Mary E. Kimball, for RD.
Petitioner, Pro se.

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

This matter is before me on the petition of Christopher A. Shoup, contesting the efforts of the United States Department of Agriculture's Rural Development office, to garnish his wages in order to obtain repayment of a debt of $20,297.50. In this decision, I conclude that Petitioner is liable for the debt, but that due to financial considerations the garnishment should be limited to $75.00 monthly ($37.50 per paycheck).

I issued a prehearing order in this matter on September 2, 2009, requesting that the parties submit witness lists, exhibits and other information concerning the existence of the debt, who was liable for the debt, and Petitioner's ability to pay the debt. Both parties submitted timely responses to my order.

Pursuant to 7 CFR § 3.62, I conducted a telephonic hearing on December 1, 2009. Petitioner represented himself, while the USDA was represented by Mary Kimball and Gene Elkin. Petitioner was the only witness who testified.

The amount of the debt was not an issue. Petitioner and his then-wife, Tracy L. Shoup, purchased a home in Herscher, Illinois in September, 2001. The house was financed through a Rural Housing Service Loan. Ex. RX-1. The Shoups were divorced on February 11, 2003. As part of the divorce decree, Tracy Shoup was granted possession of the house, with the requirement that she make the mortgage payments. Ex. CS-1. The payments were not forthcoming from Ms. Shoup, however, and the house was sold in foreclosure on September 12, 2008, leaving $20,297.50 due to Rural Development. Ex. RX-4. Petitioner made numerous efforts before the foreclosure sale to force Tracy Shoup to honor her obligations to pay the mortgage, but was unsuccessful. Respondents commenced separate actions against Petitioner and Tracy Shoup, and the latter action was stayed after Petitioner requested this hearing.

The primary focus of Petitioner's testimony, other than the general unfairness in his being liable for a mortgage due to his former spouse's actions and inactions, was his financial condition. Petitioner has

remarried and has a 3 year old child with his wife. Exs. CS-6, CS-7. He is a schoolteacher with a current annual income of approximately $48,000 and his wife is also a schoolteacher with an annual income of approximately $36,000. He pays $916 in child support for his two children from his marriage to Tracy Shoup, and his current student loan payments are $315 per month. He currently resides in a house with his wife and daughter, where the mortgage is in his wife's name due to the fallout in terms of credit ranking resulting from his ex-wife's failure to pay the previous mortgage and resulting foreclosure. School and day care for his 3 year old is approximately $500 per month. Mr. Shoup testified that the household's combined net pay is $4486 with combined expenses of $4382. Mr. Shoup understood his responsibility for the debt but contended that any payments would constitute a hardship.

While Mr. Shoup did not document every one of his expenses, it is clear to me his ability to repay the amount due is severely limited by his basic expenses, including costs associated with the support of his children. I find that reasonable garnishment would be $75 per month, or $37.50 per paycheck. In assessing this amount, I am mindful of the assurances by Ms. Kimball and Mr. Elkin that Respondents are continuing in their efforts to seek payment from Tracy Shoup[1].

Findings of Fact

1. On September 5, 2001, Petitioner Christopher A. Shoup and his then-wife, Tracy Shoup, purchased a home in Herscher, Illinois, which was financed in part by a promissory note for $80, 880 with USDA's Rural Housing Service. Ex. RX-1.

2. Petitioner and Tracy Shoup were divorced on February 11, 2003. Ex. CS-1. The divorce decree provided that Tracy Shoup would live in the jointly purchased home and would be responsible for making the payments on the note. However, Tracy Shoup did not keep up the payments, and the house was subsequently sold at foreclosure on

[1]Presumably, Petitioner will have a right of recovery in state court against Tracy Shoup for any amounts he pays pursuant to this garnishment order.

September 12, 2008. As a result of the foreclosure sale, Petitioner and Tracy Shoup jointly owed a balance of $20,297.50 to USDA.

3. Petitioner has remarried and has a child with his current spouse. Petitioner is employed full-time as a school teacher, as is his wife, is paying 21% of his gross pay for the support of two children from his marriage to Tracy Shoup, is making federal student loan payments of $315 monthly, and has substantial other expenses relating to mortgage, child care and car ownership.

4. I have determined that Petitioner can pay, through the garnishment process, $75 monthly ($37.50 per bi-monthly pay period).

Conclusions of Law

1. Petitioner Christopher A. Shoup is indebted to the USDA, Rural Development, in the amount of $20, 297.50.

2. Petitioner's ex-wife, Tracy Shoup, appears to be jointly liable for the same debt as Petitioner.

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

4. Respondent is entitled to administratively garnish the wages of Petitioner, but the amount of the garnishment is limited to $75 per month ($37.50 per pay period.).

Order

For the foregoing reasons, the wages of the Petitioner, Christopher A. Shoup, shall be subject to administrative wage garnishment at the rate of $75 per month, or such lesser amount as specified in 31 C.F.R. § 285.11(i).

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

Done at Washington, D.C.

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In re: JOHN H. McAFEE.
DA Docket No. 09-0176.
Decision and Order.
Filed December 22, 2009.

DA.

Alan Robinson and Vickie Taber, for Respondent.
Petitioner, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Decision

Petitioner John H. McAfee, an employee of the United States Department of Agriculture, filed a petition on August 17, 2009 challenging USDA's Notice of Intent to Offset Salary that was issued on August 1, 2009, which was seeking to offset $229.00 from Petitioner's bi-weekly paycheck until $3145.60 had been repaid. I sustain the offset in full.

I conducted a telephone conference at which Petitioner represented himself, and USDA was represented by Alan Robinson, Chief, Employee Relations Branch, Agricultural Research Service. At the conference I asked each party to present me a brief position paper concerning the legitimacy of the debt and the offset action, and I scheduled the matter for a hearing before me on November 24, 2009. At Petitioner's request the hearing was rescheduled to December 17, 2009. Respondent submitted the Agency's position paper, while Petitioner submitted nothing. Mr. Robinson and Ms. Vickie Taber appeared on behalf of USDA, while Petitioner did not appear at the hearing he requested.

The hearing was conducted pursuant to the regulations at 7 C.F.R. § 3.77. Ms. Taber, a supervisory human relations specialist for the Agricultural Research service, testified that the debt arose after Petitioner was restored to the rolls of ARS after prematurely retiring—the Office of Personnel Management decided he was ineligible to retire at the time he originally elected to retire. When Petitioner was

reinstated to the rolls, errors were made in calculating his deductions—even though he was still covered by health insurance, through Blue Cross Blue Shield—health insurance premiums were not deducted from his check. When the error was detected, Respondent verified with Blue Cross that Petitioner was covered during the entire time in question, and initiated the offset action to recoup the premiums due.

At no time has Petitioner offered any reason whatsoever for denying the offset request. He gave no reasons for contesting the offset, even though such a petition must "identify and explain with reasonable specificity and brevity the facts, evidence and witness which the employee believes support his or her position." 7 C.F.R. § 3.75(b). He submitted no written information and did not appear in person, even though he requested the hearing.

Accordingly the overwhelming evidence supports the finding that Petitioner owes USDA $3,145.60 and that $229.00 should be deducted from each bi-weekly paycheck until the debt is paid in full.

Findings of Fact

1. Petition John H. McAfee is an employee of USDA's Agricultural Research Service.
2. The USDA accidentally failed to deduct health insurance premiums in the amount of $3,145.60 during a period when Petitioner was, in fact covered by health insurance.

Conclusion of Law

1. Petitioner John H. McAfee is indebted to the USDA in the amount of $3,145.60.
2. All procedural requirements for Federal Salary Offset have been met.
3. Respondent is entitled to deduct $229.00 from Petitioner's bi-weekly paycheck.

Order

For the foregoing reasons, the wages of the Petitioner, John H. McAfee, shall be subject to an offset deduction at the rate of $229.00 per biweekly pay 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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In re: MARY MILLS.
AWG Docket No. 09-0180.
Decision and Order.
Filed December 22, 2009.

AWG.

Mary E. Kimball, for RD.
Richard H. Rhodes, for Petitioner.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

This matter is before me on the petition of Mary B. Mills for a hearing challenging the attempt of Respondent United States Department of Agriculture's Rural Development office to garnish her wages to repay an alleged debt of $49,473.10. In this decision, I reject Petitioner's challenge to the validity of the debt, but I allow a reduced garnishment in light of Petitioner's current financial condition.

On September 2, 2009, I issued a Prehearing Order requiring that the parties exchange information and documentation concerning the existence and amount of the alleged debt, and for Petitioner to supply additional information concerning her ability to pay the debt. Both parties complied with the Order. In November, 2009, I conducted a telephone conference at which the parties agreed that I would conduct a telephone hearing on the matter pursuant to 7 CFR § 3.62.

On December 9, 2009, I conducted a telephone hearing in this matter.

Petitioner was represented by Richard Rhodes, Esq., and testified on her own behalf. Respondent was represented by Gene Elkin, Esq. and Mary Kimball, and Ms. Kimball testified on behalf of Respondent. Each party filed a short brief.

While there is an issue as to the validity of the debt, which I will discuss below, the amount of the debt owed to USDA was not seriously challenged. Rural Development guaranteed a loan for the purchase of a home in Boiling Springs, South Carolina on May 12, 2004. The purchase price of the home was $122,955 and the amount financed was $124,799. It was typical to finance a mortgage at 100% or more, including the payment of a guarantee fee and other closing costs, under rural Development's program, which is designed to help people who might not otherwise qualify to purchase a home. Rural Development only acts as a guarantor, and does not otherwise participate in what is basically a commercial loan, as long as guidelines are met. They knew that Petitioner was in debt for medical expenses, but, as Ms. Kimball testified, that is why Petitioner was able to take advantage of USDA's program.

The mortgage, originally issued by Franklin American Mortgage Company, was subsequently sold to Chase Home Mortgage. After Petitioner fell behind in her payments, Chase filed a foreclosure action, and the house was sold at foreclosure on June 29, 2007 for $98,000. Petitioner lived in the home until she was ordered to vacate, and left the home in good condition. After USDA paid certain fees to Chase, and counting a payment Petitioner has made to USDA, the debt to USDA is $49,803.36. Additional fees of over $13,000 have been assessed by the U.S. Department of the Treasury, but these fees are not an issue here.

Petitioner contends that because the foreclosure order stated "Deficiency Waived" that there can be no personal lien against Petitioner pursuant to South Carolina law. However, I am persuaded by the cases cited by Respondent that such a waiver does not apply to the guarantor of a federally-backed loan. Here, Chase was never in contact with USDA until after the foreclosure sale, and USDA never even knew that the mortgage was sold to Chase. Since Chase sought and received

full reimbursement from USDA, Petitioner's argument that Chase was acting as USDA's agent is particularly non-compelling, since it is inconceivable that Chase could waive the right of USDA to collect on funds that Chase itself was collecting from USDA. South Carolina's law concerning deficiency waivers in foreclosures does not apply to a federal agency acting as a guarantor of a mortgage, and if it does apply, it would be superseded by the federal regulations. See, *Boley v. Brown,* 10 F. 3d 218 (C. A. 4, 1993), *Boley v. Principi*, 144 FRD 305 (E.D.N.C. 1992), *Vail v. Derwinski*, 946 F. 2d 589 (C.A. 8, 1991). Accordingly, I find that Petitioner does owe USDA $49,803.36.

Petitioner also contends that she is unable to afford paying the debt back via wage garnishment. Petitioner works one full time and one part time job, taking home $934 bi-weekly from her full time job and $50 to $100 monthly from her part time job. She has worked in a clerical capacity throughout her career of 33 years. She has suffered through a number of illnesses, currently including diabetes, hypertension, hypothyroidism, and arthritis, and has a mass in her neck which will require surgery. She presently pays approximately $170 monthly out-of-pocket for medications, and currently owes $7,000 in unpaid medical expenses. She has had a number of surgeries in recent years and, although she was covered under a health plan, had to make substantial copayments. Her current monthly rent is $650, her monthly car payments are $274, and she has car insurance and partial payments on her medical debts.

I find that Petitioner can pay, through wage garnishment, $40 per pay period ($80 per month). While I recognize that this constitutes some hardship, and that in reality the full debt could never be repaid at this rate, Petitioner may request the Treasury to consider settling for a reduced consolidated amount following the issuance of this decision.

Findings of Fact

1. On May 12, 2004, Petitioner Mary Mills purchased a home in Boiling Springs, South Carolina. She obtained a home mortgage loan $124,799, including guarantee fee and closing costs, which was

guaranteed by the United States Department of Agriculture. Ex. RX-1.

2. Petitioner subsequently defaulted on the loan, and the home was sold at foreclosure on June 29, 2007, for $98,000. USDA Rural Development had to pay the mortgage holder, Chase Bank, $49,913.78, of which $49,803.36 is still owed.

3. Petitioner is employed full time, and also has a part-time job, but has suffered through a number of medical misfortunes in recent years. She has a combined take home pay of under $2,000, owes medical bills of over $7,000, and has other regular expenses that would reduce the amount she can pay USDA.

4. I have determined that petitioner can pay, through the garnishment process, $80 monthly ($40 per bi-weekly pay period).

Conclusions of Law

1. Petitioner Mary Mills is indebted to the USDA, Rural Development, in the amount of $49,803.36.

2. The fact that the foreclosure document issued by South Carolina state "Deficiency Waived" does not impact the right of the federal government to collect Petitioner's debt, as a guarantor, via wage garnishment.

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

4. Respondent is entitled to administratively garnish the wages of Petitioner, but the amount of the garnishment is limited to $80 per month ($40 per pay period.).

Order

For the foregoing reasons, the wages of the Petitioner, Mary Mills, shall be subject to administrative wage garnishment at the rate of $80 per month, 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.

ELIZABETH MORTIMER.
AWG-09-0157.
Decision and Order.
Filed December 23, 2009.

AWG.

Mary E. Kimbell, for RD.
Petitioner, Pro se.
Decision issued by Victor W. Palmer, Administrative Law Judge.

Elizabeth Mortimer filed a petition to contest the efforts of the Respondent, USDA/Rural Development, to garnish her wages in order to collect part of the rental assistance it provided her because she failed to list the income of an alleged member of her household. I held a hearing by telephone, on December 22, 2009, to decide the issues raised by the petition. Ms. Mortimer was duly sworn, and testified as her only witness. USDA/Rural Development also had only one witness: Esther McQuaid, Financial Specialist, USDA/Rural Development, Office of the Deputy Chief Financial Officer in St. Louis, MO. Ms. McQuaid, who was duly sworn, identified records maintained as official government records, to show that when Ms. Mortimer's wages were combined with those of her boyfriend, Randy Bracken, the alleged member of her household, her household income was higher than the amounts she listed on the application forms she had filed when she applied for and received rental assistance from USDA/Rural Development. The amount of her present alleged debt for receiving higher rental assistance than she should have received is $2,607.67. Ms. Mortimer gave sworn testimony that her present income is limited to wages received from a part time job that pays $9.50 an hour, and averages $800.00 a month. Ms. Mortimer testified that she has not lived with Mr. Bracken for a long time, and that her normal, monthly expenses are: $500 rent; $234electricity; $300

groceries; and $100 gas for her car. Her combined expenses exceed her income and she needs outside help to get be. The evidence received at the hearing supports Ms. Mortimer's testimony that she is unable to pay any amount at this time, and that any repayment schedule would cause her financial hardship. Ms. Mortimer has therefore met her burden of proof under 31 C.F.R. § 285.11(f)(8) and has produced evidence that the garnishment of any part of her salaried income would cause her financial hardship.

Accordingly, the petition is hereby granted and the pending garnishment proceedings against Ms. Mortimer are dismissed for reason of financial hardship.

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

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EQUAL OPPORTUNITY CREDIT ACT

COURT DECISIONS

ELLIS E. BELL v. USDA.
No. 4:08CV01030 ERW.
Filed July 22, 2009.

[Cite as: 2009 WL 2182170 (E.D.Mo.)].

[Editor's Note: We have not included certain portions of the case which are unrelated to the Equal Opportunity Credit Act.]

EOCA – Racial dicrimination – Time barred claim.

Plaintiffs claim was time barred under the strict interpetation of a conditional waiver of sovererign immunity.

United States District Court,
E.D. Missouri,
Eastern Division.

MEMORANDUM AND ORDER

E. RICHARD WEBBER, District Judge.

This matter comes before the Court upon the United States Department of Agriculture's Motion to Dismiss [doc. # 9].

I. BACKGROUND AND PROCEDURAL HISTORY

The Farmers Home Administration was formerly a credit agency within the United States Department of Agriculture ("Defendant"). The Farmers Home Administration was authorized to make loans to farmers. Those who believe that they have been discriminated against by the Farmers Home Administration may file written complaints with the

Office of Adjudication and Compliance (formerly known as the Office of Civil Rights).[1] Aggrieved persons do not have to file a complaint with the Office of Adjudication and Compliance before bringing a lawsuit in federal court.

In this lawsuit, Ellis E. Bell ("Plaintiff"), alleges that Defendant discriminated against him based on his race. He states that he applied for various farm credit and non-credit benefit programs during the years of 1970 and 1971, and he asserts that his applications were denied based on race. Additionally, Plaintiff alleges that he filed written discrimination complaints the Office of Adjudication and Compliance that were not properly investigated.[2] Plaintiff seeks to recover for these alleged discriminatory acts.

II. LEGAL STANDARD

Defendant moves to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). When a court's subject matter jurisdiction is challenged, at issue is that court's "very power to hear the case." *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir.1990). As a result, a court must satisfy itself that it has jurisdiction over the subject matter of the case before it may reach the merits of the complaint. *Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

For an action to be dismissed "under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments." *Titus v. Sullivan,* 4 F.3d 590, 593 (8th Cir.1993).

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[1]The Office of Adjudication and Compliance (and the Office of Civil Rights) is a compliance office within the United States Department of Agriculture.

[2]Plaintiff has attached as an exhibit to his Complaint a letter from Defendant referencing a complaint filed on or about December 24, 1997, alleging discrimination between 1970 and 1994.

Consequently, a court faced with a Fed.R.Civ.P. 12(b)(1) motion to dismiss must determine whether the motion is brought as a facial or factual attack to the complaint. A court considering a facial attack "restricts itself to the face of the pleadings." *Osborn,* 918 F.2d at 729 n. 6. Alternately, in a factual attack, a court "considers matters outside the pleadings," including testimony and affidavits. *Osborn,* 918 F.2d at 729 (citing *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir.1980).[3]

Before the Court today is a facial attack on subject matter jurisdiction as Defendant has limited its challenge to the allegations in Plaintiff's Complaint. In a facial attack, a court must "accept all of the factual allegations in [the] complaint as true and ask whether, in these circumstances" subject matter jurisdiction exists. *Deuser v. Vecera,* 139 F.3d 1190, 1191 (8th Cir.1998) (quoting *Berkovitz v. United States,* 486 U.S. 531, 540, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988)). Because the Court presumes that the factual allegations in Plaintiff's complaint are true, the Court will only dismiss if "it appears beyond doubt that the plaintiff can prove no set of facts" that would entitle Plaintiff to relief. *Osborn,* 918 F.2d at 729 n. 6 (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

III. DISCUSSION

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I. C. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) (citing *Loeffler v. Frank,* 486 U.S. 549, 554, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988)). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text ... and will not be implied." *United States v. Hall,* 269 F.3d 940, 944 (8th Cir.2001) (quoting *Lane v. Pena,* 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996)).

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[3]A court considering a factual attack "inquires into and resolves factual disputes." *Faibisch v. Univ. of Minn.,* 304 F.3d 797, 801 (8th Cir.2002).

Moreover, any such waiver "must be 'construed strictly in favor of the sovereign.' " *United States v. Nordic Village Inc.,* 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992).

A. *EQUAL CREDIT OPPORTUNITY ACT*

In Count III, Plaintiff seeks to recover under 15 U.S.C. § 1691(a), also known as the Equal Credit Opportunity Act ("ECOA"). ECOA makes it unlawful for any creditor to discriminate against an applicant "on the basis of race, color, religion, national origin, sex or marital status, or age. 15 U.S.C. § 1691(a). Under ECOA, any creditor that fails to comply with its requirements "shall be liable to the aggrieved applicant for any actual damages sustained by such applicant." 15 U.S.C. § 1691 e(a). However, subsection (f) provides that no action may be brought later than two years after the alleged ECOA violation. 15 U.S.C. § 1691 e(f).

Congress recognized that the USDA " 'effectively dismantled' its civil rights enforcement apparatus." in the early 1980's, ignoring discrimination complaints that were filed with the agency. *Garcia v. Vilsack,* 563 F.3d 519, 521 (D.C.Cir.2009). As a result, "Congress enacted a special remedial statute in 1998 for applicants who had filed a 'nonemployment related complaint' with the USDA before July 1, 1997 that alleged discrimination between January 1, 1981 and December 31, 1996." *Id.* (citing Pub.L. No. 105-277, § 741(e)). This waiver clearly specified the time period in which the discrimination must have occurred, and the waiver was limited in time as it required suits under this waiver to be filed by October 21, 2000. *Id.*

Plaintiff's claim does not fall within either the two year statute of limitations under ECOA because it alleges discrimination from 1070 to 1994 and was filed on July 15, 2008. Additionally, Plaintiff's claim is not saved by the 1998 Congressional waiver. Plaintiff states that he filed a complaint with the Office of Civil Rights on or about December 24,

1997, however, this did not satisfy the July 1, 1997 deadline. This Congressional waiver "must be 'construed strictly in favor of the sovereign,' " and Plaintiff's claim does not fall within its ambit. *Nordic Village Inc.,* 503 U.S.at 34. The waiver of sovereign immunity under ECOA is not applicable and this Court does not have jurisdiction over Plaintiff's ECOA claim in Count III.

B. ***ADMINISTRATIVE PROCEDURES ACT***
[See Editor's note above.]

C. ***TITLE VI OF THE CIVIL RIGHTS ACT OF 1964***
[See Editor's note above.]

D. ***FIFTH AMENDMENT***
[See Editor's note above.]

E. ***PLAINTIFF'S REMAINING CLAIMS***
[See Editor's note above.]

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss [doc. # 9] is **GRANTED.** Plaintiff's claims are dismissed, with prejudice.

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ETHEL KAMARA v. COLUMBIA HOME LOANS, LLC, d/b/a BROKERS FUNDING SERVICES CO., ET AL.
Civil Action No. 08-5998.
Filed July 24, 2009.

[Cite as 2009 WL 2230733)].

[Editor's Note: We have not included certain portions of the case which are unrelated to the Equal Opportunity Credit Act.]

EOCA – Failure to allege the "adverse action" by agency.

Petitioner failed to allege what adverse action was taken by the agecy which resulted in a violationo of EOCA. Threadbare receitals of mere conclusionary statements do not suffice.

United States District Court,
E.D. Pennsylvania.

MEMORANDUM

McLAUGHLIN, District Judge.

This action arises out of the grant of a purchase money mortgage loan by Columbia Home Loans, LLC ("Columbia") to the plaintiff on December 6, 2006. The plaintiff alleges that the defendants induced her to obtain the loan by making false promises, and that the terms of the loan as revealed at the loan closing were different from those promised. The defendants are Columbia, OceanFirst Financial Corporation ("OceanFirst"), Fidelity Borrowing, LLC ("Fidelity"), Mortgage Electronic Registration Systems, Inc. ("MERS"), EMC Mortgage Corporation ("EMC"), and Bank of America, National Association ("Bank of America").

The complaint was filed on December 24, 2008. On March 10, 2009, the plaintiff filed an amended complaint. The amended complaint alleges violations of the following statutes: (1) the Federal Truth in Lending Act ("TILA"), as amended by the Home Ownership and Equity Protection Act ("HOEPA") (Count I); (2) the Federal Real Estate Settlement Procedures Act ("RESPA") (Count II); (3) the Federal Credit Services Act (Count III); (4) the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") (Count IV); (5) the Federal Fair Debt Collection Practices Act ("FDCPA") (Count V); (6) the Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA") (Count VI); and (7) the Federal Equal Credit Opportunity Act ("ECOA") (Count

VII). Columbia, OceanFirst, MERS, EMC, and Bank of America have moved to dismiss all claims against them.[1] For the reasons stated herein, the Court will grant their motions.

I. *Facts as Alleged in the Amended Complaint*

In 2006, the plaintiff sought to purchase a home. To finance the purchase, she needed to obtain a loan. To facilitate obtaining a loan, she went to Fidelity. At Fidelity, the plaintiff dealt with an individual named "Michael." Michael promised the plaintiff that he could secure a loan for her with better rates than she would be able to find on her own. He explained that there was a mortgage program for which she had been pre-approved. Through this program, the plaintiff could obtain a loan with an 8% fixed interest rate with monthly payments of $750 for a loan of $120,000. She was also promised 100% financing with no pre-payment penalty. Am. Compl. ¶¶ 25-31.

The loan closing took place on December 6, 2006. At the closing, the plaintiff discovered that the terms of the loan being offered to her by Columbia were not what Fidelity had promised. Instead, the terms included 85% financing, monthly payments of $952, a 10% interest rate, and other allegedly unfavorable terms. She also alleges that the loan involved an undisclosed "yield spread premium ." The plaintiff called Fidelity to complain, as she could not afford these terms. *Id.* ¶¶ 25, 39-41, 60-62.

The plaintiff alleges that Fidelity induced her to sign the loan documents by promising her that it would assist her to obtain refinancing at better terms after the closing. Based on these representations, the plaintiff signed the loan documents at the closing on December 6, 2006. *Id.* ¶¶ 44-45.

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[1]Count I is alleged against all defendants except Fidelity. Counts II and IV are alleged against all defendants. Count III is alleged against Fidelity only. Counts V and VI are alleged against MERS, EMC, and Bank of America. Count VII is brought against Columbia and OceanFirst.

Approximately one month after the closing, the plaintiff called Fidelity to inquire about the status of her refinancing. At that time, she was told that it was too early to refinance and that she would have to wait until at least six months after the closing to refinance. Six months after the closing, she again called Fidelity. According to the plaintiff, Fidelity did not respond to her repeated calls and messages. Ultimately, to save her home, the plaintiff filed for bankruptcy. *Id.* ¶¶ 46-49, 56.[2]

II. *Analysis*

As a preliminary matter, the plaintiff concedes that she is withdrawing all claims against OceanFirst. She also concedes withdrawal of her claim under RESPA, insofar as it pertains to a "qualified written request" ("QWR"), and of her claim under HOEPA. *See* Pl.'s Opp. 5. Those claims are therefore dismissed.

The defendants, with the exception of Fidelity, move to dismiss the remainder of the claims against them for failure to comply with the applicable statutes of limitations and/or failure to state a claim. The Court agrees and will dismiss all claims against the moving defendants.

A. *Federal Pleading Standard*

The current standard for adequately pleading a claim was set out in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Under *Twombly,* to state a claim, a party's factual allegations must raise a right to relief above the speculative level. *Phillips v. County of Allegheny,* 515 F.3d 224, 232 (3d Cir.2008) (citing *Twombly,* 550 U.S. at 555). The Supreme Court recently reaffirmed and

[2]MERS is alleged to have been Columbia's "nominee." Bank of America is alleged to be the successor in interest to the plaintiff's trustee in bankruptcy. According to the plaintiff, she was informed during the course of the bankruptcy proceedings that EMC was the holder of her mortgage.

clarified the *Twombly* standard in *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The *Iqbal* Court explained that although a plaintiff is not required to make "detailed factual allegations," Federal Rule 8 demands more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949.

To survive a motion to dismiss, a party cannot allege "labels and conclusions." *Twombly,* 550 U.S. at 555. Rather, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is "plausible on its face." *Iqbal,* 1927 S.Ct. at 1949. A claim has facial plausibility when the plaintiff pleads sufficient factual content to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.*

The Supreme Court has explained that "two working principles" underlie a motion to dismiss inquiry. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* at 1950. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but has not "shown," that the pleader is entitled to relief within the meaning of Rule 8(a) (2).

B. *Count I-TILA*
[See Editor's Note above.]

C. *Count II-RESPA*
[See Editor's Note above.]

D. *Count IV-UTPCPL*
[See Editor's Note above.]

E. *Counts v. and VI-FDCPA/FCEUA*
[See Editor's note above.]

F. *Count VII-ECOA*

The ECOA is a federal statute that prohibits discrimination on the basis of certain protected characteristics with respect to credit transactions. Under 15 U.S.C. § 1691, any creditor who takes "adverse action" on an application is required to provide a written statement of the reasons. An "adverse action" is defined as "[a] refusal to grant credit in substantially the amount or on substantially the terms requested in an application unless the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered." 12 C.F.R. § 202.2(c)(1)(i).

The plaintiff here has not identified an adverse action within the meaning of the ECOA. Columbia-the only party against whom this count is alleged[3] -did not refuse to grant the plaintiff credit. Even to the extent that the terms of the loan ultimately offered by Columbia may not have been "on substantially the terms" alleged to have been promised by Fidelity, the plaintiff also alleges that Columbia did nonetheless offer to extend credit to her, and the plaintiff did accept the credit offered. Accordingly, the complaint establishes that Columbia did not take any adverse action, and the plaintiff's ECOA claim is dismissed.

An appropriate Order shall issue separately.

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[3]Although this claim was also alleged against OceanFirst, the plaintiff has withdrawn all claims against OceanFirst.

ORDER

AND NOW, this 24th day of July, 2009, upon consideration of the motions to dismiss filed by defendants OceanFirst Financial Corporation ("OceanFirst") and Columbia Home Loans, LLC ("Columbia") (Docket No. 30), and by defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), EMC Mortgage Corporation ("EMC"), and Bank of America, National Association ("Bank of America") (Docket No. 33), the plaintiff's omnibus opposition (Docket No. 38), the reply briefs filed by the defendants (Docket Nos. 41, 42), and the plaintiff's omnibus rebuttal brief (Docket No. 46), and for the reasons stated in a memorandum of law bearing today's date, IT IS HEREBY ORDERED that the defendants' motions are GRANTED. The moving defendants are hereby DISMISSED from this case. IT IS FURTHER ORDERED THAT:

1. Counts I, V, VI, and VII of the Amended Complaint are DISMISSED in their entirety.

2. Count II of the Amended Complaint is DISMISSED as to Columbia, OceanFirst, MERS, EMC, and Bank of America, and in its entirety as it pertains to the plaintiff's claim regarding a "qualified written request."

3. Count IV of the Amended Complaint is DISMISSED as to Columbia, OceanFirst, MERS, EMC, and Bank of America.

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JAMES ALLEN, ET AL. v. USDA.
No. 4:08CV120-SA-DAS.
Filed July 27, 2009.

[Cite as: 2009 WL 2245220)].

EOCA – Jurisdiction of EOCA claims will lie in Federal District Courts.

United States District Court,
N.D. Mississippi,
Greenville Division.

MEMORANDUM OPINION

SHARION AYCOCK, District Judge.

This cause comes before the Court on the motion of the Defendant to dismiss this case for lack of subject matter jurisdiction, or alternatively, to transfer this matter to the United States District Court for the District of Columbia [10]. Plaintiffs have responded in opposition to the motion, and the Court, having considered the memoranda and submissions of the parties, along with other pertinent authorities, concludes that the Motion to Transfer should be GRANTED.

Factual and Procedural Background

The Equal Credit Opportunity Act ("ECOA") creates a private right of action against a creditor who discriminates against any applicant "with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age....". 15 U.S.C. § 1691(a); *see Garcia v. Johanns,* 444 F.3d 625, 629 n. 4 (D.C.Cir.2006). The statute defines the term "creditor" to include the United States government, *see* 15 U.S.C. §§ 1691a(e), (f), and thereby waives the United States' sovereign immunity for claims brought under the ECOA. *See Moore v. USDA,* 55 F.3d 991, 994-95 (5th Cir.1995); *Williams v. Conner,* 522 F.Supp.2d 92, 99 (D.D.C.2007). Claims under the ECOA must be brought within two years of the date of the alleged violation. *See* 15 U.S.C. § 1691e(f).

However, in 1998, Congress enacted Section 741, a retroactive limited waiver of the ECOA's statute of limitations. *See Garcia,* 444 F.3d at 629 n. 4. Section 741 was "a response to a fundamental breakdown in the USDA's system for processing discrimination

complaints." *Benoit v. United States Dep't of Agric.,* 577 F.Supp.2d 12, 17 (D.D.C.2008). The civil rights office of the USDA was essentially "dismantled" in the early 1980s and, as a result, many administrative complaints of discrimination filed with the USDA between 1981 and 1996 "were never processed, investigated or forwarded to the appropriate agencies for conciliation." *Pigford v. Glickman,* 185 F.R.D. 82, 88 (D.D.C.1999). The agency's failure to properly process these complaints effectively denied a large number of complainants the right to seek relief under applicable anti-discrimination statutes-such as the ECOA-because the limitations periods for those statutes expired while the complainants waited for a response from the USDA. *See* Administrative Civil Rights Adjudications Under Section 741, 63 Fed.Reg. 67392, 67392 (Dec. 4, 1998) (explaining the genesis of Section 741).

It was under ECOA that four hundred and one African American farmers from Alabama, Arkansas, California, Florida, Georgia, Illinois, Kansas, Missouri, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia alleged (1) that the USDA willfully discriminated against them when they applied for various farm programs, and (2) that when they filed complaints of discrimination with the USDA, the USDA failed properly to investigate those complaints. *Pigford v. Glickman,* 182 F.R.D. 341, 342-43 (D.D.C.1998) (order on motion for class certification). Following the passage of Section 741, thereby waiving ECOA's statute of limitations, a Consent Decree was agreed upon and entered by the Court.

The consent decree provided for the creation of a two-track mechanism to resolve the discrimination claims of individual class members. *Pigford,* 185 F.R.D. at 95-96. The Decree further included a provision permitting individuals who did not timely present their claims to nonetheless present their claims if they could demonstrate that they were prevented from making a timely application due to "extraordinary circumstances beyond their control." *Id.* at 95 n. 5. Many class members attempted to file claims after the Court-imposed deadline of September 15, 2000, with limited success in proving those "extraordinary

circumstances." *See Pigford v. Veneman,* 173 F.Supp.2d 38, 39 (D.D.C.2001) (noting that by 2001, 61,000 late claims had been filed; the arbitrator had reviewed 41,000, and denied 40,000 for failing to meet the "extraordinary circumstances" standard).

Congress subsequently enacted a new cause of action for *Pigford* claimants who had "not previously obtained a determination on the merits of a *Pigford* claim." Pub.L. No. 110-234, § 14012, 122 Stat. 923, 1448-51 (2008). Congress conditioned the new cause of action on a two-year statute of limitations and a limited amount of funds. *See* Pub.L. No. 110-246, § § 14012(c)(2), (i)(l), (k), 122 Stat. 1651, 2209-12 (2008).

On September 15, 2008, twenty-eight named plaintiffs brought a *Pigford* claim pursuant to Section 14012(b) of the Food, Conservation and Energy Act of 2008, in the Northern District of Mississippi. The Defendant thereafter filed a Motion to Dismiss, or in the alternative, to Transfer to Cure the Lack of Subject Matter Jurisdiction. Defendant contends that this Court lacks subject matter jurisdiction because Section 14012 directs the filing of all *Pigford* claims in the United States District Court for the District of Columbia.

Motion to Dismiss Standard

A motion to dismiss premised on Rule 12(b)(1) attacks the court's jurisdiction to hear and decide any issues in the case. FED.R.CIV.P. 12(b)(1). Therefore, the court may address such motion at any time during the pendency of the litigation that is asserted or even upon its own motion. *See Williamson v. Tucker,* 645 F.2d 404 (5th Cir.1981). A motion under Federal Rule of Civil Procedure 12(b)(1) should be granted "only if it appears certain that the plaintiffs cannot prove any set of facts in support of their claims that would entitle them to relief." *Home Builders Ass'n of Miss., Inc., v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir.1998).

It is well settled that on a 12(b)(1) motion the court may go outside

the pleadings and consider additional facts, whether contested or not and may even resolve issues of contested facts. *Clark v. Tarrant County,* 798 F.2d 736, 741 (5th Cir.1986). If, however, the court limits its review to the face of the pleadings, the safeguards under Rule 12(b)(6) apply. If the court considers external matters to the pleadings in deciding a 12(b)(1) motion, the allegations of the complaint need not be taken as true. If the factual matters considered outside the pleadings are undisputed, the court need not make specific factual findings for the record.

Discussion and Analysis

Although the Plaintiffs argue that jurisdiction is proper in the Northern District of Mississippi, they acknowledge that the case should be transferred to the United States District Court for the District of Columbia for the convenience of the parties and witnesses. Because the parties are in agreement that the District Court for the District of Columbia is an appropriate forum for this matter, the Court grants the Motion to Transfer. However, because the Defendant argues that transfer is proper under 28 U.S.C. § 1631, but Plaintiffs contend that 28 U.S.C. § 1404(a) should be used, this Court must determine whether subject matter jurisdiction is proper in the Northern District of Mississippi.[1]

Plaintiffs argue that under the ECOA, the Northern District of Mississippi is an appropriate forum for the action based on the general venue statute found at 28 U.S.C. § 1391(e). However, Defendant contends that Congress specifically limited the appropriate venue to the District Court of the District of Columbia in the statute.

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[1]28 U.S.C. Section 1404 provides that a district court may transfer a civil action, for the convenience of parties and witnesses and in the interest of justice, to any other district where the claim might have been brought. 28 U.S.C. Section 1631, entitled Transfer to Cure Want of Jurisdiction, allows the transfer of an action from a court which lacks subject matter jurisdiction to another district where the claim could have been brought.

The Court notes that Plaintiffs' case is not brought pursuant to the ECOA. As noted above, Congress created a new cause of action for *Pigford* claimants under the Food, Conservation and Energy Act of 2008 because all applicable limitations periods had expired under ECOA. Plaintiffs specifically allude to Section 14012 in the opening paragraph of their Complaint. Accordingly, Section 14012(b) states:

Any Pigford claimant who has not previously obtained a determination on the merits of a Pigford claim may, in a civil action brought in the United States District Court for the District of Columbia, obtain that determination.

Pub.L. No. 110-249, § 14012(b).

Plaintiffs argue that the word "may" modifies "in a civil action brought in the United States District Court for the District of Columbia," such that Section 14012 claims may be brought in that district just as any other district.

In a statutory interpretation case, the beginning point must be the language of the statute, and "when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992) (citing *Demarest v. Manspeaker,* 498 U.S. 184, 190, 111 S.Ct. 599, 112 L.Ed.2d 608 (1991).

The clear reading of the statute provides that a *Pigford* claimant who has yet to obtain a determination of the claim may file suit. This is the creation of the new claim. Where that suit must be filed is specifically referred to in that section-the United States District Court for the District of Columbia. *See United States v. Ron Pair Enters.,* 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (noting that where a phrase is set aside by commas, "that phrase stands independent").

Moreover, based on the extensive legal history of these claims, it was clearly Congress' intent to vest the District Court of the District of Columbia with ad judicatory control over these cases. *See Pigford v. Vilsack,* 613 F.Supp.2d 78 (D.D.C.2009); *Benoit v. United States Dep't of Agric.,* 577 F.Supp.2d 12 (D.D .C.2008); *In re Black Farmers Discrimination Litigation,* 587 F.Supp.2d 23 (D.D.C.2008); *Pigford v. Schafer,* 536 F.Supp.2d 1 (D.D.C.2008); *Williams v. Conner,* 522 F.Supp.2d 92 (D.D.C.2007); *Pigford v. Johanns,* 421 F.Supp.2d 130 (D.D.C.2006); *Wise v. Glickman,* 257 F.Supp.2d 123 (D.D.C.2003); *Pigford v. Veneman,* 173 F.Supp.2d 38 (D.D.C.2001); *Garcia v. Veneman,* 211 F.R.D. 15 (D.D.C.2002); *Pigford v. Glickman,* 185 F.R.D. 82 (D.D.C.1999).

Accordingly, pursuant to 28 U.S.C. § 1631, this case is hereby TRANSFERRED to the United States District Court for the District of Columbia.

SO ORDERED.

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JENNIFER BARRETT v. AMERICAN PARTNERS BANK, et al.
Civil Action No. AW-08-0319.
Filed July 28, 2009.

[Cite as: 2009 WL 2366282 (D.Md.)].

[Editor's Note: We have not included certain portions of the case which are unrelated to the Equal Opportunity Credit Act..]

EOCA – Failure to allege specific acts of discrimination.

United States District Court,
D. Maryland, Southern Division.

MEMORANDUM OPINION

ALEXANDER WILLIAMS, JR., District Judge.

Plaintiff brought this action against Defendant for violations of the Truth In Lending Act ("TILA") 15 U.S.C. § 1601 *et seq.,* the Real Estate Settlement Procedures Act ("RESPA") 12 U.S.C. § 2601 *et seq.,* the Uniform Commercial Code ("UCC"), and the Equal Credit Opportunity Act ("ECOA") 15 U.S.C. 1691 *et seq.* The Defendant counter-claimed for breach of contract.[1] Currently pending before the Court is Defendant's Motion for Summary Judgment (Paper 24) pursuant to Rule 56 of the Federal Rules of Civil Procedure as to the Plaintiff's claims as well as their own Counter-claims. The Court has reviewed the parties' filings with respect to the instant Motion. For the reasons stated more fully below, the Court will grant Defendant's Motion for Summary Judgment.

I. Factual and Procedural Background

The following facts are viewed in the light most favorable to the non-movant. On August 1, 2006, Jennifer Barrett ("Barrett") obtained two purchase money loans from American Partners Bank ("American Partners"). She obtained these loans to pay for a house located at 3658 Joy Lane, Waldorf, Maryland. Barrett obtained a first deed of trust against property she owned in Fort Washington, Maryland to secure the first loan of $225,000 ("Prince George's County loan"). She also obtained a first deed of trust against the Waldorf home to secure the second loan of $666,000 ("Charles County loan"). Both prior to and at settlement, American Partners failed to provide many of the disclosures required by TILA, RESPA, and various other statutes. Included among the documents required by law, but not provided by American Partners, were the "Notice to Cancel" required by 15 U.S.C. § 1635(a) and the "Pre-Closing Disclosures" required by 15 U.S.C. § 1638(b)(1). Barrett

[1] Originally, the Plaintiff sued American Partners Bank and John Does 1-10. Because the Plaintiff has not named Does 1-10, the Court will consider this Motion on behalf of American Partners alone.

sold the Prince George's County property on November 29, 2006.

Barrett has never made any payments toward the loan secured by her Prince George's County property. That loan included a "balloon payment rider" making all interest and principal due on August 1, 2007. The terms of the loan included a provision requiring full payment if Barrett sold the Prince George's County property prior to August 1, 2007. Barrett has made payments totaling $40,421.20 towards the interest on the Charles County loan, and payments totaling $1.03 toward that loan's principal. In August, 2007, she ceased making loan payments to American Partners, and sent notices of rescission for both loans. American Partners refused to honor either rescission, and did not return the fees which were collected in connection with the loans.

Barrett initiated this suit against American Partners on October 16, 2007 in the United States District Court for the Eastern District of Virginia. On motion of the Defendant, the case was transferred to this Court on February 1, 2008. The Defendant filed its counter-claim against the Plaintiff on June 26, 2008, and filed the instant Motion for Summary Judgment on September 30, 2008.

II. Standard of Review

Summary judgment is only appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). To defeat a motion for summary judgment, the nonmoving party must come forward with affidavits or other similar evidence to show that a genuine issue of material fact exists. *See*

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). While the evidence of the nonmoving party is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc.,* 152 F.3d 326, 330-31 (4th Cir.1998). Additionally, neither hearsay nor conclusory statements with no evidentiary basis may support or defeat a motion for summary judgment. *See Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro,* 64 F.3d 962, 967 (4th Cir.1995).

III. Analysis

The Defendant's Motion for Summary Judgment requires this Court to consider both the Plaintiff's complaint and the Defendant's counter-claim. Because the resolution of the Plaintiff's Complaint in large measure determines the outcome of the Defendant's Counter-claim, the Court will examine the Motion for Summary Judgment with respect to the Complaint first.

A. Barrett's Complaint

The subject matter of Barrett's complaint can be organized into three categories: first, TILA claims; second, RESPA claims; third, other claims. For the sake of organization, this Court will examine each category of claims separately.

1. TILA Claims

[See Editor's note above.]

2. RESPA Claims

[See Editor's note above.]

3. Other Claims

The Defendant asserts that all of Barrett's remaining claims fall under inapplicable statutes. Aside from her TILA and RESPA claims, the Plaintiff asserts five other causes of action in her complaint: a violation in obtaining and performing appraisals; a violation of the Paperwork Reduction Act of 1995; a violation of Article Nine of the Uniform Commercial Code; a failure to disclose the yield spread premium; and a violation of the Equal Credit Opportunity Act ("ECOA").

Count III
[See Editor's note above.]

Count VIII
[See Editor's note above.]

Count XI
[See Editor's note above.]

Count XII
[See Editor's note above.]

Count XIII alleges that the Defendant violated ECOA by failing to provide clear and conspicuous disclosures. The purpose of ECOA is to protect consumers from discriminatory practices. *See* 15 U.S.C. § 1691(a). ECOA does not discuss the form and disclosure of loan documents. Furthermore, the Plaintiff has not alleged that American Parners' failure to make certain disclosures clear and conspicuous was discriminatory based. Therefore, the Court will grant Defendant's Motion for Summary Judgment as to Count XIII.

Barrett's remaining claims either are not cognizable or are not sufficiently pled. For these reasons, the Court will grant Defendant's Motion for Summary Judgment with respect to those claims which fall outside of TILA and RESPA.

II. American Partners' Counter-Claim

Having discussed Barrett's claims, American Partners' Motion next turns the Court's attention to its Counter-claims for damages resulting from breach of contract. Central to this claim is the issue of rescission. If Barrett could rescind her loans, and if she did so prior to breaching the contract, then she could be in breach. As the above analysis concluded, however, Barrett did not have the right to rescind either loan.

Barrett ceased making payments on the Charles County loan in August, 2007, without having paid off the loan. Because the terms of this note required her to continue to make payments, and because she could not rescind the contract, this Court finds that Barrett has breached her contract with American Partners with respect to the Charles County loan.

Likewise, Barrett has failed to pay back the entire Prince George's County loan. This loan, structured differently than the Charles County loan, required Barrett to repay immediately upon the sale of the Prince George's County property which served as its security. Barrett sold the property on November 29, 2006, but failed to repay the loan on that date. Therefore, this Court finds that Barrett has breached her contract with American Partners with respect to the Prince George's County loan.

The Court will grant Defendant's motion for Summary Judgment with respect to its Counterclaims for breach of contract because Barrett has failed to make payments toward her two loans as required by the contracts. While it is true that the Plaintiff believed that she was entitled to rescission, that belief, alone, does not negate her failure to uphold her end of the bargain. Because Barrett has breached her obligations under the terms of both the Prince George's County and Charles County loans, the Court will enter a judgment for liquidated damages in favor of American Partners. With respect to the Price George's County loan, the judgment will reflect the principal, $225,000, plus interest. With respect to the Charles County Loan, the judgment will reflect the principal, $666,000, plus interest, less the amounts paid against the interest and the principal. This Court will also award American Partners reasonable

attorney's fees with respect to this litigation. The total amount of this judgment will be determined by an updated affidavit to be filed by American Partners within fourteen (14) days of the entry of this order. Along with an accurate computation of attorney's fees, this affidavit shall detail and outline the principal and interest due under the terms of the respective loans.

A separate Order will follow

KARINE GRINKE AND CARLOS MORENO v. COUNTRYWIDE HOME LOANS, INC.
No. 08-23383-CIV.
Filed August. 24, 2009.

[Cite as 2009 WL 2588746 (S.D. Fla)].

[Editor's Note: We have not included certain portions of the case which are unrelated to the Equal Opportunity Credit Act.]

EOCA – Time barred claims – Tolling of limitations applies but must be shown – Adverse actions by agency must be well pleaded.

Petitioner failed to show how the lender's sales tactics resulted in a concealment that would justify tolling.

United States District Court,
S.D. Florida.

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

WILLIAM M. HOEVELER, Senior District Judge.

Before the Court is Defendant's motion to dismiss the Complaint. For

the reasons that follow, the motion is GRANTED, without prejudice.

Background

The following allegations as set forth in the Complaint are assumed to be true for the purposes of evaluating the motion to dismiss. The Plaintiffs bring this action for damages and rescission of a home mortgage loan executed on October 17, 2005, in favor of Defendant, Countrywide Home Loans, Inc., in the amount of $920,000. Plaintiffs allege that they are entitled to rescission and damages based on Defendant's failure to make numerous disclosures required by the Truth in Lending Act[1] (Count I, II, and III), Real Estate Settlement Procedures Act[2] (Count IV), and Equal Credit Opportunity Act[3] (Count V), and for violations of the Fair Credit Reporting Act[4] (Count VI) and Florida Deceptive and Unfair Trade Practices Act[5] (Count VII).

The Plaintiffs allege that Defendant engaged in "bait and switch" sales practices such that Plaintiffs were induced to sign loan documents by promises of low interest rates and few costs when the documents actually contained significantly less favorable terms. Complaint ¶ 5.

Plaintiffs allegedly thought they were taking a "conventional" loan at a low fixed rate of interest, when the loan was in fact an adjustable rate mortgage with a "three month introductory rate," "high variable

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[1]The Truth in Lending Act, 15 U.S.C. § 1601, *et seq.,* "TILA".

[2]The Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.,* "RESPA".

[3]The Equal Credit Opportunity Act, 15 U.S.C. § 1691, *et seq.,* "ECOA".

[4]The Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.,* "FCRA".

[5]The Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.,* "FDUTPA".

rates of interest," and was negatively amortized. Complaint ¶ 13-15. Additionally, it is alleged that Defendant "falsified income, employment, and assets and deposits" to qualify Plaintiffs for a loan larger then they could afford, and that Defendant charged excessive fees during the coarse of the loan. Complaint ¶ 6, 8. Plaintiffs also allege that Defendant engaged in "high pressure sales tactics and deceit" whereby Plaintiffs were "forced and induced" to sign the loan documents without reading them based on representations from Defendant that there was "no need or time to read them." Complaint ¶ 7.

Plaintiffs filed the Complaint on December 8, 2008, three years and two months after the execution of the loan. Defendant moved for dismissal of all counts on the grounds that, with the exception of FDUPTA, they were time barred by statute or otherwise defectively plead.[6] With the exception of the claim under the Fair Credit Reporting Act, Plaintiffs do not dispute that their claims accrued after the appropriate statute of limitations had run. The Plaintiffs instead request that the Court equitably toll the statute of limitations, alleging fraudulent concealment by Defendant as a basis for tolling.

I. STANDARD OF REVIEW

In evaluating a motion to dismiss, the allegations of the complaint are entitled to a presumption of truth. *Scott v. Taylor,* 405 F.3d 1251, 1253 (11th Cir.2005). A complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 553, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The allegations of fact in the Complaint must be enough to

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[6]The statutory periods are as follows: TILA provides Plaintiffs one year from the "transaction," typically the execution of the document in question, to sue for damages; TILA also provides three years from the date of the "transaction" to seek rescission. 15 U .S.C. § 1640(e); *In re Smith,* 737 F.2d 1549, 1552 (11th Cir.1984). RESPA also provides a three year statutory period according to the section on which Plaintiffs rely, 12 U.S.C. § 2605, pertaining to failures to disclose information regarding loan servicing. 12 U.S.C. § 2614. Both FCRA and ECOA have two year statutory periods, which accrue at the time of the violation. 15 U.S.C. § 1681i(a)(1)(A); 15 U.S.C. § 1691e(f).

make the plaintiff's entitlement to relief "plausible." *Twombly,* 550 U.S. at 556-557.

Equitable tolling is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances. *Baily v. Glover,* 21 Wall. 342, 88 U.S. 342, 347, 22 L.Ed. 636 (1874). It is the Plaintiffs' burden to establish that the Court should exercise its power to toll a statute of limitations. *Booth v. Carnival Corp.,* 522 F.3d 1148, 1150 (11th Cir.2008).

II. CLAIMS ARISING UNDER TILA (COUNTS I, II, AND III).
[See Editor's note above.]

III. CLAIMS ARISING UNDER RESPA (COUNT IV).
[See Editor's note above.]

IV. CLAIMS ARISING UNDER ECOA (COUNT V).

Plaintiffs allege that Defendant violated ECOA, specifically Federal Reserve Board Regulation B, 12 C.F.R. § 202.1. Complaint ¶ 43. Specifically, Plaintiffs allege violations of Regulation B, section 202.9, regarding required notifications before adverse action is taken on a loan application. Plaintiffs' pleadings in Count V are vague, omitting what "adverse action" taken on their application obligated Defendant to provide them timely notice, or how the other allegations figure into the alleged ECOA violation. The Defendant must be afforded fair notice of the grounds on which the claim will rest. *Twombly,* 127 S.Ct. at 555.

Plaintiffs do not dispute that they brought their claims after the ECOA statute of limitations had run, and have not demonstrated a valid basis for equitable tolling. While the Eleventh Circuit has not addressed whether or not equitable tolling applies to ECOA, those courts which have considered the issue have held that tolling does apply. *See*

Robinson v. Schafer, 2008 WL 1995354, at *6 (M.D.Ga. May 6, 2008) (recognizing the lack of precedent in the 11th Circuit, while holding that tolling does apply to ECOA); *see also Farrell v. Bank of New Hampshire-Portsmouth,* 929 F.2d 871, 874 (1st Cir.1991) (recognizing circumstances in ECOA case where equitable tolling could apply); *Matthews v. New Century Mortg. Corp.,* 185 F.Supp.2d 874, 883 (S.D.Ohio 2002) (applying equitable tolling in an ECOA case).

Plaintiffs attempt to establish a basis for tolling by relying on paragraph 43 of the Complaint, which alleges that Defendants engaged in bait and switch sales tactics, but it is unclear how these sales tactics could constitute the kind of ongoing fraudulent concealment that might justify tolling. Even if Plaintiffs had demonstrated a basis for tolling, which the Court does not find, Count V would be defective as plead because the allegations in this Count are impermissibly vague. For the above reasons the Court has determined that Plaintiffs have not adequately demonstrated a basis for tolling the statute of limitations for Count V. As this dismissal is without prejudice, Plaintiffs may have an opportunity to file an amended complaint.

V. CLAIMS ARISING UNDER FCRA (COUNT VI).
[See Editor's note above.]

VI. CLAIMS ARISING UNDER FDUTPA (COUNT VII).
[See Editor's note above.].

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED, without prejudice. Plaintiffs shall have twenty (20) days in which to file an amended complaint; failure to do so will result in dismissal of this case with prejudice.

DONE AND ORDERED in Chambers at Miami, Florida this *21st* day of August 2009.

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In re: ELNORA MACKLIN v. JEFFERSON FINANCE, LLC.
Bankruptcy No. 05-12750-BGC-13.
Adversary No. 08-00013-BGC-13.
Filed September 23, 2009.

[Cite as: 2009 WL 3080461].

[*Editor's Note: We have not included certain portions of the case which are unrelated to the Equal Opportunity Credit Act.]*

EOCA – Failure to specify specific acts of discrimination – Lender may offer denial of credit based upon non-discriminatory reasons – Age discrimination – Race discrimination.

United States Bankruptcy Court,
N.D. Alabama,
Southern Division.

Memorandum Opinion on
MOTION FOR SUMMARY JUDGMENT [1]

BENJAMIN COHEN, Bankruptcy Judge.

I. Background

The defendant's *Motion for Summary Judgment* is the latest phase in a lengthy dispute between these parties. The following is a summary of that dispute.

The movant holds mortgage liens on property owned by the debtor. On August 25, 2006, the movant filed a *Motion for Relief From Stay* in the debtor's main case, Docket No. 57, seeking permission to foreclose

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[1]This Memorandum Opinion constitutes findings of facts and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable here pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014.

on those mortgages. A hearing was held on December 19, 2006. At the hearing, the parties announced that they had settled the matter, and that movant's counsel would submit a proposed consent order. Docket No. 79.

On April 5, 2007, rather than filing a settlement document, movant's counsel filed a *Request to Re-Set Motion for Relief from Stay Put Back on Calendar.* Docket No. 84. Movant's counsel represented, "The issues in this case have not been resolved." *Id.*
[See Editor's note above.]

II. The Real Estate in Dispute

A. Property Located at 119 Avenue Y, Birmingham, Alabama 35214.

The defendant Jefferson Finance, LLC and Ms. Macklin entered into a purchase money mortgage loan agreement on December 4, 2001. At the time, the plaintiff was in her late seventies or early eighties. The mortgage was secured by property located at 119 Avenue Y, Birmingham, Alabama 35214. The debtor borrowed $19,000 at an annual interest rate of 12 percent. Her monthly payment was $230. The plaintiff's intention, which she shared with Mr. Bailey prior to receiving the loan, was to lease the property.

After about a year from acquiring the property, the plaintiff has continuously rented it to a paying tenant for $300 to $350 per month. According to her deposition, she has never occupied the property and never intended to occupy it.

In its proof of claim filed in the plaintiff's bankruptcy case, the defendant estimated the value of the property to be $33,000. At the hearing on the defendant's motion for relief from the stay on January 16, 2008, Mr. Bailey testified that the property was worth $33,000 at the time of the hearing.

B. Property Located at 828 Spring Street, Birmingham, Alabama 35214.

On June 7, 2005, the defendant made a loan to Ms. Macklin and her sister, Bernice Barnfield, on another piece of real estate.[4] Ms. Barnfield filed her own Chapter 13 case on April 18, 2009. Case No. 09-02363-BGC13. Numerous matters involving many of the issues before the Court in the instant case are scheduled for trial before this Court in that case on October 7, 2009. Those matters include: Docket No. 40, the Debtor's *Objection to Claim # 3 of Jefferson Finance, LLC;* Docket No. 28, a *Motion for Relief from Stay* from Jefferson Finance, LLC; Docket No. 45, a *Renewed motion for relief From Stay* from Jefferson Finance, LLC; Docket No. 29, an *Objection to Confirmation* from Jefferson Finance, LLC; and Docket No. 10, the *Confirmation Hearing* on the debtor's proposed Chapter 13 plan. At the time, the plaintiff was in her early eighties. That loan was secured by a mortgage on property jointly owned by Ms. Macklin and Ms. Barnfield located at 828 Spring Street, Birmingham, Alabama 35214. They acquired the property by inheritance. Their purpose in obtaining the loan was to pay certain debts of the decedent's estate that otherwise would have had to have been paid through liquidation of the property. Their intention, which they shared with Mr. Bailey prior to receiving the loan, was to lease the property.

Ms. Macklin and Ms. Barnfield borrowed $10,600 at an annual interest rate of 19.75 percent. Their monthly payment was $235. In the proof of claim filed in the plaintiff's bankruptcy case, the defendant estimated the value of the property at $65,000. In contrast, at the hearing

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[4]Ms. Barnfield filed her own Chapter 13 case on April 18, 2009. Case No. 09-02363-BGC13. Numerous matters involving many of the issues before the Court in the instant case are scheduled for trial before this Court in that case on October 7, 2009. Those matters include: Docket No. 40, the Debtor's *Objection to Claim # 3 of Jefferson Finance, LLC;* Docket No. 28, a *Motion for Relief from Stay* from Jefferson Finance, LLC; Docket No. 45, a *Renewed motion for relief From Stay* from Jefferson Finance, LLC; Docket No. 29, an *Objection to Confirmation* from Jefferson Finance, LLC; and Docket No. 10, the *Confirmation Hearing* on the debtor's proposed Chapter 13 plan.

on the defendant's motion for relief from the stay, conducted on January 16, 2008, Mr. Bailey testified that the property was worth between $20,000 and $25,000 when the defendant made the loan and was worth approximately the same at the time of the hearing.

Neither Ms. Macklin nor Ms. Barnfield has ever occupied the property and according to the plaintiff's deposition, neither had the intention to do so. Since acquiring the property they have allowed a granddaughter to live in it continuously, rent free.

III. The Plaintiff's Complaint

A. Truth in Lending Act
[See Editor's note above.]

B. Home Ownership and Equity Protection Act
[See Editor's note above.]

C. Equal Credit Opportunity Act

The plaintiff also contends that the defendant violated the Equal Credit Opportunity Act in connection with both mortgage loans. 15 U.S.C. §§ 1691a-1691f; 12 C.F.R. §§ 202.1-202.16. Again, the plaintiff does not specify, explain, or describe how the defendant violated any of the statutes which comprise that legislation or the regulations promulgated pursuant to it, or what particular provisions of those statutes and regulations were violated, or what conduct of the defendant may have violated any provision of those statutes and regulations.

D. Real Estate Settlement Procedures Act of 1974
[See Editor's note above.]

E. Omnibus Allegation
[See Editor's note above.]

IV. The Defendant's Motion for Summary Judgment

In support of its summary judgment motion, the defendant submitted the affidavit of Mr. Ward Bailey, the defendant's managing member, who personally dealt with the plaintiff in connection with the closing of both mortgage loans; the plaintiff's deposition; the answers given by the plaintiff to the defendant's interrogatories; and the documents executed by the plaintiff in connection with both mortgage loans. In response, the plaintiff submitted her own affidavit and asked the Court to take notice of the testimony given by Mr. Bailey at the hearing held on January 16, 2008, on the defendant's motion for relief from the stay.

V. Legal Framework: Summary Judgment Standards

Under Fed.R.Civ.P. 56(c), made applicable by Bankruptcy Rule 7056 to bankruptcy adversary proceedings, a moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The framework in this Circuit for making that determination is outlined in the Eleventh Circuit Court of Appeals decision in *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112 (11th Cir.1993). The Court applied that standard in this proceeding.

VI. Discussion

A. The debtor's contention that the 15 U.S.C. § 1638 "Truth in Lending" disclosures were not made
[See Editor's note above.]

B. The debtor's contention that she failed to receive notice of her 15 U.S.C. § 1635(a) right to rescind
[See Editor's note above.]

C. The plaintiff's contentions that the defendant violated the Home Ownership and Equity Protection Act

[See Editor's note above.]

D. The plaintiff's Equal Credit Opportunity Act contentions

The plaintiff also contends that the defendant violated the Equal Credit Opportunity Act in connection with both mortgage loans. 15 U.S.C. §§ 1691a-1691f; strategy C.F.R. §§ 202.1-202.16.

Section 1691(a)(1) provides, "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)...." 5 U.S.C. §§ 1691 a(1). Associated regulations provide, "Discriminate against an applicant means to treat an applicant less favorably than other applicants." 12 C.F.R. § 202.2(n).[7]

A plaintiff bears the initial burden of establishing a prima facie case of discrimination. If the plaintiff establishes a prima facie case of discrimination under the ECOA, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory actions. If the defendant then successfully articulates a legitimate, non-discriminatory reason for its action, the plaintiff will have to prove, by preponderance of evidence, that the reasons offered by defendant were a pretext. *Shiplet v. Veneman,* 2009 WL 1439305, *30 (D.Mont.2009); *Cooley v. Sterling Bank,* 280 F.Supp.2d 1331, 1338 (M.D.Ala.2003); *Davis v. Strata Corp.,* 242 F.Supp.2d 643, 651-652 (D.N.D.2003); *Faulkner v. Glickman,* 172 F.Supp.2d 732, 737 (D.Md.2001); *Sallion v. SunTrust Bank, Atlanta,* 87 F.Supp.2d 1323,

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[7] A plaintiff may prove unlawful discrimination under the ECOA by one or more of three theories. Those are: (1) direct evidence of discrimination; (2) disparate impact analysis; and (3) disparate treatment analysis. *Shiplet v. Veneman,* 2009 WL 1439305, *21 (D.Mont.2009); *Faulkner v. Glickman,* 172 F.Supp.2d 732, 737 (D.Md.2001); *Sallion v. SunTrust Bank, Atlanta,* 87 F.Supp.2d 1323, 1327 (N.D.Ga.2000); *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago,* 962 F.Supp. 1056, 1060 (ND.Ill.1997); *Williams v. First Federal Sav. and Loan Ass'n of Rochester,* 554 F.Supp. 447, 449 (N.D.N.Y.1981).

1329 (N.D.Ga.2000); *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago,* 962 F.Supp. 1056, 1060-1061 (ND.Ill.1997); *Resolution Trust Corp. v. Townsend Associates Ltd. Partnership,* 840 F.Supp. 1127, 1142 n. 14 (E.D.Mich.1993); *In re DiPietro,* 135 B.R. 773, 776 (Bankr.E.D.Pa.1992); *Mercado Garcia v. Ponce Federal Bank, F.S.B.,* 779 F.Supp. 620, 628 (D.P.R.1991); *In re Farris,* 194 B.R. 931, 937 (Bankr.E.D.Pa.1996).

The ultimate burden of persuasion however, remains on the plaintiff throughout. *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

Mr. Bailey, the defendant's representative who participated in both transactions with the plaintiff, testified in his affidavit that there was no discrimination practiced on the plaintiff with respect to either mortgage loan. He stated, "There was no discrimination of any kind intended or affected by JF against Ms. Macklin in any aspect of either mortgage loan." *Affidavit of Ward Bailey* (attached to *Jefferson Finance, LLC's Pretrial Statement and Motion for Summary Judgment* filed on January 14, 2008 (A.P. 08-00013-BGC-13, Proceeding No. 52)).

The plaintiff's complaint does not specify, explain, or describe how the defendant violated the ECOA, or what particular provisions of the statutes which comprise that legislation or the regulations promulgated pursuant to it were violated. It also does not identify what conduct of the defendant may have violated any provision of those statutes and regulations.

Similarly, in her deposition, the plaintiff was not specifically asked to explain her ECOA claim. Instead, she was asked to explain what, if anything the defendant was guilty of. She was asked if the defendant did any harmful things to her and, if so, what those were, and if there were things, how she was harmed by that conduct. In response, she was unable to explain or describe anything inappropriate or harmful. In contrast, she stated that she had not suffered injury or damages as a

result of anything done by the defendant. She testified:

Q. Tell me what, if anything, you contend or believe has been done wrong by Jefferson Finance with regard to either of these loans?

A. I'm sorry, I haven't-I don't-I find some fault in some of them, but right now my mind ain't-ain't clear right now. My head's killing me. But other than that, I don't find too much fault in it.

Q. You don't know of anything that they've done wrong yourself?

A. No. sir.

Q. There's been a-somewhere there's something in some of the paperwork talking about damages, but have you had any losses or damages or expenses as a result of anything Jefferson Finance has done or Mr. Bailey has done?

A. No.

Deposition of Elnora Macklin at 78-79, A.P. Docket No. 52-3 (attached to *Jefferson Finance, LLC's Pretrial Statement and Motion for Summary Judgment*).

In an attempt to clarify the plaintiff's position with respect to the ECOA claim, and discover the evidentiary basis of the plaintiff's contentions, the defendant promulgated the following interrogatory to the plaintiff:

6. Describe in detail each act and omission you claim is a violation of the Equal Credit Opportunity Act (ECOA), including, but not limited to, the following details in your description of each:

A. The nature, details and specifics of the act or omission

B. the date(s) it allegedly occurred

C. the individual(s) you allege committed the act or omission

D. the names and addresses of each person with any knowledge or information about the act or omission and the substance of their knowledge and information

E. a description of each document that reflects or relates to the act or omission and an explanation of how that document reflects or relates to the act or omission

F. the specific statutory provision and/or regulation that you allege the act or omission violates

G. the type, nature, and dollar amount of each injury, loss, expense, and other adverse result that you claim as damages for the act or omission.

Interrogatories and Requests for Production to the Debtor at 4, A.P. Docket No. 15.

In response to that interrogatory, the plaintiff stated:

The debtor and co-debtor were offered less favorable terms on both properties based on race. Based on the creditor's failure to obtain information regarding the debtor and co-debtor's income and expenses and the debtor's and co-debtor high equity to loan ratio the creditor violated the ECOA and their fiduciary duty to the debtor and the co-debtor. Both mortgage loans were unreasonably favorable to the creditor based on the equity in the property and the fact that the creditor knew or should have known by ascertainment that the debtor's and co-debtor's income and expenses did not support both mortgages on the terms offered to them.

Debtor's Amended and Continuing Response to Defendant's Interrogatories at 6, A.P. Docket No. 45.

The plaintiff's response to the defendant's interrogatory No. 6 clearly specifies that she is claiming racial discrimination under the ECOA. However, in the affidavit that she filed in opposition to the defendant's present motion, the plaintiff made the following statements with respect to *all* of the claims made by her in her complaint, and did not direct those statements specifically or strictly to her ECOA claim:

I was and continue to be an elderly lady with no experience in the mortgage lending business or the valuation business and *it is my opinion* that the defendant took unfair advantage of me because of my age and limited knowledge in the mortgage lending field.

It is my opinion that the only reason the Defendant made both loans to me was because of the amount of equity in both homes and the Defendant's superior knowledge regarding my inability to pay the loans under the terms given to me because my source of income was limited because of my age and the fact that I was receiving social security.

Plaintiff's Partial Response Pursuant to Rule 56(e) and (f) FRCP; Affidavit and Evidence in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Defendant's Motion to Dismiss at 3, A.P. Docket No. 57 (emphasis added).

Those statements, although not specifically directed to the plaintiff's ECOA claim, do not mention race or racial discrimination, but instead focus on the plaintiff's age, thus suggesting that her ECOA claim may be based on age discrimination instead of or in addition to racial discrimination. That question is however resolved because there is no evidence or proof of discrimination of either.

The information contained in the plaintiff's deposition, affidavit and answers to interrogatories represents the only "evidence" which stands in opposition to the defendant's summary judgment motion. The deposition does not support the plaintiff because she was unable to describe any malfeasance or statutory violation by the defendant. Her answers to the defendant's interrogatories and affidavit contain only her

personal conclusions, conclusory allegations, bare assertions, and subjective beliefs. They do not include any specific facts to support those conclusions, allegations and beliefs.

Under the summary judgment standard in this Circuit, a nonmoving party's response to a summary judgment motion *must set forth specific facts* showing a genuine issue for trial. Fed.R.Civ.P. 56(e). The party's personal conclusions, conclusory allegations, bare assertions, and subjective beliefs are of no probative value and will not suffice to prevent summary judgment from being granted against her.[8]

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[8]"If the nonmoving party's response to the summary judgment motion consists of nothing more than mere conclusory allegations, then the Court must enter summary judgment in the moving party's favor." *Johnson v. Fleet Finance, Inc.,* 4 F.3d 946, 949 (11th Cir.1993). "This court has consistently held that conclusory allegations without specific supporting facts have no probative value." *Evers v. General Motors Corp.,* 770 F.2d 984, 986 (11th Cir.1985). "Bare assertions ... are insufficient to create an issue...." *Gordon v. Terry,* 684 F.2d 736, 743 (11th Cir.1982), *cert. denied,* 459 U.S. 1203 (1983). "Conclusory allegations such as these, without specific supporting facts, have no probative value." *Id.* at 744. "The affidavit constitutes nothing more than a recital of unsupported allegations, conclusory in nature. As such it is insufficient to avoid summary judgment." *Broadway v. City of Montgomery,* 530 F.2d 657, 660 (5th Cir.1976). "Conclusory statements, unsubstantiated by facts in the record, will normally be insufficient to defeat a motion for summary judgment." *Sellers v. American Broadcasting Co.,* 668 F.2d 1207, 1209 n. 3 (5th Cir.1982). "Defendants' argument on appeal, that affidavits introduced by them to oppose the government's motion for summary judgment created a fact issue as to the burdensomeness of the reports, is without merit in light of the fact that the proffered affidavits are merely conclusory in nature." *United States v. W.H. Hodges & Co., Inc.,* 533 F.2d 276, 278 (5th Cir.1976). "Summary judgment is required where the non-moving party's response to a motion is merely 'a repetition of his conclusional allegations' and is unsupported by evidence showing an issue for trial. *Comer v. City of Palm Bay, Fla.,* 265 F.3d 1186, 1192 (11th Cir.2001)(quoting *Morris v. Ross,* 663 F.2d 1032, 1034 (11th Cir.1981). "If the party's response consists of nothing more than a repetition of his conclusory allegations, the district court must enter summary judgment in the moving party's favor." *Peppers v. Coates,* 887 F.2d 1493, 1498 (11th Cir.1989). "The purpose of summary judgment is to determine, on the basis of evidence that must be forthcoming, whether there is any dispute as to an issue of material fact, as distinguished from a party's mere allegations. When [the non-movant] was unable to respond to the court's notice with anything more than a repetition of his conclusional allegations, summary judgment for the defendants

(continued...)

In addition to their lack of probative value, the conclusions the plaintiff reached in her answers to the interrogatories and in her affidavit do not suggest racial bias, age bias, or discrimination of any sort as is necessary for an ECOA cause of action.[9] None of the conclusory and generalized allegations made by the plaintiff say or suggest that: (1) the defendant specifically targeted her because of her race or age; (2) the defendant granted loans to non-minority or non-elderly applicants on more advantageous terms; (3) the non-minority or non-elderly applicants, if any, who received loans from the defendant on more advantageous terms were financially identical to the plaintiff; (4) the loans, if any, granted to those non-minority or non-elderly applicants were similar in amount, collateralization, and length to the loans granted to the plaintiff; or (5) the plaintiff was financially qualified to receive better, less onerous loans than those she received. And finally, the plaintiff did not identify a policy, procedure, or practice of the defendant that has a significantly greater discriminatory impact on members of a protected class.

In contrast, the materials submitted by the defendant, including the plaintiff's deposition and Mr. Bailey's affidavit, refute the plaintiff's unsupported assertion that she could not afford to pay the loans when

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[8](...continued)
was not only proper but required.
ADD to FOOTNOTE *8 v. City of Treasure Island,* 544 F.3d 1201, 1224-1225 (11th Cir.2008)(same); *Chanda v. Engelhard/ICC,* 234 F.3d 1219, 1223 (11th Cir.2000)(same); *Leigh v. Warner Bros., Inc.,* 212 F.3d 1210, 1217 (11th Cir.2000)(same); *Hilburn v. Murata Electronics North America, Inc.,* 181 F.3d 1220, 1227 -1228 (11th Cir.1999)(same); *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 642 (11th Cir.1998)(same); *Benton-Volvo-Metaire, Inc. v.. Volvo Southwest, Inc.,* 479 F.2d 135, 139 (5th Cir.1973)(same).
Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir.1981), *cert. denied,* 456 U.S. 1010 (1982). *See also, Schwarz*

[9]The plaintiffs allegations are in essence that the defendant, in order to take the equity in her property, took "unfair advantage" of her advanced age and lack of commercial sophistication by giving her a loan that she could not afford to pay.

she took them.[10] That evidence supports the conclusion, given the plaintiff's intent to rent both properties, that she would have the ability to pay the loans, a conclusion that the defendant, through Mr. Bailey, could have reached at the time the loans were made. That evidence is discussed below.

About a year after receiving the loan on the Avenue Y property, the plaintiff began renting it for $300 per month. That rent exceeded her $230 per month mortgage payment. Since then, the plaintiff continued to lease the property and collect rent, which increased to $350 per month sometime before she received the second loan.[11]

That rent is of course key in any review of the loan process. As stated above, before she received the loan, the plaintiff told Mr. Bailey she intended to rent the Avenue Y property. It is apparent then, despite her unsupported allegations to the contrary, that with that income the plaintiff knew she had the means to make the mortgage payment on the Avenue Y property. Consequently, at the time the loan was taken, Mr. Bailey would have also known that the plaintiff would be able make the mortgage payments with the rent she would receive from her tenant.

The situation in regard to the Spring Street property is similar. Again, the plaintiff told Mr. Bailey before she took the loan for the Spring Street property that she and her sister *intended to rent* that property, as she had with the Avenue Y property. Mr. Bailey therefore had every reason to expect that the anticipated rent from the Spring Street house would more than satisfy that mortgage, especially given the plaintiff's successful track record in renting the Avenue Y house. This is particularly true given that because her sister was a co-obligor on that note, the plaintiff would have to shoulder only one-half of the payment,

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[10] As stated above, the plaintiff's contention that she could not afford to pay the loans when she took them is the cornerstone of her theory of liability against the defendant.

[11] The reason the plaintiff stopped using the rent to make her mortgage payment is unknown to the Court.

that is, $117.50. But as the parties and the Court know, the plaintiff did not make the mortgage payments. She now complains that her failure to make the payments is evidence that she did not have that the ability to make the payments when she obtained the loan. For two reasons, the evidence demonstrates otherwise.

One, rather than renting the Spring Street property as Ms. Macklin and Ms. Barnfield told Mr. Bailey they would, they decided to allow their adult granddaughter to reside in the property rent free. That decision, after the fact and not anything the defendant did, impacted the sisters' ability to make the mortgage payments. They, not the defendant, altered the equation. How the defendant could have anticipated that decision is not evident.

Two, according to Mr. Bailey's affidavit, the plaintiff made payments on the Spring Street mortgage until about October 2006. According to the plaintiff's testimony, it was at about that time that her sister verbally abandoned interest in the property leaving the plaintiff to shoulder the entire mortgage.

Both of the above suggest that the plaintiff's inability to pay did not come from anything attributable to the defendant. In addition, it appears that the sisters' combined income would be sufficient to meet the Spring Street mortgage payments. The monthly mortgage payment on the Spring Street property was $235. According to the loan application submitted by Ms. Macklin and Ms. Barnfield, their total monthly income was $2,537. The plaintiff's income was $1,287, which included the $350 from rental on the Avenue Y house and social security of $937. Her sister's income was $1,250, which included social security of $750 and employment income of $500. It is impossible to infer from those figures, without more, that Mr. Bailey had reason to expect that the sisters would be unable to pay $235 per month between them to satisfy the Spring Street mortgage.

These same materials refute the plaintiff's representation that Mr. Bailey neglected to obtain any information from her and her sister about

their incomes in connection with the loan on the Spring Street property. The plaintiff admitted in her deposition that both she and her sister executed the loan application in connection with the Spring Street loan which contained the above income information. In contrast, that document does not contain any information with respect to the sisters' expenses, which is consistent with what she stated in her answer to the defendant's interrogatory No. 6.

Finally, the plaintiff contends that the defendant had a predatory design on the equity in each of the properties when the loans were made. However, that inference does not necessarily follow since ample equity is first a substantial benefit to the borrower. Ample equity allows the borrower to sell the property to pay the mortgage if payments cannot be made.

Therefore, based on the above, the defendant is entitled to summary judgment as a matter of law in regard to the plaintiff's Equal Credit Opportunity Act allegations. The plaintiff's responses to the defendant's present motion consist only of the conclusions, allegations, bare assertions, and subjective beliefs contained in her answers to her interrogatories and in her affidavit. According to the decision of the Court of Appeals for the Eleventh Circuit in *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 642 (11th Cir.1998) such "evidence" is not sufficient as in *Carter* where the affiants' statements containing conclusory and generalized allegations of racial bias, including statements that the facility "was a racially hostile environment," or that "there was a racially biased attitude by management towards minority black employees," were properly struck by the district court and could not prevent summary judgment. *Id.*

E. The plaintiff's Real Estate Settlement Procedures Act contentions
[See Editor's note above.]

F. The plaintiff's omnibus allegation
[See Editor's note above.]

VII. Conclusion

Based on the above, the Court finds that there are no genuine issues of material fact and that the defendant is entitled to summary judgment as a matter of law. An order will be entered in conformity with this memorandum opinion.

WILBUR WILKINSON v. USDA[1]
Civil Action No. 08-1854
Filed October 29, 2009.

[Cite as: 666 F. Supp. 2d 118].

United States District Court,
District of Columbia.

MEMORANDUM OPINION

JOHN D. BATES, District Judge.

Petitioner Wilbur Wilkinson brings this action on behalf of his parents, Ernest and Mollie Wilkinson, for a writ of mandamus directed to respondents Tom Vilsack, the Secretary of Agriculture, and the United States Department of Agriculture ("USDA"). Wilkinson contends that respondents have a duty to pay damages resulting from an administrative adjudication concluding that USDA discriminated against his parents. Now before the Court is respondents' motion to dismiss the verified petition for a writ of mandamus.

BACKGROUND

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[1]Pursuant to Federal Rule of Civil Procedure 25(d), Tom Vilsack is automatically substituted as defendant for his predecessor as Secretary of Agriculture, Ed Schafer.

Wilkinson's parents, Mollie and Ernest Wilkinson, now deceased, were American Indians from North Dakota. *See* V. Pet. for Writ of Mandamus ("Pet.") [Docket Entry 1], ¶¶ 2, 5. They allegedly filed a complaint against USDA on March 5, 1990, claiming that a predecessor of the Farm Services Agency, a component of USDA, discriminated against them in administering a USDA credit program. *See id.* USDA did not take any action on the Wilkinsons' complaint. In the late 1990s, however, USDA admitted that "[d]uring much of the 1980s and 1990s, USDA administrative processes for review of program civil rights complaints filed against USDA agencies by program participants did not function effectively." Administrative Civil Rights Adjudications Under Section 741, 63 Fed.Reg. 67,392, at 67,392 (Dec. 4, 1998). In response, Congress enacted a special adjudication statute, known as Section 741, "to waive the applicable statutes of limitation for those individuals who had filed non-employment related discrimination complaints with USDA alleging discrimination during [the 1980s and early 1990s]." *Id.* Pursuant to this legislation, USDA's Office of Civil Rights notified the Wilkinsons in September of 2000 that they could file a request for the 1990 discrimination complaint to be processed under Section 741. *See* Pet. at ¶ 8.

The Wilkinsons filed such a request the following month, and USDA set the 1990 discrimination complaint for Section 741 processing in April 2003. *Id.* In August 2006,[2] USDA notified the Wilkinsons that their Section 741 Complaint Request was "eligible," and therefore the Wilkinsons could request an adjudication before an administrative law judge ("ALJ"). *Id.* at ¶ 9. The Wilkinsons did so, and the case proceeded before senior ALJ Victor Palmer. *See id.* at ¶¶ 10, 11. The parties agreed to bifurcate this proceeding, such that the ALJ would determine liability before assessing damages.*See* Pet., Exhibit B (Determination Part Two),1. The ALJ then found USDA liable to the Wilkinsons, concluding

[2]The delays in the complaint's processing do not bear on the legal issues currently before the Court. At least some of the delay was attributable to a still-pending class action, *Keepseagle v. Vilsack,* Civ. Action No. 99-3119. Wilkinson opted out of that class.

that the agency had discriminated against the Wilkinsons in violation of the Equal Credit Opportunity Act. *See id.,* Exhibit A (Determination Part One), 1. The ALJ set a hearing to determine the appropriate damages award. *See id.,* Exhibit A at 17.

Section 741 authorizes USDA's Assistant Secretary for Civil Rights ("ASCR") to review any ALJ determination, and conclude whether it will become USDA's final adjudication. *See* 7 C.F.R. § 15f.24(a). Here, the Assistant Secretary, Margo McKay, intervened before the damages hearing. Invoking her discretion under Section 741 to review a proposed determination, she stayed the damages hearing in order to review the liability determination. *See* Resp'ts' Mem. in Supp. of Mot. to Dismiss ("Resp'ts' Mem.") [Docket Entry 7], Exhibit 2 (ASCR's Order), at 2. Wilkinson opposed the stay, and filed a motion with the ALJ to proceed with the scheduled damages hearing. *See* Pet., Ex. B at 3. The ALJ construed McKay's "request that the scheduled hearing not be held" as "an election" that the ALJ reach a damages finding without a hearing, *see id.,* and issued the damages determination on June 18, 2008, finding damages of $5,284,647, *see id.* at 6. In other words, the case proceeded on two separate tracks: as the ALJ was awarding damages notwithstanding the stay of that hearing, McKay was completing her review of the liability determination.

Wilkinson sought payment of those damages on September 5, 2008, a request that the Farm Services Agency opposed and USDA rejected. *See* Pet. at ¶ 18. McKay issued her final liability determination on October 27, 2008, concluding that the Wilkinsons' complaint was not eligible for Section 741 relief.[3] Wilkinson then commenced this action on October 27, 2008, for a writ of mandamus requiring respondents to satisfy the ALJ's damages award.

ANALYSIS

[3]McKay found that Wilkinson failed to demonstrate that his parents' complaint was timely filed. *See* Resp'ts' Mem., Ex. 1 (Final Determination), 5-7. McKay also addressed the merits of the complaint, finding several errors with the ALJ's damages analysis. *See id.* at 37.

Mandamus is a drastic remedy to be invoked only in extraordinary situations and granted only when essential to the interests of justice. *See Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs,* 570 F.3d 327, 333 (D.C.Cir.2009); *Chatman-Bey v. Thornburgh,* 864 F.2d 804, 806 n. 2 (D.C.Cir.1988). Mandamus is appropriate only where "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *In re Medicare Reimbursement Litig.,* 414 F.3d 7, 10 (D.C.Cir.2005) (citations omitted). The party seeking mandamus has the " 'burden of showing that [his] right to issuance of the writ is clear and indisputable.' " *Gulfstream Aerospace Corp. v. Mayacamas Corp.,* 485 U.S. 271, 289, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988) (quoting *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953)).

Respondents contend here that because the ASCR reversed the ALJ's liability determination, Wilkinson does not have a clear right to damages. *See* Resp'ts' Mem. at 4. In fact, they offer that "the ALJ lacked any authority to enter an award of damages because the [ASCR] had already divested the ALJ of jurisdiction by agreeing to review the liability determination." *Id.* at 5.[4]

Wilkinson responds that the ASCR's action was an improper "interlocutory review" of the ALJ's determination. *See* Pet'r's First Mem. in Opp'n to Mot. to Dismiss ("Pet'r's 1st Opp'n") [Docket Entry 11], at 5; Pet'r's Second Mem. in Opp'n to Mot. to Dismiss ("Pet'r's 2d Opp'n") [Docket Entry 12], at 3-4.5 Although Wilkinson concedes that the ASCR has a right to review an ALJ's determination, he asserts that the ASCR can only do so within 35 days of an ALJ's determination. *See* Pet'r's 1st Opp'n at 6 (citing 7 C.F.R. § 15f.24(a)). Because the parties agreed to bifurcate the ALJ's adjudication, Wilkinson claims, the ALJ could not render his determination until after the damages award. *See*

[4]Respondents make the additional argument that the ALJ's decision was incorrect on the merits. Because of the procedural posture of this case, the Court cannot consider this argument.

id.; see also Pet'r's 2d Opp'n at 3-4.[5] The ASCR's review of the liability determination was therefore an improper "interlocutory review" of an ALJ ruling. *See* Pet'r's 1st Opp'n at 5 (citing 7 C.F.R. § 15f.21(d)(8) ("Interlocutory review of rulings by the ALJ will not be permitted.")); *see also* Pet'r's 2d Opp'n at 3 (citing same). The ALJ's damages determination therefore is the USDA's final, enforceable decision according to Wilkinson.

Not so, say respondents. 7 C.F.R. § 15f.24 "expressly" permits the ASCR to review an ALJ's determination "without regard to the scope of that proposed decision." Resp'ts' Reply at 5. And even though the parties agreed to bifurcate the adjudication, "[n]othing in the regulations requires the [ASCR] to wait until there is also a proposed determination on damages." *Id.* at 6. Indeed, "[t]here would be no need for a damages determination if the [ASCR] reversed the decision on liability...." *Id.* At the least, respondents suggest, the absence of specific procedures governing when the ASCR is empowered to review an ALJ determination requires the Court to give "the Secretary [of Agriculture's] interpretation of his rules ... controlling weight." *Id.* at 7. Accordingly, the ASCR validly stayed the proceedings in the Wilkinsons' case and thereby divested the ALJ of jurisdiction. *See id.* at 9.

Respondents have the better of this argument. The Court "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); *see also Orion Reserves Ltd. P'ship v. Salazar,* 553 F.3d 697, 707 (D.C.Cir.2009). It may only invalidate USDA's adjudicative procedures "if the plain language of the regulation or 'other indications of the [agency's] intent' require another interpretation.' " *See Orion Reserves,* 553 F.3d at 707 (quoting *Thomas Jefferson Univ.,* 512 U.S. at 512, 114 S.Ct. 2381, and *Fabi Constr. Co.*

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[5]Wilkinson filed two memoranda in opposition to the motion to dismiss, one pro se, and one through counsel. Because respondents do not challenge the propriety of these filings, the Court will consider the arguments raised in both memoranda. Additionally, Wilkinson noticed the dismissal of his attorney on October 26, 2009. This dismissal does not bear on the Court's decision here.

v. Sec'y of Labor, 508 F.3d 1077, 1080-81 (D.C.Cir.2007)). A court's task "is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Thomas Jefferson Univ.,* 512 U.S. at 512, 114 S.Ct. 2381 (quoting *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)).

There is no showing here that USDA's interpretation of the regulations governing Section 741 adjudicative proceedings was "plainly erroneous" or "inconsistent" with those regulations. Neither the "plain language" of the Section 741 administrative procedure rules nor "other indications of the [agency's] intent" indicate that the ASCR's actions were improper. *See Orion Reserves,* 553 F.3d at 707. Indeed, the ASCR is empowered to "[m]ake *final* determinations in proceedings under part 15f of this title where review of an administrative law judge decision is undertaken." 7 C.F.R. § 2.25(a)(21) (emphasis added). Hence, an ALJ decision in these cases is only a recommendation until the ASCR's review has transpired:

> The ALJ may *recommend* dismissal of your complaint ...; *recommend* denial ... on the merits; or make a *proposed finding* of discrimination on your eligible complaint and *recommend* to award you ... relief.... The *proposed determination* will become the final determination 35 days after it is made, unless you request review of the proposed determination by the ASCR. *The ASCR also may review the proposed determination on his or her own initiative.*

7 C.F.R. § 15f.24(a) (emphases added). By this language, the ASCR arguably was authorized to review the ALJ's liability determination.[6]

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[6]The plain language of the regulations disposes of Wilkinson's argument that USDA General Counsel improperly "appealed" the liability determination. Under 7 C.F.R. § 15f.24, the ASCR "may review the proposed determination on his or her own initiative." Here, the Farm Services Agency filed a "request" for ASCR review, and the ASCR (continued...)

Section 741's prohibition of "interlocutory review" is not plainly to the contrary. 7 C.F.R. § 15f.21(d)(8) precludes only "[i]nterlocutory review of rulings by the ALJ...." Although the regulations define neither "interlocutory review" nor "rulings," *see id.* § 15f.4, they do suggest that "rulings," as used in 7 C.F.R. § 15f.21(d)(8), refers to minor trial management decisions the ALJ makes during the adjudication. *See id.* § 15f.21(d)(2)(i) ("If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the ALJ, the party must state briefly the grounds of such objection."). Moreover, the prohibition on "interlocutory review" is found in the code section entitled "What rules are applicable to the actual conduct of the hearing?" *See id.* § 15f.21. This is in contrast to the ASCR's authority to review an ALJ determination, which is found in the code section entitled "When and in what form will a denial determination be made on my complaint by USDA?" *See id.* § 15f.24. Reading these two sections in concert, the prohibition on "interlocutory review" would not seem to limit ASCR review of ALJ determinations.

At the least, the Court cannot say that "the plain language of the regulation or other indications of the [agency's] intent" render impermissible the ASCR's review of the ALJ's liability determination. *Orion Reserves,* 553 F.3d at 707. USDA "is entitled to prescribe its own procedures," *Robertson v. Fed. Election Comm'n,* 45 F.3d 486, 491 (D.C.Cir.1995), and "an agency's interpretation of its own regulations" receives "substantial deference," *Thomas Jefferson Univ.,* 512 U.S. at 512, 114 S.Ct. 2381. The Court cannot substitute its own view of the agency's procedures where, as here, those procedures do not contravene the plain language of the governing regulations. In the end, then, Wilkinson's argument certainly is not on such solid footing as to satisfy the very stringent test for mandamus relief. Wilkinson has not shown a

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[6](...continued)
"decided to exercise [her] discretion to review" the liability determination. *See* Resp'ts' Mem., Exhibit 2, at 1-2. However the ASCR learned of the ALJ determination, she chose to exercise her regulatory discretion to reconsider it: this was not "plainly erroneous or inconsistent with the regulation." *See Thomas Jefferson Univ.,* 512 U.S. at 512, 114 S.Ct. 2381.

"clear right" to the relief he seeks or that respondents have a "clear duty" to provide those damages under the applicable rules. Therefore, he has failed to state a claim for the "extraordinary remedy" of mandamus. *See In re Cheney,* 544 F.3d 311, 312 (D.C.Cir.2008).[7]

CONCLUSION

The Court must defer to the agency's interpretation of its regulations and hence to the procedures USDA used in considering the Wilkinsons' administrative complaint. Because Wilkinson has not stated a claim that would demonstrate a clear right to the relief he seeks, the Court dismisses without prejudice the verified petition for a writ of mandamus. A separate order accompanies this opinion.

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EUNICE AND GARY MANUEL, v. CITY OF BANGOR, et al.
No. 09-CV-339-B-W.
Filed October 30, 2009.

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

[Editor's Note: We have not included certain portions of the case which are unrelated to the Equal Opportunity Credit Act.]

United States District Court,
D. Maine.

RECOMMENDED DECISION ON MOTION TO DISMISS FILED BY FEDERAL DEFENDANTS (Doc. No. 22)

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[7]The Court expresses no position on the merits of the Wilkinsons' administrative complaint. Wilkinson may be able "to seek judicial review in the United States Court of Federal Claims or a United States District Court of competent jurisdiction" of the ASCR's final determination dismissing his parents' complaint. *See* 7 C.F.R. § 15f 26

MARGARET J. KRAVCHUK, United States Magistrate Judge.

Eunice and Gary Manuel have filed suit against the State of Maine and the City of Bangor and various subdivisions of state and municipal government, as well as the United States Army, the United States Rural Department of Housing (USDA), and a handful of other entities, including the Penobscot Community Health Center. The Army, the Rural Department, and the Health Center have filed a combined motion to dismiss. I refer to the moving defendants as "the federal defendants" for ease of reference, except when describing the allegations relating to each entity. The Court referred the motion for report and recommendation. I recommend that the Court grant the motion, in the main, with two exceptions.

The Allegations

The Manuels' complaint includes the federal defendants in its list of named defendants, but it does not recite any factual allegations pertinent to these defendants except to allege that Penobscot Community Health Center (PCHC) stopped prescribing Gary his Z[y]prexa medication. (Compl. at 2.) However, in opposition to the instant motion to dismiss, the Manuels have offered more allegations concerning each defendant.

a. Allegations related to PCHC (see Doc. No. 25).
[See Editor's note above.]

b. Allegations related to the Rural Department (see Doc. No. 24).
[See Editor's note above.]

c. Allegations related to the Army (see Doc. No. 22).
[See Editor's note above.]

Applicable Standards

The federal defendants contend that the Manuels' claims against them are subject to summary dismissal under Rule 12 of the Federal Rules of

Civil Procedure either because the complaint fails to state a basis for this Court's subject matter jurisdiction (Rule 12(b)(1)) or because the complaint fails to state a claim for which relief may be granted (Rule 12(b)(6)). The standards that apply to these challenges are as follows.

a. Subject Matter Jurisdiction

The federal defendants contend, among other things, that the Manuels' claims against them must be dismissed pursuant to Rule 12(b)(1) for failure to allege facts reflecting that this Court has subject matter jurisdiction. In particular, the federal defendants argue that the complaint fails to allege that the Manuels complied with administrative prerequisites to filing. (Mot. to Dismiss at 4.) Subject matter jurisdiction concerns the power of the court to hear and decide a claim. *Torres-Negron v. J & N Records, LLC,* 504 F.3d 151, 159 n. 5 (1st Cir.2007). The party asserting the claim bears the burden of proof on the issue of whether the Court has the authority (subject matter jurisdiction) to decide the claim. *Johansen v. United States,* 506 F.3d 65, 68 (1 st Cir.2007). By proof, it is meant "that jurisdiction must be apparent from the face of the plaintiffs' pleading." *PCS 2000 LP v. Romulus Telecomms., Inc.,* 148 F.3d 32, 35 (1st Cir.1998). When the defendant is the federal government, sovereign immunity will preclude an exercise of subject matter jurisdiction unless the plaintiff can identify a clear and unambiguous expression of consent by Congress to permit the claim to proceed against the federal government. "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996).

b. Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6), another of the procedural vehicles for the defendants' motion, provides that a complaint can be

dismissed for "failure to state a claim upon which relief can be granted." In deciding a motion to dismiss, the court accepts as true the factual allegations of the complaint, draws all reasonable inferences in favor of the plaintiff that are supported by the factual allegations, and determines whether the complaint, so read, sets forth a plausible basis for recovery. *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.,* 524 F.3d 315, 320 (1st Cir.2008). To properly allege a claim in federal court, it is not enough merely to allege that a defendant acted unlawfully; a plaintiff must affirmatively plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 (2007)). Additionally, because the Manuels are *pro se* litigants, their complaint is subjected to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner,* 404 U.S. 519, 520 (1972). As *pro se* litigants, their pleadings also may be interpreted in light of supplemental submissions, such as their responses to the motion to dismiss. *Gray v. Poole,* 275 F.3d 1113, 1115 (D.C.Cir.2002); *Wall v. Dion,* 257 F.Supp.2d 316, 318 (D.Me.2003).

In appropriate circumstances, *pro se* litigants also may be entitled to an opportunity to amend before their claims are dismissed with prejudice. *Rodi v. S. New Eng. Sch. of Law,* 389 F .3d 5, 20 (1st Cir.2004); *Cote v. Maloney,* 152 Fed. Appx. 6, 8 (1st Cir.2005) (not submitted for publication); *cf. Crawford-El v.. Britton,* 523 U.S. 574, 598 (1998) (discussing "the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind" and noting that requiring a more definite statement affords a pragmatic approach to avoid subjecting officials "to unnecessary and burdensome discovery or trial proceedings," while still affording a reasonable opportunity for judgment to enter on the merits).[1] The

[1] "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley,* 355 U.S. at 48. *But see Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 562-63 (2007) ("retiring" a (continued...)

Manuels have already been put on notice of their opportunity to amend their complaint. (See Doc. Nos. 29 & 30). While a subsequent amendment may operate to clarify and save those claims that I do not recommend be dismissed at this time, in my view the bulk of these claims are subject to dismissal for lack of subject matter jurisdiction which no amendment could possibly cure so I have proceeded with my recommendations in light of that reality.

Discussion

The federal defendants filed their motion to dismiss based on the Manuels' failure to allege essentially any facts against them, which made it impossible to understand how the complaint could support an exercise of subject matter jurisdiction by the Court or how the complaint could possibly state a claim against the federal defendants. In opposition to the motion, the Manuels supplemented their complaint by reciting allegations pertaining to each of the federal defendants. Notwithstanding this supplementation by *pro se* litigants, the federal defendants declined to file a reply memorandum. In the context of *pro se* litigation, this is not how matters are supposed to unfold. Following the Manuels' supplementation of their complaint to include specific allegations

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[1](...continued)
different phrase from the Conley opinion that stated a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," quoting *Conley,* 355 U.S. at 45-46). *See also Lalonde v. Textron, Inc.,* 369 F.3d 1, 6-7 & n. 10 (1st Cir.2004) (describing a motion for more definite statement as "the proper response" by a defendant as compared to a motion for dismissal on the merits); *Hayduk v. Lanna,* 775 F.2d 441, 445 (1st Cir.1985) (affirming dismissal after "two opportunities to amend" as "well within the discretion of the district court" where plaintiffs were also advised as to what areas of the complaint lacked sufficient detail); *Marcello v. Maine,* 489 F.Supp.2d 82, 85-86 (D.Me.2007) ("Rule 12(e) is designed to provide relief for a defendant who is having difficulty crafting an answer in response to an overly vague or ambiguous complaint."); *Haghkerdar v. Husson College,* 226 F.R.D. 12, 13-14 (D.Me.2005) (explaining that a motion for more definite statement is proper to address "unintelligibility," as "when a party is unable to determine the issues he must meet") (quoting *Cox. v. Me. Mar. Acad.,* 122 F.R.D. 115, 116 (D.Me.1988)).

against the federal defendants, the federal defendants should have supplemented their motion to dismiss to account for those allegations.[2] Given their failure to do so, I have addressed their arguments under Rule 12(b)(1) and Rule 12(b)(6) only to the extent that the applicable law plainly forecloses a finding of subject matter jurisdiction and to the extent that the supplemental factual allegations are plainly deficient to state a claim for discrimination.[3]

In their complaint the Manuels cite Title II of the Americans with Disabilities Act, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, "and any other relevant laws that apply." (Compl. at 3.) They do not cite specific provisions of these titles. The only relief they seek is money damages. (*Id.*) I address the federal defendants' Rule 12 arguments in the context of each statute. Because the Manuels are *pro se* litigants, I also address whether their claims for money damages might proceed under the Rehabilitation Act or the Equal Credit Opportunity Act, both of which statutes are more likely sources of relief against federal executive departments and agencies.

a. Title II.
[See Editor's note above.]

b. Title VI.
[See Editor's note above.]

c. Title VIII.
[See Editor's note above.]

d. The Rehabilitation Act.

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[2]I certainly would have extended the deadline for the reply memorandum under these circumstances, had the federal defendants requested it.

[3]The federal defendants suggest that this is a case involving a tort claim subject to the administrative filing requirements of the Federal Tort Claims Act. I do not interpret the Manuels' allegations to relate a state law tort claim. They are obviously attempting to raise a claim of discrimination under federal law.

[See Editor's note above.]

e. Equal Credit Opportunity Act

The ECOA prohibits "any creditor" from discriminating "with respect to any aspect of a credit transaction[,] on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a). The ECOA defines creditor to include "any person who regularly extends, renews, or continues credit," or arranges the same, and expressly includes government or governmental subdivisions or agencies. *Id.* § 1691a(e)-(f). The ECOA also subjects "any creditor" to civil liability for damages, including punitive damages. This language has been read to waive the federal government's sovereign immunity to claims for money damages. *Garcia v. Vilsack,* 563 F.3d 519, 521 (D.D.C.2009) [5]; *Sanders v. Vilsack,* No. 7:08-cv-126(HL), 2009 U.S. Dist. LEXIS 40770, *13, 2009 WL 1370919, *5 (M.D.Ga. May 14, 2009). That resolves the Rule 12(b)(1) issue with regard to the Rural Department. The Rural Department's Rule 12(b)(6) arguments were premised on the total absence of any material allegations in the complaint. The Rural Department failed to reply, however, to the factual allegations set forth in the Manuels' opposition. The Court should interpret the Manuels' complaint about discrimination in lending practices as invoking the provisions of the ECOA and should leave the onus on the Rural Department to articulate its grounds for dismissal in light of the Manuels' factual allegations. I do not by this recommendation intend to suggest that the allegations would necessarily survive a properly articulated Rule 12(b) motion. I have simply not undertaken a sua sponte discussion of every defense or argument that could possibly be raised now that the Manuels have at least given some factual content to their allegations.

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[5]The *Garcia* opinion includes a discussion of a "failure to investigate" claim under the Administrative Procedures Act. However, the APA does not appear to offer any prospect of relief in the form of money damages, 5 U.S.C. § 702, and the availability of legal remedies under the ECOA calls into question the Manuels' ability to obtain judicial review under the APA, in any event. 5 U.S.C. § 704; *Garcia,* 563 F.3d at 525.

f. Summation

Based on the foregoing analysis of the federal statutes implicated by the Manuels' allegations, the Court has subject matter jurisdiction over claims against PCHC under Title VI and the Rehabilitation Act. The Manuels' supplemental allegations allege both racial and disability discrimination and PCHC has not replied to these allegations. As for the Rural Department, the Rehabilitation Act and the ECOA confer subject matter jurisdiction, but the Manuels allege only racial discrimination with respect to their application for credit from the Rural Department. Consequently, only the ECOA is in play with respect to the Rural Department. As for the Army, the Manuels fail to identify a statutory scheme that would give the Court authority to hear and decide a claim of employment discrimination. Moreover, their allegations fail to state a plausible connection between a decision on Eunice or Gary Manuel's reenlistment and any bias concerning race or disability.[6]

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[6]In prior orders granting the Manuels an opportunity to amend their complaint in relation to claims against Bank of America and the City of Bangor, I advised the Manuels that their existing allegations did not set forth a plausible entitlement to relief in the form of money damages under Title VI because of a need to demonstrate more than discriminatory intent on the part of a lower-level officer. *See Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 584 (1983); *Latinos Unidos de Chelsea En Accion v. Secretary of Housing and Urban Dev.,* 799 F.2d 774, 783 (1 st Cir.1986). I also noted that the claims against the City of Bangor could be faulted for failure to identify the disability at issue. Additionally, I indicated in the prior orders that, because "[a]dditional defendants have also filed motions to dismiss[,] ... the Manuels might be well advised to consider this their one opportunity to file an amended complaint as to all defendants that sets forth separate counts and explains 'who, what, when, and where' separately for each defendant." (Doc. No. 30 at 7 n. 4.) The deadline for amending their complaint, should the Manuels decide to do so, is today. In the event the two remaining federal defendants wish to renew a motion to dismiss as to the allegations I have recommended not be dismissed, I will consider supplemental motions and argument from the PCHC and the Rural Department on the remaining claims on the timetable set out in the prior order, which calls for supplemental briefing by November 13, 2009. If the federal defendants choose to proceed in that fashion, I would recommend that the Court not view their failure to object to this recommended decision as in any way a waiver of their right to challenge by way of motion to dismiss the "new" allegations I have identified under the ECOA, Title VI, and the Rehabilitation Act as to the two remaining federal

(continued...)

Conclusion

For the reasons set forth above, I RECOMMEND that the Court GRANT, IN PART, the federal defendants' motion to dismiss (Doc. No. 22) by:

DISMISSING all claims against PCHC with the exception of the Title VI claim and a claim under the Rehabilitation Act;

DISMISSING all claims against the Rural Department with the exception of an ECOA claim; and

DISMISSING all claims against the Army, without exception.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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[6](...continued)
defendants.

In re: TIMOTHY MAYS, d/b/a CT FARMS.
FCIA Docket No. 08-0153.
Decision and Order.
Filed November 13, 2009.

FCIA.

Mark R. Simpson, for Complainant.
Terry G. Kilgore, for Respondent.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

Preliminary Statement

On June 30, 2008, Eldon Gould, the 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 August 1, 2008, Counsel for the Respondent filed a Motion for Leave to File Answer and Answer. The Answer denied generally the material allegations of the Complaint and requested that an oral hearing be scheduled.

On August 6, 2008, the Complainant filed a motion asking that the Complaint be deemed admitted. By Order dated August 7, 2008, the Motion for Leave to File Answer was granted and the Motion for the Complaint to be Deemed Admitted was denied. On August 12, 2008, the Complainant also requested that the matter be set for oral hearing. On December 10, 2008, a teleconference was conducted with the parties, dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Abingdon, Virginia on March 24, 2009. As hearing space in Abingdon, Virginia was not available on March 24, 2009, by Notice of Hearing Location filed on March 3, 2009, the hearing site was moved to Roanoke, Virginia. On March 16, 2009, the Respondent filed a Motion to Continue Hearing Until Available Space in Abingdon, Virginia. Following a telephonic hearing on the

Motion, an Order dated March 19, 2009 was entered denying in part the Motion for continuance. The hearing would commence on March 24, 2009 for the presentation of the Complainant's case, but, in order to accommodate the needs of locally based witnesses, the Respondent was to be given an opportunity to present his portion of the case at a later date when hearing space would be available in Abingdon, Virginia.

At the oral hearing held on March 24, 2009 in Roanoke, 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. Five witnesses testified and 25 exhibits were identified and received into evidence.[1] Upon conclusion of the Complainant's presentation of evidence, the hearing was recessed pending the availability of space in Abingdon to conclude the hearing.

The hearing resumed in Abingdon, Virginia on August 13, 2009 for the presentation of evidence by the Respondent. The Complainant was again represented by Mark R. Simpson and the Respondent was represented by Terry G. Kilgore. At this hearing, three witnesses were called by the Respondent. Johnnie Perdue, who had testified at the earlier hearing, was recalled by the Complainant and again testified. One exhibit was admitted and a DVD disk was admitted subject to confirmation of its authenticity and consistency with the records of the Farm Service Agency Office.[2]

Discussion

The Complaint in this action alleges that Timothy Mays, doing

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[1]CX-1 through CX-25. References to the Transcript of the proceedings will be to "Tr."

[2]The contents contained on the disk (RX-4) were verified by the Complainant. Docket Entry 19 is a letter dated August 25, 2009 from Mark R. Simpson to L. Eugene Whitfield indicating that the contents of the DVD were compared to and found to be maintained with the usual business records of the Washington/Smyth County Farm Service Agency Office.

business as CT Farms,[3] willfully misrepresented material facts in connection with obtaining a federally insured crop insurance policy on burley tobacco raised by him during the 2003 crop year and that he provided false and inaccurate information regarding the planting date of his tobacco to the insurance company which sold him the crop insurance policy.

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 misrepresentations and false certifications, the Complaint seeks disqualification of the Respondent Mays and CT Farms from receiving monetary or nonmonetary gain under certain specified federal programs for up to five years and imposition a civil fine or penalty of up to $10,000.00 per violation or the amount of pecuniary gain obtained as a result of the false or incorrect information.

Mays expressly denies any wrongdoing, asserting that his tobacco was planted within the prescribed period, indicating that as many as six adjusters representing two different agencies inspected his fields and found evidence of tobacco production for that crop year, and blaming his poor tobacco crop yield on washing from rain and adverse weather conditions. Tr. 7, 197, 200.

The uncontroverted evidence in the case establishes that Timothy Mays, acting on behalf of CT Farms, applied to Rural Community Insurance Service (RCIS), a participating insurance provider for the Federal Crop Insurance Program and received a federally insured crop insurance policy on 14.9 acres of burley tobacco. Tr. 174. Under the

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[3]CT Farms is a general partnership. CX-15. The Respondent Mays has an 80% interest and Michelle Fleenor has the other 20%. CX-6, 15. Fleenor took care of the books, made the payroll and "more or less kept [Mays] organized. Mays took care of the day to day operations. Tr. 174.

terms of the common crop policy, the grower is 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, Tr. 10. That certification was made on July 15, 2003[4] when Timothy Mays completed the RCIS Acreage Report indicating that CT Farms had a 100% interest in the crop and had planted 9 acres of burley tobacco on Farm 7542 on June 28, 2003 and 5.9 acres of burley tobacco on Farm 7781 on June 29, 2003.[5] CX-8, Tr. 177. Mays testified that he took the insurance out on the CT Farms tobacco because of an agreement with McClellan ("Tubb") Salyer, Jr. whereby in exchange to having access to Salyer's credit for the CT Farms tobacco the crop had to be insured, but personal tobacco raised that year by Mays was not insured.[6] Tr. 176. On August 29, 2003, Mays filed a loss claim with RCIS on behalf of CT Farms, claiming that the crop was damaged due to excessive precipitation encountered during June and July of that year. On October 15, 2003, J. Landis Walker, a RCIS adjuster visited the Respondent's farm and observed that all of the insured burley tobacco

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[4]The planting certificate was made at approximately the same time that Mays indicated that he had re-planted a portion of the crop due to rains having washed out his insured fields. CX-15 (8 of 15).

[5]The 9 acres reported on Farm FS 7542 was reduced to 8.31 acres following a field measurement. CX-11. The CT Farms burley tobacco was raised on Fields 1 (Tracts 1AY, 1BY, 1CY & 1DY), Field 3 (Tracts 3BY & 3CY) and Field 4 (Tract 4BY) CX-7, 9, 23(6 of 8).

[6]Mays raised burley tobacco on the two tracts of land which were designated FS 7542 and FS 7781 by the Farm Services Agency. Tr. 12. In addition to the tobacco raised by CT Farms, tobacco was also raised there by others, including Mays (in his individual capacity), Michelle Fleenor, and Robert Salyer. Tr. 181-3. Mays personal tobacco was raised in Fields 1 (Tract 1EY), 2 (Tract 2AY), 3 (Tract 3AY), and 7 (Tract 7AY). CX 7, 9, 23 (6 of 8). Fields 8 and 9 were on Farm FS 7781. Tr. 180. In order to complete FSA Form 578, the grower identifies the crop grown in each field and indicates the numeric identifier of the individual or entity having an ownership interest. CT Farms' number was 8519, Mays' personal number was 5707, and Michelle Fleenor's was 2332. Tr. 181, CX-7,9. The grower also completes a more detailed report for the Farm Services Agency; it indicates the specific fields which are planted using field identifiers which correlate to aerial photographs of each farm.

had been harvested. Visits during the same month by others reported that May's uninsured tobacco was being harvested and the fields had been disked.[7] Based upon CT Farms claim of damage, it was paid $45,804 by RCIS.[8] CX-13.

The case presented by the Government against CT Farms disputed the accuracy of Mays' certification that CT Farms burley tobacco was planted on FS 7542 on June 28, 2003 and on FS 7781 on June 29, 2003. Testimony from Douglas Eastep and Melvin Wayne Harless was introduced which indicated that they visited the farm on October 22, 2003 and felt that tobacco may not have been planted in all of the fields on FS 7542 for the crop year 2003; however, their testimony was equivocal and vague as to the details as to which field each had observed and neither could rule out tobacco being grown on the field in question.[9] Tr. 23-25, 27-29, 31-36, 40-41, CX-14. More definitive and persuasive evidence was introduced by the testimony of James Hipple, Ph.D., a remote sensing specialist with the Risk Management Agency of the Department of Agriculture.[10] Dr. Hipple testified that based upon his analysis of the satellite imagery data obtained from three satellites

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[7]Some question was raised as to whether tobacco had been raised on certain of the fields as no stubble was present; however, the fields had been worked after harvest and at least one adjuster indicated that he saw evidence of tobacco production in every field.

[8]Because tobacco was raised by CT Farms on both FS 7542 and 7781, two checks were cut, one for $21,383.00 for the FS 7781 loss and a second one for $24,421.00 for the FS 7542 loss. CX-13.

[9]A slightly different observation was made by Sam Hunter and William Bushong, individuals who visited both tracts 7542 and 7781 of the farm in January of 2004. While those individuals had reservations as to whether tobacco was planted, they did indicate that they did observe tobacco stubble in the fields and further stated that there was no way to tell whether tobacco had been planted by the time of their visit as the ground had been disked after the tobacco had been harvested. Tr. 51-2, CX-21.

[10]Respondent's Counsel had no objection to Dr. Hipple testifying as an expert in satellite imagery. Tr. 59. The use of satellite imagery is sufficiently well established as a scientific technique as to satisfy the evaluation standards using the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786 (1993).

(LANDSAT 5, LANDSAT 7 and NASA ASTER) between the dates of April 23, 2003 to July 4, 2003 and using the Normalized Difference Vegetation Index, the imagery of fields 1 and 3 of FS 7542 was gramineous, consistent with native grass growth and that contrary to the certification that burley tobacco had been planted on June 28, no burley tobacco had been planted on either fields 1 or 3 during that period. Tr. 78-82, 85-87, 93-95. By way of contrast, Dr. Hipple indicated that his analysis of the same data indicated that during the period field 7 reflected signs of vegetation removal, consistent with the field being prepared for planting or having been planted. Tr. 84, 86-88. As Dr. Hipple's testimony was confined to analysis of Farm FS 7542 and the testimony of individuals visiting the farm was inconclusive, the burden of proving any adverse conclusion concerning the planting date of the burley tobacco raised on Farm FS 7781 was not met in this case.

During the hearing on August 13, 2009, in addition to testifying himself, the Respondent introduced the testimony of two witnesses, McClellan McNear Salyer, Jr. (Tubb) and Dennis Giles Porter. Mr. Salyer, an individual with whom the Respondent lived and whose family fed the Respondent[11], as previously indicated had allowed the Respondent access to his line of credit to raise the CT Farms tobacco, but had as a condition to such access, required that the crop be insured. Tr. 134, 142. Mr. Salyer indicated that he did the running, "picked up fertilizer chemical, ever what was needed." Tr. 119. Mr. Salyer indicated that he had been on the farm every day, had plowed some of the fields, provided the 10 to 12 Mexican laborers that actually did the planting, and paid the bills for the crop, but could not remember with any precision when any of the fields were planted.[12] Tr. 119, 126-127, 129, 131, 141-2, 144. Mr. Porter's testimony was otiose and even less helpful in providing specific details as he had never been to the upper fields' location; didn't even know the tracts "existed up there;" but

[11]Mr. Salyer's son Robert was allowed to raise about three acres on tobacco on the same farm. Tr. 119, 124.

[12]Mr. Salyer testified that he thought that Field 7 (an uninsured field) was planted in June. Tr. 123, 130.

wouldn't have gone up there as the road was rough and he had a new truck and didn't want it scratched. Tr. 152, 154, 161. The Respondent testified that he planted 9 acres of burley tobacco on Farm FS 7542 with the last final planting being completed on June 28, 2003 and that he planted 5.9 acres of burley tobacco on Farm FS 7781 with the last final planting being completed on June 29, 2003.[13] Tr. 177, 221. The Respondent also introduced aerial slides from a DVD provided by the county Farm Services Agency Office which appeared to show that all of the fields were plowed and planted by July 20, 2003. RX-3, 4.

After considering all of the evidence, including the testimony and the exhibits which were introduced in this case, the following Finding of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Timothy Mays is an individual currently residing in Honaker, Virginia. He is the owner of 80% of and is the controlling partner of CT Farms, a Virginia partnership which was originally formed in 2002. Tr. 173.
2. CT Farms was a participant in the Federal Crop Insurance Program in the crop year 2003, insuring CT Farms burley tobacco crop which was raised in Washington County, Virginia on Farm FS 7542. Tr. 173-174.
3. The Respondent Timothy Mays, acting for and on behalf of CT Farms, applied for and obtained a federal crop insurance policy on CT Farms burley tobacco from Rural Community Insurance Services (RCIS) which policy was reinsured by FCIC. Tr. 174.
4. RCIS was an approved insurance provider under the federal crop insurance program.
5. The final date for planting burley tobacco for full federal crop insurance benefits for the 2003 crop year in Washington County, Virginia was June 30, 2003.
6. The Common Crop Insurance Policy for the 2003 crop year required

[13]The 9 acres on Farm FS 7542 was subsequently reduced to 8.3 acres after field measurement. Tr. 198, CX-11.

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.

7. On July 15, 2003, Respondent Timothy Mays, acting for CT Farms, completed the RCIS Acreage Report indicating that CT Farms had a 100% interest in 9 acres of burley tobacco planted on Farm FS 7542 on June 28, 2003 and 5.9 acres of burley tobacco planted on June 29, 2003 on Farm FS 7781. CX-8, Tr. 177.

8. Respondent Timothy Mays submitted a claim under his federally insured crop insurance policy for the insured tobacco grown by CT Farms for the 2003 crop year and received two checks, one for $24,421.00 for the Farm FS 7542 loss dated January 28, 2004 and the second for $21,383.00 for the Farm FS 7781 loss dated March 5, 2004. CX-13.

9. Analysis of satellite imagery from three satellites (LANDSAT5, LANDSAT 7 and NASA ASTER) taken between the dates of April 23, 2003 to July 4, 2003 analyzed by James Hipple, Ph.D., a sensing specialist employed by Risk Management Agency of the United States Department of Agriculture indicated that no burley tobacco could have been planted by CT Farms on FS 7542 on June 28, 2003 as certified by Respondent Timothy Mays.

10. Although tobacco yields for the year were lower than average throughout the Washington County, Virginia as a result of adverse weather, the pound per acre burley tobacco yield of CT Farms for the crop year 2003 of was significantly less than that for Mays' personal and uninsured tobacco grown on the same farm or that grown in the same general area by other growers in Washington County, Virginia. CX-15 (6 of 13).

11. Respondent Timothy Mays failed to fully cooperate with FCIA Compliance Investigators in the administration of the crop loss claim contrary to the terms of Section 21 of the Common Crop Insurance Policy Basic Provisions for 2003 (01-BR). CX-1, 17.1 (5 of 10).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. The Respondent Timothy Mays willfully provided false and incorrect information concerning the planting dates of the burley tobacco crop grown on Farm FS 7542 by CT Farms to RCIS and to Farm Services Agency in violation of 7 C.F.R. § 400.454(a).
3. The reporting of false or incorrect planting dates represents a material misrepresentation of fact under the Federal Crop Insurance program.
4. The Respondent Timothy Mays failed to fully cooperate with FCIA Investigators in the administration of the crop loss claim contrary to the provisions of the Common Crop Insurance Policy in effect for crop year 2003.
5. As a result of the false and incorrect information provided by the Respondent Timothy Mays, CT Farms improperly received the sum of $24,421.00.

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 Timothy Mays, individually and as the controlling partner of CT Farms is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of five years:

(a) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);

(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 $24,421.00 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.

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LION RAISINS, INC. v. USDA.
No. 1:08-CV-00358-OWW-SMS.
Filed July 13, 2009.

[Cite as 636 F.Supp.2d 1081].

I&G – F.O.I.A. – Retention policy, agency – Trade secrets – Financial information, personal – Redaction, reasons for, required – Physical access to original records – Unreasonable costs to produce – Bad faith – Good faith effort, must show.

United States District Court,
E.D. California.

MEMORANDUM DECISION AND ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

OLIVER W. WANGER, District Judge.

I. INTRODUCTION

Before the court are cross-motions for summary judgment filed by Defendant United States Department of Agriculture ("USDA") and Plaintiff Lion Raisins, Inc. ("Lion"). The parties seek summary judgment on Lion's claims asserted in its First Amended Complaint ("FAC"). Most of these claims arise under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq.

The following background facts are taken from the parties' submissions in connection with the motion and other documents on file in this case.

II. BACKGROUND

A. *Lion And The Investigation Into Its Purported Misconduct*

Lion, a family-owned business since 1903, is the largest raisin packer and raisin exporter in California. Lion prides itself on its ability to guarantee exacting standards of quality and condition that are demanded by its overseas buyers.

Lion is governed by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-627, and a federal marketing order, 7 C.F.R. §§ 989.1-989.801, that regulate the sale of raisins. *See Lion Raisins Inc. v. U.S. Dep't of Agric.,* 354 F.3d 1072, 1076 (9th Cir.2004). The marketing order requires that raisin handlers, like Lion, have their products inspected by the USDA when they are received from producers and again before they are shipped to buyers. 7 C.F.R. §§ 989.58-989.59.

USDA inspectors assess the quality of raisins in various categories such as weight, color, and size. USDA inspectors then document their observations on "line check sheets" and assign grades to the raisins. In turn, information from the line check sheets is summarized on USDA inspection certificates that Lion can send to purchasers as an assurance of quality.

In the past, when Lion requested an inspection certificate with respect to certain raisins, the USDA grader would prepare a draft version of the certificate called a certificate "worksheet." The USDA grader prepared the worksheet based on inspection results previously recorded in the line check sheet. The USDA grader then gave the worksheet to Lion personnel. Based on information in the worksheet, Lion typed up the original inspection certificate and returned it and the worksheet to the USDA grader. The USDA grader then signed and returned the original certificate to Lion along with carbon copies (on blue tissue paper) of the certificate. Typically, the USDA would retain the worksheet and a copy (on blue tissue paper) of the certificate.

(Trykowski Decl. ¶¶ 10-11.)

On February 20, 1998, the USDA's Agricultural Marketing Service ("AMS") received an anonymous tip that Lion was falsifying inspection certificates. After receiving the tip, G. Neil Blevins, then Chief Compliance Officer for the AMS, initiated an administrative investigation into Lion. At times, David Trykowski, then Senior Compliance Officer, and Maria Esguerra-Martinez assisted in the investigation. The investigative team reported that Lion had falsified three inspection certificates between 1997 and 1998. Based on this, Blevins recommended a criminal investigation by the USDA Office of Inspector General ("OIG"). On May 27, 1999, the AMS Compliance Office forwarded to the OIG a request for a criminal investigation.

In October 2000, special agents with the USDA OIG executed a search warrant at Lion's place of business in Selma, California. The agents seized Lion's shipping records pertaining to export customers from approximately 1995 to October 2000. Ultimately, no criminal indictments or criminal charges were made against Lion. The USDA did, however, initiate three administrative enforcement proceedings against Lion.[1]

B. *Administrative Enforcement Proceedings*

1. *First Administrative Proceeding-I & G No. 01-0001*

On January 12, 2001 the USDA filed the first administrative complaint (I & G No. 01-0001)[2] against Lion alleging that Lion, and its principal officers, agents and affiliates, falsified and misrepresented USDA certificates. The potential punishment for such misconduct

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[1]In addition to these administrative enforcement proceedings, on January 12, 2001, the AMS suspended Lion from eligibility for government procurement contracts based on the three falsified inspection certificates. This suspension was later set aside by the U.S. Court of Federal Claims.

[2]"I & G" stands for Inspection and Grading.

includes being debarred from receiving benefits provided for under the Agricultural Marketing Agreement of 1946. The original administrative complaint alleged the falsification of the same three certificates discovered in the administrative investigation. The complaint was later amended to allege that Lion misrepresented USDA inspection results on three (3) forged certificates, one (1) altered certificate, and two (2) Lion documents that stated "Source of Sample: Officially Drawn" and "U.S. Grade."

Between January 28, 2002, and March 23, 2006, seventy-two days of hearings were held. Among other evidence, the USDA presented testimony of inspectors, Trykowski, and two former Lion employees. Colleen Carroll represented the USDA in the proceeding.[3]

After the close of evidence, Lion petitioned to reopen the hearing apparently on the ground that the USDA allegedly suppressed, altered and/or destroyed evidence. On May 4, 2009 (after the parties filed their initial summary judgment briefing in this case), the Administrative Law Judge ("ALJ") issued an initial decision adverse to Lion and also denied Lion's petition to reopen the hearing. Lion has not stated whether it will appeal.

2. *Second Administrative Proceeding-I & G No. 03-0001*

On October 11, 2002, the USDA filed a second administrative complaint (I & G No. 03-0001) against Lion alleging additional violations in connection with USDA certificates (allegedly Lion altered one additional certificate by changing the moisture content). Carroll represented the USDA. After various procedural steps and motions, in January 2008, the proceeding was finally scheduled for hearing. In March 2008, the USDA provided witness and exhibit lists to Lion, and in June 2008, the hearing began. Trykowski and Blevins testified as

[3]Based on its research, Lion represents that Carroll is married to Blevins (and has been since April 1998).

USDA witnesses.

The hearing was temporarily suspended while certified questions were submitted to the USDA Judicial Officer ("JO") concerning a legal dispute over the submission of exhibits. The hearing resumed, and on May 4, 2009, the ALJ issued an initial decision adverse to Lion. Lion has not stated whether it will appeal.

The ALJ decision of May 4, 2009, encompasses both of the administrative proceedings/complaints (I & G Nos. 01-0001 and 03-0001). According to the USDA, the ALJ found that Lion had falsified inspections results and ordered debarment. The debarment period is set to run concurrently with the five-year debarment period that was recently ordered as a result of the third and final administrative complaint discussed below.

3. *Third Administrative Proceeding-I & G No. 04-0001*

On November 20, 2003, the USDA filed a third administrative complaint against Lion (I & G No. 04-0001) alleging that Lion misrepresented inspection results. The ALJ dismissed a portion of the complaint on statute of limitations grounds. The remainder of the complaint alleged that Lion misrepresented inspection results on thirty-three (33) Lion "facsimile" certificates and altered the moisture percentage on one additional certificate. The hearing began on February 21, 2006, with Carroll representing the USDA once again. Trykowski and Blevins were USDA witnesses. The evidence closed on March 3, 2006.

In June 2006, the ALJ issued a decision and found that Lion had engaged in a pattern of misrepresentation, or deceptive or fraudulent practices in connection with the use of official inspection certificates and/or inspection results. The ALJ ordered debarment for five years. Lion appealed that decision on July 12, 2006. On April 17, 2009 (just a few weeks before Lion and the USDA filed their initial summary judgment briefing) the JO issued a decision and order which largely upheld the ALJ's disposition. The JO's order debarred Lion from

receiving inspection services for five years.

C. *Lion's FOIA requests*

After the criminal investigation, and during the administrative enforcement proceedings, Lion submitted a number of FOIA requests to the USDA. Some of the FOIA requests precipitated earlier litigation and appeals to the Ninth Circuit. The FOIA requests that are the subject of *this* lawsuit, and that form the basis of the counts in Lion's complaint, are set forth below with the USDA's responses.

1. *Count I-FOIA Request No. 97-07*

On August 1, 2007, Lion submitted the following request to the USDA:

This is a request under the Freedom of Information Act for USDA/AMS policies and procedures for the storage, archiving, transferring, retrievability, access controls, retention, and disposal of records that were created from 1995 through 2000. Please include all revisions and amendments thereto, and any sections of the policy for defendants or respondents against whom the USDA filed a complaint.

(Doc. 43-8, Ex. 46.) The request was assigned FOIA No. 97-07. The USDA searched for records and on August 30, 2007, the USDA issued a written response (Doc. 43-8, Ex. 47), enclosing "two documents" responsive to the request. The two documents totaled 290 pages. The documents included the "USDA, AMS, *FV,* PPB File Code 175-B-20 Records Retention and Disposition instruction" with its "related Forms Retention Index and GRS handbook," and "AMS Directive 270.1." (Blazejak Decl. ¶ 8) (emphasis added.)

On October 11, 2007, Lion submitted a written appeal to the Administrator of the AMS (Doc. 43-8, Ex. 49). Lion appealed on the grounds that the "FOIA Officer released a disposition plan for F & V

forms" but did not release disposition plans for the "FR and RAC series" of forms.[4] In its appeal letter, Lion cited federal regulations (36 C.F.R. § 1228.22) that address a federal agency's responsibility to develop record schedules for its records, including retention and disposition instructions. Based on federal regulations, Lion stated that it believed "that the USDA must have created disposition plans not only for F & V forms but also [for the] FR and RAC forms." To support its position, Lion cited specific statements from certain USDA agents.

In response to the appeal, the USDA conducted an additional search and issued a final written response on January 28, 2008 (Doc. 43-8, Ex. 50). The USDA decided to release an additional sixteen (16) pages of documents. None of the additional documents, however, appear to be disposition plans specifically for the "FR" and "RAC" forms. The USDA did not indicate that it was withholding any further documents.

In the first count of Lion's FAC, Lion claims that the USDA "continues to withhold the disposition plans for the 'FR' and 'RAC' forms."

2. *Count II-FOIA Request No. 96-07*

On July 31, 2007, Lion submitted the following request to the USDA (received on August 1, 2007):

This is a request under the Freedom of Information Act for records related to the disposition of *inspection documents* for Lion, including, but not limited to, what agency had custody of the documents, what documents were destroyed, who destroyed them, how were they destroyed, and where were they destroyed. For instance, in reply to Lion's request for inspection documents (FOIA 60-07) the USDA stated on June 13, 2007, 'Most documents responsive to those items were destroyed in accordance with Agency file disposition requirements.'

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[4]"F & V" stands for Fruit and Vegetable, "FR" stands for Fresno, and "RAC" stands for Raisin Administrative Committee.

(Doc. 43-8, Ex. 45) (emphasis added.) In its submission, Lion defined "inspection documents" as "any records pertaining to incoming or outgoing inspections, including but not limited to" the following:

1) Incoming meeting lots ledger,

2) ledger record (meeting and failing) memorandum reports,

3) ledger record of meeting lots,

4) fumigation certificates (FR-12),

5) fumigation letters (FR-13),

6) line check sheets (FR-20 and FR-21),

7) microanalysis reports (FR-30),

8) weight check sheets (FK-31A and FR-31B),

9) report of meeting lots of processed raisins ledgers (FR-40),

10) processed failing raisins held ledgers (FR-41),

11) surveillance records (FR-43),

12) daily compliance check sheets (FR-51),

13) potential violation or complaints (FR-52),

14) reports of raisins to be charged on AMS-183 (FR-53),

15) worksheets for certificate (PK-146-10),

16) reconditioning worksheets,

17) requests for USDA certificate (FR-146-11),

18) report of inspection (FV-66),

19) certificates of quality and condition (FV-146),

20) memorandum reports of inspection for processed raisins (FV-489),

21) memorandum reports (FV-489) accountability ledgers,

22) condition inspection and failing lots ledgers,

23) memorandums (FV-490),

24) certificate accountability ledgers (for FV-44 and FV-146),

25) airstream sorter results,

26) power of attorneys,

27) pallet control cards,

28) daily pack-out reports (RAC-15),

29) buyer specifications,

30) correspondence relating to inspections,

31) investigations, and

32) any other records relating to inspection services at Lion from 1995 to the present.

(Doc. 43-8, Ex. 45.) The request was assigned FOIA No. 96-07.

The USDA searched for records and on August 30, 2007, the USDA issued a written no-records response. (Doc. 43-8, Ex. 47.) Specifically, in its response, the USDA asserted that "after the specified retention period for inspection documents ... the documents are destroyed. There are no records either created or maintained regarding the destruction of the documents in your letter. Therefore, we have no documents responsive to your request." (*Id.*)

On October 11, 2007, Lion submitted a written appeal. (Doc. 43-8, Ex. 48.) In its appeal, Lion relied upon federal regulations to advance its argument that responsive records should exist:

Lion hereby appeals the FOIA Officers' reply. The AMS has a federally-regulated records management program (36 C.F.R. § 1228.1

through 1228.282 and AMS Directive 270.1, attached as Exhibit 'C') .... Federal regulations state, 'No Federal records shall be destroyed or otherwise alienated from the Government except in accordance with procedures described in this part 1228 (44 U.S.C. 3314).' (See 36 C.F.R. § 1228.20.) For records that were properly destroyed, the regulations state, 'Agencies must also create and maintain records that document the destruction of temporary records.' 36 C.F.R. § 1220.36(b) For records improperly destroyed, the regulations state, 'The willful and unlawful destruction, damage, or alienation of Federal records carries a maximum criminal penalty of a $2,000 fine, 3 years in prison, or both.' 36 C.F.R. § 1228.102. Associate Administrator, Dr. Kenneth Clayton, has been delegated oversight and responsibility for the [p]rogram. (Exhibit 'C', Section VI. Responsibilities)

The basis of this appeal is that the requested disposition records were created and improperly withheld. Otherwise, under the watch of Dr. Clayton the disposition records were either *not* created or unlawfully destroyed.

(*Id.*) (emphasis in original.) In response to the appeal, the USDA conducted an additional search and issued a final written response on January 28, 2008. (Doc. 43-8, Ex. 50). The written response reasserted that no responsive documents existed:

The basis of your appeal of AMS FOIA number 96-07 is that the requested disposition records were either created and improperly withheld or destroyed; or that the disposition records were not created. In accordance with FOIA, AMS performed an additional search for responsive records and determined that there are no responsive records. Accordingly, we are upholding the agency's previous determination as to AMS FOIA number 96-07.

In the second count of Lion's FAC, Lion asserts a FOIA claim for the "refusal to produce" the "transfer and destruction" records it requested.

3. *Count III-FOIA Request No. 184-01*

In August 2001, Lion submitted a request to the USDA for "any and all USDA line check sheets performed by the USDA at Lion Raisins, Inc. and Lion enterprises from and including 1991 to 2000." Lion also requested "any and all USDA 'inspection certificates' for the same time frame with respect to each line check sheet." (Doc. 43-5, Ex. 1.) The request was assigned FOIA No. 184-01.

In September 2001, the USDA issued a written response to the request in which it informed Lion that the requested records "are being withheld at this time pursuant to 5 U.S.C. § 552b(7)(A). The requested records are currently under evaluation as evidence by the Office of Inspector General as part of an on-going criminal investigation and the production and release could reasonably be expected to interfere with a pending law enforcement proceeding." (Doc. 43-5, Ex. 2.)

This FOIA request resulted in litigation between the parties and an appeal to the Ninth Circuit. Ultimately, the Ninth Circuit ordered AMS to release the line check sheets requested by Lion. *See Lion Raisins,* 354 F.3d at 1085.

Following the appeal, on April 14, 2004, the USDA sent correspondence to Lion stating it would release thousands of responsive records, and that older documents no longer existed:

In response to [your] request and [the Ninth Circuit] decision, we are forwarding to you separately 10,055 documents which represent the USDA retained copies of Line Check Sheets for outgoing raisins inspected at Lion Raisins, Inc., for the period August 1, 1995 to December 31, 2000. Your request had asked for Line Check Sheets from 1991, however, Line Check Sheets prior to August 1, 1995, no longer exist because of record management guidelines.

Also shipped to you separately are 1,270 documents representing USDA inspection certificates for the same period of time which were issued at Lion Raisins, Inc. Once again, due to record management

guidelines, certificates issued prior to August 1995 no longer exist.

(Doc. 43-5, Ex. 3.) On April 14, 2004, AMS did release, in full, 10,055 responsive documents that consisted of USDA retained line check sheets along with associated forms FV-489 (Memorandum Reports of Inspection) which were attached to the line check sheets. The AMS also released 1,270 pages of responsive inspection certificates.

Following this production, on November 27, 2006, Lion submitted a request for a "supplemental production." (Doc. 43-5, Ex. 4.) Lion asked for responsive records pertaining to "Afgan [Sic] and Chilean Raisins." According to Lion's supplemental production request:

David Trykowski ... through Government's Counsel Colleen Carroll, represented on the record during the hearing on I & G No. 01-0001 (before ALJ Clifton) that there were additional documents responsive to Lion's original request, which *had not* been produced, pertaining to Afgan [Sic] and Chilean Raisins. Mr. Trykowski provided what he had available at the time, but stated there were more. Lion's counsel immediately provided a list of documents it believed were ... missing from those provided by Mr. Trykowski.

(*Id.*) (emphasis in original.) In response to Lion's supplemental production request, a search was performed. On December 11, 2006, the USDA issued a written response and enclosed fifty-two (52) additional line checks sheets that documented the inspection of raisins imported from Afghanistan and Chile. (Trykowski Decl. ¶ 21.) In pertinent part the response states:

> I have enclosed 52 pages of documentation, numbered S-001 to S-052, which represents the USDA Line Check Sheets that support the inspection certificates documenting the certification of product imported by Lion Raisins from Afghanistan. These line check sheets were not included in the original submission of April 14, 2004, [which was in response to the Ninth Circuit's order] because these documents were filed separately from the

> line check sheets documenting the inspection of domestic product.

Line check sheets for 11 of the certificates that were on the list Mr. Green provided to Mr. Trykowski could not be located. However, line check sheets for 10 certificates that were not on Mr. Green's list were located and have been enclosed. An extensive search of the records holding area maintained by the Fresno Inspection Office has been conducted and no further responsive documents could be located.

(Doc. 43-5, Ex. 5.) Subsequently, on April 23, 2007, Lion submitted a letter to the USDA requesting another round of supplemental production. (Doc. 43-5, Ex. 6.) This time, Lion asked for additional line check sheets and inspection memoranda. In its letter, Lion states:

After the close of evidence in ... (I & G Docket No. 01-0001), Lion discovered that the USDA withheld four Line Check Sheets for raisins that were successfully reconditioned after having failed the initial inspection. Attached hereto as Attachment 'A' are the four previously withheld Line Check Sheets that were exchanged with Lion, identified as Exhibit 38 by AMS Counsel, Colleen Carroll. While approximately 136 reconditioning Line Check Sheets were released through FOIA, Lion anticipates that there are many more than four that were withheld, perhaps in the custody and control of AMS Investigator Trykowski. As with the previously withheld Line Check Sheets for Afghan raisins, Lion hereby requests a supplemental disclosure of all Line Check Sheets for reconditioned raisins, regardless of the type of reconditioning, i.e., identity preserved, identity commingled or various commingled (USDA Manual § 11 at 11. 6, 11.7 and 11.8), and any other Line Check Sheets that were withheld for any reason, including those for raisins that were repackaged or blended, for example.

In addition, the USDA produced approximately 494 Memorandum Report of Inspections, 15 of which are dated from 1995 through approximately August 1996 and the remaining dated from approximately November 1999 through 2000. Such Memos were required to be issued and attached to the original Line Check Sheet when

raisins were re-inspected, repackaged, reconditioned or blended with raisins that were returned or failed to ship within 90 days.... Lion observed evidence on Line Check Sheets that strongly suggests additional Memos were issued between August 1996 and November 1999. Lion hereby requests a supplemental disclosure of all such Memos that were withheld from 1995 through 2000 ('FV-489').

(*Id.*) In addition to this supplemental production request, Lion's letter of April 23, 2007, contained a section that included new FOIA requests for documents. The USDA assigned FOIA No. 60-07 to the additional requests. The additional FOIA requests apparently deal with "in-coming" raisins.

In response to Lion's April 23, 2007, supplemental production request, another search was conducted that took "forty man-hours." (Trykowski Decl. ¶ 26.) The search yielded 575 Memorandum Reports of Inspection and 140 line check sheets. These documents were then forwarded to Washington D.C. where they were analyzed by a Program Analyst to determine whether and to what extent they had been previously released in April 2004 (in response to the Ninth Circuit's order). The Program Analyst determined that it appeared four line check sheets and twenty-four (24) Memorandum Reports of Inspection (FV-489) were not previously released.

On June 13, 2007, the USDA issued a written response enclosing these documents, which were responsive to FOIA No. 184-01.[5] (Doc. 43-5, Ex. 7.) In its written response, the USDA stated that "[b]ased on the Agency's review the only Line Check Sheets for reconditioned raisins that were not released were the four Line Check Sheets from June 25, 1998, you had attached to your letter of April 23, 2007. Those four Line Check Sheets are again released in this supplemental production ..." (*Id.*) In addition to these four line check sheets, the USDA provided

[5]The written response mistakenly identified the FOIA request at issue as FOIA No. 60-07, not No. 184-01.

twenty-four (24) Memorandum Reports of Inspection (Form FV-489) "that did not appear to have been released in April 2004." (Trykowski Decl. ¶ 26.) [6]

A few weeks later, Lion submitted a written appeal to the AMS Administrator. (Doc. 43-5, Ex. 8.) In its appeal, Lion claimed that there should be more Memorandum Reports of Inspection and pointed to "accountability reports" which "suggest" there may be additional line check sheets as well.

With respect to potential, additional Memorandum Reports of Inspection, Lion advanced three arguments:

1) There should be responsive Memos from 1997-1999: ... [T]he USDA previously released 15 Memos from 1995 to December 19, 1996 and additional Memos from December 1999 through 2000.... The Memos were attached to Line Check Sheets, together numbering 10,055 pages. It is unreasonable to believe that no Memos were prepared from 1997 to December 1999. That timeframe coincides with the majority of the allegations in the three administrative complaints filed against Lion ....

2) *There should be additional responsive Memos from 1999-2000:* Pursuant to FOIA No. 184-001, the USDA released 24 Memos on June 13, 2007. Each Memo was from 2000 and all but one had been previously released. Obviously, Lion is concerned that the FOIA Officer failed to determine that 23 of 24 Memos had previously been released among the 10,055 documents disclosed after the Ninth Circuit Order. Lion is also concerned because the FOIA Officer failed to identify approximately 30 Memos that should have been released. As summarized below, at least ten of those Memo numbers are recorded on a Line Check Sheet. Lion contends that these Memos are possibly being withheld because they are exculpatory. [The summary Lion provided included a list of thirty (30) Memos by their date and Memo number.]

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[6]The USDA's written response of June 13, 2007, states that these documents "had not been previously released." (Doc. 43-5, Ex. 7.)

3) *Line Check Sheet Remarks suggest there are additional responsive Memos:* ... [T]here are at least three Line Check Sheets with Remarks indicating that a Memo should have been prepared for raisins that were repackaged or transferred to another container. As with the other responsive Memos, Lion asserts that they are possibly being withheld because of exculpatory evidence.

(*Id.*) With respect to potential, additional line check sheets, Lion advanced one argument:

4) *Accountability Report indicates additional responsive Line Cheek Sheets:* It is our understanding that when raisins failed the initial inspection, the results were noted on a failing lots ledger. Upon successful re-inspection, the results were prepared on a separate Line Check Sheet and then transferred to the report of *meeting* lots ledger, which was previously disclosed. There are at least two references in the report of meeting lots to raisins that were transferred from the failing lots ledger but the separate LCS was not released. Lion contends that there are additional Line Check Sheets being withheld that evidence re-inspection results that likely support Lion's defense in the administrative proceedings, as explained above.

(*Id.*) (emphasis in original.) At the end of its written appeal letter, Lion stated it was requesting "full-disclosure of every Line Check Sheet and Memo as previously ordered by the Ninth Circuit Court of Appeals." (*Id.*)

In response to the appeal, another search was conducted. On September 4, 2007, the USDA issued a final written response, stating:

> The appeal provided three bases to support the contention that additional Memorandum Reports of Inspection for Processed Raisins (Forms FV-489) were possibly being withheld 'because they are exculpatory.' Agency files have been searched again and no documents responsive to the original request in FOIA 184-01

have been withheld, including any Forms FV-489.

Additionally, it appears that you misunderstand the process for recording inspection results. The Freedom of Information Act does not require us to respond to your allegations of misconduct or to correct your misunderstanding regarding the inspection process. Accordingly, we simply reiterate that Agency records have been searched and that no additional responsive records were located.

(Doc. 43-5, Ex. 9.)

In count three of its FAC, Lion asserts a FOIA claim for the "refusal to produce [the] line check sheets and memorandum reports of inspection" it requested.

4. *Count IV-FOIA Request No. 85-04*

On May 13, 2004, Lion submitted a request for USDA certificate "Worksheets" for the period of January 1995 through December 2000. (Doc. 43-6, Ex. 27.) The request was assigned FOIA No. 85-04.

On June 23, 2004, the USDA issued a written response stating that the requested records were in the custody of the AMS Compliance Office and were being withheld pursuant to Exemption 7(A) of the FOIA, 5 U.S.C. § 552(b)(7)(A). (Doc. 43-6, Ex. 28.) The USDA noted the three, then-pending enforcement proceedings and stated that the "production and release of [the requested] records at this time could reasonably be expected to interfere with the Agency's pending administrative enforcement proceedings." (*Id.*)

On July 12, 2004, Lion appealed. In its appeal, Lion argued:

The USDA voluntarily gave each and every one of those worksheets to a Lion employee to type up the USDA's FV-146, Certificate of Quality and Condition.... USDA recently lost an extremely similar, if not identical, issue in the Ninth Circuit Court of Appeals regarding USDA

Line Check Sheets and USDA Certificates. What the Ninth Circuit said in that matter is equally applicable here.

(Doc. 43-6, Ex. 29.) On January 3, 2005, the USDA responded to the FOIA appeal and upheld the decision to withhold the worksheets in full pursuant to Exemption 7(A). (Doc. 43-6, Ex. 30.) The USDA again noted the ongoing administrative proceedings and stressed the "prominent" role the documents played in the third administrative proceeding:

The Agricultural Marketing Service (AMS) has filed three administrative complaints before the Department in an effort to debar Lion Raisins, Inc., from receiving all benefits of the Agricultural Marketing Act of 1946. The first complaint (I & G Docket No. 01-0001) is currently the subject of a hearing before an administrative law judge. The second administrative complaint (I & G Docket No. 03-0001) is pending review by the U.S. District Court.

The third complaint (I & G Docket No. 04-0001) has not been scheduled for hearing yet. The type of documents which you seek in this appeal (Work Sheets for Certificate of Quality and Condition for Raisins) play a prominent role in this third administrative complaint. The production and release of those records at this time could reasonably be expected to interfere with the Agency's pending administrative enforcement action.

(Doc. 43-6, Ex. 30.) On January 11, 2005, Lion filed a complaint under FOIA in the United States District Court for the Eastern District of California seeking release of the worksheets. In October 2005, the district court upheld the USDA's decision to withhold the worksheets on the basis of Exemption 7(A) and granted summary judgment in favor of the USDA. *See Lion Raisins, Inc. v. U.S. Dep't of Agric.,* No. CVF050062RECSMS, 2005 WL 2704879, at *4-10 (E.D.Cal. Oct. 19, 2005). Lion appealed and the Ninth Circuit affirmed the district court's ruling. *Lion Raisins Inc. v. U.S. Dep't of Agric.,* 231 Fed.Appx. 563 (9th Cir.2007). In its opinion, the Ninth Circuit rejected arguments made by

Lion:

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

Id. at 565 n. 2 (alterations in original).

Subsequently, on September 20, 2007, Lion submitted a "renewed request" for the worksheets the Ninth Circuit previously determined were properly withheld on the basis of Exemption 7(A). (Doc. 43-7, Ex. 31.) In Lion's submission, Lion stated that the "evidence closed" in the first and third administrative hearing and that the "only" worksheet relevant to the second administrative proceeding had been released during the first administrative proceeding. "As such, please release the ... Certificate Worksheets; otherwise, please release them as soon as the administrative investigations and proceedings have been completed." (*Id.*) Lion acknowledged that, at the time, a hearing in connection with the second administrative proceeding had not been held, and that Lion had filed pending motions to reopen the first and third administrative proceedings. (*Id.*)

Four days later, on September 24, 2007, Lion filed, in this court, a motion for relief from Judge Coyle's summary judgment order entered on October 20, 2005. The motion was ultimately denied. *See Lion Raisins, Inc. v. U.S. Dep't of Agric.,* No. 1:05-CV-00062 OWW-SMS, 2008 WL 3834271 (E.D.Cal. Aug. 14, 2008).

Meanwhile, on October 19, 2007, the USDA responded to Lion's

supplemental request and continued to withhold the certificate worksheets on the basis of Exemption 7(A). (Doc. 43-7, Ex. 32.) In its written response, the USDA discussed the status of the administrative proceedings:

Your renewed request for the Certificate Worksheets is denied.... In the matter of Inspection and Grading (I & G) Docket No. 01-0001 [the first administrative proceeding], on February 26, 2007, you made a motion to the Administrative Law Judge (ALJ) to reopen the hearing and supplemented it with three additional filings dated April 24, 2007, and September 6, 2007. The ALJ has not issued a decision yet and if the ALJ grants the motion to reopen the hearing then that proceeding would be reopened and the release of the requested information could reasonably interfere.

In I & G 03-0001 [the second administrative proceeding], that matter was remanded to the ALJ for further proceedings. However, the assigned ALJ was a reserve Army officer who is now on a tour to Iraq and the case is to be assigned to another ALJ.

In I & G 04-0001 [the third administrative proceeding], a significant number of the counts in the complaint were dismissed by the ALJ. The remaining counts were litigated and the ALJ issued a decision and order finding that on 33 occasions Lion had engaged in a 'pattern of misrepresentation or deceptive or fraudulent practices in connection with the use of official inspection certificates [and/or] inspection results.' You appealed that decision to the USDA's Judicial Officer (JO). AMS in the response to the appeal asked the JO to review the ALJ's decision to dismiss the counts contained in the original complaint. If the JO determines the ALJ erred in dismissing those counts then it is likely that the previously dismissed counts could be remanded for additional proceedings.

....

While the USDA administrative proceedings have progressed since May 13, 2004, they have not yet concluded, and the requested

documents will continue to be withheld pursuant to 5 U.S.C. § 552(b)(7)(A) as their release could reasonably be expected to interfere with the Agency's pending administrative enforcement proceedings.

(*Id*.) A few weeks later, Lion appealed. Lion covered the status of the administrative proceedings and argued why it believed that Exemption 7(A) could not be properly invoked:

In I & G Docket Nos. 01-0001 and 04-0001 [the first and third proceeding], the AMS has already presented its case-in-chief and rebuttal evidence in an effort to prove the Respondents' misrepresented USDA inspection results that were initially recorded on Certificate Worksheets. As the [USDA] FOIA Officer pointed out, the Respondents have since filed motions to reopen the hearings. If reopened, the limited purpose of the hearings would be for the Respondents to prove that the AMS misused, suppressed, destroyed and/or altered evidence that the Respondents accurately represented reinspection results. As such, disclosure of the Worksheets could not reasonably interfere with the administrative proceeding unless proving innocence is proper basis of withholding public records (and of course it is not).

It is true that the ALJ dismissed several counts of the complaint in I & G Docket No. 04-0001. However, the AMS had already exchanged exhibits (including Worksheets) for the dismissed counts. In addition, those counts were dismissed as untimely because they were filed after the five-year statute of limitations established by federal law. In the unlikely event that the case is remanded for additional proceedings, the Respondents would immediately seek relief in federal court and would likely prevail. Again, it is unreasonable to expect that disclosure of the Worksheets could interfere with the administrative proceedings.

Finally, on October 11, 2002, a complaint was filed against the Respondents in I & G Docket No. 03-0001. The AMS alleged that the Respondents misrepresented an inspection result related to a single shipment of raisins. It is undisputed that the Worksheet was disclosed by AMS in its rebuttal case in I & G 01-0001.

In conclusion, the AMS has disclosed every Worksheet with the initial inspection results that the Respondents allegedly misrepresented from 1995 through 2000. It is unreasonable to continue to withhold the remaining Worksheets about which there is no allegation that the Respondents misrepresented the inspection results. Interfering with the Respondents' post-hearing efforts to provide innocent explanations is *not* a legally recognized justification for withholding the documents.

(Doc. 43-7, Ex. 33) (emphasis in original.) On May 28, 2008, the USDA responded to the FOIA appeal and continued to withhold the records on the basis of Exemption 7(A). (Doc. 43-7, Ex. 35.) In its response, the USDA discussed the status of the pending administrative proceedings and upheld the prior determination:

On September 20, 2007, you submitted a 'Renewed Request for Worksheets' wherein you requested that AMS 'release the .... Certificate Worksheets; otherwise, please release them as soon as the administrative investigations and proceedings have been completed.' In a letter dated October 19, 2007 ... [an] AMS FOIA Officer [ ] denied your renewed request for the Certificate Worksheets and provided the basis for the Agency's denial of those records.

....

As explained in the letter of October 19, 2007, AMS determined that the release of the records at this time could reasonably be expected to interfere with the Agency's pending administrative enforcement proceedings against Lion Raisins, Inc. You chose to make a motion to reopen the hearing of I & G Docket No. 01-0001 and to appeal the decision of I & G Docket No. 04-0001 to the Judicial Officer. In addition. I & G Docket No. 03-0001 was remanded to the Administrative Law Judge for further proceedings. After reviewing your request, your appeal, and the file, I concur with the agency's determination. Accordingly, the requested Certificate Worksheets will continue to be withheld pursuant to 5 U.S.C. § 552(b)(7)(A).
(*Id.*)

In the fourth count of Lion's FAC, Lion asserts a FOIA claim for the worksheets. After Lion filed its FAC, significant progress occurred in the administrative proceedings. Lion has recently submitted a new FOIA request for the worksheets, and, according to the USDA's reply brief, the USDA will release the worksheets upon payment of the estimated costs and the USDA "no longer asserts Exemption 7(A)."

5. *Count V-Request For Disposition Records*[7]

On September 20, 2007, after the Ninth Circuit affirmed Judge Coyle's grant of summary judgment, Lion submitted a "new request for worksheet disposition records." (Doc. 43-7, Ex. 31.)FN8. This "new request" was included in the same correspondence as Lion's "renewed request" for worksheets (which is the subject of Count IV).[8] This request states: "please release the disposition schedule for the Worksheets, possibly identified as Standard Form 115, as well as all records, requests, concurrences, instructions, and other documents related to destruction and/or transfer of the Worksheets between the Fresno Field Office, the U.S. Attorney, AMS and any other agencies." (*Id.*)

On October 19, 2007, in a written correspondence to Lion, the USDA briefly addressed this request stating "[y]our request pertaining to the disposition records for the Worksheets is being answered in a separate response." (Doc. 43-7, Ex. 32.) The remainder of the correspondence addresses a separate FOIA request Lion submitted (No. 85-04, the subject of the fourth count).

On December 11, 2007, Lion appealed the USDA's "non-reply" to its request for disposition records. (Doc. 43-7, Ex. 34.) Lion stated that the USDA "FOIA Officer never assigned a FOIA number or replied to [Lion's] request" for disposition records. Lion reasserted its request to

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[7]Apparently this request does not have an assigned FOIA number.

[8]This "new request" was included in the same correspondence as Lion's "renewed request" for worksheets (which is the subject of Count IV).

"release all non-exempt disposition records for the Worksheets requested. At a minimum, the request covers the disposition schedule, Standard Form 115, as well as all records, requests, concurrences, instructions, and other documents related to the destruction and/or any transfer of the Worksheets." (*Id.*)

On May 28, 2008, the USDA issued a written response to Lion's appeal and stated that the request was duplicative of other FOIA requests:

Your September 20, 2007 request also included a new, separate FOIA request for 'the disposition schedule, Standard Form 115, as well as all records, requests, concurrences, instructions, and other documents related to the destruction and/or any transfer of the Worksheets.' This request is duplicative of other FOIA requests you have submitted to AMS, including FOIA No. 113-07.[9] AMS responded to your request for disposition schedules and other documents relating to destruction and/or transfer of the Worksheets by letter dated November 5, 2007 in response to your FOIA request No. 113-07. You were given appeal rights at that time.

In addition, your FOIA Requests No. 96-07 and No. 97-07 were duplicative of this new, separate request. AMS responded to these 96-07 and 97-07 by letter dated August 30, 2007 and provided you with appeal rights at that time.
(Doc. 43-7, Ex. 35.)

In the fifth count of Lion's FAC, Lion asserts a FOIA claim for an alleged "failure to respond to [its] request for disposition records for worksheets."

6. *Count VI-FOIA No. 61-01*

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[9]This FOIA request is not alleged as a substantive basis for any count in the FAC.

On February 8, 2002, Lion submitted a request for certain investigation and compliance-related records:

> The Raisin Administrative Committee, through its manager is required to report to USDA any alleged violations of the Raisin Marketing Order by raisin packers in the industry. While you can redact the name of the packer if it is not Lion, please provide any and all compliance and investigation files, compliance and audit programs and policies, referral letters or referral reports communicated to USDA, AMS from the RAC to USDA regarding alleged wrongdoing or non-compliance by any raisin packer. If it involves Lion, please do not redact the name. If it involves other packers, you can redact the name, but not the allegation with respect to what the packer allegedly did wrong. This is all for the time frame [of January 1, 1995 to the date of this request].

(Doc. 43-5, Ex. 10.) The request was assigned FOIA No. 61-02.

In response to the request, a search was conducted and on March 28, 2002, the USDA issued a written response stating it had responsive documents, some of which it would release:

> Documents responsive to your request are estimated to include: 1) warning letters and related documents, 2) 6 compliance plans, and 3) 12 compliance cases. Releasable information consists of about 1000 pages, which includes the first two items and part of the third (7 closed or completed compliance cases). Material that we would withhold consists of about 500 pages, which includes part of the third item (5 ongoing compliance cases). The information is being withheld pursuant to § 552(b)(7) of FOIA (5 U.S.C. 552) that exempts from disclosure 'information compiled for law enforcement purposes.' Also, information is being withheld under § 552(b)(4) of FOIA that exempts from disclosure 'commercial information' that is obtained from a person and is privileged or confidential. Additionally, telephone numbers are being withheld pursuant to § 552(b)(6), because release of that information

would constitute a clearly unwarranted invasion of personal privacy.

(Doc. 43-5, Ex. 11.) The USDA provided an estimation of the fees for supplying the releasable, responsive records.

In response, on April 11, 2002, Lion requested ten (10) "examples" of the identified "compliance plans" in order to determine whether "compliance plans" were responsive to Lion's request:

> Lion is seeking Federal California raisin marketing order compliance documents. You stated in your response that you have approximately 1,000 documents responsive to said request. In order for Lion to determine that the documents you state are responsive and do not consist of USDA compliance manuals, or RAC compliance manuals etc., it would be appreciated if you could provide to this office, via facsimile, at least 10 examples of the documents that you state are 'compliance plans' documents.

(Doc. 43-5, Ex. 12.) Lion apparently misread the USDA's written response which stated that only six compliance plans (not ten) existed. In Lion's correspondence of April 11, 2002, Lion also sought to clarify its request:

> In order to clarify what the request is seeking I offer the following: Lion is only interested in internal documentation between the RAC, AMS and/or USDA regarding any alleged violations of the California Raisin Marketing Order by any raisin packer. If the alleged violation involves Lion, please do not redact the name. If it involves any other packer besides Lion, Lion understands that there are privacy concerns and therefore the packer name may be redacted.

(*Id.*) On April 30, 2002, the USDA responded to Lion's request for examples of compliance plan documents by providing "one sample for the period 2001-2002, as developed by the RAC, which consists of 25 pages." The USDA stated that the "rest of the estimated RAC

'compliance plan' documents are similar except that they apply to previous crop years." (Doc. 43-5, Ex. 13.)

After Lion received the sample, Lion submitted a revised request to the USDA on May 14, 2002. Lion wrote:

> After review of said document [the compliance plan], it would be appreciated if you could provide me with a revised estimate of the cost to obtain copies of: 1) warning letters; and 3) compliance cases as outlined in [previous correspondence]. I am omitting the item number "2) compliance plans" as these documents Lion does not wish to receive.

(Doc. 43-5, Ex. 14.) On June 7, 2002, the USDA supplied Lion with a revised fee estimate of $1,171.00. (Doc. 43-5, Ex. 15.).

After the USDA received partial payment from Lion, the USDA began to process documents responsive to Lion's revised request. In a correspondence dated August 13, 2002, the USDA informed Lion that documents responsive to the request consisted of approximately 700 pages and that, to expedite Lion's receipt of the documents, the USDA intended to release the documents in periodic batches:

> We are currently processing the documents that are responsive to your request, which consist of approximately 700 pages. Because of the voluminous nature of the request and the fact that the documents were obtained from our field office, it will take time to process the documents. To expedite your receipt of these documents, we intend to release batches of documents to you approximately every two weeks.

(Doc. 43-6, Ex. 16.) Ultimately, the USDA released the documents in six batches.

In a correspondence dated August 22, 2006, the USDA enclosed the first batch of documents totaling 169 pages. (Doc. 43-6, Ex. 17.) The first batch consisted of warning letters and related documents. The

USDA explained that it was redacting/withholding information pursuant to various exemptions:

> Pursuant to 5 U.S.C. 552(b)(4) of FOIA, which covers trade secrets, I am withholding the following: 1) Names of shippers or growers who do business with allegedly noncompliant industry members under the California raisin marketing order; 2) certificate numbers; 3) production information such as acreage and shipment amounts; and 4) names of Department of Agriculture inspectors that are closely associated with certain raisin plants. Pursuant to 5 U.S.C. 552(b)(6) any information that would constitute a clearly unwarranted invasion of personal privacy (e.g. social security numbers) was redacted. Also, pursuant to 5 U.S.C. 552(b)(7)(C), information has been withheld that was compiled for law enforcement purposes and could reasonably be expected to constitute an unwarranted invasion of personal privacy, which could include the names of alleged noncompliant industry members, or others associated with such information. Pursuant to 5 U.S.C. 552(b)(7)(E), information was withheld that would disclose techniques and procedures for law enforcement purposes.

(*Id.*) In a correspondence dated September 24, 2006, the USDA enclosed the second batch of documents totaling 138 pages. (Doc. 43-6, Ex. 20.) The USDA explained that the released pages in the second batch consisted of two "closed" compliance cases, that further pages would be released from five other "closed" compliance cases, and that with respect to five active compliance cases, the USDA was withholding those records pursuant to Exemption 7(A). The USDA also noted that, in connection with this second batch, it redacted/withheld information pursuant to various exemptions:

> Enclosed is the second batch of responsive documents (138 pages), which contains information from two closed cases. There are five remaining closed cases that will be forwarded. Pursuant to 5 U.S.C. 552(b)(4) of FOIA, which covers trade secrets, I am

> withholding the following: 1) Names of shippers or growers who do business with allegedly noncompliant industry members under the California raisin marketing order; 2) certificate numbers; 3) production information such as acreage and shipment amounts; and 4) names of Department of Agriculture inspectors that are closely associated with certain raisin plants. Pursuant to 5 U.S.C. 552(b)(6) any information that would constitute a clearly unwarranted invasion of personal privacy (e.g. social security numbers) has been redacted. Also, pursuant to 5 U.S.C. 552(b)(7)(C), information has been withheld that was compiled for law enforcement purposes and could reasonably be expected to constitute an unwarranted invasion of personal privacy, which could include the names of alleged noncompliant industry members, or others associated with such information. Pursuant to 5 U.S.C. 552(b)(7)(E), information was withheld that would disclose techniques and procedures for law enforcement purposes.

(*Id.*)

In a correspondence dated October 10, 2002, the USDA enclosed the third batch of responsive documents totaling 172 pages. (Doc. 43-6, Ex. 21.) The third batch contained the contents of three closed compliance cases. (*Id.*) As to the third batch, the USDA explained that it redacted/withheld information pursuant to various exemptions (which were the same exemptions noted in the USDA's second batch correspondence). (*Id.*)

In a correspondence dated November 18, 2002, the USDA enclosed the fourth batch of responsive documents totaling 252 pages. (Doc. 43-6, Ex. 22.) The fourth batch contained half of the case information on a specific packer, Custom Raisin Packing, Inc. The USDA noted that it was releasing information that would otherwise be confidential because the information was made public, but some information was redacted/withheld pursuant to various exemptions:

> Enclosed is the fourth batch of responsive documents (252 pages),

which contains half of our case information concerning Mr. John Bowersox and Custom Raisin Packing, Inc. (Custom). There are two remaining batches, one consists of the other half of the Custom case and another batch from another case.

Unlike previous batches, we are releasing some information that would normally be considered confidential. Because Custom is no longer in existence, much of the information that would normally be withheld under 5 U.S.C. 552(b)(4), trade and financial secrets is releasable to the public. This includes items such as production figures, sales prices, shipment information, and the taxpayer identification number. Much of Custom's and Mr. Bowersox' information was deemed public as it was already released in bankruptcy court.

However, where necessary, we are reserving the right to withhold certain information in the Custom case. Pursuant to Section 5 U.S.C. 552(b)(4) of FOIA, trade secrets and commercial or financial information obtained that is personal or confidential, I am withholding information such as bank account numbers and names of businesses that did business with Custom raisin. Pursuant to 5 U.S.C. 552(b)(6) any information that would constitute a clearly unwarranted invasion of personal privacy (e.g. social security numbers or phone numbers of those other than Custom) have been redacted. Also, pursuant to 5 U.S.C. 552(b)(7)(C), information has been withheld that was compiled for law enforcement purposes and could reasonably be expected to constitute an unwarranted invasion of personal privacy, which could include the names of alleged noncompliant industry members, or others associated with such information. Pursuant to 5 U.S.C. 552(b)(7)(E), information was withheld that would disclose techniques and procedures for law enforcement purposes.

(*Id.*)

In a correspondence dated December 11, 2002, the USDA enclosed the fifth batch of responsive document totaling 247 pages. (Doc. 43-6,

Ex. 23.) The fifth batch contained the second half of the Custom compliance case. (*Id.*) As to the fifth batch, the USDA noted that information was redacted/withheld pursuant to various exemptions (which were the same exemptions noted in the USDA's fourth batch correspondence).

Finally, in a correspondence dated January 7, 2003, the USDA released the sixth batch of responsive documents totaling 122 pages. (Doc. 43-6, Ex. 24.) The sixth batch contained the contents of the last closed compliance case. The USDA noted that some information was redacted/withheld pursuant to various exemptions:

As with previous batches, we are withholding certain information. Pursuant to 5 U.S.C. 552(b)(4) of FOIA, which covers trade and financial secrets, I am withholding certain bank account information. Pursuant to 5 U.S.C. 552(b)(6) any information that would constitute a clearly unwarranted invasion of personal privacy (e.g., personal social security numbers or phone numbers) have been redacted. Also, pursuant to 5 U.S.C. 552(b)(7)(C), information has been withheld that was compiled for law enforcement purposes and could reasonably be expected to constitute an unwarranted invasion of personal privacy, which could include the names of alleged noncompliant industry members, or others associated with such information.
(*Id.*)

After receiving the six batches of documents, Lion appealed on February 21, 2003. Lion objected to the deletion/redaction of information pursuant to an exemption without any notation as to the kind of information being withheld:

I hereby file this FOIA APPEAL ... on the grounds that the Freedom of Information Officer failed to comply with the pertinent provisions of FOIA. There is absolutely no indication that the exemption stated pursuant to 552(b)(4) of FOIA governing trade and financial secrets, are evident and where she simply deletes information and information and writes (b)(4) that fails to comply with the Freedom of Information Act

since it does not indicate what the information was in order to properly address whether or not the exemption is properly applied. The same is true with respect to the FOIA Officer's (b)(6) exemption and (b)(7)(C) exemption listed in all of the documents where deletions had occurred.

When something is redacted, there must be some notation or indication as to why it is redacted, indicating the type of information (not just code sections of exemptions) being redacted.

I believe that the FOIA Officer must indicate with respect to each redaction claimed, sufficient information addressing what was redacted, and not simply designate an exemption code section.

(Doc. 43-6, Ex. 25.) At the time Lion filed its FAC on August 26, 2008, the USDA had not issued a written response to this appeal. Accordingly, the sixth count in Lion's FAC alleges that the USDA failed to respond to Lion's appeal. After the filing of the FAC, however, the USDA responded to Lion's appeal.

The USDA issued a written, detailed response to the appeal dated March 9, 2009. (Doc. 43-6, Ex. 26.) The USDA's response addressed Lion's arguments, explained what information was being redacted/withheld and why, and released additional documents. After the USDA issued this detailed response to Lion's appeal, Lion has not since amended its FAC.

7. *Count VII-Refusal To Provide Access To Original Records*

In four separate written submissions, all dated October 26, 2005, Lion requested physical access to original USDA records.

The first request, assigned FOIA No. 22-06, sought "physical access" to documents that contained the "Original (in living color) signatures" of fourteen different USDA inspectors who inspected raisins at Lion. (Doc. 43-7, Ex. 37.) The second request, assigned FOIA No. 23-06,

sought "physical access" to "Original Blue Tissue Copy (in living color) USDA Certificates for product inspected at Lion Raisins during the years of 1995 through 2005 as stored by the USDA." (Doc. 43-7, Ex. 38.) The third request, assigned FOIA No. 25-06, sought "physical access" to "Original (in living color) USDA Line Check Sheets for product inspected at Lion Raisins during the years of 1995 through 2005 as stored by the USDA." (Doc. 43-7, Ex. 39.) Finally, the fourth request, assigned FOIA No. 26-06, sought "physical access" to "Original (in living color) Voided USDA Certificates for product inspected at Lion Raisins during the years of 1995 through 2005 as stored by the USDA." (Doc. 43-7, Ex. 40.) With respect to each request, Lion stated that "before granting this FOIA request please inform us of the costs that may be involved with such a request."

On January 9, 2006, the USDA informed Lion, in an "interim" response, that it would need an additional ten days to respond. (Doc. 43-7, Ex. 41.) On February 10, 2006, in another "interim" response, the USDA explained that it identified approximately 15,000 documents in two different locations and provided an estimate of the cost:

> We have identified approximately 15,000 documents responsive to your request. The records you have requested are normally maintained by the Fruit and Vegetable Programs. However, due to an ongoing investigation, a large portion of the requested records are currently in the possession of the Compliance and Analysis Programs. Since you have requested physical access to the records for your inspection, each program area will need to be contacted to arrange a mutually convenient time for such inspection.
>
> ....
>
> Under the FOIA [5 U.S.C. § 552(a)(4)(A)], fees may be charged for the search and review of requested documents. The USDA fee schedule for FOIA requests can be found in 7 C.F.R. Part 1, Subpart A, Appendix A. Since the requested records are in the possession of two separate programs, a separate search and review will need to be performed by each.

(Doc. 43-7, Ex. 42.) For the two separate searches, the USDA broke down the fee estimation as follows:

Search time:	20 hours x $36.16/hr = $ 723.20
Professional review time:	40 hours x $60.97/hour = $2,438.80
Search time:	143 hours x $14.00/hour = $2,002.00
Professional review time:	40 hours x $41.47/hour = $1,658.80
Total =	$6,822.80

(*Id.*) The USDA requested that Lion pay the estimated fee within thirty (30) days. The USDA asked for the payment in full "before the [USDA] continues to process this request." (*Id.*)

On March 27, 2006, Lion appealed and argued that the costs were excessive. (Doc. 43-7, Ex. 43.) Lion stated that the documents were previously produced and that searching for them again should not be burdensome:

On March, 22, 2006, I contacted Ms. [Zipora] Bullard [a USDA FOIA officer] for clarification as to why the cost for 'physical access' was so high when hard copies of the same documents Lion seeks physical access to were previously produced in an earlier FOIA request. Ms. Bullard offered to verify the costs with program manager, Mike Blazejak. Thereafter, Ms. Bullard contacted me by telephone and informed me that Mr. Blazejak confirmed the costs were required and must be paid ... because someone would be required to access the files to facilitate our request for 'physical access.'

Lion appeals the February 10, 2006 Interim Response. This appeal is based on the grounds that the costs associated with further processing of the requests are unreasonably excessive, in that a copy of the requested documents should currently exist and be available for AMS's use in identifying documents responsive to Lion's October 26, 2005 requests. AMS's [r]equirement for pre-payment has the same effect as an outright denial, in that if Lion does not pay the required $6,822.80,

AMS will deny Lion physical access to the requested documents.

(*Id.*) The USDA issued a written response to Lion's appeal dated June 7, 2006. (Doc. 43-7, Ex. 44.) In its response, the USDA addressed Lion's arguments and explained the basis for the fees:

Your appeal is based on the grounds that, in your assessment, the costs associated with processing this request are unreasonably excessive. You also assert in your appeal that the requirement to pay the full estimated fee in advance has the same effect as an outright denial. We have reviewed your appeal and have determined to uphold the requirements in the interim response dated February 10, 2006.

The estimated costs are based on the estimated amount of time it will take to provide you the information as described in you[r] request. The point was also raised in your appeal, that copies of this information were previously produced in response to an earlier request. In the normal process of responding to a FOIA request, after copies of the requested information have been made, the original documents are returned to the files from which they were retrieved. It is possible that the response to a subsequent request may be facilitated based on the results of the earlier request if identical information is sought and only requires the production of additional copies of the same documents. In this particular case, you have not requested additional copies of the information. Your request is for access to the original documents themselves. Since the original documents you seek have been returned to files, a complete search and retrieval process will need to be performed in order to locate and produce the requested information. Since the original documents are sought, it is not possible to facilitate this process based on the efforts and results from a previous request. Furthermore, due to the age of the information, some of the records have been moved from the office filing system and are now located in storage. Additional time will be required for the search and retrieval of any information from records located in storage.

(*Id.*) The USDA also explained why the fees were requested in advance:

> Under the FOIA [5 U.S.C. § 552(a)(4)(A)], fees may be charged for search, review, and duplication of requested documents in order to recover the cost of providing the information. The fee schedule for FOIA requests can be found in 7 C.F.R. Part 1, Subpart A, Appendix A. The request for payment of these fees does not constitute a denial.

5 U.S.C. § 552(a)(4)(A)(v) states: 'No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.'

7 C.F.R. Part 1, Subpart A, Appendix A, Section 8(d) states: 'In instances where a requester has previously failed to pay a fee, an agency may require the requester to pay the full amount owed, plus any applicable interest as provided in section 9 of this appendix, as well as the full estimated fee associated with any new request before the agency begins to process that new or subsequent request.'

In a letter, dated April 13, 2005, a representative of Lion Raisins, Inc. requested information under the FOIA and was assigned as AMS FOIA 72-05. The responsive documents along with a letter requesting payment were sent on June 22, 2005. A courtesy letter, dated August 4, 2005, was sent requesting payment. On August 31, 2005, a representative of Lion Raisins submitted two additional requests for information. In accordance with 7 C.F.R. Part 1, Subpart A, Appendix A, Section 8(d), the two requests were put on hold. An additional letter, dated September 12, 2005, was sent re-requesting payment for AMS FOIA 72-05. On November 21, 2005, a check for FOIA 72-05 was finally received. The two pending requests, submitted in August, were processed as FOIA Nos. 20-06 and 21-06.

In accordance with 5 U.S.C. § 552(a)(4)(A)(v) and 7 C.F.R. Part 1, Subpart A, Appendix A, Section 8(d), the payment of the full estimated fee associated with this request is being required before processing

based on the payment history for AMS FOIA 72-05.

(Doc. 43-7, Ex. 44) (alteration in original.) The USDA informed Lion that if it wished to continue processing its request for physical access, "please send a check payable to the U.S. Treasury for the amount of $6,822.80 in accordance with the instructions in the interim response, dated February 10, 2006, within 30 days of receipt of this letter." (*Id.*) Lion did not pay the requested fees or agree to pay them. The USDA ceased processing the request.

In the seventh count of Lion's FAC, Lion asserts a FOIA claim on the grounds that the estimated costs were unreasonably excessive and tantamount to an outright denial.

8. *Count VIII-"Bad Faith"*

In the eighth count of Lion's FAC, Lion asserts a stand alone claim for "bad faith" on the grounds that they USDA responses to its various FOIA requests were made in bad faith.

9. *Count IX-Violation of the Administrative Procedure Act*

In the ninth count of Lion's FAC, Lion incorporates its allegations with regards to its FOIA requests and the USDA's responses thereto (Count I through VII) and asserts that the "USDA's actions were and continue to be arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 551."

III. STANDARD OF DECISION

The FOIA "accords 'any person' a right to request any records held by a federal agency. No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions, see § 552(a)(3)(E), (b), the agency must 'make the records promptly available' to the requester, § 552(a)(3)(A). If an agency refuses to furnish the requested records, the requester may file suit in federal

court and obtain an injunction 'order[ing] the production of any agency records improperly withheld.' § 552(a)(4)(B)." *Taylor v. Sturgell,* ---U.S. ----, 128 S.Ct. 2161, 2167, 171 L.Ed.2d 155 (2008) (alteration in original) (internal citation omitted).

"It is generally recognized that summary judgment is a proper avenue for resolving a FOIA claim." *Sakamoto v. EPA,* 443 F.Supp.2d 1182, 1188 (N.D.Cal.2006). "Unlike the typical summary judgment analysis," however, "in a FOIA case, we do not ask whether there is a genuine issue of material fact, because the facts are rarely in dispute." *Minier v. CIA,* 88 F.3d 796, 800 (9th Cir.1996). Rather, the question is whether "an adequate factual basis" exists "upon which to base [a] decision" on the FOIA claim at issue. *Id.*; *see also Fiduccia v. U.S. Dep't of Justice,* 185 F.3d 1035, 1040 (9th Cir.1999). Government affidavits can supply the requisite factual basis. *Lane v. Dep't of Interior,* 523 F.3d 1128, 1135-36 (9th Cir.2008).

The precise nature of the inquiry on summary judgment, and whether an adequate factual basis exists, depends on the issue being litigated.

In cases "[w]here the government withholds documents pursuant to one of the enumerated exemptions of FOIA 'the burden is on the agency to sustain its action.' " *Lion Raisins,* 354 F.3d at 1079 (*citing* 5 U.S.C. § 552(a)(4)(B)). "If the agency supplies a reasonably detailed affidavit describing the document[s] [withheld] and facts sufficient to establish an exemption, then the district court need look no further in determining whether an exemption applies." *Church of Scientology v. U.S. Dep't of Army,* 611 F.2d 738, 742 (9th Cir.1979). Ordinarily, the agency affidavit(s) identify the document(s) withheld, specify the FOIA exemption(s) claimed, and explain why each document falls within a claimed exemption. *Lion Raisins,* 354 F.3d at 1082. This submission is typically referred to as a Vaughn index. *Id.* The affidavit(s) "must be detailed enough for the district court to make a de novo assessment of the government's claim of exemption." *Id.* (internal quotation marks omitted).

In cases where the agency's search for responsive records is at issue, the agency must demonstrate "that it has conducted a search reasonably calculated to uncover all relevant documents." *Zemansky v. EPA,* 767 F.2d 569, 571 (9th Cir.1985) (internal quotation marks omitted). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Id.* (emphasis and internal quotation marks omitted). The "adequacy of the search ... is judged by a standard of reasonableness" and to demonstrate the "adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.* (internal quotation marks omitted); *see also Citizens Comm'n on Human Rights v. FDA,* 45 F.3d 1325, 1328 (9th Cir.1995). While an ultra-thorough search is not required, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Campbell v. U.S. Dep't of Justice,* 164 F.3d 20, 27 (D.C.Cir.1998) (internal quotation marks omitted). For purposes of summary judgment, the agency affidavits are sufficient "if they are relatively detailed in their description of the files searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith." *Zemansky,* 767 F.2d at 573 (internal quotation marks omitted). In assessing the adequacy of the search, when the agency is moving for summary judgment, the facts are construed "in the light most favorable to the requestor." *Citizens Comm'n on Human Rights,* 45 F.3d at 1328.

IV. DISCUSSION AND ANALYSIS

A. *Count I-FOIA Request No. 97-07*

Through FOIA Request No. 97-07, Lion seeks USDA disposition plans for the "FR" and "RAC" series of forms. Lion refers to these disposition plans as "disposition schedules" in its moving papers. The USDA has not claimed that it is withholding these disposition plans or schedules pursuant to any exemption. Whether an exemption is properly invoked is not the issue. The issue is the adequacy of the USDA's search

for responsive records.

Lion believes disposition plans "should" exist for these series of forms because they, according to Lion, are required by federal law and the USDA released a disposition plan for another series of form (the "F & V" series). In response, the USDA claims that it conducted a reasonable search, both initially and after Lion's FOIA appeal, and the USDA produced what it found.

To demonstrate the purported adequacy of the search(es) for responsive records, the USDA submits two declarations. One declaration is from Michael Blazejak, an Agricultural Commodity Grader of the Inspection and Standardization Section of the USDA's AMS. The other declaration is from Maria Sanders, the FOIA Officer for the USDA's AMS. These declarations fail to create a sufficient factual record upon which to determine the adequacy of the search for responsive records.

In a FOIA case, sufficient declarations describe "what records were searched, by whom, and through what process." *Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury,* 534 F.Supp.2d 1126, 1131 (N.D.Cal.2008) (internal quotation marks omitted); *see also Zemansky,* 767 F.2d at 573 (noting that to be sufficient for summary judgment purposes, the affidavits regarding the agency's search must be "relatively detailed in their description of the files searched and the search procedures"). Starting with Blazejak, his declaration is deficient in a number of respects.

With respect to the initial search, Blazejak does not specify what records were searched. Instead, he states that another individual, Gabriel Mangino, an Agricultural Marketing Specialist of the Inspection and Standardization Section, searched unspecified "records." Not only does Blazejak fail to specify which records were searched, Blazejak provides no description of the process or procedure employed by Mangino to search for responsive records-all Blazejak states is that Mangino made a telephone call to an unnamed person in the Processed Products Branch

("PPB") of the AMS and Mangino conducted some unspecified "research." There is no declaration for Mangino explaining what records he searched and what process or procedure he followed. *See Maydak v. U.S. Dep't of Justice,* 362 F.Supp.2d 316, 326 (D.D.C.2005) (concluding that the agency's submission was insufficient to demonstrate the adequacy of a search; noting, among other things, that the agency "has identified the individuals who conducted the searches but has not proffered their declarations explaining their searches").

According to Blazejak, another individual, Mickey Martinez, the "Officer-in-Charge," helped conduct the second search for responsive records in response to Lion's appeal. Here too Blazejak's declaration is deficient. Blazejak does not explain what files Martinez searched. Instead, Blazejak states that Martinez was "aware that responsive records could be included in paper files." Not only are these "paper files" unspecified, there is no affirmative statement in Blazejak's declaration that Martinez or Blazejak even searched these paper files. Similarly, Blazejak states that Martinez and Blazejak reviewed "documents," but Blazejak does not explain in reasonable detail what those documents were or what process or procedure was utilized that lead to the selection of those particular "documents" for review. There is no declaration from Martinez himself explaining what files he searched and what method or procedure he employed.

After Blazejak covers Mangino's and Martinez's involvement, in a separate paragraph of his declaration, Blazejak states in a conclusory fashion that the searches performed were "reasonable and thorough" and the "AMS searched the paper files under the file code dealing with retention policies, found all responsive records, and released those records in full." This statement does not specify who at the "AMS" searched the paper files; and Blazejak does not explain why the file code dealing with retention policies is the only code file likely to contain responsive records. *See Rugiero v. U.S. Dep't of Justice,* 257 F.3d 534, 547 (6th Cir.2001) ("The FOIA requires a reasonable search tailored to the nature of the request.").

In addition to these deficiencies, Blazejak does not mention whether, or what, search terms or key words were utilized by the USDA. *See Hiken v. Dep't of Defense,* 521 F.Supp.2d 1047, 1054 (N.D.Cal.2007) ("The disclosure of search terms and a declarant's assurances that the search covered all relevant files may be helpful in evaluating the adequacy of the search"); *Maydak,* 362 F.Supp.2d at 326 (concluding that the agency's submission was insufficient where, among other things, it provided "no information about the search terms and the specific files searched for each request") (emphasis omitted).[10] Blazejak also fails to specify, with reasonable particularity, the scope of the search for responsive records (perhaps this is because individuals besides Blazejak, who did not supply their own declarations, searched for responsive records). *See Rugiero,* 257 F.3d at 547 (recognizing that agency affidavits must provide "reasonable detail of the scope of the search"); *Perry v. Block,* 684 F.2d 121, 127 (D.C.Cir.1982) (recognizing that agency affidavits must "explain in reasonable detail the scope and method of the search conducted by the agency"). Finally, at times, Blazejak's declaration suggests that he is simply relaying hearsay (i.e., what others have told him) and that he lacks personal knowledge of Mangino and Martinez's efforts.

As for Sanders's declaration, she briefly discusses the initial and subsequent search. Sanders states that, in response to the FOIA request, the "AMS FOIA Officer contacted the Fruit and Vegetable Program, Processed Products Branch and spoke with staff members knowledgeable of the records retention policies that apply to AMS inspection records. The initial response was prepared with the assistance of Michael Blazejak ...." Sanders provides no meaningful information on what records were searched, what method or procedure was employed to search for responsive records, whether, or what, search terms were utilized or the scope of the search. Sanders notes that a second search was conducted after Lion's appeal, but Sanders provides

[10]There is no clear indication in any USDA declaration as to whether the USDA used a computer in its search for responsive records or whether it searched electronic records in response to Lion's FOIA requests.

no specifics on the search.

Given the deficiencies in Blazejak and Sanders's declaration, the current record does not provide a sufficient basis upon which to conclude that the USDA conducted a search reasonably calculated to uncover all relevant documents. Summary judgment in favor of the USDA is for these reasons inappropriate. This conclusion is bolstered by evidence which calls into question the USDA's good faith in this FOIA action. *See Rugiero,* 257 F.3d at 543 (recognizing that "bad faith" in a FOIA case may arise from "the agency's conduct in the FOIA action").

In the FOIA appeal process, in Blazejak's and Sanders's declaration, and in its summary judgments papers, the USDA has avoided the main questions raised by Lion in its FOIA appeal and pressed again by Lion in summary judgment. First, why is there a disposition plan for one series of form-the F & V series-but not for the FR and RAC series of forms? Second, if federal regulations require record schedules for the FR and RAC series of forms, why were they not located and produced?

At no point in the FOIA appeal process did the USDA explain why a search for responsive records generated a disposition plan for the F & V series of forms but not for the FR and RAC series of forms. The declarants do not answer this question either, and the USDA has not answered this question in their summary judgment briefing. In the appeal process, in the statements of its declarants, and its summary judgment briefing, the USDA has not affirmatively and directly stated that, while a disposition plan exists for the F & V series of form, specific disposition plans for the FR and RAC series of forms do not exist or that the USDA was unable to locate them with reasonable efforts. Even though the USDA is not obligated to respond to each and every argument or point raised by a FOIA requester, the USDA's consistent unwillingness to confirm or even discuss, in a straightforward fashion, the existence or non-existence of the FR and RAC series of forms, or the USDA's inability to find them, appears evasive and not reflective of good faith. *Compare Defenders of Wildlife v. U.S. Dep't of Interior,* 314 F.Supp.2d 1, 10 (D.D.C.2004) (government declaration considered

sufficient when it addressed why the government agency did not have a particular document-a "final version of a severance agreement"-requested by the plaintiffs; the declarant stated there was no evidence that the agency had received the final agreement and it was "normal for [the] agency to view only drafts of such an agreement").

The USDA did not address Lion's argument that federal regulations require the USDA to maintain these disposition schedules, in the FOIA appeal process, in the declarations of Blazejak or Sanders, or in the USDA's summary judgment briefing. Instead of addressing the issue, the USDA argues that the "question whether the agency should have created other records is irrelevant under FOIA" because the FOIA imposes no duty on the agency to create records that do not exist. This argument, as the USDA's response to Lion's FOIA appeal and Blazejak's and Sanders's declarations, ignores the question of whether federal regulations actually require the creation of these records. This argument assumes that the regulations do require the creation of these records and that the USDA has failed to create them, but this failure (according to the USDA) is "irrelevant" in this case because *FOIA* does not require the USDA to create documents. While it is true that the FOIA does not require the USDA to create documents, the USDA's apparent unwillingness to respond to Lion's argument and affirmatively state, either way, the USDA's position on whether the federal regulations require the creation of these documents and whether such documents exist raises questions about the USDA's good faith.

The USDA's affidavits are presently insufficient to meet its burden at the summary judgement stage.[11] When, as here, the adequacy of the search remains in doubt on summary judgment, courts have permitted the FOIA requester to use narrow interrogatories or depositions, or required the government agency to supply supplemental declarations, to gather additional relevant information. *See Kozacky & Weitzel, P.C. v.*

[11]Although Lion has moved for summary judgment on this claim, Lion has also failed to sustain its burden of demonstrating that summary judgment in its favor is warranted. Whether the USDA conducted a reasonable search remains in dispute.

United States, No. 07 C 2246, 2008 WL 2188457, at *7 (N.D.Ill. Apr. 10, 2008) (permitting the use of interrogatories concerning the "nature and adequacy of the IRS's search(es)"); *El Badrawi v. Dep't of Homeland Sec.,* 583 F.Supp.2d 285, 321 (D.Conn.2008) (permitting "limited discovery as to the adequacy" of the searches in the form of depositions, including, among others, a deposition of an "employee most knowledgeable about the whereabouts" of a missing file); *Lawyers' Comm. for Civil Rights,* 534 F.Supp.2d at 1130 (permitting a supplemental declaration "regarding the adequacy of the search").

At oral argument on the cross-motions for summary judgment, Lion stated its preference for a limited-scope deposition of the custodian of records or an appropriate USDA representative to determine whether a disposition plan or schedule for the FR and RAC series of forms exists and, if so, why it has not been produced. At oral argument, both parties expressed a willingness to "get to the bottom of this."[12] If disposition plans or schedules for the FR and RAC series of forms do not exist, this eviscerates Lion's FOIA claim (as no search can uncover non-existent documents). If they do exist, the USDA can moot Lion's FOIA claim by turning the nonexempt documents over. *Papa v. United States,* 281 F.3d 1004, 1013 (9th Cir.2002) (recognizing that the production of all nonexempt documents, "however belatedly," moots a FOIA claim) (internal quotation marks omitted); *Yonemoto v. Dep't of Veterans Affairs,* 305 Fed.Appx. 333, 334 (9th Cir.2008) (same).

In order to create a sufficient factual record regarding the adequacy of the search, Lion may engage in *limited* discovery via deposition. This is not a license to engage in a fishing expedition or to seek information about the debarment proceedings. The objective of this limited discovery is to ascertain whether a disposition plan or schedule exists for the FR and RAC series of forms; whether, if such documents exist, there is any justification for their non-production (if the USDA seeks to withhold them); and for additional facts regarding the search for responsive documents. Lion must limit its questioning accordingly. Within ten (10)

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[12]The parties have been to the Ninth Circuit twice before in FOIA litigation.

calendar days following service of this order, the USDA and Lion shall meet and confer as to the appropriate deponent(s). After the deposition(s), Lion and USDA shall submit a joint written report on whether a controversy still remains as to this FOIA request.[13]

On the present record, neither the USDA nor Lion is entitled to summary judgment. The cross-motions on Count I are DENIED without prejudice.

B. *Count II-FOIA Request No. 96-07*

Through FOIA Request No. 96-07, Lion seeks "transfer and destruction" records for inspection documents. The USDA has not claimed that it is withholding these records pursuant to any exemption. Whether an exemption is properly invoked is not at issue. The issue is the adequacy of the USDA's search for responsive records.

The USDA's response to Lion's request is that no responsive documents exist. Lion argues that federal regulations require the creation of such documents and "it strains credulity" to believe that they do not exist. The USDA contends that it conducted a reasonable search, both initially and in response to Lion's FOIA appeal, and no responsive documents were uncovered. The USDA submits the declarations of Blazejak and Sanders to demonstrate the purported adequacy of the search. Both declarations are insufficient.

As for the first search, Blazejak does not specify what records were

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[13]In connection with this FOIA claim, the USDA is not asserting an exemption which would justify the withholding of documents. In FOIA cases, generally "discovery is limited because the underlying case revolves around the propriety of revealing certain documents." *Lane,* 523 F.3d at 1134. Lion's FOIA claim does not, however, revolve around the propriety of revealing certain documents. This is not a case where the discovery being sought or permitted is geared to produce "precisely what defendants maintain is exempt from disclosure." *Id.* at 1135 (internal quotation marks omitted). Even so, the discovery permitted here is limited.

searched or by what methods. Blazejak states that Mangino performed a search of "AMS records" without identifying the records or how the "AMS records" were searched. Blazejak does not mention whether search terms were utilized and he does not discuss, in any detail, the scope of the search.

According to Blazejak, it was determined that no responsive documents exist because Mangino spoke with some unspecified person at the PPB office in Fresno and Mangino "was informed [by this unspecified person] that in accordance with current policies and procedures, inspections documents are destroyed after their specified retention period" and "in accordance with the policies and procedures, it is not required that new 'disposition' records be created to document the destruction of these documents." Blazejak continues "[t]herefore, because records reflecting the disposition (e.g., destruction) of records pursuant to a retention schedule are not required, AMS concluded that there are no documents responsive to this request."[14] This portion of Blazejak's declaration appears to contain two levels of hearsay (what the unspecified person told Mangino and what Mangino then told Blazejak). The USDA does not provide a copy of the "policies and procedures" that purportedly indicate that a document need not be created to record the destruction of inspection documents, nor does the USDA identify the person who apparently relayed this information verbally to Mangino. Blazejak's declaration is also completely silent as to whether anybody searched for the "transfer" records, i.e., the records reflecting "what agency had custody" of the inspection documents from 1995 to the date of Lion's FOIA request. As to the first search, Blazejak's declaration is insufficient.

As to the second "search," Blazejak declaration is similarly deficient. Instead of actually searching for destruction records, Blazejak looked only at the "policies and procedures for the disposition of the inspection records" and "concluded that the creation of a record regarding the

[14]The USDA's recognition that it has destroyed documents pursuant to a "retention schedule" adds some weight to Lion's belief that there is a disposition plan or schedule for the FR and RAC series of forms.

destruction of inspection documents was not required." Blazejak then called the PPB office in Fresno and "verified [by talking with an unidentified person] that these procedures were being followed and that no such records had been created and therefore no such records existed." Blazejak also contacted the "Office of the General Counsel and the Departmental Records Officer to confirm [Blazejak's] understanding of the records retention process. Accordingly, AMS again concluded that no responsive records exist."

Blazejak's declaration demonstrates that he did not search for the destruction records Lion requested; rather he looked only at "policies and procedures regarding," and made telephone calls to various individuals to determine and confirm, whether a document is required to record the destruction of inspection records. Even assuming that the USDA's "policies and procedures" (whatever they are) do not require the USDA to create a document to record when another document is destroyed, this does not mean that such destruction records were never generated from 1995 to the time of Lion's FOIA request. Not only did Blazejak fail to look for any destruction records during the second "search," Blazejak makes no mention of whether he searched for the transfer records Lion initially requested.

Sanders's declaration is not helpful. Sanders does not provide any information on what records were searched, what procedures or methods were utilized, the search terms utilized (if any), or the scope of the search. Her declaration is devoid of details on the searches for responsive records.

Based on deficiencies in Blazejak's and Sanders's declaration, the current record does not provide a sufficient basis to conclude that the USDA conducted a search reasonably calculated to uncover all relevant documents. At this time, summary judgment for the USDA is inappropriate. This conclusion is bolstered by evidence that calls into question the USDA's good faith in responding to Lion's FOIA request.

In the FOIA appeal process, in Blazejak's and Sanders's declaration, and its summary judgment briefing, the USDA has ignored Lion's main argument in its FOIA appeal and raised again in its summary judgment briefing. If federal regulations require the creation of documents to record when documents are destroyed, why are there no destruction records?

The USDA did not address this argument in the FOIA appeal process. Neither Blazejak nor Sanders address this argument in their declarations. While Blazejak states that unspecified USDA "policies and procedures" do not require the creation of destruction documents, Blazejak stops short of stating that *federal regulations* do not require the creation of these documents. In its summary judgment briefing, the USDA did not address whether federal regulations require the creation of destruction records. Rather, without discussing the matter, the USDA argues that whether they should have created documents is irrelevant as the *FOIA* does not require the USDA to create documents. This argument skirts the issue. It was not until oral argument on the cross-motions for summary judgment that the USDA squarely stated its position: it has never interpreted the federal regulations as requiring the creation of a document to record the destruction of another document. The USDA's past unwillingness to address Lion's argument head on, Blazejak's avoidance of the issue, and the USDA's belated revelation of its legal position during oral argument, raise questions about the USDA's good faith.

The USDA's affidavits are insufficient to meet its burden at the summary judgement stage. More information is needed as specified above.

At oral argument, Lion requested limited-scope discovery; a narrowly-focused deposition of a custodian of records or an appropriate USDA representative regarding the existence of destruction records and transfer records (which Lion also described as "chain of custody" records). If these documents do not exist, this eviscerates Lion's FOIA claim and if they do exist, the USDA can moot Lion's FOIA claim by

producing them.

In order to create a sufficient factual record as to the adequacy of the search, Lion may engage in *limited* discovery. Lion must confine its discovery questions to determining whether destruction records and transfer records exist and, if they exist, any justification for their non-production, and any additional facts addressing the search for such records. Within ten (10) calendar days following service of this order, the USDA and Lion shall meet and confer as to the appropriate deponent(s). After the deposition(s), Lion and the USDA shall submit a joint written report on whether a controversy still remains as to this FOIA request.

On the present record, neither the USDA nor Lion is entitled to summary judgment as the adequacy of the search remains in dispute. The cross-motions on Count II are DENIED without prejudice.

C. *Count III-FOIA Request No. 184-01*

Through FOIA Request No. 184-01, Lion seeks all the "line check sheets and memorandum reports of inspection" it requested. The USDA has not claimed that it is withholding any responsive records pursuant to an exemption. The issue is the adequacy of the USDA's search for responsive records.

Notwithstanding the USDA position that it has produced all responsive documents, Lion argues that additional memorandum reports of inspection and line check sheets "should exist." In its summary judgment papers, Lion's reiterates many of the arguments it made in its FOIA appeal. Lion further notes that, on several successive occasions, the USDA has supplied responsive documents and the "fact that records keep showing up is proof enough that the search was unreasonable." The

USDA denies this.[15] Lion also attacks the adequacy of the search, arguing that the USDA's declarations fail to specify where searches were conducted.

Starting with the memorandum reports of inspection, the evidence reveals some inconsistency or confusion as to number of potentially responsive documents. Originally, in April 2004, the USDA supplied memorandum reports of inspection to Lion after the Ninth Circuit's decision.[16] Lion submits evidence that the USDA's production in April 2004 contained 494 memorandum reports of inspection. (Doc. 47-2 at 27; Green Decl. ¶ 46.) In its initial round of declarations, the USDA did not specify how many memorandum reports of inspection it produced in April 2004. However, in connection with its reply brief, the USDA submitted a supplemental declaration from Trykowski which states that the USDA produced approximately 643 memorandum reports of inspection in April 2004. Regardless of whether Lion's number (494) or Trykowski's number (643) is utilized, both create problems when they are compared to the number of memorandum reports that Trykowski claims (in his initial declaration) were discovered in a *subsequent* search after the USDA's April 2004 production.

Following Lion's April 2007 supplemental production request (Doc. 43-5, Ex. 6) for line check sheets and memorandum reports of inspection, Trykowski claims that a "forty man-hour[ ]" search was conducted and approximately "575" memorandum reports of inspection were located. An analyst determined that twenty-four (24) of these

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[15]Lion's argument that "records keep showing up" appears misdirected to the wrong time period. Count III of Lion's complaint deals with the USDA's response to Lion's supplemental production request in April 2007. *See* FAC ¶ 52. To the extent responsive documents surfaced *prior* to Lion's April 2007 supplemental production request, this does not call into question the adequacy of the USDA's search *after* Lion's April 2007 supplemental production request.

[16]The Ninth Circuit ordered the production of USDA-retained "line check sheets." However, since memorandum reports of inspection are attached to line check sheets, the USDA apparently decided to produce the corresponding memorandum reports of inspection as well.

memorandums had not been previously produced in April 2004.

Using Trykowski's numbers, it is unclear why 643 memorandum reports of inspection were initially produced in April 2004 and yet a subsequent "forty man-hour[ ]" search uncovered substantially less memoranda; only 575. The fact that the subsequent "forty man-hour[ ]" search for memoranda yielded substantially less memoranda (only 575), compared to the original production of memoranda (643), calls into question the adequacy of the subsequent search for memoranda. Using Lion's number, if 494 memorandums were produced by the 'USDA in April 2004 and the "forty man-hour[ ]" search uncovered 575 memoranda, then the analyst should have uncovered much more than twenty-four (24) previously unproduced memoranda. There may be a reasonable explanation for this. The numbers before the court, however, create confusion.

Apart from the numerical inconsistencies, Trykowski does not provide the requisite information regarding the search for memorandum reports of inspection and line check sheets in connection with Lion's supplemental production request. Trykowski claims that, after receiving the supplemental production request in April 2007, he "instructed" three unspecified members of the Compliance Staff in Fresno to search for responsive records. Trykowski does not explain what records were searched or by what process. No mention is made of whether, or what, search terms were utilized, and the scope of "forty man-hour[ ]" search remains unclear.

Following this search, the USDA produced four line check sheets and twenty four (24) memorandum reports of inspection. Lion then submitted its June 2007 FOIA appeal. Following this appeal, another search was conducted; however Trykowski does not specifically describe the search. Trykowski explains that he "instructed a Fresno-based Compliance Officer to once again review the files that had been thoroughly searched again in April 2007 to ensure no files had been missed in the original search." Trykowski does not describe these

"files," what they consisted of, or what years they covered. Trykowski explains that the "Compliance Officer confirmed to me that all pertinent boxes had been searched." This conclusory statement fails to specify who searched the boxes, does not identify the boxes, nor how the search was conducted. Trykowski also does not explain what constitutes a "pertinent" box so as to distinguish it from a non-pertinent box. The scope and content of this search remains unclear.

The only other declarant who discusses these searches-Sanders-does not provide any detailed information. Sanders simply mentions that searches were conducted but not does describe any specifics on the search following Lion's April 2007 supplemental production request or Lion's June 2007 FOIA appeal.

The USDA's declarations are insufficient to demonstrate that the USDA conducted a search reasonably calculated to uncover all relevant documents and warrant summary judgment in favor of the USDA. Out of fairness, Trykowski does attempt to address the arguments raised by Lion in its FOIA appeal and repeated in Lion's motion. For example, Lion argues that there should be memoranda from 1997-1999, but none were produced. Trykowski explains that prior to December 1999, the memoranda (FV-489) were only used in two limited circumstances, i.e., to record inspections of raisins that failed to ship or make final disposition for human consumption within 90 calendar days, or any shipment of raisins that had been returned to the inspection point. Beginning in December 1999, the inspection service began using the memoranda for all shipments being exported overseas for which a packer intended to submit a claim to the Raisin Administrative Committee as part of the export subsidy program. As a result, the use of memoranda increased significantly. According to Trykowski, the lack of memoranda prior to 1999 is a function of their limited use in those years. Nonetheless, Trykowski does not dispute that fifteen (15) memoranda released to Lion were dated from 1995 to 1996. This lends support to Lion's theory that at least some memoranda should exist from 1997-1999, and if a search (claimed to be reasonable) uncovered memoranda from 1995 and 1996, one would expect that such a search

would have yielded at least one memorandum from 1997-1999. In Lion's FOIA appeal and its summary judgment motion, Lion also argues additional memoranda from 1999-2000 should exist based on the fact that the memoranda the USDA produced were assigned serial numbers and there is a break in the numerical sequence of the produced memoranda (e.g., memorandum # 1 produced, memorandum # 2 produced, memorandum # 4 produced; and # 3 is missing). Trykowski concedes that "there are breaks in the numerical sequence of the Memos" but he believes that the breaks represent memoranda that "were not created, were voided, were lost, or were destroyed" and thus they "do not currently exist." Trykowski bases his belief on his own "efforts and those of [his] staff to locate additional Memos," which did not yield such documents (from which Trykowski posits that they must have been voided, lost, destroyed or not created). As discussed above, however, Trykowski did not sufficiently explain his or his staff's "efforts" to search for responsive records and thus the adequacy of the search remains in doubt.

The USDA's affidavits are insufficient to warrant summary judgment in favor of the USDA on Count III; more information is needed to assess the adequacy of the search(es). During oral argument on the cross-motions for summary judgment, the USDA indicated it would like to "get this behind us" and it was open to suggestions on how to resolve the ongoing dispute over the memoranda and line check sheets.[17]

To develop an adequate factual record as to the adequacy of the search, Lion may engage in limited discovery. Lion must confine its discovery questions to determining whether additional responsive memorandum reports of inspection and line check sheets exist and, if they exist, any justification for their non-production, and the nature of the search for these records. Within ten (10) calendar days following service of this order, the USDA and Lion shall meet and confer as to the appropriate deponent(s). After the deposition(s), Lion and the USDA

[17]Based on the history of this case this is manifest understatement.

shall submit a joint written report on whether a controversy still remains as to this FOIA request.

On the present record, neither the USDA nor Lion is entitled to summary judgment on Count III. The cross-motions are DENIED without prejudice.

D. *Count IV-FOIA Request No. 85-04*

FOIA Request No. 85-04 seeks USDA worksheets which the USDA has previously withheld on the basis of Exemption 7(A). However, after the ALJ issued a decision on May 4, 2009, in the first and second administrative proceedings, Lion submitted a new FOIA request for the worksheets, and the USDA stated it will release the worksheets. In its reply brief, the USDA affirmatively declares that it "no longer asserts Exemption 7(A) and the Court need not reach the issue whether the exemption now applies."

Given the USDA's abandonment of its 7(A) exemption claim and its stated willingness to produce the responsive documents, the propriety of the USDA's past response to this FOIA request need not be addressed. The production of all nonexempt documents, "however belatedly," moots a FOIA claim. *Papa,* 281 F.3d at 1013; *Yonemoto,* 305 Fed.Appx. at 334. As soon as the USDA properly certifies, via declaration, that it has produced all responsive worksheets, Lion's FOIA claim will be mooted and summary judgment in favor of the USDA granted. *See Papa,* 281 F.3d at 1013 (stating that "[b]efore the court may dismiss the FOIA claims [as moot], the defendants must properly certify the[ ] production" of the requested documents). Within thirty (30) calendar days of service of this order, the USDA shall notify the court in writing on the status of the production.

E. *Count V-Disposition Records For Worksheets*

With respect to the fifth count, Lion asserts that the USDA failed to respond to its "request for disposition records for worksheets." The

evidence shows that Lion is mistaken. The USDA did respond to this request by noting that it was duplicative of other requests.

Lion does not mention this claim in its moving papers. In opposition to the USDA's motion, Lion's allocates three sentences of its 40-page opposition to addressing this claim. At oral argument on the cross-motions for summary judgment, Lion agreed that this FOIA claim can be "put to rest." On the record in open court Lion requested a Rule 41(a) voluntary dismissal without prejudice of Count V. This request is GRANTED. Count V of Lion's FAC is DISMISSED without prejudice. Fed.R.Civ.P. 41(a)(2).

F. *Count VI-FOIA Request No. 61-01*

The sixth count alleges that the USDA failed to respond to Lion's appeal in which Lion objected to the USDA's redaction of information in the six-batches of inspection and compliance-related documents the USDA produced. After Lion filed its FAC, however, the USDA did respond, in detail, to the appeal. Lion has not since amended its FAC, and it does not mention this claim in its moving papers.

In opposition to the USDA's motion, Lion allocates two sentences of its 40-page opposition to addressing this claim. At oral argument on the cross-motions for summary judgment, Lion also agreed that this FOIA claim can be put to rest. On the record in open court Lion requested a Rule 41(a) voluntary dismissal without prejudice of Count VI. This request is GRANTED. Count VI in Lion's FAC is DISMISSED without prejudice. Fed.R.Civ.P. 41(a)(2).

G. *Count VII-FOIA Nos. 22-06, 23-06, 25-06, 26-06*

The seventh count asserts a FOIA claim on the grounds that USDA's estimated costs to respond to Lion's request for physical access to original documents was unreasonably excessive and tantamount to an outright denial. Lion does not mention this claim in its moving papers,

and in its opposition brief to the USDA's motion Lion (contrary to its plead claim) does not even argue that the estimated cost ($6,822.80) is excessive.

During oral argument, the USDA reiterated its willingness to provide physical access if Lion paid the stated sum. Lion, on the record, agreed to pay the stated sum, $6,822.80, so long as it is not charged an additional fee for "access." In its written response to Lion's FOIA appeal, the USDA explained that its estimated fees are for "search time" and "professional review time." Contrary to Lion's suggestion, there is no indication that apart from the fees associated with these activities, the USDA requested an "access" fee.

Lion has agreed to pay the requested sum. This moots Count VII. Summary judgment is granted in favor of the USDA.

H. *Count VIII-Bad Faith*

Lion's eighth count asserts a stand alone claim for "bad faith." Lion has not advanced any argument that a compensable, independent claim for "bad faith" is cognizable in tort, contract, or under an applicable federal statute. At oral argument, Lion conceded that Count VIII does not assert a compensable, independent claim. Because a showing of bad faith on the part of agency responding to a FOIA request can open the door to limited discovery, see *Carney v. U.S. Dep't of Justice,* 19 F.3d 807, 812 (2d Cir.1994), Lion stated that it included this "bad faith" claim in the complaint only to provide a basis for discovery.

Because Count VIII does not assert a stand alone compensable claim for relief, summary judgment on Count VIII is GRANTED in favor of the USDA.

I. *Count IX-APA*

Lion's ninth count asserts a claim for a violation of the Administrative Procedures Act on the ground that the USDA's actions

were arbitrary and capricious.

Citing *Tucson Airport Authority v. General Dynamics Corp.,* 136 F.3d 641, 645 (9th Cir.1998), the USDA argues that the APA does not apply to claims for which there is another adequate remedy in court. The USDA also cites to language in *Fisher v. FBI,* 94 F.Supp.2d 213, 216 (D.Conn.2000): "The APA cannot support jurisdiction where another statute provides for judicial review in a given situation." The USDA contends that Lion's APA claim is nothing more than an attack on the USDA's alleged "failures" in responding to Lion's FOIA requests.

"[F]ederal courts lack jurisdiction over APA challenges whenever Congress has provided another 'adequate remedy.' " *Brem-Air Disposal v. Cohen,* 156 F.3d 1002, 1004 (9th Cir.1998) (quoting 5 U.S.C. § 704); *see also Bennett v. Spear,* 520 U.S. 154, 161-62, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (recognizing that the "APA by its terms independently authorizes review *only* when 'there is no other adequate remedy in a court' ") (quoting 5 U.S.C. § 704) (emphasis added); *Edmonds Inst. v. U.S. Dep't of Interior,* 383 F.Supp.2d 105, 111 (D.D.C.2005) ("The law is clear, however, that review under the APA is unavailable when another statute provides an adequate remedy."). The Ninth Circuit recognizes: "[I]f a plaintiff can bring suit against the responsible federal agencies under [a citizen-suit provision], this action precludes an additional suit under the APA." *Brem,* 156 F.3d at 1005 (alterations in original) (internal quotation marks omitted). *See also Bowen v. Massachusetts,* 487 U.S. 879, 903, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). The FOIA contains a citizen-suit provision, *Walsh v. Department of Veterans Affairs,* 400 F.3d 535, 537 (7th Cir.2005), and it provides Lion with another adequate remedy. A separate suit under the APA is, therefore, precluded.

The FOIA permits a document requester, like Lion, to file suit in a district court and to obtain an order compelling the agency at issue to

comply with the document request. *See* 5 U.S.C. § 552(a)(4)(B). The FOIA provides a remedy that is identical to the remedy an aggrieved FOIA requester could obtain under the APA, i.e., "a court order requiring total compliance with his [or her] request." *Walsh,* 400 F.3d at 538 (rejecting the viability of a separate APA claim in a FOIA case); *accord Edmonds Inst.,* 383 F.Supp.2d at 111-12 & n. 10; *Laroche v. SEC,* No. C 05-4760 CW, 2006 WL 2868972, at *4-5 (N.D.Cal. Oct. 6, 2006), *aff'd,* 289 Fed.Appx. 231 (9th Cir.2008). As such, the FOIA provides another adequate remedy. *See Walsh,* 400 F.3d at 538; *Edmonds Inst.,* 383 F.Supp.2d at 111-12 & n. 10.

Because FOIA's citizen-suit provision provides Lion with an another adequate remedy, a separate suit (or a separate review of the USDA's actions) under the APA is precluded and summary judgment on Lion's APA claim is GRANTED in favor of the USDA.

V. CONCLUSION

For the foregoing reasons:

1. On the present record, neither the USDA nor Lion is entitled to summary judgment as to Count I. The cross-motions as to Count I are DENIED without prejudice, and limited discovery is permitted as specified above.

2. On the present record, neither the USDA nor Lion is entitled to summary judgment as to Count II. The cross-motions as to Count II are DENIED without prejudice, and limited discovery is permitted as specified above.

3. On the present record, neither the USDA nor Lion is entitled to summary judgment as to Count III. The cross-motions as to Count III are DENIED without prejudice, and limited discovery is permitted as specified above.

4. As soon as the USDA properly certifies, via declaration, that it has

produced all responsive worksheets, Count IV will be mooted and summary judgment in favor of the USDA GRANTED. The ruling on this count is deferred pending this certification.

5. Count V of Lion's FAC is DISMISSED without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

6. Count VI of Lion's FAC is DISMISSED without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

7. Summary judgment is GRANTED in favor of the USDA on Count VII.

8. Summary judgment is GRANTED in favor of the USDA on Count VIII.

9. Summary judgment is GRANTED in favor of the USDA on Count IX.

IT IS SO ORDERED.

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ORGANIC FOODS PRODUCTION ACT

DEPARTMENTAL DECISION

Corrected Decision

In re: PROMISELAND LIVESTOCK, LLC, AND ANTHONY J. ZEMAN.
OFPA Docket No. 08-0134.
Decision and Order.
Filed November 25, 2009.

OFPA.

Babak Rastogoufard, for AMS.
Mark Mansour and Bran Cave, Washington, DC, for Respondents.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

Preliminary Statement

On June 4, 2008, Lloyd C. Day, the Administrator of the Agricultural Marketing Service (AMS), initiated this disciplinary proceeding against the Respondents Promiseland Livestock, LLC (Promiseland) and Anthony J. Zeman by filing a Complaint alleging willful violations of the Organic Foods Production Act of 1990, as amended (7 U.S.C. §6501, *et seq.*) (the "Act" or "OFPA") and the National Organic Program (the "NOP") regulations (7 C.F.R. §§205.1-205.690 (the "Regulations" or the "NOP Regulations").

On June 30, 2008, Counsel for the Respondents filed a Notice of Appearance[1]; an Answer and Statement of Defenses; a Motion to Strike

[1]During the initial contacts by counsel with AMS, the Respondents were represented by William J. Friedman, Esquire, of Covington & Burling, LLP, Washington, D.C. Sometime prior to the filing of the Respondents' Answer, Friedman left Covington & Burling (subsequently returning) and eventually withdrew as the Respondents' attorney. As noted by Complainant, Friedman is frequently referred to by his middle name ("Jay"). *Fn.* 4, Complainant's Proposed Findings of Fact, Conclusions of Law and Order and Brief in Support Thereof. On June 9, 2009, Mark Mansour, Esquire of Bryan Cave (continued...)

and to Dismiss for Lack of Jurisdiction; and a Request to Establish a Briefing Schedule. Docket Entries 3-5. On July 18, 2008, the Complainant filed a Response to the Respondents' Motions.[2] Docket Entry 11. On November 14, 2008, a teleconference was conducted and a schedule for the exchange of witness lists and exhibit list and exhibits was established.[3]

On January 26, 2009, the Complainant filed an Amended Complaint. Both parties filed additional pleadings in the form of Status Reports and on February 17, 2009, the Respondent filed a Motion to Strike the Amended Complaint, a Request for Leave to File Provisional Answer to the First Amended Complaint under Seal. Docket Entries 27 and 28. The parties filed additional exchanges and on March 10, 2009, William Friedman filed a Notice of Attorney Withdrawal and Request for Stay of Pending Deadlines and Designation of Appropriate Time for Respondent[s] to Obtain Replacement Counsel. Docket Entry 39. On March 11, 2009, an Order was entered holding matters in abeyance for 30 days in order for the Respondents to secure replacement counsel. The Respondents failed to secure replacement counsel in the allotted period and on May 12, 2009 an Order was entered directing the Respondents to provide the Hearing Clerk and the Administrative Law Judge's Secretary with a telephone number at which they might be reached so that a teleconference could be conducted.

On May 20, 2009, a second teleconference was held. The Respondents were unrepresented at that time and Anthony J. Zeman

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[1](...continued)
LLP filed his Notice of Appearance and has represented the Respondents at the hearings and in post hearing matters.

[2]On July 16, 2008, the Hearing Clerk sent out a letter indicating that no response had been filed in response to Respondents' motion by the Complainant within the allotted time. Docket Entry 7. Rather than addressing the matter with the Hearing Clerk, Counsel for the Complainant filed a pleading responding to the Hearing Clerk's letter. Docket Entry 9. A subsequent letter was then sent by the Hearing Clerk indicating that the parties should disregard the July 16, 2008 letter. Docket Entry 10.

[3]The Complainant sought clarification of the Exchange Order and a Clarification of Summary and Order was entered on November 24, 2008. Docket Entries 14 and 15.

participated individually and on behalf of Promiseland Livestock, LLC. The pending matters were addressed, the Motion to Strike was denied; the Provisional Answer was unsealed and ordered filed; the Respondents' Request to file further pleadings as either a consolidated reply or an amended motion was denied; and the matter was set for hearing in Bassett, Nebraska on June 23, 2009[4]. On June 17, 2009, an Order was entered cancelling the June 23, 2009 hearing and rescheduling it for July 14, 2009 in Washington, D.C.

On the day prior to the hearing, Counsel for the Respondents filed an Emergency Motion for Continuance, citing his recent retention as Counsel for the Respondent, his international travel which had interfered with his preparation for the hearing and the volume of exhibits involved in the case. The oral hearing commenced as scheduled on July 14, 2009, with the Complainant represented by Babak Rastgoufard, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. and the Respondents represented by Mark Mansour, Esquire and Patrice M. Hayden, Esquire, both of Bryan Cave, LLP, Washington, D.C. Following the entry of appearances of counsel, the Emergency Motion was heard and denied;[5] however, the Respondents were granted leave to delay presentation of their case until a later date. On July 14, 2009, following opening statements (Tr. 1@ 14-19), the Complainant introduced the testimony of four witnesses and 58 exhibits.[6] The following day, July 15, 2009, the Respondent Anthony J. Zeman testified, three of the Complainant's exhibits were introduced and admitted and one of the Respondents' exhibits was admitted. At the conclusion of the hearing on July 15, 2009, the hearing was recessed to

[4]Both parties moved at different times to change the hearing location (Docket Entries 47 and 50).

[5]Counsel for the Respondents strenuously objected to the case proceeding as scheduled, suggesting that the hearing was "absolutely out of order at this point. It's unfair, it's prejudicial and we want it noted for the record." Tr. 1@10-11.

[6]References to the transcript of the proceedings will be indicated as Tr. 1 for July 14, 2009, Tr. 2 for July 15, 2009 and Tr. 3 for September 18, 2009 (with the page number). Complainant's exhibits are indicated as CX with the exhibit number; the Respondents' exhibits are indicated as RX and the number. Also admitted was Joint Exhibit 1, a Stipulation as to Authenticity of Exhibits. Tr. 1@13.

be reset on a date to be agreed upon by the parties. Tr. 2@567-568.

The hearing resumed on September 18, 2009 with the same counsel representing the parties as appeared at the earlier hearing. The Respondents again called Anthony J. Zeman and then introduced the testimony of two other witnesses. The Complainant recalled Dr. Barbara Robinson who had testified previously on July 14, 2009. The Respondents introduced two additional exhibits which were admitted. Both parties presented closing arguments. Tr. 3@ 64-75. Post hearing briefs have since been received from both parties and the matter is now ready for disposition.

Discussion

Despite the somewhat voluminous size of the record, the facts in this case are relatively simple.[7] The Complainant alleged that the Respondents willfully violated the Act and the NOP Regulations by refusing to provide AMS personnel access to Respondents' records (1) between January 22, 2007 and June 5, 2007; (2) June 5, 2007; and (3) June 10, 2007.

The record keeping requirement is set forth expressly in Section 2107 of the Act:

> (b) DISCRETIONARY REQUIRMENTS. - An organic certification program established under this title may –
>
> (1) provide for the certification of an entire farm or handling operation…if-
>
> ….
>
> (B) the operators of such farm or handling operation maintain records of all organic operations separate from records relating to other operations and make such records available **at all times** for inspection by the Secretary, the certifying agent, and the

[7]Respondents disagree, asserting instead that the Respondents made every attempt to cooperate and that the Complainant should have specified exactly what information was to be produced and that the request to produce records was an attempt to gather information without any real purpose. Tr. 1@18-19, 168-169.

governing State official; … 7 U.S.C. §6506(b) (Emphasis added)

A similar provision is found in the NOP Regulations:

(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as "100 percent organic," "organic," or "made with organic(specified ingredients or food group(s))."

(b) Such records must:
(1) Be adapted to the particular business that the certified operation is conducting;
(2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited;
(3) Be maintained for not less than 5 years beyond their creation; and
(4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.

(c) The certified operation **must make such records available for inspection and copying during normal business hours** by authorized representatives of the Secretary, the applicable State program's governing State official, and the certifying agent. 7 C.F.R §205.103 Emphasis added.

A similar provision provides:

(d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and **allow authorized representatives of the Secretary**, the applicable State organic program's governing official, and the certifying agent **access to such records during normal business hours for review and copying to determine compliance with the Act and the regulations** in this part….7 C.F.R. §205.400(d) Emphasis

added.

The position of the Complainant is that despite the clear, absolute and unambiguous duty imposed by the language of both the Act and the NOP Regulations requiring that records be made available to representatives of the Secretary upon request,[8] the Respondents willfully failed to do so despite being given ample and multiple opportunities, considerable latitude and time in which to comply. In somewhat stark contrast to the testimony introduced during the course of the three days of hearing, the Respondents claim in their Post Trial Brief that access to the records was provided, somehow equating creation of computer programs and generation of records with producing them for the Secretary's representatives.[9] Respondents' Post Trial Brief @ 2-4.

The testimony of David Trykowski, the Director of Compliance, Security and Safety Division of AMS (hereafter Compliance Office), explained that the National Organic Program differs from other programs managed by the Agricultural Marketing Service in that inspection and certification is performed by private or state certifying agents rather than having USDA inspectors in the field inspecting samples of commodities.[10] Tr. 1@25-29. The accredited certifying agents (ACAs) accept applications for organic certification which are accompanied by an organic systems plan which specifies how the entity will comply with the requirements of the Act and the NOP Regulations. Once the organic systems plan has been reviewed and accepted, the

[8]Although the statute uses the word "at all times," the regulatory provision is somewhat more lenient and relaxes the duty to require only that the records be made available only during normal business hours. 7 U.S.C. §6506(b) and 7 C.F.R §205.103 and 205.400(d).

[9]Respondents are correct only to the extent that the records pertaining to the Aurora investigation which had been originally requested on January 22, 2007 were produced on June 5, 2007; however, the records sufficient to conduct an audit have yet to be produced to Compliance Officers.

[10]Mr. Trykowski testified that there are approximately 95 certifying agents, most of which are private entities. At the time of the hearing, the certifying agents had certified in excess of 27,000 operations. Tr. 1@29.

certifying agent conducts an on-site inspection of the facility to verify that the organic systems plan is being followed before the entity is certified as meeting the criteria to operate as a "certified organic farm or handling operation." Tr. 1@26-28. Thereafter, inspections are generally conducted annually by the certifying agent to insure continued compliance. *Id* @28. In addition to the inspections and routine audits of the organic operations, AMS has two individuals assigned to review any complaints which are received concerning participants in the program. Tr. 1@30-31.

Mr. Trykowski testified that Promiseland first came to his office's attention in March of 2006 when AMS received a complaint concerning the Respondents' operation. Tr. 1@33. The complaint contained a number of allegations, including feeding non-organic feed to livestock, purchasing conventional grain, mislabeling it and reselling it as an organic product. CX-33, *Id* @33-34. Upon receipt of the complaint, AMS first determined that the Respondents' operation had been certified, identified the certifying agent as Quality Assurance International (QAI) and then consistent with the usual practice sent a letter to the certifying agent requesting that they investigate the allegations. CX-34, *Id* @34-35, 66. After not receiving inspection results from QAI by September of 2006 (a period of approximately six months), AMS sent a follow up letter.[11] CX-35, Tr. 1@71.

QAI responded to the follow up letter, indicating that their investigation was still under way, that they had been unable to conduct their audit which had been scheduled to be conducted on August 11, 2006 as the Respondent Promiseland Livestock, LLC had indicated that no one would be available that day, and that the audit would be rescheduled for October 10-12, 2006. CX-25, 36, Tr. 1@72-73, 75. When the QAI inspector attempted to perform his audit in October of 2006, he was informed that in the interim, the Respondents changed

[11]QAI had provided AMS with a "Non-Compliant" letter that had been sent to Promiseland on March 16, 2006 as well as a notification of "Client Status-Suspension Pending" dated April 18, 2006, but had not provided the requested investigation results. CX-21, 23, and 35.

certifying agents[12] and that the inspector would not be provided access to any records. CX-26, 27, Tr. 1@77,78.

In order to change certifying agents, Promiseland was required to go through the entire certification process with the Indiana Certified Organic ("ICO"), the new accredited certifying agent, submitting a new application with supporting documentation and undergoing an on-site inspection by the new agent. As part of this process, Promiseland completed a handwritten "ICO Organic Farm Plan Questionnaire" dated June 6, 2006 indicating that June or July would be the best time to inspect their operation. CX-28. Promiseland completed additional typed questionnaires dated July 13, 2006 and which were signed on August 1, 2006 and submitted in connection with the application. CX-29, Tr. 1@81. ICO's on-site inspection of Promiseland's operation was conducted at the Falcon, Missouri location on August 2, the Grant City, Missouri location on August 3, and the Bassett, Nebraska location on August 10, 2006 by Ib Hagsten, an independent inspector.[13] CX-31, 32.

While certified organic operations are free to change their certifying agent at will, the timing of the change of Promiseland's agent and the significant change found in the evaluation of the operation's audit trail and record keeping[14] raised concerns with the Compliance Office as to

[12]A letter dated October 10, 2006 was sent via fax from Promiseland to QAI informing it that Promiseland Livestock, LLC had surrendered their certification for the Missouri location effective August 10, 2006. CX-27, Tr. 1@77-79.

[13]It should be noted that Respondents indicated only that no one would be available on August 11, 2006 and made no mention that QAI's services were being terminated when QAI was attempting to schedule their inspection in August. Respondents met with ICO's inspector the day before on August 10, 2006, but QAI was not notified that they had been replaced until October. Although ICO's certification (CX-6, 7) was dated as being effective August 10, 2006 (the same date as the final portion of the on-site inspection), presumably it was issued sometime later as Hagsten's report was not created until August 13, 2006 at 8:17 PM. CX-31.

[14]While QAI had reported significant audit trail deficiencies for both 2005 and 2006 (CX-15, 20, 21, and 23), ICO found the Respondents' audit trail and record keeping to
(continued...)

whether there had been unacceptable application of the standards. Tr. 1@85-87. A few months later, the Compliance Office was asked by the National Organic Program to obtain records from Promiseland Livestock, LLC in connection with their transactions with another entity, Aurora Organic Dairy, an entity that was the subject of an investigation. Questions had been raised in that investigation concerning replacement livestock that Aurora had indicated that they had obtained from Promiseland. Tr. 1@88, 89.

In order to respond to the request involving the Aurora investigation, Mr. Trykowski directed one of the Compliance Officers, Terry Kaiser, to contact Promiseland for any documents needed in that investigation. Tr. 1@88-89. Despite repeated contacts by Mr. Kaiser between January 22, 2007 and June of 2007, Promiseland produced no records for inspection. CX-37, Tr. 1@90-91.

Confronted now with a lack of cooperation involving two separate outstanding investigations concerning the Respondents,[15] Mr. Trykowski dispatched two teams from his office to conduct independent unannounced inspections, one to the operation in Falcon, Missouri and the other to Grant City, Missouri. Tr. 1@89-92, 94-102. The Compliance Officers sent to Falcon, Missouri were provided with a letter addressed to Mr. Zeman signed by Mr. Trykowski, citing the efforts that had been made to secure records in connection with the Aurora inquiry, providing the authority for requesting the information, and including the following language in the penultimate paragraph:

> If you, or any representative of your organization, fail to make your records available for inspection and copying, I will request

[14](...continued)
be more than acceptable. CX-31. Zeman testified that the differences were attributable to his significant investment in a records keeping system designed by David Konrad, a consultant employed by Promiseland.

[15]QAI eventually notified AMS that due to Promiseland's surrender of their certification through QAI, they were no longer able to conduct the requested investigation. Tr. 1@95-96. As noted above, despite repeated efforts from January to the first part of June of 2007, no progress had been made in securing the records needed in the Aurora investigation.

> that the National Organic Program Manager within 48 hours propose your suspension from the National Organic Program in accordance with 7 CFR §205.660(b)(1). CX-39.

The team sent to the Falcon, Missouri had been charged with two missions, the first to obtain the documents needed for the Aurora investigation and the second, to audit the organic system plan. Tr. 1@202-205. Eleanor "Shelly" Scott, one of the Compliance Officers sent to Falcon, Missouri testified that while the records requested in connection with the Aurora investigation were produced and provided, the records necessary to audit the organic systems plan were not.[16] Tr. 1@199-204. Another attempt to conduct the audit of the Respondents' Falcon, Missouri organic systems plan was made on June 10, 2008 by Ms. Scott and Ross Laidig, another Compliance Officer at which time the officers were denied access to the records by Anthony J. Zeman. Tr. 1@208-209.

The three Compliance Officers sent to the Grant City, Missouri facility received a more cooperative reception and were able to interview Adam Zeman concerning the operation there and allegations contained in the Complaint which had been received by AMS.[17] Tr. 2@266-271.

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[16]Ms. Scott testified that she and Richard Matthews arrived at the Respondents' location in Falcon, Missouri on June 5, 2007. After some initial difficulty effecting contact with anyone, they were able to contact Leslie Ehnis. After identifying themselves to Ms. Ehnis and explaining the reason for their visit and giving her a copy of Mr. Trykowski's letter, they were asked to return that afternoon at which time the Aurora documents were provided. When the subject of the audit was discussed, Ms. Ehnis indicated that she had a lot of farm work to do and that she needed to talk with Mr. Zeman about the audit. Ms. Scott and Mr. Matthews then indicated that they would return the following day on June 6, 2007. On June 6, 2007, they were denied access to the records. Tr. 1@197-207, CX-38.

[17]The team sent to Grant City, Missouri included Compliance Officers Ross Laidig, Terry Kaiser and Pablo Orozco. Tr. 1@266. Anthony Zeman testified that the Grant City operation was never operated as organic, but rather was a conventional operation operated by his son, Adam (Tr. 2@486-487), a claim somewhat inconsistent with ICO's inspection of all three sites (Falcon, Missouri, Bassett, Nebraska and Grant City, Missouri). Additionally, although Zeman testified that the last animal that Promiseland (continued...)

As the Complaint in this action involves denial of access to records, and it appears that the younger Zeman cooperated with the Compliance Officers, further discussion of those allegations appears unnecessary to the resolution of the issues in this action.

Similarly, both parties introduced testimony concerning a further attempt to secure necessary records at a meeting between the Respondents, his attorney at the time, William J. Friedman, and representatives from the Compliance Office at law offices located in Washington, D.C. in May of 2008. At that meeting, the Respondents apparently had the records available, but again failed to produce them for review and copying;[18] however, as the Complaint contains no allegation of further violation other than June 10, 2008, other than mentioning the event in passing, further discussion of it is also considered unnecessary.

Despite a clearly Manichean duty to produce records on request during normal business hours, Anthony J. Zeman seeks to excuse his and Promiseland's record production delicts on the differing occasions on the basis that he was too busy coping with the impact of natural events (an ice storm which took out the electricity for 13 days in January of 2006 [Tr. 2@501]), his dissatisfaction and subsequent firing of QAI as Promiseland's accredited certifying agent[19] [Tr. 2@ 441-443, 464-

[17](...continued)
had there was in 2005 (Tr. 2@ 431-432), Ib Hagsten's report indicates that the animals raised on Promiseland grass are finished out 70-75 days at the Grant City feedlot. CX-31.

[18]The meeting was set up by William Friedman in the Washington, D.C. offices of Crowell & Moring, LLP in May of 2008. Anthony Zeman testified that although he brought all of the operation's records with him to the meeting including a binder or binders as well several CDs or DVDs containing the computerized programs, his attorney put them in his brief case and never proffered access to them. In any event, records sufficient to conduct an audit were yet again not produced. Tr. 1@114-115, 238; Tr. 2@535-536.

[19] The failure to make records available on August 11, 2006, although not alleged as a violation constitutes another instance in which the Respondents failed to make records available to an individual authorized under the NOP Regulations to review and copy records. ICO's certification appears to have been backdated as the report on which
(continued...)

470, 474-475, 526](at the same time taking the multiple days to become certified by another accrediting agent), the demands on his time at multiple locations during the planting season (Tr. 2@504-507, 530), the perceived vagueness of the request for the records necessary to conduct an audit coming from individuals who "did not understand farming" (Tr. 2@441-443), and lastly, upon the advice of counsel (Tr. 2@513, 531, 538). Given the sheer size and volume of the Respondents' operation,[20] such excuses over the prolonged period of time involved in this action cannot be countenanced. While the Compliance Office may well exercise substantial latitude or leniency in exacting cooperation in the production of requested records in individual cases where warranted, the Secretary and his representatives have an unfettered and absolute right under the Act and the NOP Regulations to have records produced upon request without the type of delay, obstruction, and willful withholding that has been manifested by the Respondents in this action. Operation under the auspices of the USDA NOP is a privilege rather than a right and requires that USDA be granted access to NOP related records upon request.

The Respondents cannot seek refuge from this obligation invoking advice of counsel,[21] as the Judicial Officer has held that reliance on

[19](...continued)
it was based was not prepared until August 13, 2006. CX-6, 7, 31.

[20]The ICO certificates indicate that Promiseland's operation involved 13,000 acres on which multiple crops were raised and 22,000 head of cattle. CX- 6, 7. The dollar volume of the operation is significant, well in excess of seven figures. Tr. 1@218-220. As such, the Respondents' operation well exceeds the threshold definition of a small agricultural producer set forth in 13 C.F.R. §121.201,

[21]Even were advice of counsel a defense, it is manifestly clear that the Respondents had not retained Mr. Friedman until sometime after June 5, 2006 as Friedman's conversation with Ms. Scott indicated that he had not been retained at that point. Tr. 1@223, CX-42. By June 7, 2006, Friedman had been retained. CX-51. Rather than facilitating compliance, his efforts to limit the scope of review and to superimpose the need for his presence during any contact with USDA served only to continue to frustrate the efforts of the AMS officers to obtain information that they were clearly entitled to under the Act's mandate. CX-51, 53, 58, 63 & 73. Moreover, his offensive (continued...)

erroneous advice is misplaced. *In re: Arab Stock Yard, Inc.,* 37 Agric. Dec. 293,306 (1978), *aff'd sub nom. Arab Stock Yard v. United States,* 582 F.2d 39 (5th Cir. 1978). Similarly, efforts by counsel to limit the scope of review, to require definition of the specific records sought to be reviewed, or to have either an attorney or a specific corporate officer present when the records are produced cannot abrogate, modify or mitigate the duty to make the records available for review and copying upon request.[22]

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. Respondent Promiseland Livestock, LLC is a limited liability company, incorporated under the laws of the State of Missouri, with its principal place of business in Bassett, Nebraska. CX-1-3. At various points in time since 2002, the LLC has maintained certified organic facilities at the following locations: Promiseland Heifer Ranch, Falcon, Missouri; Promiseland Empire; Lebanon, Missouri; Promiseland

[21](...continued)
characterization in his letter of June 29, 2006 to Lloyd C. Day of the conduct of the Compliance Officers' visit as "badge-toting AMS agents demanding to rummage around a farmer's home" is flatly contradicted by the testimony of his own client Anthony Zeman ("…To her credit, she was very congenial." Tr. 2@507) and did little to promote a favorable settlement environment. CX-55.

[22]*See:* 7 U.S.C. §6506(b). In his testimony on July 15, 2009, Anthony Zeman indicated "…My deal is that I never have to be smart, I just have smart people around me." Tr. 2@462. His testimony and the exhibits clearly indicate that Leslie Ehnis took care of most of the correspondence and record keeping and not only had superior knowledge of how the records were organized and would have been the logical individual rather than Zeman himself to make records available to individuals needing access. Tr. 2@480, 552-553, 556-557; CX-17, 18, 21, 22, 24, 27, 28, & 40. Her testimony indicates that the duties of her job continued to evolve, starting with paying bills on the day to day level and progressing to the point where the operation's administrative matters consume approximately 30-40% of her time. Tr. 3@10-15. She went on to say that with the help of others, Promiseland had developed its own computer program for the crop and livestock records. Tr. 3@16-19.

Elkland, Elkland, Missouri; Promiseland Bassett, Bassett, Nebraska; and the Promiseland Feedlot, Grant City, Missouri. The size, scope and multi-million dollar volume of the Respondent's operation is significant, well in excess of the definitional threshold for a small agricultural producer.

2. Respondent Anthony J. Zeman, also known as Anthony Zeman and "Tony" Zeman, resides in Bassett, Nebraska and is the sole organizer, agent for service of process and chief operating officer of Promiseland Livestock, LLP. CX-1, 3.

3. Quality Assurance International (QAI) and Indiana Certified Organic, LLP (ICO) are both accredited certifying agents authorized to certify operations as a "certified organic farm or handling operation" under the Act and the NOP Regulations by AMS.

4. QAI certified Promiseland's and Tony Zeman's livestock and crop operations as meeting the requirements under the Act and the NOP Regulations to operate as a certified organic farm operation from April 29, 2002 until sometime in 2006. For the 2006 crop year, the certified livestock operation included non-slaughter dairy heifers, and slaughter cattle including Angus, Wagyu and Wangus Beef and the certified crops included pasture, alfalfa hay, soybeans and yellow corn. CX-4-5.

5. ICO certified Anthony Zeman's and Promiseland's livestock and crop operations as meeting the requirements under the Act and the NOP Regulations to operate as a certified organic farm operation from and after August 10, 2006. For the 2006 crop year, the certified livestock operation included 12,000 dairy heifers, and 10,000 head of slaughter cattle and the certified crops included 2500 acres of corn, 2500 acres of soybeans, 1500 acres of sunflowers, and 7500 acres of grass and alfalfa. CX-6, 7.

6. On November 12, 2007, ICO certified Anthony Zeman's and Promiseland's livestock and crop operations as meeting the requirements under the Act and the NOP Regulations to operate as a certified organic farm operation for the 2007 crop year, with the certified livestock operation including dairy replacement heifers, and beef slaughter stock and beef calves and the certified crops including 1081 acres of corn, 548 acres of corn silage, 1254 acres of pasture, 4471 acres of permanent

pasture, 868 acres of soybeans and 345 acres of yellow corn. CX-8, 9.

7. In March of 2006, the Compliance Office at AMS received a complaint indicating that Respondents were not complying with the requirements of the organic program, including allegations of feeding non-organic feed to livestock, and purchasing conventional grain, mislabeling it and reselling it as an organic product. CX-33.

8. After determining that Respondents were in fact certified under the NOP, consistent with usual practice, the Compliance Office requested that the ACA, QAI investigate the allegations. CX-34. QAI contacted Respondents to schedule an on-site inspection visit of the operation on August 11, 2006, but were informed that no one would be available that date and the inspection visit was rescheduled for October 10-12, 2006. CX-25, 36. When the QAI inspector arrived on October 10, 2006, he was advised that as a result of being dissatisfied with the service provided Promiseland had replaced QAI with another ACA and that no records would be produced. CX-26, 27. QAI subsequently advised the Compliance Office that as a result of the termination of their services as Promiseland's ACA that they would be unable to conduct the requested investigation.

9. Sometime thereafter, the Compliance Office received a request to obtain records from Promiseland concerning their transactions with Aurora Organic Dairy in connection with an ongoing investigation of that entity. Compliance Officer Terry Kaiser was assigned the task of getting records; however, despite his repeated efforts between January 22, 2007 and June 5, 2007, no records were produced by Promiseland. CX-37, Tr. 1@90-91.

10. With two separate outstanding investigations concerning the Respondents, the Compliance Office dispatched two teams to conduct their own inspections, one to the operation in Falcon, Missouri and the other to Grant City, Missouri. Tr. 1@89-92, 94-102.

11. Eleanor "Shelly" Scott and Richard Matthews were sent to Falcon, Missouri and were provided with a hand carried letter dated June 5, 2007 addressed to Mr. Zeman signed by Mr. Trykowski, citing the efforts that had been made to secure records in connection with the Aurora inquiry, providing the authority for requesting the information, and including language of action that could be taken in the event of a

continued failure to produce the records. CX-39.

12.Ms. Scott's inspection visit to the Falcon, Missouri location on June 5, 2007 was to serve two purposes, the first being to obtain the records pertaining to the Aurora investigation, and the second being to conduct an audit of the organic systems plan to determine if the requirements of the Act and the NOP regulations were being met, a concern raised by the disparity of the record keeping evaluations by QAI and ICO. Although the Aurora records were produced on June 5, 2007, access to the necessary records required for an audit was denied on June 6, 2007 by Leslie Ehnis, acting on instructions from Anthony Zeman.

13.On June 10, 2008, another inspection was attempted by Compliance Officers Scott and Ross Laidig and access to the records was again denied by Anthony Zeman.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The obligation to maintaining organic operation's records and making such records available to individuals designated under the Act and NOP Regulations for the purpose of determining compliance with the Act and the NOP Regulations is critical to the enforcement of the integrity of the National Organic Program.

3. The Respondents Promiseland Livestock LLC and Anthony J. Zeman willfully and in violation of 7 U.S.C. §6506(b), 7 C.F.R §205.103 and §205.400(d) failed to make requested records available and denied the Secretary's representatives access to review and copy organic operation records required to determine compliance with the Act and the NOP Regulations on the following occasions:

a. January 22, 2007 to June 5, 2007, inclusive,
b. June 6, 2007, and
c. June 10, 2008

Order

1. The organic certifications of Respondents Promiseland Livestock, LLC and Anthony J. Zeman are suspended, pursuant to 7 C.F.R. §205.662(f)(1), for a period of 4 years.

2. The Respondents Promiseland Livestock, LLC and Anthony J. Zeman, and any person responsibly connected with Respondents' certified organic operation are disqualified, pursuant to 7 U.S.C. §6519, from receiving certification under the Act for a period of 4 years.

3. 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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MISCELLANEOUS ORDERS

In re: MARVIN D. HORNE AND LAURA R. HORNE, d/b/a RAISIN VALLEY FARMS, A PARTNERSHIP AND d/b/a RAISIN VALLEY FARMS MARKETING ASSOCIATION, a/k/a RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION, RAISIN VALLEY FARMS MARKETING, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY, LASSEN VINEYARDS, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY, RAISIN VALLEY FARMS, LLC., A CALIFORNIA LIMITED LIABILITY COMPANY
AND
MARVIN D. HORNE, LAURA R. HORNE, DON DURBAHN, LASSEN VINEYARDS THE DURBAHN FAMILY TRUST, D/B/A LASSEN VINEYARDS, A PARTNERSHIP.
AMAA Docket No. 09-0202.
Miscellaneous Order.
Filed November 9, 2009.

AMAA.

Frank Martin, Jr., for Respondent.
Brian C. Leighton, for Complainant.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Order

A complaint in this matter was issued by Rayne Pegg, Administrator, Agricultural Marketing Service, on September 30, 2009, Respondents filed a timely answer on October 23, 2009.

The parties jointly move that these proceedings be stayed until the Federal Courts resolve two pending appeals involving similar issues to these presented here. In the interest of judicial economy and fairness, this matter is stayed until the courts have ruled in Marvin D. Horne and Laura R. Horne, et al. v. United States Department of Agriculture, 1:08-

cv-01549-LJO-SMS (E.D. Cal. 2008), and Marvin Horne, et al. v. United States Department of Agriculture 09-1507 (9th Cir. 2009).

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In re: DAVID L. NOBLE, d/b/a NOBLE FARMS.
A.Q. Docket No. 09-0033.
Order Denying Late Appeal.
Filed December 17, 2009.

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

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 November 20, 2008. The Administrator instituted the proceeding under the Animal Health Protection Act, as amended (7 U.S.C. §§ 8301-8321) [hereinafter the Animal Health Protection Act]; regulations promulgated under the Animal Health Protection Act (9 C.F.R. §§ 77.1-.41) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under Certain Acts (9 C.F.R. pt. 99) [hereinafter the Rules of Practice].

The Administrator alleges David L. Noble violated the Animal Health Protection Act and the Regulations. On April 22, 2009, Mr. Noble filed a timely response in which he admitted all the material allegations of the Complaint. On October 14, 2009, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order: (1) concluding Mr. Noble violated the Animal Health Protection Act and the Regulations, 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 15, 2009, 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 within 30 days after service; therefore, Mr. Noble was required to file his appeal petition with the Hearing Clerk no later than November 18, 2009. 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.[2] The ALJ's Decision and Order

[1]United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7022 7480.

[2]*See, e.g., 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 (continued...)

became final on November 23, 2009. Mr. Noble filed his appeal petition on November 24, 2009, 1 day after the ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Mr. Noble's 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. Noble's filing an appeal petition after the ALJ's Decision and Order became final.

Moreover, the jurisdictional bar under the Rules of Practice, which precludes the Judicial Officer from hearing an appeal that is filed after an administrative law judge's decision becomes final, is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs 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

[2](...continued)
respondent's appeal petition filed on the day the administrative law judge's decision became final).

conduct to the administrative regulations. *Id.* at 602.[3]

Accordingly, Mr. Noble's appeal petition must be denied, since it is too late for the matter to be further considered.

For the foregoing reasons, the following Order is issued.

ORDER

1. David L. Noble's appeal petition, filed November 24, 2009, is denied.

2. Administrative Law Judge Peter M. Davenport's Decision and Order, filed October 14, 2009, is the final decision in this proceeding.

_____

In re: TERRI SCHUH AND CASSANDRA SCHUH.
AWA Docket No. 08-0090.
Miscellaneous Order.
Filed August 6, 2009.

AWA.

Heather M. Pichelman for APHIS.
Respondent, Pro se.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Joint Motion of the parties to Dismiss Cassandra Schuh as a Respondent in

[3] *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).

this action.

Being sufficiently advised, Cassandra Schuh is **DISMISSED** as a Respondent in this action.

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

Done at Washington, D.C.

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In re: OCTAGON SEQUENCE OF EIGHT, INC., A FLORIDA CORPORATION, d/b/a OCTAGON WILDLIFE SANCTUARY AND OCTAGON ANIMAL SHOWCASE; LANCELOT KOLLMAN RAMOS, AN INDIVIDUAL, a/k/a LANCELOT RAMOS KOLLMAN; AND MANUEL RAMOS, AN INDIVIDUAL.
AWA Docket No. 05-0016.
Order Lifting Stay Order as to Lancelot Kollman Ramos.
Filed August 17, 2009.

AWA.

Colleen Carroll for APHIS.
Kevin Shirley and Joesph R. Fritz for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On October 2, 2007, I issued a Decision and Order as to Lancelot Kollman Ramos.[1] On November 15, 2007, Lancelot Kollman Ramos filed a petition for rehearing, which I denied.[2] On March 19, 2008, Lancelot Kollman Ramos filed a motion for a stay of the Orders in *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007), and *In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283 (2007), pending the outcome of

[1] *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007).

[2] *In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283 (2007).

proceedings for judicial review. On March 19, 2008, I granted Mr. Ramos' motion for stay.[3] On July 17, 2009, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed "Complainant's Motion to Lift Stay Order." Mr. Ramos failed to file a response to Complainant's Motion to Lift Stay Order, and on August 14, 2009, the Hearing Clerk transmitted the record to me for a ruling on Complainant's Motion to Lift Stay Order.

Proceedings for judicial review are concluded. Mr. Ramos filed no response to Complainant's Motion to Lift Stay Order. Therefore, the March 19, 2008, Stay Order as to Lancelot Kollman Ramos is lifted and the Orders issued in *In re Octagon Sequence of Eight, Inc.* (Decision as to Lancelot Kollman Ramos), 66 Agric. Dec. 1093 (2007), and *In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283 (2007), are effective as follows:

ORDER

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

Paragraph 1 of this Order shall become effective on the day after service of this Order on Lancelot Kollman Ramos.

2. Lancelot Kollman Ramos is assessed a $13,750 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
Marketing Division

[3] *In re Octagon Sequence of Eight, Inc.* (Stay Order as to Lancelot Kollman Ramos), 67 Agric. Dec. ___ (Mar. 19, 2008).

1400 Independence Avenue, SW
Room 2343-South Building, Mail Stop 1417
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 Lancelot Kollman Ramos. Lancelot Kollman Ramos shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0016.

3. Lancelot Kollman Ramos' Animal Welfare Act license (Animal Welfare Act license number 58-C-0816) is revoked.

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

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In re: SAM MAZZOLA, AN INDIVIDUAL D/B/A WORLD ANIMAL STUDIOS, INC., A FORMER OHIO DOMESTIC CORPORATION AND WILDLIFE ADVENTURES OF OHIO, INC., A FORMER FLORIDA DOMESTIC STOCK CORPORATION CURRENTLY LICENSED AS A FOREIGN CORPORATION IN OHIO.
AWA Docket No. 06-0010.
and
In re: SAM MAZZOLA.
AWA Docket No. D-07-0064
Ruling Denying Mr. Mazzola's Motion To Reopen.
Filed October 27, 2009.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.
Initial ruling issued by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

On March 13, 2009, Sam Mazzola filed a motion to reopen the case [hereinafter the Motion to Reopen] to allow two documents and a video to be entered as evidence in support of Mr. Mazzola's appeal petition.

On April 6, 2009, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "APHIS's Response to Mazzola's Motion to Reopen the Case" opposing Mr. Mazzola's Motion to Reopen. On May 13, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Mr. Mazzola's Motion to Reopen. The two documents Mr. Mazzola requests that I admit into evidence in support of his appeal petition are attached to Mr. Mazzola's Motion to Reopen; however, the video was not included in the Hearing Clerk's transmission to the Judicial Officer.

First, Mr. Mazzola requests that I admit into evidence a copy of an expired Animal Welfare Act license issued to "Sam F. Mazzola DBA: World Animal Studios, Inc.," which Mr. Mazzola has marked as MAZ-1 (Motion to Reopen ¶¶ 1-3). Mr. Mazzola asserts MAZ-1 proves Dr. Goldentyer "was less than truthful when she said that 'never' did APHIS issue a license to Sam Mazzola as a DBA to a corporation." (Motion to Reopen ¶ 1.) Mr. Mazzola does not provide a transcript citation to support his assertion that Dr. Goldentyer stated the Animal and Plant Health Inspection Service [hereinafter APHIS] "never" issued a license to Sam Mazzola, d/b/a World Animal Studios, Inc. Contrary to Mr. Mazzola's assertion, Dr. Goldentyer acknowledges the possibility that an Animal Welfare Act license could have been mistakenly issued to Sam Mazzola, d/b/a World Animal Studios, Inc., and testified as to the APHIS response to such an error, as follows:

> JUDGE CLIFTON: . . . if, for example, the records were to show that the licensee was Sam Mazzola doing business as World Animal Studios, Inc., would it have been error to require Mr. Mazzola to go through a brand new application process when it was determined that the corporation was not valid?
>
> [DR. GOLDENTYER:]
>
> THE WITNESS: We would have flagged an application

> in which an individual was doing business as a corporation because really that's two different legal entities.
>
> Now, if it's - - I don't know how we would've handled that because you're asking about a renewal. So, really we should have never gotten into a situation where we were licensing on one license two legal entities. That should never occur in the first place.
>
> So, I'm not exactly sure what we would've done about it, but we would've had - - we would not renew that. We would definitely have to get that corrected.

Tr. 6536-37. Therefore, I find no basis upon which to reopen the proceeding to admit MAZ-1 into evidence in support of Mr. Mazzola's appeal petition.

Second, Mr. Mazzola requests that I admit into evidence a copy of a 2-page completed APHIS complaint/search form which Mr. Mazzola has marked as MAZ-2 and MAZ-3 (Motion to Reopen ¶¶ 4-5). This document was introduced by Mr. Mazzola during the hearing in the instant proceeding (Tr. 6733), and Jill S. Clifton, the administrative law judge who conducted the hearing, admitted the document into evidence (Tr. 6825-26). See RX 52 at 7-8. Under these circumstances, I find no purpose to be served by reopening the proceeding to admit MAZ-2 and MAZ-3 into evidence in support of Mr. Mazzola's appeal petition.

Third, Mr. Mazzola requests that I admit into evidence a video which Mr. Mazzola states he has marked as MAZ-4 (Motion to Reopen ¶¶ 6-7). Mr. Mazzola states the video depicts a bear exhibit conducted by another Animal Welfare Act licensee only days after the conclusion of the hearing in the instant proceeding, July 31, 2008 (Motion to Reopen ¶¶ 6-7). Mr. Mazzola asserts an APHIS inspector inspected the bear exhibit, observed Animal Welfare Act violations similar to those at issue in the instant proceeding, and failed to "write this exhibitor a non compliance inspection." (Motion to Reopen ¶ 6.) Mr. Mazzola argues the video proves the Administrator arbitrarily enforces the Animal Welfare Act.

The issue in the instant proceeding is whether Mr. Mazzola violated the Animal Welfare Act. Alleged violations by another Animal Welfare

Act licensee and the Administrator's response to those alleged violations are not at issue in the instant proceeding. Therefore, I find no basis upon which to reopen the proceeding to admit MAZ-4 into evidence in support of Mr. Mazzola's appeal petition.

For the foregoing reasons, I deny Mr. Mazzola's Motion to Reopen.

_____

In re: SAM MAZZOLA, AN INDIVIDUAL D/B/A WORLD ANIMAL STUDIOS, INC., A FORMER OHIO DOMESTIC CORPORATION AND WILDLIFE ADVENTURES OF OHIO, INC., A FORMER FLORIDA DOMESTIC STOCK CORPORATION CURRENTLY LICENSED AS A FOREIGN CORPORATION IN OHIO.
AWA Docket No. 06-0010.
and
In re: SAM MAZZOLA.
AWA Docket No. D-07-0064
Supplemental Ruling Denying Mr. Mazzola's Motion To Reopen.
Filed November 20, 2009.

Babak A. Rastgoufard, for the Administrator, APHIS.
Respondent/Petitioner, Pro se.
Initial ruling issued by Jill S. Clifton, Administrative Law Judge.
Ruling issued by William G. Jenson, Judicial Officer.

On March 13, 2009, Sam Mazzola filed a motion to reopen the case [hereinafter the Motion to Reopen] to allow two documents and a video to be entered as evidence in support of Mr. Mazzola's appeal petition. On April 6, 2009, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "APHIS's Response to Mazzola's Motion to Reopen the Case" opposing Mr. Mazzola's Motion to Reopen. On May 13, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Mr. Mazzola's Motion to Reopen. On

October 27, 2009, I issued a Ruling Denying Mr. Mazzola's Motion to Reopen. In the Ruling Denying Mr. Mazzola's Motion to Reopen, I noted the two documents Mr. Mazzola requested that I admit into evidence were attached to Mr. Mazzola's Motion to Reopen; however, the video was not included in the Hearing Clerk's transmission to the Judicial Officer.

After Mr. Mazzola received the Ruling Denying Mr. Mazzola's Motion to Reopen, Mr. Mazzola contacted me, by telephone, and informed me that he had filed three copies of the video on three compact disks with his Motion to Reopen. Mr. Mazzola requested that I locate the compact disks (marked MAZ-4) and issue a supplemental ruling after having viewed the video. After an exhaustive search for the compact disks, an employee of the Office of the Judicial Officer located two of the three compact disks. I provided one of the two compact disks to counsel for the Administrator. On November 19, 2009, counsel for the Administrator, by telephone, informed me that, after having viewed the video, the Administrator continued to oppose Mr. Mazzola's request that I admit the video into evidence and declined to supplement APHIS's Response to Mazzola's Motion to Reopen the Case.

Mr. Mazzola states the video depicts a bear exhibit conducted by another Animal Welfare Act licensee only days after the conclusion of the hearing in the instant proceeding, July 31, 2008 (Motion to Reopen ¶¶ 6-7). Mr. Mazzola asserts an APHIS official inspected the bear exhibit, observed Animal Welfare Act violations similar to those at issue in the instant proceeding, and failed to "write this exhibitor a non compliance inspection." (Motion to Reopen ¶ 6.) Mr. Mazzola argues the video proves the Administrator arbitrarily enforces the Animal Welfare Act.

The issue in the instant proceeding is whether Mr. Mazzola violated the Animal Welfare Act. Alleged violations by another Animal Welfare Act licensee and the Administrator's response to those alleged violations are not at issue in the instant proceeding. The Administrator is entitled to exercise prosecutorial discretion. The Administrator neither is prevented from instituting an Animal Welfare Act disciplinary proceeding against Mr. Mazzola when not instituting a proceeding as to others who are similarly situated nor is constrained to institute

disciplinary proceedings as to all similarly situated persons. Mr. Mazzola has no right to have the Animal Welfare Act go unenforced against him, even if Mr. Mazzola can demonstrate that he is not as culpable as others who have not had Animal Welfare Act disciplinary proceedings instituted against them. The Animal Welfare Act does not need to be enforced everywhere to be enforced somewhere, and the Administrator has broad discretion in deciding against whom to institute Animal Welfare Act disciplinary proceedings. Therefore, even after viewing the video, I find no basis upon which to reopen the proceeding to admit MAZ-4 into evidence in support of Mr. Mazzola's appeal petition.

For the foregoing reasons, I deny Mr. Mazzola's Motion to Reopen.

In re: KATHY JO BAUCK, AN INDIVIDUAL, 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 Respondent's Request for Oral Argument.
Filed December 10, 2009.

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.

On October 29, 2009, Kathy Jo Bauck appealed Administrative Law Judge Peter M. Davenport's Decision and Order to the Judicial Officer. On December 8, 2009, Ms. Bauck requested oral argument before the Judicial Officer. On December 9, 2009, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed a response opposing Respondent's request for oral argument. On December 10, 2009, the Hearing Clerk transmitted the record to me for a ruling on Ms. Bauck's request for oral argument.

The rules of practice applicable to the instant proceeding[1] provide that oral argument may be requested by a party bringing an appeal within the time prescribed for filing the appeal (7 C.F.R. § 1.145(d)). Ms. Bauck's time for filing an appeal expired on November 4, 2009. Therefore, Ms. Bauck's request for oral argument before the Judicial Officer is denied as late-filed. Moreover, I issued the decision and order in the instant proceeding 6 days prior to Ms. Bauck's filing the request for oral argument. *In re Kathy Jo Bauck*, 68 Agric. Dec. ___ (Dec. 2, 2009). Therefore, Ms. Bauck's request for oral argument is moot.

For the foregoing reasons, the following Order is issued.

ORDER

Ms. Bauck's December 8, 2009, request for oral argument is denied.

_____

In re: ZOOCATS, INC., A TEXAS CORPORATION; MARCUS COOK, a/k/a MARCUS CLINE-HINES COOK, AN INDIVIDUAL; AND MELISSA COODY, a/k/a MISTY COODY, AN INDIVIDUAL, JOINTLY DOING BUSINESS AS ZOO DYNAMICS AND ZOOCATS ZOOLOGICAL SYSTEMS; SIX FLAGS OVER TEXAS, INC., A DELAWARE CORPORATION; AND MARIAN BUEHLER, AN INDIVIDUAL.
AWA Docket No. 03-0035.
Order Denying Respondents' Petition To Reconsider And Administrator's Petition To Reconsider.
Filed December 14, 2009.

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.

[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).

PROCEDURAL HISTORY

I issued *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009), in which I concluded ZooCats, Inc., Marcus Cook, and Melissa Coody [hereinafter Respondents] 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]; ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and revoked ZooCats, Inc.'s Animal Welfare Act license. On September 8, 2009, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a petition to reconsider *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009). On November 6, 2009, Respondents filed a petition to reconsider *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009), and a reply to the Administrator's petition to reconsider. On November 27, 2009, the Administrator filed a reply to Respondents' petition to reconsider, and on December 3, 2009, the Hearing Clerk transmitted the record to me to consider and rule on the petitions to reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondents' Petition to Reconsider

Respondents raise nine issues in "Respondent's [sic] Petition for Reconsideration and Response to Complainant's Motion for Reconsideration" [hereinafter Respondents' Petition to Reconsider]. First, Respondents contend I erroneously rejected Respondents' argument that the Administrator's Amended Complaint was not timely

filed (Respondents' Pet. to Reconsider at 4-5).

I rejected Respondents' argument regarding timeliness of the Administrator's Amended Complaint because Respondents' argument was raised for the first time on appeal to the Judicial Officer[1] and Respondents were not prejudiced by the timing of the Administrator's filing the Amended Complaint. *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 24-25 (July 27, 2009). Respondents assert they first raised the issue of the timeliness of the Amended Complaint before Administrative Law Judge Victor W. Palmer [hereinafter the ALJ], who entertained and denied Respondents' motion to strike the Amended Complaint (Respondents' Pet. to Reconsider at 4-5). Respondents do not cite and I cannot locate Respondents' motion to strike the Amended Complaint or the ALJ's denial of Respondents' motion to strike the Amended Complaint. Therefore, I reject Respondents' contention that I erroneously concluded Respondents' argument regarding the timeliness of the Amended Complaint was raised for the first time on appeal to the Judicial Officer.

Second, Respondents contend I erroneously rejected Respondents' argument regarding the timeliness of the Administrator's witness list and exhibit list based on my conclusion that Respondents' argument was raised for the first time on appeal to the Judicial Officer. Respondents assert they raised the argument before the ALJ. (Respondents' Pet. to Reconsider at 4-5.)

I found the Administrator's witness list and exhibit list were timely filed. I did not reject Respondents' argument regarding the timeliness of the Administrator's witness list or exhibit list based upon a conclusion that Respondents raised the argument for the first time on appeal to the Judicial Officer. *In re ZooCats, Inc.* (Decision as to

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[1]New arguments cannot be raised for the first time on appeal to the Judicial Officer. *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).

ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 25-27 (July 27, 2009). Therefore, I reject Respondents' contention that I based my decision not to strike the testimony of the Administrator's witnesses and the Administrator's exhibits on the ground that Respondents' argument regarding the timeliness of the Administrator's witness list and exhibit list was raised for the first time on appeal to the Judicial Officer.

Third, Respondents contend I erroneously found ZooCats, Inc., is not a "research facility," as that term is defined in the Animal Welfare Act and the Regulations. Respondents argue, since ZooCats, Inc., has expressed an intent to conduct research on live animals, ZooCats, Inc., is a "research facility." (Respondents' Pet. to Reconsider at 5-13.)

The term "research facility" is defined in section 2(e) of the Animal Welfare Act, as follows:

> **§ 2132 Definitions.**
>
> . . . .
>
> (e) The term "research facility" means any school (except an elementary or secondary school), institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports such animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons, is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of this chapter.

7 U.S.C. § 2132(e). See also 9 C.F.R. § 1.1. Thus, an intent to use live animals in research, tests, or experiments may be sufficient for a person to meet the definition of the term "research facility." However, a claim that a person intends to conduct research on live animals is not sufficient to meet the definition of the term "research facility," unless that claim is an accurate reflection of that person's actual intent. As fully discussed in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 27-31 (July 27, 2009), the record before me refutes Respondents' claim that ZooCats, Inc., intends to conduct research on live animals. Therefore, I reject Respondents' contention that my finding that ZooCats, Inc., is not a "research facility," as that term is defined in the Animal Welfare Act and the Regulations, is error.

Fourth, Respondents contend revocation of ZooCats, Inc.'s Animal Welfare Act license is not justified by the facts (Respondents' Pet. to Reconsider at 13-24).

Respondents' violations of the Animal Welfare Act and the Regulations are enumerated in conclusions of law numbers 4 through 28 in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 11-19 (July 27, 2009). Many of Respondents' violations affected the health and well-being of Respondents' animals and some of Respondents' violations resulted in harm to members of the public. Respondents' violations were not isolated incidents, but extended over a significant period of time, December 5, 2000, through February 23, 2007, indicating a pattern of conduct. Therefore, based upon the number of violations, the seriousness of the violations, and the extended period of time over which the violations occurred, I reject Respondents' contention that revocation of ZooCats, Inc.'s Animal Welfare Act license is not justified by the facts.

Fifth, Respondents contend I erroneously concluded that on February 9, 2006, Respondents failed to "obtain veterinary care for a tiger cub that had re-injured a leg a couple of days earlier." Respondents cite the testimony of Dr. Laurie Gage, an Animal and Plant Health Inspection Service [hereinafter APHIS] veterinary medical officer, as support for their contention that I erred. (Respondents' Pet. to

Reconsider at 24-28.)

I concluded that, on February 9, 2006, Respondents failed to provide veterinary care for a tiger that had re-injured a leg, in willful violation of 9 C.F.R. § 2.40(b)(2). *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 18-19 (July 27, 2009). I have reviewed the record and find the record supports the conclusion that, on February 9, 2006, Respondents willfully violated 9 C.F.R. § 2.40(b)(2). (See CX 36 at 6-7; R 6 at 35; Tr. 95-99.[2]) Moreover, Dr. Gage's testimony does not support Respondents' contention that I erred. To the contrary, Dr. Gage's testimony lends further support to my conclusion that Respondents violated 9 C.F.R. § 2.40(b)(2) on February 9, 2006. (See Tr. 95-96.)

Sixth, Respondents contend I erroneously concluded that on February 23, 2007, Respondents did not provide veterinary care for a tiger with hair loss. Respondents assert no evidence was introduced supporting this conclusion. (Respondents' Pet. to Reconsider at 25-28.)

I concluded that, on February 23, 2007, Respondents failed to provide veterinary care for a tiger suffering from excessive hair loss and weight loss, in willful violation of 9 C.F.R. § 2.40(b)(2). *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 19 (July 27, 2009). The record establishes that, on February 23, 2007, an APHIS inspector, Donnovan Fox, inspected ZooCats, Inc.'s Kaufman, Texas, facility and prepared a report of his observations during the inspection. Inspector Fox reported observing a tiger named Apollo which had a great amount of hair coat loss, skin irritation, and weight loss. Inspector Fox stated in his report that Apollo needed to be seen for evaluation and treatment of these conditions, but, according to Respondents' records, Apollo had not been seen by a veterinarian since July 6, 2006. (CX 38 at 1; R 6 at 6.) My finding that Respondents failed to provide veterinary care to Apollo, on February 23, 2007, is consistent with Inspector Fox's report of his observations (CX 38 at 1; R 6 at 6); therefore, I reject Respondents'

[2]The Administrator's exhibits are referred to as "CX _." Respondents' exhibits are referred to as "R _." The transcript is referred to as "Tr. _."

contention that my conclusion that Respondents violated 9 C.F.R. § 2.40(b)(2) on February 23, 2007, is not supported by any evidence.

Seventh, Respondents contend the recording of two telephone conversations between Marcus Cook and Dr. Daniel Jones in March 2007, which are contained on a compact disc (R 13), should not have been excluded (Respondents' Pet. to Reconsider at 28-31).

I did not exclude the recording of the March 2007 telephone conversations but, instead, found the ALJ's exclusion harmless error. *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 35-36 (July 27, 2009).

Eighth, Respondents assert "there are no set standards for the public to be able to touch tiger and lion cubs, etc."[;] therefore, my findings that Respondents violated 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. 2.131(c)(1)[3] are error (Respondents' Pet. to Reconsider at 31-38).

The Regulations (9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005)) require Respondents to handle any animal, during public exhibition, so there is minimal risk of harm to the animal and to the public, with sufficient distance or barriers or distance and barriers between the animal and the general viewing public so as to assure the safety of the animal and the public. I have long held that 9 C.F.R. § 2.131(b)(1) (2004) and 9 C.F.R. § 2.131(c)(1) (2005) provide adequate notice of the manner in which an Animal Welfare Act licensee is required to handle animals during public exhibition.[4] Moreover, given the facts of the instant proceeding, Respondents should have known, even without specific engineering standards setting forth exact distance and barrier requirements, that they were in violation of 9 C.F.R. § 2.131(b)(1) (2004) or 9 C.F.R. § 2.131(c)(1) (2005) on six occasions. On three of these six occasions, Respondents exhibited tigers with no distance or barriers between the tigers and the general viewing public

[3]Effective August 13, 2004, 9 C.F.R. § 2.131(a), (b), (c), and (d) were redesignated 9 C.F.R. § 2.131(b), (c), (d), and (e) respectively. (See 69 Fed. Reg. 42,089-42,102 (July 14, 2004).) Therefore, prior to August 13, 2004, "9 C.F.R. § 2.131(c)" was designated as "9 C.F.R. § 2.131(b)."

[4]See *In re The International Siberian Tiger Foundation* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 77-78 (2002).

(CX 19, CX 19F at 7-19, CX 24 at 1-47, CX 35; Tr. 137-48, 723-29, 1569) and on one occasion, Respondents exhibited a lion with no distance or barriers between the lion and the general viewing public (CX 27; Tr. 48-54). Given the size, quickness, strength, and nature of lions and tigers, Respondents should have known that some distance or barrier between Respondents' tigers and lion and the general viewing public was necessary to assure the safety of Respondents' animals and the public.

On each of the other two occasions in which Respondents violated 9 C.F.R. § 2.131(b)(1) (2004), Respondents did provide a barrier between their animals and the general viewing public; namely, Respondents exhibited tigers that were caged. However, in one of these instances, Respondents photographed spectators while the spectators hand-fed meat to a tiger through the bars of the tiger's cage (CX 24 at 1, 47-56). In the other instance, Respondents photographed spectators while the spectators fed a tiger meat on a short stick that the spectators pressed through the bars of the tiger's cage (CX 28, CX 28A; Tr. 918-20). While a cage constitutes a barrier between Respondents' tigers and the general viewing public, given the size, quickness, strength, and nature of tigers, Respondents should have known that allowing the general viewing public to feed his tigers by hand and by use of a short stick almost completely negated the protective effect of the barrier and, under the circumstances, the cage was not sufficient to assure the safety of Respondents' animals and the public.

Ninth, Respondents contend revocation of ZooCats, Inc.'s Animal Welfare Act license is not consistent with sanctions imposed on other licensees after incidents resulting in animal and human death or injury. Respondents assert the Secretary of Agriculture's imposition of disparate sanctions demonstrates "a selective enforcement practice." (Respondents' Pet. to Reconsider at 38-54.)

Even if revocation of ZooCats, Inc.'s Animal Welfare Act license were a more severe sanction than the sanctions imposed in other similar cases, the revocation of ZooCats, Inc.'s Animal Welfare Act license 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.[5]

As for Respondents' contention that the Secretary of Agriculture engages in "a selective enforcement practice," Respondents bear the burden of proving they are the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[6] In order to prove a selective enforcement claim, Respondents must show one of two sets of circumstances. Respondents must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[7] Respondents have not shown that they are members of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondents must show: (1) they exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondents for exercise of the

[5] *In re Cheryl Morgan*, 65 Agric. Dec. 849, 874-75 (2006); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric Dec. 85 (1999).

[6] *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985).

[7] *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

protected right.[8] Respondents have not shown any of these circumstances.

Administrator's Petition to Reconsider

The Administrator raises three issues in "Complainant's Petition for Reconsideration" [hereinafter Administrator's Petition to Reconsider]. First, the Administrator contends I erroneously found the ALJ's exclusion of the recording of two March 2007 telephone conversations between Marcus Cook and Dr. Daniel Jones, which are contained on a compact disc (R 13), was harmless error. The Administrator asserts the recording should have been excluded because the recording is not the sort of evidence upon which responsible persons are accustomed to rely. (Administrator's Pet. to Reconsider at 4-6.)

The Administrative Procedure Act imposes few restrictions on the admissibility of evidence in administrative proceedings. "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." (5 U.S.C. § 556(d).) The Rules of Practice equally favor admitting evidence. "Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable." (7 C.F.R. § 1.141(h)(1)(iv).) The courts have long held that administrative fora are not bound by the strict evidentiary limitations found in judicial proceedings.[9] Over 60 years ago, the United States Court of Appeals for the Second Circuit discussed

[8] *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453-54 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

[9] *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229-30 (1938); *Tagg Bros. & Moorehead v. United States*, 280 U.S. 420, 442 (1930); *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274, 288 (1924); *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93 (1913); *ICC v. Baird*, 194 U.S. 25, 44 (1904).

the preference for admitting evidence in administrative proceedings.

> Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.

Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 380 (2d Cir.) (per curiam), *cert. denied*, 326 U.S. 734 (1945). Still today, the preference in administrative proceedings is for admitting all evidence that is not irrelevant, immaterial, or unduly repetitious.

Considering the few restrictions on admissibility imposed by the Administrative Procedure Act and the Rules of Practice, as well as the recognition by the judiciary that admissibility of evidence in administrative proceedings is favored over exclusion, I conclude the recording should have been admitted. However, even though I found the exclusion of the recording erroneous, I found the exclusion harmless error.

Second, the Administrator asserts I erroneously failed to include the ALJ's discussion of Mr. Cook's background in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009) (Administrator's Pet. to Reconsider at 6-11).

Even if I were to make findings regarding Mr. Cook's background, those findings would not affect the disposition of the instant proceeding. Therefore, I reject the Administrator's contention that my failure to adopt the ALJ's discussion of Mr. Cook's background, is error.

Third, the Administrator contends I erroneously failed to adopt a portion of the cease and desist order issued by the ALJ, which provides,

as follows:

> It is also specifically ORDERED that the above-named respondents shall cease and desist from publicly exhibiting any lion or tiger, including a cub or a juvenile, unless the animal is contained inside a suitable primary enclosure with any needed secondary barrier such as a perimeter fence sufficiently distanced from the primary enclosure in conformity with the requirements of 7 C.F.R. § 3.127(d) that may be varied only when appropriate alternative security measures are approved in writing by the Administrator of APHIS, so as to completely preclude any member of the public from touching or coming into contact with any part of the animal. To fully effectuate this provision, special attention shall be given to the safety of children to eliminate any contact between them and the animals, their teeth, claws, fur or feces. (ALJ's Decision and Order at 16.)

Administrator's Pet. to Reconsider at 11-25.

A cease and desist order must bear a reasonable relation to the unlawful practice found to exist.[10] I did not conclude that Respondents violated 9 C.F.R. § 3.127(d);[11] therefore, I did not adopt the ALJ's order requiring Respondents to conform to the requirements of 9 C.F.R. § 3.127(d). Moreover, as stated in *In re ZooCats, Inc.* (Decision as to

[10]*FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946); *Excel Corp. v. U.S. Dep't of Agric.*, 397 F.3d 1285, 1298 (10th Cir. 2005); *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978); *Spiegel, Inc. v. FTC*, 411 F.2d 481, 484-85 (7th Cir. 1969); *Swift & Co. v. United States*, 317 F.2d 53, 56 (7th Cir. 1963); *Gellman v. FTC*, 290 F.2d 666, 670-71 (8th Cir. 1961).

[11]The ALJ orders Respondents to conform to the requirements of "7 C.F.R. § 3.127(d)." Based on the record before me, I infer the ALJ's citation is error and the ALJ intended to order Respondents to conform to the requirements of "9 C.F.R. § 3.127(d)."

ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___, slip op. at 37-39 (July 27, 2009), the record does not support my adoption of this provision of the ALJ's cease and desist order.

For the foregoing reasons and the reasons set forth in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009), Respondents' Petition to Reconsider and the Administrator's Petition to Reconsider are denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondents' Petition to Reconsider and the Administrator's Petition to Reconsider were timely filed and automatically stayed *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009). Therefore, since Respondents' Petition to Reconsider and the Administrator's Petition to Reconsider are denied, I hereby lift the automatic stay, and the Order in *In re ZooCats, Inc.* (Decision as to ZooCats, Inc., Marcus Cook, and Melissa Coody), 68 Agric. Dec. ___ (July 27, 2009), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider.

For the foregoing reasons, the following Order is issued.

ORDER

1. ZooCats, Inc., Marcus Cook, and Melissa Coody, their 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) failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort;

(b) using physical abuse to train, work, or otherwise handle animals;

(c) failing, during public exhibition, to handle animals so there is

minimal risk of harm to the animals and 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;

(d) failing to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals contained in the enclosures;

(e) utilizing an insufficient number of adequately-trained employees to maintain a professionally acceptable level of husbandry practices;

(f) failing to provide a suitable method to rapidly eliminate excess water from enclosures housing animals;

(g) failing to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals;

(h) failing to feed animals at least once a day, except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices;

(i) failing to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal;

(j) failing to follow the prescribed dietary recommendations of Respondents' attending veterinarian;

(k) failing to establish and maintain a program of adequate veterinary care that includes the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries; and

(l) failing to have formal arrangements for regularly scheduled veterinary visits to Respondents' premises.

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

2. Animal Welfare Act license number 74-C-0426 issued to ZooCats, Inc., is permanently revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on ZooCats, Inc.

RIGHT TO JUDICIAL REVIEW

ZooCats, Inc., Marcus Cook, and Melissa Coody have the right to seek judicial review of the Order in this Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. ZooCats, Inc., Marcus Cook, and Melissa Coody must seek judicial review within 60 days after entry of the Order in this Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider.[12] The date of entry of the Order in this Order Denying Respondents' Petition to Reconsider and Administrator's Petition to Reconsider is December 14, 2009.

In re: CHANCE ENGLE.
AWG Docket No. 09-0061.
Miscellaneous Order.
Filed July 10, 2009.

AWG.

Mary Kimbell, for RD.
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Order Dismissing Case Without Prejudice

The Petitioner is Chance Engle ("Mr. Engle"). The Respondent Agency is Rural Development, United States Department of Agriculture ("USDA").

This case concerns administrative wage garnishment. Mr. Engle denies owing any debt to USDA. USDA's Motion to Dismiss, filed July 9, 2009, is before me. USDA refers to a completed Bankruptcy Chapter 13, file #09-40761. USDA asserts that **wage garnishment is no longer an issue.**

Consequently, the hearing scheduled for **August 18, 2009** is CANCELED. The Prehearing Filing Deadlines are VACATED.

[12] 7 U.S.C. § 2149(c).

USDA's Motion to Dismiss is GRANTED, without prejudice to Mr. Engle to request a hearing timely, should garnishment be noticed.

Copies of this Order Dismissing Case shall be served by the Hearing Clerk upon each of the parties, **together with copies of USDA's Motion to Dismiss** filed July 9, 2009.

_____

In re: JACKIE HEAD.
AWG Docket No. 09-0077.
Miscellaneous Order.
Filed July 29, 2009.

AWG.

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

Dismissal of Petition

Pursuant to the Hearing Notice issued on July 6, 2009, a hearing by telephone to be preceded by a teleconference was scheduled and held on July 21, 2009 at 10 AM Eastern Time. Respondents' representatives were present. Petitioner was not. Petitioner also failed to comply with a Prehearing Order I previously issued on April 3, 2009, that required him to file by June 5, 2009, lists of exhibits and witnesses, and a narrative describing why he cannot pay the alleged debt and indicating what portion of the alleged debt he is able to pay through garnishment. The July 6, 2009 Hearing Notice gave Petitioner another opportunity to file these materials together with financial information by July 10, 2009, and directed him to provide a telephone number where he could be reached on the day of the hearing. Petitioner did not comply in any way with these directions or made any attempt to contact my office.

Under these circumstances, his petition is hereby dismissed and the proceedings to garnish his wages may be continued at the rate of 15%

of his disposable income as allowed by applicable Federal regulations.

_____

In re: DANIELLE McINNIS, a/k/a DANIELLE NICHOLSON.
AWG Docket No. 09-0078.
Miscellaneous Order.
Filed July 29, 2009.

AWG.

Gene Elkin and Mary Kimball, for RD.
Petitioner, Pro se.
Order issued by Victor W. Palmer, Administrative Law Judge.

Dismissal of Petition

Pursuant to a Hearing Notice issued on July 6, 2009, I held a teleconference and a hearing by telephone, on July 22, 2009, at 10 AM Eastern Time. Petitioner and Respondents' representatives, Gene Elkin and Mary E. Kimball, participated. Petitioner had not complied with a Prehearing Order I had issued on April 3, 2009, that required her to file by June 5, 2009, lists of exhibits and witnesses, and a narrative describing why she cannot pay the alleged debt and indicating what portion of the alleged debt she is able to pay through garnishment. Petitioner was instructed by the July 6, 2009 Hearing Notice to file these materials together with financial information by July 15, 2009, but she did not do so. In the teleconference, Petitioner stated that she had not been able to contact Treasury Department officials to discuss settlement arrangements and denied receiving forms to provide financial information.

The parties were sworn. Respondent introduced records regularly maintained by USDA, Rural Development that were duly identified and authenticated that proved that:

- On September 30, 2003, petitioner signed an Assumption Agreement obligating herself to pay an USDA RD home mortgage loan for property located at 43 Hartzog Magee

Road, Prentiss, MS 3974 that had been made to her mother on April 25, 1990 (Exhibit RX-1).

- On June 25, 2006, the loan was reamortized with a principal balance of $34,217.13 (Exhibit RX-2).

- On March 26, 2007, Petitioner was sent a Notice of Default when the loan balance was $33,518.23 (Exhibit RX-3).

- On October 156, 2007, a foreclosure/short sale of the property was held when the total owed on the loan was $38,087.14. The sale resulted in the receipt of $16,000.00, and after these funds were applied to the debt, Petitioner owed $22,087.14. There was an insurance refund, and USDA has received offset payments collected by the United States Treasury Department whereby the current amount due from Petitioner is $20,582.16 (Exhibit RX-4).

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. Under that section Petitioner, as the debtor, was then required to show at the hearing by a preponderance of the evidence, that no debt exists, or the amount was incorrect, or the terms of a repayment schedule would cause her financial hardship, or that the collection of the debt may not be pursued due to operation of law (31 C.F.R. §285.11(f)(8)(ii)). She did not provide evidence sufficient to meet this burden of proof. However, USDA, RD has agreed to provide Petitioner and Treasury with current, correct contact information to enable them to work together to establish an appropriate settlement/payment plan.

Under these circumstances, the petition is hereby dismissed and the proceedings to garnish Petitioner's wages may be resumed at the applicable percentage rate of her disposable income allowed by Federal regulations.

_____

In re: KELLI McGEE.
AWG Docket No. 09-0134.
Miscellaneous Order.
Filed September 9, 2009.

AWG.

Mary E. Kimbell, for RD.
Petitioner, Pro se.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the request of the Petitioner for a hearing concerning the existence or amount of the debt alleged, and if established, the terms of any repayment. Consistent with usual procedures, a Prehearing Order was entered on June 11, 2009 directing the Respondent to file with the Hearing Clerk a narrative concerning the existence, computation of amount and documentation of the debt alleged in this case, together with lists of exhibits and witnesses. The Complainant was also directed to make similar disclosure of her lists of exhibits and witnesses. On June 26, 2009, as directed, the Respondent filed its narrative and the documentation supporting the existence of the debt.

Upon receipt of the narrative, the Complainant contacted the Respondent's representatives and advised them that she had never received the notice referenced in the narrative. Upon investigation, the Respondent found that the required notice had been sent to the wrong address, that the Petitioner had in fact never received proper notice and has filed a Supplemental Narrative asking that the Request for Wage Garnishment be dismissed.

Being sufficiently advised, it is **ORDERED** the Request for Garnishment be **DISMISSED, with prejudice.**

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

Done at Washington, D.C.

_____

In re: EUNICE CAMPBELL.
AWG Docket No. 09-0060.
Miscellaneous Order.
Filed October 6, 2009.

AWG.

Mary E. Kimball, for RD.
Petitioner, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

Order Dismissing Case Without Prejudice

The hearing was held on August 18, 2009. Eunice Campbell, the Petitioner ("Ms. Campbell") represented herself. 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.

Ms. Campbell indicated that she had filed for Chapter 13 bankruptcy in the U.S. Bankruptcy Court, Western District of Arkansas, case no. 2:09-bk-73696, in July 2009. Ms. Campbell had expected that all creditors would be notified of the bankruptcy.

Later, the same day of the hearing, Ms. Campbell's bankruptcy filing was confirmed, by both (1) the attorney for Ms. Campbell in the bankruptcy case, Lyndsey D. Dilks of the Brad Hendricks Law Firm, Little Rock, Arkansas, who telephoned me and immediately thereafter forwarded to me via email (attached) a copy of the Notice of Bankruptcy Case Filing; and (2) USDA Rural Development, through Mary E. Kimball, who filed with the Hearing Clerk that day, bankruptcy documents she had obtained from PACER. Ms. Kimball's filing includes the following statement on behalf of USDA Rural Development:

> Ms. Eunice May Campbell filed a Chapter 13 Bankruptcy in the Western District of Arkansas, Petition # 09-73696 on 07/28/2009.

> At this time, we are unable to pursue any type of collection on the debt owed to USDA. If Ms Campbell is discharged in bankruptcy, we will cancel the debt owed to USDA. At any time the bankruptcy is dismissed, we will resume collection efforts.
>
> Debt will be recalled from Treasury due to bankruptcy. USDA will monitor the bankruptcy to determine outcome.

Accordingly, this case is DISMISSED, without prejudice to Ms. Campbell to request a hearing timely, should garnishment be noticed.

During the hearing on August 18, 2009, Ms. Campbell asked if monies taken from her 2008 IRS refund would be returned to her. Mr. Elkin advised her of *31 U.S.C. - Sec. 3720A. Reduction of tax refund by amount of debt.* Mr. Elkin explained that monies collected through ***offset*** (such as had occurred with her 2008 tax refund) prior to her filing for Chapter 13 bankruptcy will **not** be refunded. Mr. Elkin mentioned that Ms. Campbell will be expected to perform her plan and that USDA Rural Development monitors bankruptcy cases.

Copies of this Order Dismissing Case, together with copies of the **Attachment**, together with copies of **all filings received August 18, 2009**, shall be served by the Hearing Clerk upon each of the parties. (**Ms. Campbell shall receive her own copy**, even though **a courtesy copy shall be sent to her attorney** at the address shown below; **Ms. Kimball**, rather than Ms. McQuaid, shall be sent the USDA Rural Development copies.)

_____

In re: PATRICIA MARIE ZUNIGA, a/k/a PATRICIA M. AGUILAR.
AWG Docket No. 09-0081.
Miscellaneous Order.
Filed October 7, 2009.

AWG.

Gene Elkin and Mary Kimball for RD.
Petitioner, Pro se.
Order by Jill S. Clifton, Administrative Law Judge.

Order Dismissing Case Without Prejudice

The hearing began on August 18, 2009 but was not completed. Ms. Patricia Marie Zuniga, also known as Patricia M. Aguilar, the Petitioner ("Ms. Zuniga") failed to appear. Ms. Zuniga did not receive notice of the hearing, because she did not update her contact information so that notice could be provided to her. 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.

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

Gina.Zahner@stl.usda.gov 314.457.4314

Ms. Zuniga requested the hearing, to determine whether Ms. Zuniga's disposable pay supports garnishment, up to 15% of Ms. Zuniga's disposable pay (within the meaning of 31 C.F.R. § 285.11). Ms. Zuniga worked for the Bank of the Hills, a branch of Sterling Bank, in Kerrville, Texas. Ms. Zuniga's circumstances of financial hardship (within the meaning of 31 C.F.R. § 285.11), including any disability or catastrophic illness, were also to be evaluated during the hearing.

Ms. Zuniga is encouraged to review the regulation found at 31 C.F.R. § 285.11. [She may "Google" or otherwise search for "31 CFR 285", for electronic access to this federal regulation.]

Each party is welcome, but not required, to be represented by counsel, at that party's expense. If counsel is retained, counsel shall file notice of Entry of Appearance with the Hearing Clerk with a copy to the other party. The address for the Hearing Clerk is shown below my signature at the end of this Order.

Ms. Zuniga has shown good cause for her failure to appear for the hearing, in that she did not know about the hearing. Nevertheless, this is her case (she filed the Petition), and she is obligated to apprise 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); and e-mail address(es). All attempts to reach Ms. Zuniga following the hearing have failed.

Accordingly, this case is DISMISSED, without prejudice to Ms. Zuniga to request a hearing timely, should garnishment be noticed.

Copies of this Order Dismissing Case shall be served by the Hearing Clerk upon each of the parties. Ms. Zuniga shall be served at the address of record (from which mail is being returned as undeliverable), and also at an alternative address which I will provide to the Hearing Clerk separately, to keep personally identifying information from being published.

———————

In re: HEATHER E.J. PRESLAR, a/k/a HEATHER E.J. REAMES.
AWG Docket No. 09-0099.
Miscellaneous Order.
Filed November 9, 2009.

AWG.

Mary E. Kimball, for RD.
Deirdre H. Nachamie, Esq., for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

Order Dismissing Case Without Prejudice

The Petitioner is Heather E.J. Preslar, a/k/a Heather E.J. Reames ("Ms. Preslar"). The Respondent Agency is Rural Development, United States Department of Agriculture ("USDA Rural Development"). USDA Rural Development is represented by Mary E. Kimball.

Ms. Preslar reported to Ms. Kimball that Ms. Preslar had filed for Chapter 7 bankruptcy. Ms. Kimball's filing dated November 6, 2009, confirms that Ms. Preslar's Chapter 7 proceeding was filed on October 30, 2009, in the U.S. Bankruptcy Court, Western District of North Carolina (Shelby), Bankruptcy Petition #: 09-40898.

Ms. Kimball's filing includes the following statement on behalf of USDA Rural Development:

> Ms. Preslar filed a Chapter 7 Bankruptcy in the Western District of North Carolina on 10/30/09, Petition # 40898.
>
> At this time, we are unable to pursue any type of collection on the debt owed to USDA. Please issue a dismissal of petition. If Ms. Preslar is discharged in bankruptcy, USDA will not be able to pursue any collection effort. However, if Ms. Preslar is not discharged in bankruptcy, we will return debt to Treasury for future collection efforts such as wage garnishment.
>
> Debt will be recalled from Treasury due to bankruptcy. USDA will monitor the bankruptcy to determine outcome.

Accordingly, this case is DISMISSED, without prejudice to Ms. Preslar to request a hearing timely, should garnishment be noticed.

Copies of this Order Dismissing Case, together with copies of **all filings received November 6, 2009**, shall be served by the Hearing Clerk upon each of the parties. (**Ms. Preslar shall receive her own copy**, even though **a courtesy copy shall be sent to her attorney** in the bankruptcy case at the address shown below.)

Done at Washington, D.C.

In re: TIMOTHY MAYS, d/b/a CT FARMS.
FCIA Docket No. 08-0153.
Miscellaneous Order.
Filed November 17, 2009.

FCIA.

Mark Simpson, for Complainant.
Terry G. Kilgore, for Respondent.
Order issued by Peter M. Davenport, Administrative Law Judge.

SUPPLEMENTAL ORDER

So much of the Decision and Order entered in this case on November 13, 2009 as indicated that the 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

is **AMENDED** to read:

made payable to USDA/RMA and sent to:

> USDA/RMA
> Beacon Facility-Stop 0814

P.O. Box 419205
Kansas City, MO 64141

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

Done at Washington, D.C.

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In re: MATTHEW STEVEN DAVIS AND FOOD4FITNESS, INC.
FMIA/PPIA Docket No. 09-0116.
Miscellaneous Order.
Filed September 28, 2009.

FMIA/PPIA.

Thomas Neil Bolick for FSIS.
Mathew Steven Davis for Respondent.
Order issued by Peter M. Davenport, Administrative Law Judge.

This matter is before the Administrative Law Judge upon the Motion of the Complainant to cancel the hearing which has been scheduled in this action and to dismiss the proceeding. The Complainant was advised by Respondents' Counsel that the Respondents are withdrawing their request for federal inspection services.

Being sufficiently advised, it is **ORDERED** that the audiovisual hearing scheduled to commence at **9:00 AM local time on October 13, 2009** is **CANCELLED** and this action is **DISMISSED**, without prejudice.

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

Done at Washington, D.C.

_____

In re: MELVIN D. COSTON.
FSIS Docket No. 09-0087.
Miscellaneous Order.
Filed July 16, 2009.

FSIS.

Patricia C. Smith, for FSIS.
Respondent, Pro se.
Order issued by Peter M. Davenport, Administrative Law Judge.

This wage off set matter was referred to the Administrative Law Judge after the filing of a request for hearing by the Petitioner to determine the existence or amount of the debt alleged, and if established, the terms of any repayment. Information provided to me by letter entered in the record on June 3, 2009 indicates that any disputed debt has since been satisfied.

There no longer being any debt which is subject to wage off set action, this matter is **DISMISSED** with no further action required.

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

Done at Washington, D.C.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; ALFRED LION, JR., AN INDIVIDUAL; DANIEL LION, AN INDIVIDUAL; JEFFREY LION, AN INDIVIDUAL; BRUCE LION, AN INDIVIDUAL; LARRY LION, AN INDIVIDUAL; AND ISABEL LION, AN INDIVIDUAL.
I & G Docket No. 04-0001.
Rulings Denying Respondents' Motion For Consolidation And Petition To Reopen Evidence Or For Rehearing.

Filed December 16, 2009.

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.
Rulings issued by William G. Jenson, Judicial Officer.

Respondents' Motion for Consolidation

Lion Raisins, Inc., Alfred Lion, Jr., Daniel Lion, Jeffrey Lion, and Bruce Lion [hereinafter Respondents] seek to consolidate the instant proceeding with *In re Lion Raisins*, I & G Docket No. 01-0001, and *In re Bruce Lion*, I & G Docket No. 03-0001. Respondents assert consolidation would result in "judicial economy."

I have issued the decision in this proceeding.[1] All that remains administratively is my consideration of Respondents' "Petition for Reconsideration" and "Complainant's Reply to Petition for Reconsideration." *In re Lion Raisins*, I & G Docket No. 01-0001, and *In re Bruce Lion*, I & G Docket No. 03-0001, are in a much different procedural posture and consolidation of the instant proceeding with these two proceedings would delay, rather than expedite, this proceeding and would not result in any administrative economy. Therefore, Respondents' motion for consolidation is denied.

Respondents' Petition to Reopen Evidence or for Rehearing

Respondents filed the petition to reopen evidence or, in the alternative, for rehearing on July 27, 2009, 3 months 10 days after I issued the decision in the instant proceeding and 3 months after the

[1] *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).

Hearing Clerk served Respondents with the decision.[2] The rules of practice applicable to this proceeding[3] provide time limits within which a party may file a petition to reopen a hearing to take further evidence and a petition for rehearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*—. . . .
> . . . .
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.
> (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)(2)-(a)(3). Therefore, Respondents' petition is

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[2]See United States Postal Service Domestic Return Receipt for article number 7007 0710 0001 3862 9618 establishing that the Hearing Clerk served Respondents with the Judicial Officer's decision in the instant proceeding on April 27, 2009.

[3]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).

denied as late-filed.[4]

———————

[4]See *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand), 61 Agric. Dec. 389, 396-99 (2002) (denying the respondent's petition to reopen because it was filed after issuance of the Judicial Officer's decision); *In re Judie Hansen* (Order Denying Pet. to Reopen Hearing), 58 Agric. Dec. 390, 392 (1999) (same); *In re Potato Sales Co.* (Order Denying Pet. to Reopen Hearing to Take Further Evidence as to Potato Sales Co., Inc.), 55 Agric. Dec. 708 (1996) (same).

ANIMAL QUARANTINE ACT

DEFAULT DECISIONS

In re: DAVID NOBLE, d/b/a NOBLE FARMS.
A.Q. Docket No. 09-0033.
Default Decision.
Filed October 14, 2009.

AQ - Default.

Darlene Bolinger, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the Animal Health and Protection Act of May 13, 2002, as amended (7 U.S.C. §§ 8301 *et seq*.)(the Act) and the regulation promulgated thereunder (9 C.F.R. §§ 77.1 *et seq*.,), hereinafter referred to as the regulation, in accordance with the Rules of Practice in 7 C.F.R. § 1.130 *et seq*.

This proceeding was instituted under the Act by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture on November 20, 2008. The complaint was served by FEDEX delivery on the respondent on April 8, 2009 and by certified mail on June 1, 2009. The respondent was informed that filing an answer which does not deny the material allegations of the complaint shall constitute an admission of those allegations and a waiver of the right to an oral hearing

On April 22, 2009, within the time allotted for the filing of an answer, Complainant's counsel filed the Respondent's response to the complaint. That response admitted all the material allegations of the complaint. Sections 1.136 (a) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(a) and 1.139) provide that an admission of the allegations in the complaint constitutes a waiver of hearing. Accordingly, based on the admissions in Respondent's April 22, 2009

Answer, he waived his right to a hearing. (7 C.F.R. § 1.139).

Consequently, the material allegations in the complaint which were admitted are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. David L. Noble d/b/a Noble Farms, hereinafter referred to as respondent, is an entity with a mailing address of 317 FM229, Crockett, Texas 75835.

2. On or about April 12, 2005, Respondent moved 161 head of cattle interstate without the required certificate accompanying the movement from Texas to Iowa in violation of 9 C.F.R. § 77.10(d).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. By reason of the Findings of Fact set forth above, the respondent has violated the Act and the regulation issued under the Act.

Order

The respondent is hereby assessed a civil penalty of five thousand dollars ($5,000.00). The respondent shall send a certified check or money order for the five thousand dollars ($5,000.00), payable to the Treasurer of the United States, to United States Department of Agriculture, APHIS, Accounts Receivable, P.O. Box 3334, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket number of this proceeding, A.Q. Docket No. 09-0033.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there

is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

A copy of this Decision and Order shall be served upon the parties.

Done at Washington, D.C.

_____

In re: CHARLES A. CARTER d/b/a C.C. HORSES TRANSPORT; AND JEREMY POLLITT d/b/a WILDCAT TRUCKING.
A.Q. Docket No. 09-0024.
Decision and Order as to only CHARLES A. CARTER d/b/a C.C. HORSES TRANSPORT.
Default Decision.
Filed October 23, 2009.

AQ- Default.

Decision Summary

Thomas Neil Bolick for APHIS
Respondent, Pro se.
Default Decision issued by Administrative Law Judge Jill S. Clifton.

1. I decide that Charles A. Carter, doing business as C.C. Horses Transport, Respondent, an owner/shipper of horses (9 C.F.R. § 88.1), failed to comply with the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) and the Regulations promulgated thereunder (9 C.F.R. § 88.1 *et seq*.), when he commercially transported horses for slaughter in 2004, 2005, and 2006, to Cavel International in Dekalb, Illinois. I decide further that Respondent Charles A. Carter is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers and trucking companies. I decide further that $230,000.00 in civil penalties (9 C.F.R. § 88.6) for remedial purposes for Respondent Charles A. Carter's failures to comply, is reasonable, appropriate, justified, necessary, proportionate, and not excessive.

Parties and Counsel

2. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein "APHIS" or "Complainant"). APHIS is represented by Thomas N. Bolick, Esq., Office of the General Counsel (Regulatory Division), United States Department of Agriculture, South Building Room 2319, 1400 Independence Ave. SW, Washington, D.C. 20250.
3. The Respondent, Charles A. Carter, doing business as C.C. Horses Transport (frequently herein "respondent Carter" or "Respondent"), (one of the two respondents[1]), has failed to appear.

Procedural History

4. APHIS' Motion for Adoption of Proposed Default Decision and Order, filed July 22, 2009, is before me. Respondent Carter was served with a copy of that Motion and a copy of the Proposed Default Decision and Order on August 26, 2009, and failed to respond.
5. Regarding service of the Complaint, which was filed on November 17, 2008, Respondent Carter was served on April 16, 2009, as follows. The Complaint was originally mailed to Respondent Carter at his last known mailing address, 4150 E. County Road 20, Loveland, Colorado 80537. Animal Health Technician (AHT) Joseph Thomas Astling, USDA APHIS Veterinary Services, subsequently notified counsel for APHIS that Respondent Carter had spoken with AHT Astling on the phone and had told him that he never received the Complaint mailed to him at 4150 E. County Road 20, Loveland, Colorado 80537, because he

[1]Regarding the other respondent in this case, a default decision and order was issued on April 8, 2009 that assessed him, Jeremy Pollitt d/b/a Wildcat Trucking, civil penalties totaling $7,200.00 (seven thousand two hundred dollars). The default decision and order was mailed to respondent Pollitt by certified mail, return receipt requested, on April 9, 2009, but was returned to the Hearing Clerk marked by the U.S. Postal Service as unclaimed. On May 6, 2009, the Hearing Clerk re-mailed the default decision and order to respondent Pollitt at the same address by regular mail. Respondent Pollitt did not appeal or otherwise respond to the default decision and order, which became final on or about June 10, 2009.

recently had moved and had not left a forwarding address.

6. After several failed attempts to contact Respondent Carter by phone in February 2009, AHT Astling notified counsel for APHIS on March 11, 2009, that he had spoken again with Respondent Carter on the phone and had told him that he needed to provide AHT Astling with a current mailing address. AHT Astling told counsel for APHIS that he told Respondent Carter that USDA APHIS would soon be sending him some documents at his new address and that he should respond to them as soon as he received them in order to avoid a default. AHT Astling told counsel for APHIS that Respondent Carter told him that his current mailing address is 22895 County Road 53, Kersey, Colorado 80644. Counsel for APHIS reported Respondent Carter's new mailing address to the Hearing Clerk that same day.

7. On March 12, 2009, the Hearing Clerk mailed the Complaint to Respondent Carter at 22895 County Road 53, Kersey, Colorado 80644 by certified mail, return receipt requested. Respondent Carter was informed in the Complaint and the letter accompanying the Complaint that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the Complaint constitutes an admission of the allegations in the Complaint and waiver of a hearing. On April 16, 2009, the Complaint was returned to the Hearing Clerk marked by the U.S. Postal Service as unclaimed, and the Hearing Clerk re-mailed it to the same address by regular mail that same day. [What Respondent Carter was served with, included a copy of the Complaint, a copy of the Hearing Clerk's notice letter, and a copy of the Rules of Practice. *See* 7 C.F.R. §1.130 *et seq*.

8. Respondent Carter is deemed to have been served with the Complaint on April 16, 2009 (in accordance with 7 C.F.R. § 1.147(c)(1)), and his answer to the Complaint was due to be filed by May 6, 2009, within 20 days after service, according to 7 C.F.R. § 1.136(a). Respondent Carter never did file an answer to the Complaint, and he is in default, pursuant to 7 C.F.R. § 1.136(c). The Hearing Clerk mailed him a "no answer"

letter on May 22, 2009.[2]

9. Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material facts alleged in the Complaint, which are admitted by the Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139. [*See also* 7 C.F.R. § 380.1 *et seq*.]

Findings of Fact and Conclusions

10. Respondent Charles A. Carter, doing business as C.C. Horses Transport, mailing address 22895 County Road 53, Kersey, Colorado 80644,[3] was at all times material herein an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1. Respondent Carter bought slaughter horses for Canadian horse dealers and, often hiring trucking companies, commercially transported the horses to slaughter.

11. The Secretary of Agriculture has jurisdiction over respondent Carter and the subject matter involved herein.

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[2]While AHT Astling was trying to contact Respondent Carter to obtain his current mailing address, APHIS Investigative and Enforcement Services also tried to find a more current address for him and came up with 4054 E. County Road 20 E, Loveland, Colorado 80537-8834. On March 12, 2009, the Hearing Clerk mailed the Complaint to this address in addition to Respondent Carter's address in Kersey, Colorado. The Complaint mailed to Respondent Carter's second address in Loveland, Colorado, was returned to the Hearing Clerk marked by the U.S. Postal Service as unclaimed on April 15, 2009, and the Hearing Clerk re-mailed the Complaint to this address by regular mail that same day. Respondent Carter did not file an answer to this mailing of the Complaint, and the Hearing Clerk mailed him a "no answer" letter at the second address in Loveland, Colorado, on May 22, 2009.

[3]On March 11, 2009, Respondent Carter told Animal Health Technician Joseph T. Astling, USDA APHIS Veterinary Services, that his mailing address is 22895 County Road 53, Kersey, Colorado 80644.

12. On or about September 30, 2004, respondent Carter shipped a load of 44 horses in commercial transportation for slaughter from Rushville, Nebraska, to Cavel International in Dekalb, Illinois (hereinafter, Cavel), and:

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

(b) Respondent Carter and/or his driver unloaded the horses at Robert Wetzel Livestock in Ashton, Illinois, on or about October 1, 2004, and reloaded them on or about October 4, 2004, for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing the date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(c) One of the horses in the shipment, a black gelding with a white star on its forehead and bearing USDA back tag # USAW 1211, died during said transportation before the shipment reached Omaha, Nebraska, but respondent Carter and/or his driver did not contact the nearest APHIS office as soon as possible and allow an APHIS veterinarian to examine the dead horse, in violation of 9 C.F.R. § 88.4(b)(2).

13. On or about December 9, 2004, respondent Carter shipped 45 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); and (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

14. On or about December 16, 2004, respondent Carter shipped 41

horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); and (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

15. On or about January 5, 2005, respondent Carter shipped 46 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (3) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (4) the prefix for each horse's USDA back tag number was not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (5) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

16. On or about January 9, 2005, respondent Carter shipped a load of 46 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (3) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (4) the time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

17. On or about January 9, 2005, respondent Carter shipped a second

load of 15 horses in commercial transportation for slaughter from an unknown location to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (3) all of the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (4) the date on which the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

18. On or about March 2, 2005, respondent Carter shipped a load of 45 horses in commercial transportation for slaughter from Mandan, North Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the date and time when the horses were loaded onto the conveyance were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

19. On or about March 3, 2005, respondent Carter shipped a load of 47 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); and (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

20. On or about March 12, 2005, respondent Carter shipped a load of 43 horses in commercial transportation for slaughter from St. Onge, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in

violation of 9 C.F.R. § 88.4(a)(3)(ii); and (2) the time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

21. On or about March 28, 2005, respondent Carter shipped a load of 45 horses in commercial transportation for slaughter from Billings, Montana, to Cavel, and:

(a) Respondent Carter and/or his driver unloaded the horses in Platte, South Dakota, at 2 a.m. on March 29, 2005, and reloaded them about 12 hours later for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(b) One of the horses in the shipment, bearing USDA back tag # USBZ 6891, went down about 300 miles outside of Platte, South Dakota, indicating that it was in obvious physical distress, yet respondent Carter and/or his driver did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

22. On or about March 30, 2005, respondent Carter shipped 33 horses in commercial transportation for slaughter from Minot, North Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: there was no signature on the statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

23. On or about March 30, 2005, respondent Carter shipped a second load of 52 horses in commercial transportation for slaughter from Billings, Montana, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) there was no description of the conveyance used to transport the horses and the license plate

number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the date and time when the horses were loaded onto the conveyance were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) Respondent Carter and/or his driver unloaded the horses in Harlan, Iowa, and reloaded them sometime later for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(c) Respondent Carter's driver stated that horses fought each other constantly during said transportation. Respondent Carter thus failed to completely segregate each aggressive horse on the conveyance so that no aggressive horse could come into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.3(a)(2).

(d) Respondent Carter's driver stated that horses fought each other constantly during said transportation. Respondent Carter thus failed to handle the horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

24. On or about April 1, 2005, respondent Carter shipped a load of 45 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) one horse in the shipment, bearing USDA back tag # USBZ 6873, was not listed on the form, in violation of 9 C.F.R. § 88.4(a)(3); (2) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); and (3) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

25. On or about April 4, 2005, respondent Carter shipped a load of 56 horses in commercial transportation for slaughter from Aberdeen, South Dakota, and Mobridge, South Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: there was no signature on the statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(b) One of the horses in the shipment, an old mare bearing USDA back tag # USAW 1282, went down at least three times during said transportation, indicating that it was in obvious physical distress, yet respondent Carter did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

26. On or about April 28, 2005, respondent Carter shipped a load of 49 horses in commercial transportation for slaughter from Billings, Montana, to Cavel, and:

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

(b) Respondent Carter and/or his driver unloaded the horses in Sioux Falls, South Dakota, and reloaded them about four hours later for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(c) shipped the horses in a conveyance that had inadequate headroom for the horses. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(d) At least five horses in the shipment suffered head and facial injuries during said transportation because the conveyance used for the transportation had inadequate headroom for the horses. Respondent Carter thus failed to handle these horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

27. On or about May 3, 2005, respondent Carter shipped a load of 53 horses in commercial transportation for slaughter from St. Onge, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the form did not indicate the color, breed/type, and sex of one of the horses in the shipment, USDA back tag # USBZ 6937, physical characteristics that could be used to identify that horse, in violation of 9 C.F.R. § 88.4(a)(3)(v).

28. On or about May 4, 2005, respondent Carter shipped a load of 32 horses in commercial transportation for slaughter from an unknown location to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (2) the form did not indicate the breed/type of seven horses in the shipment, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the place where the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

29. On or about May 10, 2005, respondent Carter shipped a load of 44 horses in commercial transportation for slaughter from St. Onge, South Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the receiver's phone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

(b) One of the horses in the shipment, a palomino mare bearing USDA back tag # USBJ 7961, went down right after loading and

several times during said transportation, indicating that it was in obvious physical distress, yet respondent Carter did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(c) One of the horses in the shipment, a palomino mare bearing USDA back tag # USBJ 7961, went down right after loading and several times during said transportation, and died while en route to the slaughter facility. Respondent Carter thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

30. On or about May 12, 2005, respondent Carter shipped a load of 53 horses in commercial transportation for slaughter from St. Onge, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3); (2) the owner/shipper's address and telephone number were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(i); and (3) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

31. On or about May 18, 2005, respondent Carter shipped a load of 47 horses in commercial transportation for slaughter from Glen Rock, Wyoming, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

32. On or about May 23, 2005, respondent Carter shipped a load of 48 horses in commercial transportation for slaughter from Minot, North Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following

deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); (2) the form did not indicate the breed/type of 31 horses in the shipment, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the date and time when the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

33. On or about May 24, 2005, respondent Carter shipped a load of 44 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

34. On or about June 2, 2005, respondent Carter shipped 49 horses in commercial transportation for slaughter from Billings, Montana, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper's phone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(i), and (2) the receiver's phone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

35. On or about June 2, 2005, respondent Carter shipped a second load of 52 horses in commercial transportation for slaughter from Billings, Montana, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper's phone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(i), and (2) the receiver's phone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

36. On or about June 5, 2005, respondent Carter shipped a load of 51 horses in commercial transportation for slaughter from Mobridge, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's telephone number was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (2) the form did not indicate the sex of one horse in the shipment, USDA back tag # USBS 5657, a

physical characteristic that could be used to identify that horse, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

37. On or about June 7, 2005, respondent Carter shipped 36 horses in commercial transportation for slaughter from Sisseton, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3); (2) the form did not indicate the sex of one horse in the shipment, a physical characteristic that could be used to identify that horse, in violation of 9 C.F.R. § 88.4(a)(3)(v); (3) the prefixes of the USDA back tag numbers for 25 horses in the shipment were not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (4) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

38. On or about June 7, 2005, respondent Carter shipped a second load of 59 horses in commercial transportation for slaughter from Sisseton, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

39. On or about June 9, 2005, respondent Carter shipped a load of 45 horses in commercial transportation for slaughter from Sisseton, South Dakota, to Cavel, and:

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

(b) Respondent Carter unloaded the horses in Manchester, Iowa,

and reloaded them about six hours later for commercial transportation to Cavel, but did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

40. On or about June 9, 2005, respondent Carter shipped a second load of 30 horses in commercial transportation for slaughter from Sisseton, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (2) the prefix of the horses' USDA back tags was not recorded properly for any of the horses in the shipment, in violation of 9 C.F.R. § 88.4(a)(3)(vi); and (3) the place where the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

41. On or about June 10, 2005, respondent Carter shipped a load of 48 horses in commercial transportation for slaughter from an unknown location to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (2) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (3) the date, time, and place that the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

42. On or about June 14, 2005, respondent Carter shipped a load of 49 horses in commercial transportation for slaughter from Yankton, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3); and (2) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

43. On or about June 21, 2005, respondent Carter shipped a load of 48 horses in commercial transportation for slaughter from Devil's Lake, North Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper did not sign the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3); and (2) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

44. On or about June 22, 2005, respondent Carter shipped a load of 57 horses in commercial transportation for slaughter from an unknown location to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii); (2) the place where the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix); and (3) there was no statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

45. On or about June 22, 2005, respondent Carter shipped a second load of 32 horses in commercial transportation for slaughter from Stroud, Oklahoma, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the receiver's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii), and (2) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

(b) Respondent Carter's driver stated that there were too many horses in the middle compartment of the conveyance and that three of these horses fought off and on during said transportation. Respondent Carter thus failed to completely segregate each aggressive horse on the conveyance so that no aggressive horse

could come into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.3(a)(2).

(c) Respondent Carter's driver stated that there were too many horses in the middle compartment of the conveyance and that three of these horses fought off and on during said transportation. Additionally, one of these three horses, a mare bearing USDA back tag # USBZ 7283, died during said transportation. Respondent Carter thus failed to handle these horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

46. On or about June 27, 2005, respondent Carter shipped two loads of horses, one containing 49 horses and the other containing 50 horses, in commercial transportation for slaughter from Piedmont, South Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificates,

VS Form 10-13. The forms had the following deficiencies: (1) respondent Carter's driver stated that he observed a cut on the cheek of a horse bearing USDA back tag # USBP 1621 before this horse was loaded onto the conveyance, but this pre-existing injury was not noted on the owner-shipper certificate, in violation of 9 C.F.R. § 88.4(a)(3)(viii); and (2) the place where the horses were loaded onto the conveyance was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) One of the trailers in which the horses were transported had nuts and bolts protruding from the ceiling, which likely caused the fresh head injury suffered by a horse bearing USDA back tag # USBP 1613 during commercial transportation to slaughter. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(c) During said transportation, a horse bearing USDA back tag #

USBP 1613 suffered a head injury, most likely by striking its head on nuts and bolts that protruded from the ceiling of the trailer. Respondent Carter thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

47. On or about June 28, 2005, respondent Carter shipped 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

(b) Four (4) of the horses were transported inside a removable/collapsible section of the conveyance, commonly known as the "dog house" or "jail box," that did not provide the horses with adequate headroom. Respondent Carter thus transported these four (4) horses to slaughter in a section of the conveyance that did not have sufficient interior height in its animal cargo space to allow each horse in that space to stand with its head extended to the fullest normal postural height, in violation of 9 C.F.R. § 88.3(a)(3).

(c) Four (4) of the horses were transported inside a removable/collapsible section of the conveyance, commonly known as the "dog house" or "jail box," that did not provide the horses with adequate headroom. One of these four (4) horses, bearing USDA back tag # USCI 2393, became stuck in the "dog house" or "jail box" during the commercial transportation to slaughter and suffered cuts, scrapes, and bruises along its back and around its left eye. Respondent Carter thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

48. On or about July 24, 2005, respondent Carter shipped a load of 45

horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and:

(a) the horses were shipped in a conveyance that had a couple of sharp-edged breaks in the trailer wall. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii), and (2) a gelding bearing USDA back tag # USCO 4063 was listed as a mare and two stallions bearing USDA backtag #s USCO 4051 and 4052 were listed as colts, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(c) The shipment contained two stallions bearing USDA back tag #s USCO 4051 and 4052, but respondent Carter and/or his driver did not load the two stallions on the conveyance so that each stallion was completely segregated from the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(d) One of the horses in the shipment, a gelding bearing USDA back tag # USCO 4063, went down several times and broke its right hind leg during said transportation. This horse thus was in obvious physical distress, yet respondent Carter and/or his driver did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(e) One of the horses in the shipment, a gelding bearing USDA back tag # USCO 4063, went down several times and broke its right hind leg during said transportation. Respondent Carter and/or his driver thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in

violation of 9 C.F.R. § 88.4(c).

49. On or about July 25, 2005, respondent Carter shipped a load of 50 horses in commercial transportation for slaughter from Billings, Montana, to Cavel, and:

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

(b) Respondent Carter and/or his driver unloaded the horses in Dickinson, North Dakota that same day and reloaded them the next morning for commercial transportation to Cavel, but they did not prepare a second owner-shipper certificate, VS Form 10-13, showing that date, time, and location that the horses initially were offloaded, in violation of 9 C.F.R. § 88.4(b)(4).

(c) Respondent Carter's driver noticed that one of the horses in the shipment, bearing USDA back tag # USCI 2227, had a leg injury prior to being reloaded onto the conveyance in Dickinson, North Dakota. This horse was in obvious physical distress, yet respondent Carter did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(d) Respondent Carter's driver noticed that one of the horses in the shipment, bearing USDA back tag # USCI 2227, had a leg injury prior to being reloaded onto the conveyance in Dickinson, North Dakota, but he loaded it onto the conveyance with the other horses anyway. Respondent Carter thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

50. On or about July 27, 2005, respondent Carter shipped a load of 27 horses in commercial transportation for slaughter from Bristow, Oklahoma, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the receiver's address was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ii).

51. On or about July 31, 2005, respondent Carter shipped 31 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii).

52. On or about August 18, 2005, respondent Carter shipped a load of 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and:

(a) The conveyance had an elliptical air hole/vent opening with sharp edges that was located about two feet above the top deck floor. During said transportation, one of the horses in the shipment, a gray gelding with USDA back tag # USCO 3467, caught its foot in this hole, fell down, and was trampled to death by the other horses. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) The conveyance had an elliptical air hole/vent opening with sharp edges that was located about two feet above the top deck floor. During said transportation, one of the horses in the shipment, a gray gelding with USDA back tag # USCO 3467, caught its foot in this hole, fell down, and was trampled to death by the other horses. Respondent Carter thus failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

53. On or about September 8, 2005, respondent Carter shipped a load of

40 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (2) the form did not indicate the breed/type of four horses, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

54. On or about September 11, 2005, respondent Carter shipped 46 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii), and (2) the date on which the horses were loaded onto the conveyance were not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) The horses were shipped in a conveyance that had large holes with sharp edges in its sides. Respondent Carter and/or his driver thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(c) Two horses in the shipment, bearing USDA back tag #s USCI 2405 and USCI 5893, suffered severe facial and eye injuries during said transportation due to the physical condition of the conveyance. Respondent Carter and/or his driver thus failed to handle these horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

55. On or about September 15, 2005, respondent Carter shipped 42 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-

shipper certificate, VS Form 10-13. The form had the following deficiencies: there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv).

56.On or about September 18, 2005, respondent Carter shipped 52 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the name of the auction/market where the horses were sold was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iii), and (2) the place when the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

57.On or about September 20, 2005, respondent Carter shipped 35 horses in commercial transportation for slaughter from somewhere in Oklahoma to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper's address was not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(i); (2) the form did not indicate the breed/type of six horses, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the place where the horses were loaded onto the conveyance was not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

58.On or about September 21, 2005, respondent Carter shipped 44 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and:

(a) One of the horses in the shipment, bearing USDA back tag # USBP 1971, had a severe pre-existing head injury at the time that it was loaded onto the conveyance, yet respondent Carter failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(b) One of the horses in the shipment, bearing USDA back tag # USBP 1971, had a severe pre-existing head injury at the time that it was loaded onto the conveyance, yet respondent Carter shipped it with the other horses. Respondent Carter thus failed to handle the injured horse as expeditiously and carefully as possible in a

manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

59. On or about September 23, 2005, respondent Carter shipped 29 horses in commercial transportation for slaughter from somewhere in Oklahoma to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) there was no description of the conveyance used to transport the horses and the license plate number of the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(iv); and (2) the time and place the horses were loaded onto the conveyance were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

60. On or about September 26, 2005, respondent Carter shipped 49 horses in commercial transportation for slaughter from Mandan, North Dakota, to Cavel, and:

(a) One of the horses in the shipment, bearing USDA back tag # USBP 1404, had a broken right hind leg and a severe injury to its right front leg upon arrival. The owner-shipper certificate, VS Form 10-13, for this shipment indicated that this horse had at least one of these injuries at the time that it was loaded onto the conveyance for commercial transportation to slaughter. Therefore, this horse was in obvious physical distress, yet respondent Carter did not obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(b) One of the horses in the shipment, bearing USDA back tag # USBP 1404, had a broken right hind leg and a severe injury to its right front leg upon arrival. The owner-shipper certificate, VS Form 10-13, for this shipment indicated that this horse had at least one of these injuries at the time that it was loaded onto the conveyance for commercial transportation to slaughter, yet respondent Carter shipped it with the other horses. Respondent Carter thus failed to handle the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9

C.F.R. § 88.4(c).

61. On or about October 2, 2005, respondent Carter shipped 39 horses in commercial transportation for slaughter from Gordon, Nebraska, to Cavel, and:

(a) The horses were shipped in a conveyance that had a loose chain hanging from the roof of the conveyance. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) The horses were shipped in a conveyance that had a loose chain hanging from the roof of the conveyance. One of the horses in the shipment, bearing USDA back tag # USBP 1763, suffered a head injury consistent with being struck on the head by the chain during commercial transportation to slaughter. Respondent Carter thus failed to handle the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

62. On or about October 6, 2005, respondent Carter shipped 31 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the numbers of the horses' USDA back tags did not match the back tag numbers listed on the VS 10-13, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

63. On or about October 9, 2005, respondent Carter shipped 33 horses in commercial transportation for slaughter from Loveland, Colorado, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

64. On or about November 8, 2005, respondent Carter shipped 39 horses

in commercial transportation for slaughter from Sisseton, South Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the form was not completed for each equine being shipped because 16 horses in the shipment were not listed on the form, in violation of 9 C.F.R. § 88.4(a)(3); (2) a stallion bearing USDA back tag # USBS 7958 was incorrectly listed as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (3) the prefixes for each horse's USDA back tag number were not recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(b) The shipment included at least one (1) stallion bearing USDA back tag # USBS 7958, but respondent Carter did not load the horses on the conveyance so that the stallion was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

65. On or about November 16, 2005, respondent Carter shipped 45 horses in commercial transportation for slaughter from Piedmont, South Dakota, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the prefix and tag number of the horses' USDA back tags were not recorded properly for any of the horses in the shipment, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

66. On or about December 12, 2005, respondent Carter shipped 41 horses in commercial transportation for slaughter from Mandan, North Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the owner/shipper's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(i); (2) the receiver's address and telephone number were not properly completed, in violation of 9 C.F.R. § 88.4(a)(3)(ii); (3) all of the boxes indicating the fitness of the horses to travel at the time of

loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii); and (4) there was no signature on the statement that the horses had been rested, watered, and fed for at least six consecutive hours prior being loaded for the commercial transportation, in violation of 9 C.F.R. § 88.4(a)(3)(x).

(b) Respondent Carter delivered the horses outside of Cavel's normal business hours and left the slaughter facility, and did not return to Cavel to meet the USDA representative upon his arrival, in violation of 9 C.F.R. § 88.5(b).

67. On or about December 13, 2005, respondent Carter shipped 42 horses in commercial transportation for slaughter from Presko, South Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the prefix of the horses' USDA back tags was not recorded properly for any of the horses in the shipment, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

(b) The owner-shipper certificate, VS Form 10-13, for this shipment indicated that the horses had been loaded on the conveyance at 5 p.m. on December 13, but they were not unloaded from the conveyance until 5 a.m. on December 15, indicating that they were on the trailer for 36 consecutive hours. Respondent Carter thus allowed the horses to be on the conveyance more than 28 consecutive hours without being offloaded and provided with food, water, and the opportunity to rest for at least six (6) consecutive hours, in violation of 9 C.F.R. § 88.4(b)(3).

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

68. On or about May 9, 2006, respondent Carter shipped 45 horses in commercial transportation for slaughter from Stroud, Oklahoma, to Cavel, and:

(a) The floor of the conveyance used to transport the horses was

completely covered in thick manure such that it created a slick surface for the horses to stand on. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) One of the horses in the shipment, USDA back tag # 6157, had a severe cut above its left eye where it struck its head on a metal brace in the roof of the conveyance, probably while slipping in the manure covering the floor of the conveyance. Respondent Carter thus failed to transport the injured horse and the other horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

69. On or about June 12, 2006, respondent Carter shipped 45 horses in commercial transportation for slaughter from Stroud, Oklahoma, to Cavel, and:

(a) While the horses were being unloaded at Cavel, a palomino mare bearing USDA back tag # USBG 4886 got its right front foot stuck in the gap between the gate and the floor of the conveyance. Respondent Carter's driver used an electric prod on the horse in an effort to make it get up, causing the horse to injure itself as it tried to pull itself free. Respondent Carter thus failed to transport the injured horse as expeditiously and carefully as possible in a manner that did not cause it unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

(b) While the horses were being unloaded at Cavel, a palomino mare bearing USDA back tag # USBG 4886 got its right front foot stuck in the gap between the gate and the floor of the conveyance. Respondent Carter's driver, Troy Ressler, used an electric prod on the horse in an effort to make it get up. The use of electric prods during the loading and off-loading of horses onto

a conveyance is a violation of 9 C.F.R. § 88.4(c).

70. On or about June 13, 2006, respondent Carter shipped 46 horses in commercial transportation for slaughter from St. Onge, South Dakota, to Cavel. The top rear deck of the conveyance used to transport the horses was so overcrowded with horses that they did not have enough room to turn around and come off the conveyance at the slaughter plant. Respondent Carter's driver started poking the horses with a sorting stick in an effort to make them off-load, which caused a horse bearing USDA back tag # USCS 4974 to start kicking and injure its right hind leg. Respondent Carter thus failed to transport the injured horse and the other horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

71. On or about June 16, 2006, respondent Carter shipped 42 horses in commercial transportation for slaughter from Bristow, Oklahoma, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) the shipment contained a stallion, USDA back tag # USCG 5059, that was incorrectly identified as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v); and (2) the date and time when the horses were loaded onto the conveyance were not properly listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(b) The shipment contained one (1) stallion, USDA back tag # USCG 5059, but respondent Carter did not load the stallion on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

72. On or about June 29, 2006, respondent Carter shipped 45 horses in commercial transportation for slaughter from Bristow, Oklahoma, to Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: only five (5) of the 45 horses in this shipment were listed on the form, in violation of 9 C.F.R. § 88.4(a)(3).

73. On or about July 18, 2006, respondent Carter shipped 42 horses in commercial transportation for slaughter from Oklahoma to Cavel, and:

(a) The horses were shipped in a conveyance that had a metal brace with sharp edges in the roof of the conveyance. Respondent Carter thus failed to transport the horses to slaughter in a conveyance the animal cargo space of which was designed, constructed, and maintained in a manner that at all times protected the health and well-being of the horses being transported, in violation of 9 C.F.R. § 88.3(a)(1).

(b) One of the horses in the shipment, USDA back tag # USCV 1666, had a fresh cut on its head where it struck its head on a metal brace in the roof of the conveyance. Respondent Carter thus failed to transport the injured horse and the other horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

74. On or about September 27, 2006, respondent Carter shipped approximately 42 horses in commercial transportation for slaughter from Stroud, Oklahoma, to Cavel. During said transportation the conveyance overturned in the highway median, resulting in the deaths of 16 horses. Respondent Carter thus failed to transport the horses as expeditiously and carefully as possible in a manner that did not cause them unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

75. On or about December 22, 2005, respondent Carter shipped 44 horses in commercial transportation for slaughter from Stroud, Oklahoma, to Cavel. The shipment contained one (1) stallion, USDA back tag # USCP 5123, but respondent Carter did not load the stallion on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

76. On or about January 4, 2006, respondent Carter shipped 31 horses in commercial transportation for slaughter from Loveland, Colorado, to

Cavel, and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the numbers of eight horses' USDA back tags were not recorded properly, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

77. On or about January 25, 2006, respondent Carter shipped 37 horses in commercial transportation for slaughter from Mitchell, South Dakota, to Cavel, and:

(a) did not apply USDA back tags to 28 of the horses, in violation of 9 C.F.R. § 88.4(a)(2).

(b) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: (1) only nine (9) of the 37 horses in this shipment were listed on the form, in violation of 9 C.F.R. § 88.4(a)(3); and (2) the date on which the horses were loaded onto the conveyance was not listed, in violation of 9 C.F.R. § 88.4(a)(3)(ix).

(c) The shipment contained one (1) stallion, USDA back tag # USBS 9051, but respondent Carter did not load the stallion on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

78. On or about January 29, 2006, respondent Carter shipped 46 horses in commercial transportation for slaughter from Mitchell, South Dakota, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the shipment contained a stallion, USDA back tag # USCU 3646, that was incorrectly identified as a gelding, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained one (1) stallion, USDA back tag # USCU 3646, but respondent Carter did not load the stallion on the conveyance so that it was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

79. On or about February 20, 2006, respondent Carter shipped 44 horses

in commercial transportation for slaughter from Hall, Montana, to Cavel, and:

(a) did not apply USDA back tags to any of the horses, in violation of 9 C.F.R. § 88.4(a)(2).

(b) did not prepare the required owner-shipper certificate, VS Form 10-13, in violation of 9 C.F.R. § 88.4(a)(3).

(c) Respondent Carter kept the horses on the conveyance for approximately 44 consecutive hours before offloading them. Respondent Carter thus failed to offload from the conveyance any horses that had been on the conveyance for 28 consecutive hours and to provide said horses with food, potable water, and the opportunity to rest for at least six (6) consecutive hours, in violation of 9 C.F.R. § 88.4(b)(3).

80. On or about March 9, 2006, respondent Carter shipped 49 horses in commercial transportation for slaughter from Mitchell, South Dakota, to Cavel and did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: the form did not provide information about the color, breed/type, and/or sex of six horses, physical characteristics that could be used to identify those horses, in violation of 9 C.F.R. § 88.4(a)(3)(v).

81. On or about March 22, 2006, respondent Carter shipped 42 horses in commercial transportation for slaughter from an unknown location to Cavel. The shipment contained two (2) stallions, one bearing USDA back tag #s USCS 5089 and the other having no USDA backtag but bearing Cavel tag # 2535, but respondent Carter did not load the two stallions on the conveyance so that they were completely segregated from each other and the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

82. On or about April 9, 2006, respondent Carter shipped 47 horses in commercial transportation for slaughter from Mt. View, Oklahoma, to Cavel. The shipment contained four (4) stallions, USDA back tag #s USCV 1853, USCV 1861, USCV 1892, and USCV 1893, but respondent Carter did not load the four stallions on the conveyance so

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

83. On or about April 27, 2006, respondent Carter shipped 35 horses in commercial transportation for slaughter from Stroud, Oklahoma, to Cavel, and:

(a) did not properly fill out the required owner-shipper certificate, VS Form 10-13. The form had the following deficiencies: two stallions bearing USDA backtag #s USCG 6378 and USCG 6369 were listed as geldings, in violation of 9 C.F.R. § 88.4(a)(3)(v).

(b) The shipment contained three (3) stallions, two bearing USDA back tag #s USCG 6378 and USCG 6369 and the third bearing no back tag, but respondent Carter did not load the three stallions on the conveyance so that they were completely segregated from each other and the other horses to prevent them from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

84. During the commercial shipments of horses for slaughter detailed in paragraphs 12 through 83, Respondent Charles A. Carter d/b/a C.C. Horses Transport violated the Commercial Transportation of Equine for Slaughter Act (7 U.S.C. § 1901 note) and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq*.). Respondent Charles A. Carter is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers and trucking companies. The maximum civil penalty per violation is $5,000.00, and each equine transported in violation of the regulations will be considered a separate violation. Civil penalties totaling $230,000.00 are warranted and appropriate, reasonable, justified, necessary, proportionate, and not excessive, for remedial purposes, for Respondent Charles A. Carter's violations, in accordance with 9 C.F.R. § 88.6 and based on APHIS's unopposed Motion filed July 22, 2009.

Order

85. Respondent Charles A. Carter d/b/a C.C. Horses Transport, an

owner/shipper, is assessed civil penalties totaling **$230,000.00** (two hundred thirty thousand dollars), which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States**."

86. Respondent Carter shall reference **AQ 09-0024** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

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

within sixty (60) days from the effective date of this Order. The provisions of this Order shall be effective on the tenth day after this Decision and Order becomes final. *See* paragraph 87 to determine when this Decision and Order becomes final. Respondent Carter shall include with his payments any change in mailing address or other contact information.

Finality

87. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

APPENDIX

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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ANIMAL WELFARE ACT

DEFAULT DECISION

In re: BEVERLY HOWSER, JONATHAN HOWSER, AND HEATHER MONTAVY.
AWA Docket No. 08-0169.
Default Decision as to Heather Montavy.
Filed October 15, 2009.

AWA – Default.

Babak A. Rastgoufard, for Complainant
Respondent Montavy, Pro se.
Decision and Order issued by Peter M. Davenport, 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 of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations and standards (9 C.F.R. § 1.1 et seq.) (the "Regulations") issued thereunder.

On September 16, 2008, the hearing clerk sent to respondent Heather Montavy, by certified mail, return receipt requested, a copy of the complaint. Respondent Heather Montavy was informed in the accompanying letter of service that an answer to the complaint should be filed pursuant to the Rules of Practice and that a failure to answer any allegation in the complaint would constitute an admission of that allegation. The complaint was received on September 20, 2008.[1] Respondent Heather Montavy failed to file an answer within the time prescribed in the Rules of Practice; thus the material facts alleged in the complaint, which are admitted by respondent Heather Montavy's default, are adopted and set forth herein as Findings of Fact.

[1] *See* Domestic Return Receipt for Article Number 7007 0710 0001 3860 2079.

This Default Decision and Order is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

FINDINGS OF FACT

1. Respondent Heather Montavy (hereinafter "Respondent Montavy"), is an individual residing in Bates City, Missouri 64011.[2]

2. Respondent Montavy, at all material times mentioned herein, was operating as a dealer as defined in the Act and the Regulations.

3. Respondent Montavy has a small-sized business. During the 15-month period described herein (May 2005 through August 2006), respondent Montavy sold no fewer than 25 dogs of various different breeds, including a sale to at least one licensed dealer.

4. Despite having made aware of the licensing requirements under the Act and Regulations, respondent Montavy continued to engage in regulated activity without a license and sold numerous dogs, including a sale to at least one licensed dealer.

5. Between on or about May 2005 and on or about August 2006, respondent Montavy, without being licensed, sold, in commerce no fewer than twenty-five dogs to Conrad's Cuddly Canines, a licensed dealer (Animal Welfare Act license number 43-B-0227), for resale use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b).

6. The violations described in the paragraph above (¶ 5) took place on or about at least the following dates: May 10, 2005; August 17, 2005; January 11, 2006; March 8, 2006; April 5, 2006; June 14, 2006; July 26, 2006 and August 9, 2006.

CONCLUSIONS OF LAW

[2]An updated address for respondent Montavy was provided to the hearing clerk in a letter from counsel for complainant, dated September 15, 2008.

1. The Secretary has jurisdiction in this matter.

2. Respondent Montavy, at all material times mentioned herein, was operating as a dealer as defined in the Act and the Regulations.

3. Respondent Montavy has a small-sized business, selling no fewer than 25 dogs of various different breeds, including sales to at least one licensed dealer.

4. The violations are serious and include repeated instances in which Respondent Montavy, without being licensed, operated as a dealer. Enforcement of the Act and Regulations depends upon the identification of persons operating as dealers.

5. Respondent Heather Montavy does not have a previous history of violations; however, Respondent Heather Montavy's conduct over the period described herein reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Act and the Regulations. Despite being made aware of the licensing requirements under the Act and Regulations, Respondent Heather Montavy continued to engage in regulated activity without a license and sold numerous dogs, including to at least one sale to a licensed dealer. Such an ongoing pattern of violations establishes a "history of previous violations" for the purposes of section 2149(b) of the Act (7 U.S.C. § 2149(b)) and lack of good faith. *See In re William Richardson*, 66 Agric. Dec. 69, 88-89, 2007 WL 1723728, at *13 (U.S.D.A. June 13, 2007) (opinion of Judicial Officer)

6. Between on or about May 2005 and on or about August 2006, Respondent Heather Montavy, without being licensed, sold, in commerce no fewer than twenty-five dogs to Conrad's Cuddly Canines, a licensed dealer (Animal Welfare Act license number 43-B-0227), for resale use as pets or breeding purposes, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations. 7 U.S.C. § 2134, 9 C.F.R. § 2.1(a)(1). The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149(b). These violations took place on or about at least the following dates: May 10, 2005; August 17, 2005; January 11, 2006; March 8, 2006; April 5, 2006; June 14, 2006; July 26, 2006 and August 9, 2006.

ORDER

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

2. Respondent Heather Montavy is assessed a civil penalty of $1,000. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
Office of the General Counsel
Marketing Division – Room 2343-South
1400 Independence Avenue, SW.
Washington, DC 20250-1417

Respondent Heather Montavy shall state on the certified check or money order that the payment is in reference to AWA Docket No. 08-0169.

3. Respondent Heather Montavy is disqualified for five (5) years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly, or through any corporate or other device or person.

4. During this period of disqualification, Respondent Heather Montavy, either directly or indirectly, or through any corporate or other device or person, shall not engage in any activity for which a license under the Animal Welfare Act is required.

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

Copies of this Default Decision and Order shall be served on the parties.

Done at Washington, D.C.

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FEDERAL CROP INSURANCE ACT

DEFAULT DECISIONS

In re: RATTRAY CUSTOM FARMING, LLC.
FCIA Docket No. 08-0179.
Default Decision.
Filed July 7, 2009.

FCIA – Default.

Kimberly E. Arrigo, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This proceeding was instituted under the Federal Crop Insurance Act (7 U.S.C. §§ 1515(h)(Act), by a complaint filed by the Manager of the Federal Crop Insurance Corporation (FCIC) on September 4, 2008 seeking the disqualification of the Respondent from receiving any benefit under the statutes specified in section 515(h)(3)(B) of the Act.

The complaint alleged that the Respondent willfully and intentionally provided false or inaccurate information to an approved insurance provider and FCIC concerning the planting date of his 2005 potato crop and that the Respondent knew or should have known that the information he provided was false.

On September 5, 2008, the Hearing Clerk's Office mailed a copy of the complaint to respondent by certified mail. Attempts by the Hearing Clerk's Office to serve Rattray Custom Farming, LLC were unsuccessful as the certified mail was returned for reasons other than "unclaimed" or "refused" and a Notice of Unsuccessful Service was filed on September 15, 2008; however, the copy mailed to Brandon Rattray was returned as "unclaimed" and on October 2, 2008, a copy of the Hearing Clerk's letter and complaint were resent by regular mail pursuant to section 1.147(c)(1) of the Rules of Practice applicable to this proceeding, and was thereby deemed to have been received by the

Respondent on October 2, 2008.[1]

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of the complaint (7 C.F.R. § 1.136(a)). The Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Rattray Custom Farming, LLC is a Washington state corporation, owned and operated by Brandon Rattray.

2. The Respondent was a participant in the Federal Crop Insurance program under the Act and the regulations for the 2005 crop year.

3. On June 29, 2005, Brandon Rattray signed a Multiple Peril Crop Insurance Application and Reporting Form on behalf of the Respondent, certifying that the Respondent had planted 62 acres of potatoes on May

[1]Brandon Rattray is listed as a "Governing Person" of Rattray Custom Farming, LLC according to information obtained from the Washington Secretary of State's webpage.

28, 2005 on land description 26 2S-39E and further certified that the information and answers on the application were true and correct, that none of the reasons for rejection were applicable. He also reported that Blueridge Farms had a 50% interest in the crop.

4. The final date for planting potatoes in Union County, Oregon where the crop was located was May 31, 2005.

5. Based upon the information contained on the application and reporting form, Rain and Hail, LLC, the managing general agent for Ace Property and Casualty Company, an approved insurance provider described in sections 515(h) and 502(b)(2) of the Act provided crop insurance coverage for the Respondent's potato crop under policy number 615021 which was reinsured by FCIC in accordance with the Act.

6. The Respondent submitted a potato loss claim which was denied and the policy voided for misrepresentation or fraud by the approved insurance provider because evidence from multiple sources indicated that the planting had occurred at a much later date than reported and it appeared that the planting date was intentionally misreported.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Respondent willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

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), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(1) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-

1524);

(2) The Agricultural Market Transition Act (7 U.S.C. §§ 7201 *et seq*.), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);
(3) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq*.);
(4) The Commodity Credit Corporation Charter Act (15 U.S.C. §§714 *et seq*.);
(5) The Agricultural Adjustment Act of 1938 (7 U.S.C §§ 1281 *et seq*.);
(6) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq*.);
(7) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq*.); and
(8) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2. Unless this decision is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified entity, 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 and entities who are determined ineligible in its Excluded Parties List System (EPLS).

3. A civil fine of $1,000 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
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road, Room 271

Kansas City, Missouri 64133

This order shall be effective 35 days after this decision is served upon the Respondent unless appealed to the Judicial Officer pursuant to 7 C.F.R. §1.145.

Done at Washington, D.C.

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In re: BLUE RIDGE SEED, LLC.
FCIA Docket No. 08-0181.
Default Decision.
Filed July 17, 2009.

FCIA – Default.

Kimberly E. Arrigo, for Complinant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This proceeding was instituted under the Federal Crop Insurance Act (7 U.S.C. §§ 1515(h)(Act), by a complaint filed by the Manager of the Federal Crop Insurance Corporation (FCIC) on September 4, 2008 seeking the disqualification of the Respondent from receiving any benefit under the statutes specified in 7 U.S.C. § 1515(h)(3)(B) of the Act.

The complaint alleged that the Respondent willfully and intentionally provided false or inaccurate information to an approved insurance provider and FCIC concerning the planting date of its 2005 potato crop and that the Respondent knew or should have known that the information he provided was false.

On September 5, 2008, the Hearing Clerk's Office mailed a copy of the complaint to respondent by certified mail. Attempts by the Hearing Clerk's Office to serve Respondent were unsuccessful as the certified mail was returned for reasons other than "unclaimed" or "refused." Notwithstanding the failure to effect proper service of the Complaint, on

November 12, 2008, the Complainant filed a Motion to Enter a Default Decision. On September 15, 2008, the Hearing Clerk's Office entered a Notice that efforts to serve the Complaint and Hearing Clerk's letter had been unsuccessful.

On January 15, 2009, Complainant filed the Declaration of Norma Ferguson, a Paralegal Specialist employed by the Appeals and Legal Liaison Staff of the Federal Crop Insurance Corporation/Risk Management Agency which was accompanied by a number of enclosures. Her Declaration indicated that Daniel Smith was the owner and operator of the Respondent corporation and noted that he had been served in another action pending before the Secretary. (*In re: Daniel Smith, d/b/a Blue Ridge Farms*).

On January 22, 2009, the Administrative Law Judge entered an Order finding that service of a Complaint in an action other than the one at issue was insufficient and directed that the Complainant personally serve the Respondent. On March 21, 2009 at 6:38 PM, a copy of the Complaint was served upon Daniel Smith at his residence in Burbank, Washington by Dave Paul, USDA/Risk Management Office, Spokane Valley, Washington.

The Complainant renewed its Motion to Enter a Default Decision on May 18, 2009. After unsuccessful attempts at service of the Motion by mail, the Respondent was personally served with a copy of the Motion and the Proposed Decision by Dave Paul on June 19, 2009 at 7:07AM.

The Respondent had been informed in the Complaint that an Answer should be filed with the Hearing Clerk's Office within twenty (20) days after service of the complaint. As the Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a), Section 1.136(c) of the Rules of Practice provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this

proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Blue Ridge Seed, LLC is a Washington state corporation, owned and operated by Daniel Smith.

2. The Respondent was a participant in the Federal Crop Insurance program under the Act and the regulations for the 2005 crop year.

3. On June 29, 2005, Daniel Smith signed a Multiple Peril Crop Insurance Application and Reporting Form on behalf of the Respondent, certifying that the Respondent had planted a total of approximately 169.2 acres of potatoes on dates between May 31, 2005 and June 1, 2005 on land described in the application and further certified that the information and answers on the application were true and correct, that none of the reasons for rejection were applicable. He also reported that Brandon Rattray had a 50% interest in the crop.

4. The final date for planting potatoes in Union County, Oregon where the crop was located was May 31, 2005.

5. Based upon the information contained on the application and reporting form, Rain and Hail, LLC, the managing general agent for Ace Property and Casualty Company, an approved insurance provider described in 7 U.S.C. § 1515(h) and 1502(b)(2) of the Act provided crop insurance coverage for the Respondent's potato crop under policy number 615021 which was reinsured by FCIC in accordance with the Act.

6. The Respondent's policy was subsequently voided for misrepresentation or fraud by the approved insurance provider because evidence from reliable sources indicated that the planting had occurred at a much later date than reported and it appeared that the planting date had been intentionally misreported.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Respondent willfully and intentionally provided false or

inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

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), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(1) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);
(2) The Agricultural Market Transition Act (7 U.S.C. §§ 7201 *et seq*.), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);
(3) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq*.);
(4) The Commodity Credit Corporation Charter Act (15 U.S.C. §§714 *et seq*.);
(5) The Agricultural Adjustment Act of 1938 (7 U.S.C §§ 1281 *et seq*.);
(6) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq*.);
(7) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq*.); and
(8) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2. Unless this decision is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified entity, 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 and entities who are determined ineligible in its Excluded Parties List System (EPLS).

3. A civil fine of $1,000 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
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road, Room 271
Kansas City, Missouri 64133

This order shall be effective 35 days after this decision is served upon the Respondent unless appealed to the Judicial Officer pursuant to 7 C.F.R. §1.145.

Done at Washington, D.C.

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In re: DANIEL SMITH, d/b/a BLUE RIDGE FARMS.
FCIA Docket No. 08-0180.
Default Decision.
Filed August 4, 2009.

FCIA – Default.

Kimberly E. Arrigo, for Complainant.
Respondent, Pro se.
Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

This proceeding was instituted under the Federal Crop Insurance Act (7 U.S.C. §§ 1515(h)(Act), by a complaint filed by the Manager of the Federal Crop Insurance Corporation (FCIC) on September 4, 2008 seeking the disqualification of the Respondent from receiving any

benefit under the statutes specified in section 515(h)(3)(B) of the Act.

The complaint alleged that the Respondent willfully and intentionally provided false or inaccurate information to an approved insurance provider and FCIC concerning the planting date of his 2005 potato crop and that the Respondent knew or should have known that the information he provided was false.

On September 5, 2008, the Hearing Clerk's Office mailed a copy of the complaint to respondent by certified mail and the same was received by the Respondent on September 8, 2008. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), Respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of the complaint (7 C.F.R. § 1.136(a)). The Respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1. Daniel Smith is an individual who resides in Burbank, Washington and does business as Blue Ridge Farms.

2. The Respondent was a participant in the Federal Crop Insurance

program under the Act and the regulations for the 2005 crop year.

3. On June 29, 2005, Respondent signed a Multiple Peril Crop Insurance Application and

Reporting Form, certifying that the Respondent had planted 62 acres of potatoes on May 28, 2005 on land description 26 2S-39E and further certified that the information and answers on the application were true and correct, that none of the reasons for rejection were applicable. He also reported that Rattray Custom Farming had a 50% interest in the crop.

4. On June 29, 2005, Respondent signed a second Multiple Peril Crop Insurance Application and Reporting Form, certifying that he had planted additional acres of potatoes on tracts more specifically described on the Reporting Form on various dates between May 30, 2005 and June 2, 2005 and again certified that the information and answers on the application were true and correct and that none of the reasons for rejection were applicable. He also reported that Rattray Custom Farming had a 50% interest in the crop.

5. The final date for planting potatoes in Union County, Oregon where the crop was located was May 31, 2005.

6. Based upon the information contained on the application and reporting form, Rain and Hail, LLC, the managing general agent for Ace Property and Casualty Company, an approved insurance provider described in sections 515(h) and 502(b)(2) of the Act provided crop insurance coverage for the Respondent's potato crop under policy number 615066 which was reinsured by FCIC in accordance with the Act.

7. The Respondent submitted a potato loss claim which was denied and the policy voided for misrepresentation or fraud by the approved insurance provider because evidence from multiple sources indicated that the planting had occurred at a much later date than reported and it appeared that the planting date was intentionally misreported.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. The Respondent willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. § 1515(h)).

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), Respondent is disqualified from receiving any monetary or nonmonetary benefit provided under each of the following for a period of two years:

(1) Subtitle A of the Federal Crop Insurance Act (7 U.S.C. §§ 1501-1524);
(2) The Agricultural Market Transition Act (7 U.S.C. §§ 7201 *et seq*.), including the non-insured crop disaster assistance program under section 196 of the Act (7 U.S.C. § 7333);
(3) The Agricultural Act of 1949 (7 U.S.C. §§ 1421 *et seq*.);
(4) The Commodity Credit Corporation Charter Act (15 U.S.C. §§714 *et seq*.);
(5) The Agricultural Adjustment Act of 1938 (7 U.S.C §§ 1281 *et seq*.);
(6) Title XII of the Food Security Act of 1985 (16 U.S.C. §§ 3801 *et seq*.);
(7) The Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921 *et seq*.); and
(8) Any law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

2. Unless this decision is appealed as set out below, the period of ineligibility for all programs offered under the above listed Acts shall commence 35 days after this decision is served. As a disqualified entity, 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 and entities who are determined ineligible in its Excluded Parties List System (EPLS).

3. A civil fine of $1,000 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
Attn: Kathy Santora, Collection Examiner
Fiscal Operations Branch
6501 Beacon Road, Room 271
Kansas City, Missouri 64133

This order shall be effective 35 days after this decision is served upon the Respondent unless appealed to the Judicial Officer pursuant to 7 C.F.R. §1.145.

Done at Washington, D.C.

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Consent Decisions

Date Format [YY/MM/DD]

GENERAL

ANIMAL QUARANTINE ACT

Ryon James Simon, AQ-09-0129, 09/07/10.
Mary Leavey, d/b/a Silver Diamond Pot Belly Pigs, d/b/a Silver Diamond Miniature Pot Belly Pigs, d/b/a Silver Diamond Piggies, AQ-09-0056, 09/08/05.
Randy G. Smith and Jeff Smith d/b/a Smith Horse Company, AQ-08-0146, 09/08/14.
Scott Kurtenbach d/b/a Kurtenbach Trucking, Kurtenback Horse Company, and Kurtenback Livestock, LLC, AQ-09-0193, 09/09/23.
Immune Disease Institute, AQ-09-0199, 09/10/14.

ANIMAL WELFARE ACT

Terri Wilson d/b/a Whistlin W. Kennel, AWA-08-0177, 09/07/16.
Patricia Dawdy, AWA-09-0014, 09/07/17.
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AGRICULTURE DECISIONS

Volume 69

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UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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

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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.

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PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISIONS

MISCELLANEOUS ORDERS

DEFAULT ORDERS

PACKERS AND STOCKYARDS ACT

DEPARTMENTAL DECISION

In re: JOE U. AMBROSE, JR.
P & S Docket No. D-10-0047.
Decision and Order.
Filed November 30, 2010.

P&S.

Leah C. Battagioli, for the Deputy Administrator, GIPSA.
Respondent, Pro se.
Decision issued by Peter M. Davenport, Chief Administrative Law Judge.

This is a disciplinary proceeding brought 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"). Complainant, the Deputy Administrator, Grain Inspection, Packers and Stockyards Program, initiated this proceeding against Respondent Joe U. Ambrose, Jr. (hereinafter "Respondent") by filing a disciplinary complaint on December 1, 2009.

Copies of the Complaint and the Rules of Practices were served upon Respondent by certified mail. The Complaint alleged that Respondent failed to pay the full amount of the purchase price for livestock within the time period required by the Act, with the total amount remaining unpaid of $352,811.43 as of November 2, 2009, in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). (Compl. ¶¶ II-III.)

Respondent filed a timely Answer to Complaint on December 30, 2009, denying the allegations in the Complaint and asserting multiple affirmative defenses. On January 29, 2010, Respondent and his wife, Rhonda Ambrose, filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq*.) in the United States Bankruptcy Court, Eastern District of California. This petition was designated case number 10-10936. Included with the Voluntary Petition was Schedule F which listed Respondent's creditors and the amounts each creditor is owed. On May 13,

2010, Respondent and his wife filed an Amended Schedule F. Respondent admitted in both the original Schedule F and the Amended Schedule F that the three livestock sellers identified in the Complaint as still being owed money for livestock purchases remained unpaid at the time Respondent filed each schedule.

Upon learning of the bankruptcy proceeding, 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). Based on careful consideration of the pleadings and the precedent cited by the parties, Complainant's motion is hereby granted and the following Decision and Order is issued without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

In his Answer to Complaint, Respondent raises three affirmative defenses. The first affirmative defense raised by Respondent is that the Complaint is overly broad, vague, and ambiguous. (Answer 2 ¶ 1.) The second affirmative defense raised by Respondent is that the Complaint fails to state a legally recognizable cause of action. (Answer 2 ¶ 2.) These defenses are meritless. Section 1.135(a) of the Rules of Practice (7 C.F.R. § 1.135(a)) specifies the required contents of complaints. All of the requirements are met. In addition, violations of section 409 of the Act (7 U.S.C. § 228b) are considered "unfair practices" under section 312(a) of the Act (7 U.S.C. § 213(a)) for which complaints can be issued against the violating person or entity. 7 U.S.C. §§ 228b(c), 213(b). Therefore, because the Complaint complies with the requirements of section 1.135(a) of the Rules of Practice (7 C.F.R. § 1.135(a)) and violations of sections 409 and 312(a) of the Act (7 U.S.C. §§ 228b, 213(a)) are legally recognizable causes of action, Respondent's first two defenses fail.

Respondent's third affirmative defense is that the transactions in the Complaint were credit transactions. Even if all the livestock sellers listed in the Complaint extended credit, in writing, to Respondent, which Complainant contests, it is still an unfair practice in violation of the Act for Respondent to fail to make full payment to the livestock sellers. *See* 7 U.S.C. § 409(c) ("Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an 'unfair practice' in violation of this Act."); *see also In re Great Am. Veal, Inc.*, 48 Agric. Dec. 183, 211 (1989) ("Even if a livestock seller expressly extends credit, in

writing, . . . it is still an unfair practice . . . to fail to make full payment to such a seller.") Here, Respondent has declared bankruptcy and has admitted in both the original Schedule F and the Amended Schedule F that he failed to make full payment to Western Stockman's Market, Visalia Livestock Market, and Overland Stockyard, and still owes the markets close to $350,000.00. Ex. A pp. 8, 10-11; Ex. B pp. 7, 9. Even under the most liberal interpretation of the payment requirements under the Act, by not fully paying for livestock purchases, Respondent is in violation of the Act. Moreover, on June 14, 2010, the bankruptcy court issued a Discharge of Debtor for both Respondent and his wife. Ex. C p. 1. Under section 524(a)(2) of the bankruptcy code (11 U.S.C. § 524(a)(2)), a discharge order eliminates a debtor's legal obligation to pay a debt that is discharged and operates as an injunction against any attempt to collect payment against the debtor. 11 U.S.C. § 524(a)(2); Ex. C p. 2. Therefore, unless Respondent reaffirms the livestock debt, of which there is no indication he has, or he voluntarily repays the livestock debt, which he is not required to do, the livestock sellers that are still owed money by Respondent will likely never be fully paid.

Because it is irrelevant whether or not Respondent had credit agreements with all of the livestock sellers identified in Appendix A of the Complaint to make a determination that Respondent is in violation of the Act, Respondent's third defense also fails.

It is well-established that failing to make full payment for livestock purchases is a serious violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b). *E.g.*, *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1428-29 (1998); *In re Syracuse Sales Co.*, 52 Agric. Dec. 1511, 1524 (1993); *In re Palmer*, 50 Agric. Dec. 1762, 1772-73 (1991); *In re Hennessey*, 48 Agric. Dec. 320, 324 (1989), *In re Garver*, 45 Agric. Dec. 1090, 1094-95 (1986), *aff'd sub nom. Garver v. United States*, 846 F.2d 1029 (6th Cir. 1988), *cert. denied* 488 U.S. 820 (1988). Because Respondent has admitted in bankruptcy documents that he has failed to fully pay for the livestock he purchased from Western Stockman's Market, Visalia Livestock Market, and Overland Stockyard, Respondent's actions are deemed to be unfair and deceptive practices in violation of sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Respondent's actions are also willful. 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*, 57 Agric. Dec. at 1414. Here, willfulness is established because Respondent intentionally continued to purchase livestock over the course of a year while some of the livestock sellers he previously purchased from were not fully paid.

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 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 clearly knew or should have known that he was unable to fully pay for the livestock that he was purchasing because as he continued to make purchases through October 2009, purchases from October and November of the previous year remained unpaid. In addition, according to Respondent's sworn affidavit, Respondent knew he had exhausted his working capital by the end of October 2008. Whether or not Respondent had credit agreements is irrelevant to a determination of willfulness because Respondent failed to comply with any alleged credit agreements as evidence by three livestock sellers still being owed close to $350,000.00 for livestock purchases.

Therefore, because Respondent was aware of his financial problems and continued to purchase livestock in spite of them, his actions can only be described as willful, both as intentional acts or as acts performed with careless disregard of statutory requirements.

The sanction policy of the Department is "to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded . . . as serious, in order to serve as an effective deterrent not only to the Respondents but to other potential violators as well." *In re Wooten*, 58 Agric. Dec. 944, 980 (1999); *see also Garver*, 45 Agric. Dec. at 1100. In this case, Respondent has failed to fully pay three different markets on multiple occasions, and still owes the markets close to $350,000.00 making these violations both serious and repeated. When livestock sellers, such as Respondent, do not make full payment for their livestock purchases, the sellers are forced to finance the transaction. *See Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978);

In re Powell, 46 Agric. Dec. 49, 53 (1985). Considering Respondent's bankruptcy and his discharge from his debts, the livestock sellers are likely to never receive full payment for their livestock.

Complainant's recommendation that Respondent be ordered to cease and desist from violating the Act and suspended as a registrant under the Act for five years is consistent with the sanctions regularly imposed in other cases involving failure to pay for livestock. *E.g.*, *Marysville Enters.*, 59 Agric. Dec. at 321 & n.14, 323; *Hines and Thurn Feedlot*, 57 Agric. Dec. at 1429 & n.9.[1] The order and sanctions requested by Complainant are necessary to deter future violations and to prevent Respondent from continuing to purchase livestock while he is bankrupt and unable to pay for his purchases. In re Holmes, 62 Agric. Dec. 254, 259 (2003).

Findings of Fact

1. Respondent Joe U. Ambrose, Jr., is an individual whose mailing address is in the State of California.

2. Respondent is and, at all times material herein, was:
   (a) Engaged in the business of buying and selling livestock in commerce as a dealer for his own account;
   (b) Engaged in the business of a market agency buying livestock in commerce on a commission basis;
   (c) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account; and
   (d) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis.

3. Respondent and his wife, Rhonda Ambrose, filed for bankruptcy under Chapter 7, Title 11 of the United States Bankruptcy Code, in the United States Bankruptcy Court, Eastern District of California, Case No. 10-10936.

4. Respondent has admitted in bankruptcy documents, of which the Secretary may take official notice, that the three livestock sellers identified

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[1]In determining the sanction, "appropriate weight" is to be given to the sanction "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); *see also Marysville Enters.*, 59 Agric. Dec. at 318.

in the Complaint as still being owed money by Respondent remain unpaid for close to $350,000.00 worth of livestock. The original Schedule F and the Amended Schedule F contain tables with columns for the name and address of the creditor, along with the amounts of each creditor's claim.

5. The amounts alleged unpaid by Complainant and admitted unpaid by Respondent are as follows:

Seller's Name	Amount Unpaid
Western Stockman's Market	$168,238.29[2]
Visalia Livestock Market	$61,641.23[3]
Overland Stockyard	$119,250.00[4]
TOTAL	**$349,129.52**

6. On June 14, 2010, the bankruptcy court issued a Discharge of Debtor for both Respondent and his wife.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. By reason of the facts found in Findings of Fact 4 and 5, Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. 213(a), 228b).

Order

1. Respondent Joe U. Ambrose, Jr., his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from failing to make full payment for livestock purchases in accordance with the Act or in accordance with the

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[2]Amount alleged unpaid in Complaint of $171,919.98 was reduced to the amount Respondent admitted was unpaid in original Schedule F and Amended Schedule F.

[3]Amount Respondent admitted was unpaid in original Schedule F and Amended Schedule F of $92,305.00 was reduced to the amount alleged to be unpaid in the Complaint.

[4]Amount alleged unpaid in Complaint of $119,250.22 was reduced by 220 to the amount Respondent admitted was unpaid in original Schedule F and Amended Schedule F.

terms of a credit agreement that complies with the requirements of the Act.

2. Pursuant to 7 U.S.C. § 204, Respondent is hereby suspended as a registrant under the Act for a period of five (5) years. *Provided*, however, that after the expiration of 120 days of the suspension period, upon application to the Packers and Stockyards Program and upon Respondent's demonstration that the unpaid livestock sellers identified in the Complaint have been paid, in full, the amount of $349,129.52 or a reasonable schedule of restitution has been arranged with the unpaid livestock sellers identified in the Complaint, a supplemental order may be issued permitting Respondent's salaried employment by another registrant or packer.

3. The provisions of this Order shall become effective on the sixth day after service of this Decision and Order on Respondent.

4. This Decision and Order shall become final without further proceedings thirty-five (35) days after service on Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Decision and Order shall be served upon the parties.

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PACKERS AND STOCKYARDS 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.

In re: TODD SYVERSON, d/b/a SYVERSON LIVESTOCK BROKERS.
P&S docket No. D-05-0005.
Decision and Order on Remand.
Filed November 16, 2010.

P&S – Remand – Reconsideration of suspension – Cease and desist – Misrepresentation of purchase price of cattle – Failure to produce records for examination – Suspension as registrant.

Charles E. Spicknall, for GIPSA.
E. Lawrence Oldfield, Oak Brook, IL & Kevin Velasquez, Mankatok, MN, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On August 27, 2008, I issued a Decision and Order: (1) concluding Todd Syverson violated the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], by engaging in an unfair and deceptive practice and failing to produce documents required to be kept; (2) ordering Mr. Syverson to cease and desist from engaging in an unfair and deceptive practice, in violation of 7 U.S.C. § 213(a); (3) ordering Mr. Syverson to cease and desist from failing to produce documents required to be kept under 7 U.S.C. § 221; and (4) suspending Mr. Syverson as a registrant under the Packers and Stockyards Act for a period of 5 years. *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008). The United States Court of Appeals for the Eighth

Circuit affirmed the conclusion that Mr. Syverson violated the Packers and Stockyards Act but vacated the 5-year suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act and remanded the case to me for reconsideration of the period of suspension, as follows:

> 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.
>
> III.
>
> The judicial officer's determinations that Syverson acted as a market agency under the [Packers and Stockyards Act] and that he violated the [Packers and Stockyards Act] are affirmed. The sanction is vacated and the case is remanded to the judicial officer for reconsideration of the sanction.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 805 (8th Cir. 2010).

On July 27, 2010, I conducted a conference call with E. Lawrence Oldfield, counsel for Mr. Syverson, and Charles E. Spicknall, counsel for the Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter GIPSA], to discuss the remand order in *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793 (8th Cir. 2010). Mr. Oldfield and Mr. Spicknall requested an opportunity to file briefs, no later than October 27, 2010, regarding the appropriate period of suspension,

if any, to be imposed on Mr. Syverson on remand, which I granted.[1] On October 26, 2010, Mr. Syverson filed "Respondent Todd Syverson's Brief Regarding Sanctions" recommending that I suspend Mr. Syverson as a registrant under the Packers and Stockyards Act for "less than 30 days, if any." On October 27, 2010, GIPSA filed "Complainant's Brief on Remand" recommending that I suspend Mr. Syverson as a registrant under the Packers and Stockyards Act for a period of 2 years. On November 1, 2010, the Hearing Clerk transmitted the record to me for consideration and a decision on remand.

DECISION ON REMAND

The United States Court of Appeals for the Eighth Circuit found I did not examine the nature of Mr. Syverson's violations in relation to the remedial purposes of the Packers and Stockyards Act and I did not consider all relevant circumstances. The Court also noted three previous disciplinary cases involving violations of the Packers and Stockyards Act similar to Mr. Syverson's violations that resulted in significantly lesser suspensions than I imposed upon Mr. Syverson. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 804-05 (8th Cir. 2010).

Mr. Syverson's Violations Directly Relate to the Remedial Purposes of the Packers and Stockyards Act

The Packers and Stockyards Act is remedial legislation designed to protect farmers and ranchers in the livestock industry.[2] "The primary purpose of [the Packers and Stockyards] Act is to assure fair competition and fair trade practices in livestock marketing. . . ." H.R. Rep. No. 85-1048, at 1 (1957), *as reprinted in* 1958 U.S.C.C.A.N. 5212, 5213. The United States Court of Appeals for the Eighth Circuit found Mr. Syverson acted as a market agency in connection with his purchases of cattle for Lance Quam

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[1]Order Regarding Time for Filing Briefs on Remand.

[2]*Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978); *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Dep't of Agric.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971); *In re Gary Chastain*, 47 Agric. Dec. 395, 420 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988).

that are the subject of the instant proceeding. As a market agency, Mr. Syverson owed a fiduciary duty to Mr. Quam,[3] and Mr. Syverson's failure to disclose that he had repurchased cattle from his own consignment was an unfair and deceptive practice and a violation of 7 U.S.C. § 213(a). *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 802 (8th Cir. 2010). Thus, I conclude Mr. Syverson's violation of 7 U.S.C. § 213(a) was directly related to the primary purpose of the Packers and Stockyards Act to assure fair trade practices in livestock marketing. Moreover, Mr. Syverson thwarted the Secretary of Agriculture's ability to enforce the Packers and Stockyards Act when he failed to produce records, which he was required to keep, for examination by United States Department of Agriculture investigators, in violation of 7 U.S.C. § 221.

Relevant Circumstances Not Previously Considered

The United States Court of Appeals for the Eighth Circuit cited three circumstances, which the Court found relevant, that I did not consider in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008): (1) Mr. Syverson's violation of 7 U.S.C. § 213(a) only harmed one individual, (2) Mr. Syverson's violation of 7 U.S.C. § 213(a) only involved a small number of livestock, and (3) a 5-year suspension would likely bankrupt Mr. Syverson and deprive Mr. Syverson of his livelihood. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 804-05 (8th Cir. 2010).

I did not consider that Mr. Syverson's violation of 7 U.S.C. § 213(a) only directly harmed one individual and only involved a small number of livestock when imposing the 5-year suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008). Having been sufficiently admonished by the Court, I find the facts that Mr. Syverson's violation of 7 U.S.C. § 213(a) only directly harmed one individual and that Mr. Syverson's violation of 7 U.S.C. § 213(a) only involved a small number of livestock, mitigating

[3] *See United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022 (8th Cir. 1932).

factors[4] that form part of the basis for my reduction of the 5-year period of suspension which I imposed on Mr. Syverson in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008).

The United States Court of Appeals for the Eighth Circuit also found relevant the fact that a 5-year period of suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act would likely bankrupt Mr. Syverson and deprive Mr. Syverson of his livelihood. The Court stated the remedial purposes of the Packers and Stockyards Act would be achieved by Mr. Syverson's continuing to conduct business in a fair and honest manner and complying with the record keeping requirements in the Packers and Stockyards Act; "[a] five-year suspension, if it permanently forces Syverson from the industry, appears to bear no relation to the remedial purposes of the [Packers and Stockyards Act]." *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 804 (8th Cir. 2010).

Mr. Syverson contends "[a]ny substantial suspension will result in [his] financial ruin and his bankruptcy. This is true whether the suspension is for five years or for one year." (Respondent Todd Syverson's Brief Regarding Sanctions at 6.) Mr. Syverson requests no more than a 30-day suspension; "[a]ny more than that, and his choice will be to either go out of business or to appeal again." (Respondent Todd Syverson's Brief Regarding Sanctions at 8.) On the other hand, GIPSA, citing Mr. and Mrs. Syverson's other sources of income (Tr. 414, 451, 456, 475-76, 482, 493, 515-16, 522-24, 539), states a 2-year suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act is unlikely to bankrupt Mr. Syverson or visit extreme hardship on his family (Complainant's Brief on Remand at 15-16).

Based upon the Court's finding that a 5-year suspension of Mr. Syverson

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[4]GIPSA concedes Mr. Syverson only directly harmed one individual but argues the mitigating effect of the small number of livestock involved should be limited. GIPSA states its investigators could only trace 24 of the 44 cattle Mr. Syverson repurchased for Mr. Quam back to the original purchase because of Mr. Syverson's failure to produce records, in violation of 7 U.S.C. § 221 (Tr. 320-21; CX 6-CX 14). (Complainant's Brief on Remand at 5 n.11.) I reject GIPSA's argument that Mr. Syverson's unfair and deceptive practice involved 44 cattle rather than 24 cattle. GIPSA only proved Mr. Syverson engaged in an unfair and deceptive practice with respect to 24 of the cattle sold to Mr. Quam. Nonetheless, even if Mr. Syverson's unfair and deceptive practice did involve 44 cattle sold to Mr. Quam, Mr. Syverson does not benefit from his violation of 7 U.S.C. § 221, as the period of suspension I impose in this Decision and Order on Remand reflects Mr. Syverson's violation of 7 U.S.C. § 221.

as a registrant under the Packers and Stockyards Act is likely to bankrupt Mr. Syverson and deprive Mr. Syverson of his livelihood, I do not impose a 5-year suspension of Mr. Syverson in this Decision and Order on Remand. I agree with the Court that the remedial purposes of the Packers and Stockyards Act would be achieved if Mr. Syverson (and all others) would conduct business in a fair and honest manner and comply with the record keeping requirements of the Packers and Stockyards Act. However, I note Mr. Syverson's violations of the Packers and Stockyards Act are serious and, in my view, a significant period of suspension as a registrant under the Packers and Stockyards Act is necessary to deter Mr. Syverson and others from violating the Packers and Stockyards Act in the future, even if the suspension poses some risk that Mr. Syverson may declare bankruptcy and poses a threat to Mr. Syverson's livelihood. While I empathize with the hardship a suspension may cause a violator, the hardship a suspension may cause an individual violator is not dispositive in determining the sanction since the national interest of having fair conditions in the livestock industry prevails over the violator's interest in continuing to conduct business as a registrant under the Packers and Stockyards Act. This Decision and Order on Remand does not operate as an absolute bar to Mr. Syverson's employment in the livestock industry during the period of suspension as a registrant under the Packers and Stockyards Act. There are many occupations in the livestock industry for which registration under the Packers and Stockyards Act is not required. Therefore, even though Mr. Syverson asserts a suspension in excess of 30 days will cause him to go out of business, I reject Mr. Syverson's request for a suspension of 30 days and impose a 16-month period of suspension on Mr. Syverson for his violations of the Packers and Stockyards Act.

Previous Disciplinary Decisions Noted by the Court

The United States Court of Appeals for the Eighth Circuit noted three disciplinary cases involving alleged violations of the Packers and Stockyards Act by persons other than Mr. Syverson, which cases are similar to the instant proceeding, but resulted in significantly lesser suspensions than I imposed upon Mr. Syverson, stating:

> 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.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 805 (8th Cir. 2010).

All three of the decisions noted by the Court are consent decisions issued by administrative law judges in which the alleged violators neither admitted nor denied the alleged violations of the Packers and Stockyards Act. A consent decision is a signed agreement by the parties in the form of a decision that must be entered by the administrative law judge, unless an error is apparent on the face of the agreement (7 C.F.R. § 1.138). Generally, consent decisions do not come before the Judicial Officer, and none of the three cases noted by the Court came before the Judicial Officer.

I have long held that sanctions in consent decisions, which involve parties other than the party before me, are given no weight in determining the sanction in a litigated case.[5] The former Judicial Officer briefly articulated the reasons for this position, as follows:

> Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget

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[5] *In re Steven Thompson* (Decision as to Darrell Moore), 50 Agric. Dec. 392, 407 (1991); *In re Paul Rodman*, 47 Agric. Dec. 1400, 1416 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1569 (1974).

> considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In re Braxton McLinden Worsley, 33 Agric. Dec. 1547, 1569 (1974).

Moreover, two of the three decisions noted by the Court, *In re Marvin J. Dinner* (Consent Decision as to Marvin J. Dinner), 41 Agric. Dec. 2201 (1982), and *In re Marvin J. Dinner* (Consent Decision as to Kenneth S. Ross), 41 Agric. Dec. 2196 (1982), predate a 1983 change in the United States Department of Agriculture's sanction policy regarding violations of Title III of the Packers and Stockyards Act (7 U.S.C. §§ 201-217a):

> [D]uring the year 1983, the complainant conducted a complete review of the sanctions imposed for violations falling under Title III of the [Packers and Stockyards] Act. That review disclosed that sanctions clearly had not been sufficiently severe to effectively deter registrants violating the law. The complainant found that the same violations were occurring repeatedly and in some instances the same people were found to repeatedly commit the same offenses. As a result of that review, the complainant indicated that it has since markedly increased the severity of sanctions sought to be imposed in all cases.

In re Mark V. Porter, 47 Agric. Dec. 656, 668 (1988). "Since 1983, GIPSA has typically sought a suspension of six months or more in breach of fiduciary cases, depending on the facts and circumstances of the individual cases." (Complainant's Brief on Remand at 7.)

Unlike two of the three consent decisions noted by the Court, the events relevant to the instant proceeding occurred after the 1983 United States Department of Agriculture sanction policy change and, unlike all of the consent decisions noted by the Court, the instant proceeding was fully litigated and the respondent was found to have committed serious violations of the Packers and Stockyards Act. Therefore, I did not consider *In re Stanley Gildersleeve* (Consent Decision), 47 Agric. Dec. 807 (1988); *In re Marvin J. Dinner* (Consent Decision as to Marvin J. Dinner), 41 Agric. Dec.

2201 (1982); or *In re Marvin J. Dinner* (Consent Decision as to Kenneth S. Ross), 41 Agric. Dec. 2196 (1982), when determining the appropriate sanction in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008). As the Court found these three consent decisions noteworthy, I have carefully reviewed them; however, with all due respect, I do not give them any weight in my determination regarding the appropriate sanction to be imposed on Mr. Syverson in this Decision and Order on Remand.

Sanction on Remand

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

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The administrative officials charged with the responsibility of administering the Packers and Stockyards Act recommend that I suspend Mr. Syverson as a registrant under the Packers and Stockyards Act for a period of 2 years. However, the recommendation of administrative officials as to the sanction is not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative

officials.[6] I reject GIPSA's sanction recommendation because, as noted, in this Decision and Order on Remand, *supra*, GIPSA does not appear to have taken into account the mitigating fact that Mr. Syverson's violation of 7 U.S.C. § 213(a) only involved a small number of livestock.

The purpose of an administrative sanction is to accomplish the remedial purposes of the Packers and Stockyards Act by deterring future violations of the Packers and Stockyards Act by the violator and others. This case involves serious violations of the Packers and Stockyards Act. Furthermore, Mr. Syverson committed these violations within a year of Mr. Syverson's consenting to a decision in which he 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." *See* CX 5 at 2-3, *In re Todd Syverson*, 60 Agric. Dec. 302 (2001).

Based on the record before me, including the mitigating fact that only one person was directly affected by Mr. Syverson's violation of 7 U.S.C. § 213(a), the mitigating fact that Mr. Syverson's violation of 7 U.S.C. § 213(a) only involved 24 cattle, and the likelihood that a 5-year suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act will bankrupt Mr. Syverson and deprive Mr. Syverson of his livelihood, I find Mr. Syverson's violations warrant a suspension as a registrant under the Packers and Stockyards Act for a period of 16 months.[7] However, Mr. Syverson may apply to the Packers and Stockyards Programs for permission to be a salaried employee of another registrant or packer after serving 8 months of the 16-month suspension.

For the foregoing reasons and the reasons in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008), the following Order is issued.

ORDER

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[6]*In re Ronald Walker*, __ Agric. Dec. ___, slip op. at 28 (Jan. 13, 2010), *appeal docketed*, No. 10-9511 (10th Cir. Feb. 24, 2010); *In re Lorenza Pearson*, __ Agric. Dec. ___, slip op. at 69 (July 13, 2009); *In re Amarillo Wildlife Refuge, Inc.*, __ Agric. Dec. ___, slip op. at 16 (Jan. 6, 2009).

[7]I suspend Mr. Syverson for a period of 1 year for his violation of 7 U.S.C. § 213(a) and for a period of 4 months for his violation of 7 U.S.C. § 221.

1. Mr. Syverson, his agents and employees, directly or indirectly through any corporate or other device, including, but not limited to, Syverson Livestock Brokers, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

a. failing to comply with the requirements of section 312(a) of the Packers and Stockyards Act (7 U.S.C. § 213(a)), and specifically, Mr. Syverson shall not represent to any buyer that his cost of cattle is based on a "purchase price" resulting from the "purchase" of cattle from his own inventory unless he discloses that he bought the cattle from his own consignment and his initial purchase price of the cattle; and

b. failing without good cause to produce for examination, within a reasonable time when asked by GIPSA, all of the accounts, records, and memoranda as are required to be kept under section 401 of the Packers and Stockyards Act (7 U.S.C. § 221), including, but not limited to, a purchase journal (recording, at minimum: the date of purchase; seller; number of head; description of livestock; purchase price(s); date(s) received; commission charges, if any; other fees or charges; whether the livestock were purchased for the account of another, and if so, the identity of that person or firm) together with all invoices, buyer bills, consignment sheets, and other records associated with individual livestock purchases and sales.

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

2. Mr. Syverson is suspended as a registrant under the Packers and Stockyards Act for a period of 16 months; *Provided*, *however*, That this Order may be modified upon application to Packers and Stockyards Programs to permit the salaried employment of Mr. Syverson by another registrant or packer after the expiration of 8 months of the suspension term.

Paragraph 2 of this Order shall become effective on the 60th day after service of this Order on Mr. Syverson.

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In re: TODD SYVERSON, d/b/a SYVERSON LIVESTOCK BROKERS.
P&S Docket No. D-05-0005.
Order Denying Petition to Reconsider on Remand.
Filed December 22, 2010.

P&S.

Charles E. Spicknall, for GIPSA.
Kevin A. Velasquez, Mankato, MN, and E. Lawrence Oldfield, Oak Brook, IL, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On November 16, 2010, I issued a Decision and Order on Remand in which I suspended Todd Syverson as a registrant under the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act], for a period of 16 months. *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010). On November 26, 2010, Mr. Syverson filed "Respondent Todd Syverson's Petition for Reconsideration or, In the Alternative, Motion for Stay Pending Appeal" [hereinafter Petition to Reconsider].[1] On December 20, 2010, the Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter GIPSA], filed "Complainant's Response to Respondent's Petition for Reconsideration and Motion for Stay Pending Appeal." On December 21, 2010, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Syverson's Petition to Reconsider.

CONCLUSIONS ON RECONSIDERATION

Mr. Syverson raises eight issues in the Petition to Reconsider. First, Mr. Syverson asserts I "did no more than pay lip service to the Eighth Circuit's clear direction concerning the importance of the effect of the sanction on the registrant." (Pet. to Reconsider at 2.)

I gave considerable weight to the Court's guidance and decreased the suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act from 5 years to 16 months. Generally, "lip service" is an avowal of adherence expressed in words, but not backed by deeds. My

[1]I address Mr. Syverson's request for a stay in *In re Todd Syverson* (Stay Order), __ Agric. Dec. ___ (Dec. 22, 2010), which I file simultaneously with this Order Denying Petition to Reconsider on Remand.

significant reduction of the period of Mr. Syverson's suspension is a deed that belies Mr. Syverson's assertion that I only paid lip service to the Eighth Circuit's guidance.

Second, I concluded the period of time in which a suspension of a registrant under the Packers and Stockyards Act is likely to bankrupt that registrant and deprive that registrant of a livelihood is not dispositive in determining the period of suspension, since the national interest of having fair conditions in the livestock industry prevails over a violator's interest in continuing to conduct business as a registrant under the Packers and Stockyards Act. *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___, slip op. at 7-8 (Nov. 16, 2010). Mr. Syverson contends this conclusion "is in direct contradiction to the Eighth Circuit's indication that the effect [of a sanction] on the registrant is crucially important." (Pet. to Reconsider at 2.)

The United States Court of Appeals for the Eighth Circuit states the effect of a sanction on a registrant under the Packers and Stockyards Act is "crucially important," as follows:

> 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.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 804 (8th Cir. 2010). I do not read the Court's reference to the crucial importance of the effect of a sanction on a registrant as requiring that a suspension of a registrant must in all cases be for a period shorter than the period that might bankrupt the registrant and deprive the registrant of his or her livelihood. Instead, I interpret *Syverson v. U.S. Dep't of Agric.*, as holding that the effect of a sanction on a registrant and the nature of the conduct of a registrant are factors, albeit crucially important factors, that I must consider when determining the sanction to be imposed on a registrant under the Packers and Stockyards Act. In *Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990), referenced by the *Syverson* Court as a case in which the Eighth Circuit previously emphasized the crucial importance of the effect of a sanction, the Eighth Circuit concluded that the Judicial Officer's 6-month suspension of a registrant was too severe, stating "[o]ur conclusion is not based upon but is strengthened by the fact that the six-month suspension would likely put Ferguson out of business." *Ferguson v. U.S.*

Dep't of Agric., 911 F.2d at 1282. This conclusion in *Ferguson* indicates the Eighth Circuit does not view the effect of a sanction as dispositive, but, instead, as an important factor that must be considered when determining the sanction to be imposed on a violator. Therefore, I reject Mr. Syverson's contention that my conclusion that the effect of a sanction on a registrant is not dispositive of the sanction to be imposed on that registrant, is error.

Third, Mr. Syverson asserts I erroneously used the Decision and Order on Remand "as an opportunity to make a new policy statement, without citation, that the national interest of having 'fair' conditions in the livestock industry prevails over the violator's interest in continuing to conduct business." (Pet to Reconsider at 2.)

The policy is not new. I have long held that collateral effects of a sanction on a violator and on a violator's community, customers, employees, and creditors are given no weight in determining the sanction to be imposed for violations of the Packers and Stockyards Act since the national interest of having fair conditions in the livestock industry must prevail over a violator's interests and the interests of the violator's community, customers, employees, and creditors.[2] Within the jurisdiction of the United States Court of Appeals for the Eighth Circuit, my policy of giving no weight to the effect of a sanction on the likelihood of a violator's bankruptcy and on the likelihood that a violator will be deprived of his or her livelihood is modified to comport with *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793 (2010).

Fourth, Mr. Syverson asserts I stated that I do not rely on consent decisions when determining the sanction in a litigated case, but then, contrary to that statement, heavily relied on *In re Todd Syverson* (Consent Decision), 60 Agric. Dec. 302 (2001), when determining the period of

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[2] *See In re Marysville Enterprises, Inc.*, 59 Agric. Dec. 299, 328 (2000); *In re Hines & Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1430 (1998); *In re Sam Odom*, 48 Agric. Dec. 519, 540-41 (1989); *In re Great American Veal, Inc.*, 48 Agric. Dec. 183, 206 (1989), *aff'd,* 891 F.2d 281 (3d Cir. 1989) (unpublished); *In re Edward Tiemann*, 47 Agric. Dec. 1573, 1593 (1988); *In re Paul Rodman* (Order Denying Pet. for Recons.), 47 Agric. Dec. 1400, 1415 (1988); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1104 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 636 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 445 (1984), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1365 (1982).

Mr. Syverson's suspension as a registrant under the Packers and Stockyards Act (Pet. to Reconsider at 2-3).

As I noted in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___, slip op. at 9 (Nov. 16, 2010), "I have long held that sanctions in consent decisions, *which involve parties other than the party before me*, are given no weight in determining the sanction in a litigated case." (Footnote omitted; emphasis added.) As Mr. Syverson was the subject of *In re Todd Syverson* (Consent Decision), 60 Agric. Dec. 302 (2001), I took that prior consent decision into account when determining the sanction to be imposed on Mr. Syverson. My consideration of Mr. Syverson's prior consent decision is consistent with the Eighth Circuit's consideration of the same prior consent decision:

> 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 on Syverson.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 805 (8th Cir. 2010). Therefore, I reject Mr. Syverson's contention that my consideration of *In re Todd Syverson* (Consent Decision), 60 Agric. 302 (2001), is error.

Mr. Syverson cites *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451 (9th Cir. 1988), as support for his contention that my reliance on *In re Todd Syverson* (Consent Decision), 60 Agric. Dec. 302 (2001), is error. However, the Ninth Circuit in *Spencer Livestock Comm'n Co.*, did not find the Judicial Officer's reliance on prior consent decisions, error:

> The fact that the consent orders were *violated* could be used to determine what kind of sanction is needed to *deter* these petitioners from conduct prohibited by the statute. In each of the prior administrative proceedings, petitioners agreed to cease and desist from precisely the sort of behavior at issue in this case. Use of this information along with the fact that petitioners violated their criminal probation was appropriate to evaluate the deterrent value of various sanctions.

Spencer Livestock Comm'n Co. v. Dep't of Agric., 841 F.2d 1451, 1458 (9th Cir. 1988) (emphasis in original). Therefore, I find my Decision on Remand consistent with the Ninth Circuit's holding in *Spencer Livestock Comm'n Co. v. Dep't of Agric.*, 841 F.2d 1451 (9th Cir. 1988).

Fifth, Mr. Syverson asserts I erroneously failed to discuss why the instant proceeding is different from *Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990); *Western States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88 (8th Cir. 1989); and *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985), in which the Court overturned sanctions imposed by the Judicial Officer (Pet. to Reconsider at 3).

The United States Court of Appeals for the Eighth Circuit concluded that the 5-year period of suspension of Mr. Syverson as a registrant under the Packers and Stockyards Act that I imposed in *In re Todd Syverson*, 67 Agric. Dec. 1326 (2008), was not reasonable and remanded the proceeding to me for reconsideration. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 805 (8th Cir. 2010). The Eighth Circuit cited *Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990); *Western States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88 (8th Cir. 1989); and *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985), as examples of cases in which the Court has taken a critical view of the Judicial Officer's sanctions and vacated those sanctions. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d at 804. Therefore, as Mr. Syverson indicates, with respect to the Court's treatment of sanctions imposed by the Judicial Officer, the instant proceeding is similar to *Ferguson*, *Western States Cattle Co.*, and *Farrow*. However, *Syverson* can be distinguished from *Ferguson*, *Western States Cattle Co.*, and *Farrow* in a number of ways, including most importantly the Eighth Circuit's view of the severity of the violations in each of these cases. The Eighth Circuit found Mr. Syverson acted as a market agency and owed a fiduciary duty to Lance Quam, Mr. Syverson knew his conduct was illegal, and Mr. Syverson's violations were serious offenses deserving of a significant sanction. These factors are absent in *Ferguson*, *Western States Cattle Co.*, and *Farrow*.[3]

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[3]*Ferguson v. U.S. Dep't of Agric.*, 911 F.2d 1273 (8th Cir. 1990) (the Court found very little evidence that Ferguson acted as a market agency and did not find Ferguson's violations of the Packers and Stockyards Act flagrant, intentional, or serious); *Western States Cattle* (continued...)

Sixth, Mr. Syverson asserts I did not give appropriate weight to Mr. Syverson's lack of knowledge that he was acting as a market agency and that his actions breached a fiduciary duty (Pet. to Reconsider at 3).

I gave no weight to Mr. Syverson's claimed lack of knowledge that he was acting as a market agency and that his actions breached a fiduciary duty in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010), because the Court did not instruct that I was to consider these factors on remand. Moreover, even if I were to find Mr. Syverson did not know he was acting as a market agency and his actions breached a fiduciary duty, I give much more weight to Mr. Syverson's knowledge that his practices were illegal, which knowledge the Eighth Circuit described, as follows:

> 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: 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

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[3](...continued)
Co. v. U.S. Dep't of Agric., 880 F.2d 88 (8th Cir. 1989) (the Court found Western States Cattle Company acted as a dealer, not as a market agency, and Western States Cattle Company's violations of the Packers and Stockyards Act were not substantial or intentional); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211 (8th Cir. 1985) (the Court found no evidence establishing the petitioners' (two principal buyers of pound cows who entered into an anti-competitive agreement) violations of the Packers and Stockyards Act were intentional, flagrant, or serious or the petitioners were aware their agreement was unlawful).

> of itself was a willful violation, belies his claim that he did not know there was anything wrong with what he had done.

Syverson v. U.S. Dep't of Agric., 601 F.3d 793, 803 n.6 (8th Cir. 2010).

Seventh, Mr. Syverson contends I erroneously failed to explain why the clear public policy, codified in 5 U.S.C. § 558, "requiring a respondent to have notice of wrongdoing before suspension is permissible *at all*, can not be considered in evaluating the *length* of a suspension." (Pet. to Reconsider at 3 (emphasis in original).)

I did not explain why the failure to provide notice of wrongdoing cannot be considered in evaluating the length of a suspension as a registrant under the Packers and Stockyards Act in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010), because the Court did not instruct that I was to consider this factor on remand. Moreover, I note 5 U.S.C. § 558(c) does not indicate the length of a suspension is affected by an agency's failure to comply with 5 U.S.C. § 558(c). As Mr. Syverson indicates, if an agency fails to provide a licensee the notice required by 5 U.S.C. § 558(c), no suspension would be lawful. Mr. Syverson has waived the argument that 5 U.S.C. § 558(c) precludes his suspension as a registrant under the Packers and Stockyards Act because he raised it for the first time on appeal to the United States Court of Appeals for the Eighth Circuit. *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 803 (8th Cir. 2010).

Eighth, Mr. Syverson asserts I did not properly address the relationship of Mr. Syverson's violations of the Packers and Stockyards Act to the remedial purposes of the Packers and Stockyards Act (Pet. to Reconsider at 4).

As I stated in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___, slip op. at 4 (Nov. 16, 2010), one of the primary purposes of the Packers and Stockyards Act is to assure fair trade practices in the marketing of livestock. The United States Court of Appeals for the Eighth Circuit found Mr. Syverson acted as a market agency in connection with his purchases of cattle for Mr. Quam that are the subject of the instant proceeding. As a market agency, Mr. Syverson owed a fiduciary duty to

Mr. Quam,[4] and Mr. Syverson's failure to disclose that he had repurchased cattle from his own consignment was an unfair and deceptive practice and a violation of 7 U.S.C. § 213(a). *Syverson v. U.S. Dep't of Agric.*, 601 F.3d 793, 802 (8th Cir. 2010). Thus, I conclude Mr. Syverson's unfair and deceptive practice directly relates to one of the primary, remedial purposes of the Packers and Stockyards Act: to assure fair trade practices in livestock marketing. Moreover, Mr. Syverson thwarted the Secretary of Agriculture's ability to enforce the Packers and Stockyards Act when he failed to produce records, which he was required to keep, for examination by United States Department of Agriculture investigators, in violation of 7 U.S.C. § 221. When I compare the remedial purposes of the Packers and Stockyards Act to Mr. Syverson's unfair and deceptive practice, I find Mr. Syverson's violations directly relate to one of the remedial purposes of the Packers and Stockyards Act.

For the foregoing reasons and the reasons set forth in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010), Mr. Syverson's Petition to Reconsider is denied. The rules of practice applicable to the instant proceeding[5] provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). Mr. Syverson's Petition to Reconsider was timely-filed and automatically stayed *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010). Therefore, since Mr. Syverson's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010), is reinstated; except that, the automatic stay is replaced with a Stay Order issued pursuant to Mr. Syverson's November 26, 2010, request for a stay pending the outcome of proceedings for judicial review.[6]

For the foregoing reasons, the following Order is issued.

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[4]*See United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022 (8th Cir. 1932).

[5]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).

[6]*In re Todd Syverson* (Stay Order), __ Agric. Dec. ___ (Dec. 22, 2010).

ORDER

Mr. Syverson's Petition to Reconsider, filed November 26, 2010, is denied. This Order shall become effective upon service on Mr. Syverson.

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In re: TODD SYVERSON, d/b/a SYVERSON LIVESTOCK BROKERS.
P&S Docket No. D-05-0005.
Stay Order.
Filed December 22, 2010.

P&S.

Charles E. Spicknall, for GIPSA.
Kevin A. Velasquez, Mankato, MN and E. Lawrence Oldfield, Oak Brook, IL, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On November 16, 2010, I issued *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010), in which I suspended Todd Syverson as a registrant under the Packers and Stockyards Act, as amended and supplemented (7 U.S.C. §§ 181-229b). On November 26, 2010, Mr. Syverson filed "Respondent Todd Syverson's Petition for Reconsideration or, In the Alternative, Motion for Stay Pending Appeal" [hereinafter Motion for Stay] seeking a stay of the Order in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___ (Nov. 16, 2010), pending the outcome of proceedings for judicial review.[1] On December 20, 2010, the Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture, filed a response to Mr. Syverson's Motion for Stay stating it has no objection to my granting Mr. Syverson's Motion for Stay.

In accordance with 5 U.S.C. § 705, Mr. Syverson's Motion for Stay is

[1]I address Mr. Syverson's petition to reconsider in *In re Todd Syverson* (Order Denying Pet. to Reconsider on Remand), __ Agric. Dec. ___ (Dec. 22, 2010), which I file simultaneously with this Stay Order.

granted. For the foregoing reasons, the following Order is issued.

ORDER

The Order in *In re Todd Syverson* (Decision on Remand), __ Agric. Dec. ___, (Nov. 16, 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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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.

In re: KAO VANG AND CHUE THAO, d/b/a CALIFORNIA FRESH MEATS.
P & S Docket No. D-10-0065.
Decision and Order by Reason of Default.
Filed July 6, 2010.

P&S.

Leah C. Battaglioli, for GIPSA.
Respondents, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

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In re: CLARENCE RICKY FISHER, a/k/a RICKY FISHER.
P. & S. Docket No. D-09-0092.
Default Decision and Order.
Filed July 7, 2010.

P&S.

Ciarra A. Toomey, for GIPSA.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

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In re: E.M.M. PIG PLACEMENT CO., LLC.
P & S Docket No. D-10-0029.
Default Decision and Order.
Filed July 7, 2010.

P&S.

Brian P. Sylvester, for GIPSA.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

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In re: JAMES MASTERS.
P & S Docket No. D-09-0091.
Decision and Order by Reason of Default.
Filed July 21, 2010.

P&S.

Ciarra A. Toomey, for the Deputy Administrator, GIPSA.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

———————

In re: JOHN LUNDGREN.
P & S Docket No. D-10-0151.
Decision and Order by Reason of Default.
Filed July 21, 2010.

P&S.

Delisle Warden, for the Deputy Administrator, GIPSA.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

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CONSENT DECISIONS

PACKERS AND STOCKYARDS ACT

Deward B. Wolfe and Jonathan Wolfe d/b/a Wolfe Livestock, P&S-10-0007, 10/08/20.
Terry Roth d/b/a Indian Creek Meadows, P&S-D-10-0062, 10/09/22.
Otis Lewis Fortner II d/b/a Lewie Fortner Livestock, P&S D-09-0090, 10/09/29.
Sam D. Holder, a/k/a Bill Holder and Mark K. Holder, d/b/a Trousdale County Livestock Market, P&S D-10-0052, 10/10/07.
New Wilmington Livestock Auction, Inc. and Thomas R. Skelton, P&S-D-10-0233, 10/11/26.
JBS USA, LLC, f/k/a Swift & Company and Swift Pork Company, P&S-D-10-0457, 10/12/22.
Gulf Packing Company, LP, and Charles L. Booth, P&S-D-09-0106, 10/12/23.

AGRICULTURE DECISIONS

Volume 69

July - December 2010
Part Three (PACA)
Pages 1524 - 1625

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 PREFACE

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 text of consent decisions is posted on the USDA/OALJ website (See url below). Consent decisions are on file in portable document format (pdf) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges (OALJ).

Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Beginning in Volume 69, only the naked citations of Miscellaneous Orders and Default Decisions of the ALJs are published in this printed volume. The full text of all ALJ decisions are posted in a timely manner of the OALJ website (see below).

Volumes 57 (circa 1998) through the current volume of *Agriculture Decisions* are available online at http://www.usda.gov/oaljdecisions/ along with links to other related websites. Volumes 39 (circa 1980) through Volume 56 (circa 1997) have been scanned but due to privacy concerns there are no plans that they appear on the OALJ website. Beginning on July 1, 2003, current ALJ Decisions will be displayed in pdf format on the OALJ website in chronological order. Decisions and Orders for years prior to the current year are also available in pdf archives by calendar year.

A compilation of past volumes on Compact Disk (CD) and individual softbound volumes from Vol. 59 (Circa 2000) of *Agriculture Decisions* are available.

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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

REPARATIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURE COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: PETS CALVERT COMPANY.
PACA Docket No. D-09-0045.
Decision and Order.
Filed July 9, 2010.

PACA.

Charles E. Spicknall, for the Administrator, AMS.
Michael Steigmann, Chicago, IL, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 23, 2008. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company failed to make full payment promptly to 10 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate and foreign commerce.[1] On March 2, 2009, Pets Calvert Company filed a response to the Complaint [hereinafter Answer] in which Pets Calvert Company admitted the material

[1]Compl. ¶ III.

allegations of the Complaint.

On October 27, 2009, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Based on Admissions and a Proposed Decision and Order. Pets Calvert Company failed to respond to the Deputy Administrator's Motion for Decision Based on Admissions and Proposed Decision and Order.

On December 22, 2009, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Admissions: (1) finding, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company failed to make full payment promptly to 10 produce sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate commerce; (2) concluding Pets Calvert Company willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); and (3) revoking Pets Calvert Company's PACA license (ALJ's Decision and Order by Reason of Admissions at 7-8).

On March 1, 2010, Pets Calvert Company filed "Appeal Petition to the Judicial Officer" [hereinafter Appeal Petition]. On March 22, 2010, the Deputy Administrator filed "Response to Respondent's Appeal to the Judicial Officer." On June 30, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Decision and Order by Reason of Admissions.

DECISION

Discussion

The PACA requires produce dealers to make full payment promptly for perishable agricultural commodity purchases, usually within 10 days after the day on which the produce is accepted, unless the parties agree to different terms prior to the purchase. (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11).) The Deputy Administrator alleges, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company violated the payment provisions of the PACA by failing to make full payment promptly

to 10 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate and foreign commerce.[2] Pets Calvert Company admitted the material allegations of the Complaint. Pets Calvert Company's owner, Michael O'Neill, states: "I also take full responsibility for the 10 vendors and amount owed in your report" (Answer). The Deputy Administrator also alleges that Pets Calvert Company is an Illinois corporation that was operating under PACA license number 1975-0925 when Pets Calvert Company failed to make full payment promptly to produce sellers in violation of 7 U.S.C. § 499b(4). Pets Calvert Company admits it was operating subject to a valid PACA license. Pets Calvert Company's failure to deny or otherwise respond to the specific allegations concerning Pets Calvert Company's incorporation and PACA license number constitutes an admission of those allegations.[3]

A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.[4] Based upon Pets Calvert Company's admissions and failure to deny or otherwise respond to allegations of the Complaint, I conclude there is no material issue of fact on which a meaningful hearing can be held in the instant proceeding.

The United States Department of Agriculture's sanction policy in cases in which PACA licensees have failed to make full payment promptly for produce is, as follows:

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[2]See note 1.

[3]*See* 7 C.F.R. § 1.136(c) ("failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation").

[4]*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating an agency may ordinarily dispense with a hearing when no genuine dispute exists).

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In re Scamcorp, Inc., 57 Agric. Dec. 527, 549 (1998). Pets Calvert Company states it received the Complaint on February 9, 2009.[5] The 120-day period for compliance with the PACA expired on June 9, 2009. Pets Calvert Company makes no assertion that the produce sellers identified in the Complaint were paid in accordance with the PACA or that Pets Calvert Company achieved full compliance with the PACA within 120 days after having been served with the Complaint. Instead, Pets Calvert Company only asserts it is "in the process of getting the necessary financing and paying the old debts over time" (Answer).

Pets Calvert Company's failure to assert it achieved full compliance with the PACA within 120 days after having been served with the Complaint makes this case a "no-pay" case. The appropriate sanction in a "no-pay" case, if the violations are flagrant or repeated, is license revocation.[6] A civil penalty is not appropriate because limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA and requiring a PACA violator to pay a civil penalty to the United States Treasury while produce sellers are left unpaid would thwart one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment

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[5]Letter from Pets Calvert Company to the Hearing Clerk dated February 28, 2009.

[6]*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

for produce promptly.[7]

Pets Calvert Company's violations of the PACA are repeated because there was more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the time period over which the violations occurred.[8] Pets Calvert Company's violations of the PACA are also willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved.[9] Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by the respondent or actions undertaken with careless disregard of the statutory requirements.[10] Despite knowing that it did not have sufficient working capital to make full or prompt payment to produce sellers, Pets Calvert Company continued to purchase more than $350,000 worth of produce over a time period that spanned almost 4 years. Pets Calvert Company intentionally, or with careless disregard for the payment requirements in 7 U.S.C. § 499b(4), shifted the risk of nonpayment to sellers of the perishable agricultural commodities.

Findings of Fact

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[7] *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

[8] *See, e.g.*, *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.) (holding 86 transactions occurring over nearly 3 years involving over $300,000 to be repeated and flagrant violations of the payment provisions of the PACA), *cert. denied*, 528 U.S. 1021 (1999); *Farley & Calfee v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of "repeated"); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA).

[9] *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (1998).

[10] *See, e.g.*, *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

1. Pets Calvert Company is a corporation incorporated and existing under the laws of the State of Illinois.

2. Pets Calvert Company's business and mailing address is 2455 S. Damen Avenue, Chicago, Illinois 60608-5231.

3. Pets Calvert Company was issued PACA license number 1975-0925 on January 10, 1974.

4. At all times material to the instant proceeding, Pets Calvert Company was a PACA licensee.

5. Pets Calvert Company failed to make full payment promptly to the 10 produce sellers identified in the Complaint in the amount of $363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert Company purchased, received, and accepted in interstate commerce during the period August 13, 2004, through June 17, 2008.

6. Pets Calvert Company makes no assertion that the produce sellers identified in the Complaint have been paid in full or that Pets Calvert Company achieved full compliance with the PACA within 120 days after having been served with the Complaint.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over Pets Calvert Company and the subject matter involved in the instant proceeding.

2. Pets Calvert Company willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4), during the period August 13, 2004, through June 17, 2008, by failing to make full payment promptly of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for perishable agricultural commodities that Pets Calvert Company purchased, received, and accepted in interstate commerce.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Pets Calvert Company's Request for Oral Argument

Pets Calvert Company's request for oral argument (Appeal Pet. at 7), which the Judicial Officer may grant, refuse, or limit,[11] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Pets Calvert Company's Appeal Petition

Pets Calvert Company raises one issue in its Appeal Petition. Pets Calvert Company contends the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), applied by the ALJ, is improper and inappropriate, especially under current economic conditions. Pets Calvert Company asserts, if its PACA license is revoked, it will be unable to pay its creditors who are also suffering from the effects of economic recession. Pets Calvert Company urges that, instead of applying the sanction policy in *In re Scamcorp, Inc.,* 57 Agric. Dec. 527 (1998), I remand the instant proceeding to the ALJ for hearing to determine if Pets Calvert Company has paid its produce sellers by the date of the hearing and allow Pets Calvert Company to avoid PACA license revocation if it has paid all of its produce sellers by the date of the hearing.

PACA was designed primarily for the protection of producers of perishable agricultural commodities, most of whom must entrust their products to a buyer who may be thousands of miles away and depend for their payment upon the buyers' business acumen and fair dealing.[12] One of the goals of the PACA is to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of

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[11]7 C.F.R. § 1.145(d).

[12]S. Rep. No. 84-2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; *Tom Lang Co. v. A. Gagliano Co.*, 61 F.3d 1305, 1308 (7th Cir. 1995).

produce distribution.[13] The United States Department of Agriculture's sanction policy, set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), is to revoke the PACA license of any PACA licensee that repeatedly or flagrantly fails to make full payment promptly if the licensee cannot achieve full compliance with the PACA within 120 days after having been served with a complaint or by the date of the administrative hearing, whichever occurs first. I conclude the sanction policy articulated in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), is consistent with the goal of the PACA to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution. To allow a financially troubled PACA licensee, such as Pets Calvert Company, that cannot make full payment promptly to its produce sellers, to continue to purchase produce for an extended period of time, would shift the risk of nonpayment to these produce sellers and would not be consistent with the goal of the PACA to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution.

I reject Pets Calvert Company's argument that economic conditions should be considered when determining whether to apply the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer has long held that business recessions are not relevant to the sanction to be imposed for failure to make full payment promptly in accordance with the PACA.[14] A PACA licensee should be adequately

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[13] *Hunts Point Tomato Co. v. U.S. Dep't of Agric.*, 204 F. App'x 981, 983 (2d Cir. 2006); *Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987); *Tri-County Wholesale Produce Co. v. U.S. Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Finer Foods Sales Co. v. Block,* 708 F.2d 774, 781-82 (D.C. Cir. 1983); *Marvin Tragash Co. v. U.S. Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). *See Anthony Marano Co. v. Glass*, 2007 WL 257630 (N.D. Ill. 2007) (stating the purposes of the PACA include ensuring financial stability of the entire produce industry).

[14] *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1483 (1988); *In re B.G. Sale's Co.*, 44 Agric. Dec. 2021, 2029-30 (1985); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 130-31 (1984); *In re Produce Brokers, Inc.* (Ruling on Certified Questions), 41 Agric.
(continued...)

capitalized to meet its obligations in economically depressed times as well as in good financial times.[15] The economic conditions in which Pets Calvert Company finds itself provide no basis for remanding the instant proceeding to the ALJ, as Pets Calvert Company urges.

Moreover, the record indicates that Pets Calvert Company's failures to pay its produce sellers in accordance with the PACA were not caused by current economic conditions. Pets Calvert Company asserts in its Answer that its financial problems resulted from a "'bad' business deal with [a] past landlord[.]"

I also reject Pets Calvert Company's argument that the detrimental effect on its creditors of a discontinuation of Pets Calvert Company's business should be considered when determining whether to apply the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer has long held that the effect on creditors of a forced discontinuation of a PACA licensee's business is not relevant to the sanction to be imposed for failure to make full payment promptly in accordance with the PACA:

> Even where a respondent argues correctly that it would be detrimental to its creditors if it were forced to discontinue business, as a result of a license-revocation order, such arguments (frequently made) are routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by the creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country. If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of a particular respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

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[14](...continued)
Dec. 2247, 2250-51 (1982).

[15]*In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 523 (1984).

In re The Caito Produce Co., 48 Agric. Dec. 602, 628 (1989) (footnote omitted).[16] The detrimental effect that PACA license revocation may have on Pets Calvert Company's creditors provides no basis for remanding the instant proceeding to the ALJ, as Pets Calvert Company urges.

For the foregoing reasons, the following Order is issued.

ORDER

Pets Calvert Company's PACA license is revoked. This Order shall become effective 60 days after service of this Order on Pets Calvert Company.

RIGHT TO JUDICIAL REVIEW

Pets Calvert Company 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. Pets Calvert Company must seek judicial review within 60 days after entry of the Order in this Decision and Order.[17] The date of entry of the Order in this Decision and Order is July 9, 2010.

In re: TANIKKA WATFORD; TANIKKA WATFORD and LATISHA WATFORD d/b/a SOUTHERN SOLUTIONS PRODUCE, LLC.
PACA Docket No. D-09-0017.

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[16] *See also In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 142 (1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1160 (1983); *In re Bananas* (Order Denying Intervention), 42 Agric. Dec. 426, 426-27 (1983), *final decision*, 42 Agric. Dec. 588 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347, 351 (6th Cir. 1984); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

[17] 28 U.S.C. § 2344.

Decision and Order.
Filed July 21, 2010.

PACA.

Ciarra A. Toomey, for the Deputy Administrator, AMS.
Respondents, Pro se.
Decision issued by Peter M. Davenport, Chief Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq; hereinafter "PACA"), instituted by a Complaint filed on October 29, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant") alleging that Tanikka Watford (hereinafter "Respondent T. Watford") and LaTisha Watford (hereinafter "Respondent L. Watford") d/b/a Southern Solutions Produce, LLC (hereinafter "Respondents") have willfully violated the PACA.

The Complaint alleged that Respondents willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of December 18, 2005 through February 18, 2006, by failing to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of $365,637.74 for 30 lots of perishable agricultural commodities, which they purchased, received, and accepted in the course of interstate and foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice"). *See* 7 C.F.R. § 1.139.

The Complaint was served on Respondent T. Watford on November 8, 2008. Respondents filed, an "Answer" on December 1, 2008. The Answer generally denied the allegations of paragraph III of the Complaint pertaining to their failure to make full payment promptly. Respondents' Answer contained an explanation for non-performance of their contractual duties, but at no time did the Answer specifically deny any of the allegations listed in paragraph III of the Complaint. (Answer ¶ III.) The Answer also generally denied the allegations listed in paragraph IV of the Complaint regarding the bankruptcy filing and stated that "the amounts on

the Schedule F [were] prepared by our counsel based off invoices obtained from the sellers." (Answer ¶ IV.)[1]

On February 24, 2006, Respondents filed a Voluntary Petition under Chapter 7, in the U.S. Bankruptcy Court for the Middle District of North Carolina, designated as Case No. 06-10185. Complainant has now filed a "Motion for a Decision without Hearing Based on Admissions." In their bankruptcy proceeding, Respondents admitted that they owed $381,700.60 to the eight sellers of produce listed in the Complaint. Bankruptcy documents are judicially noticed in proceedings before the Secretary. *See, e.g., In re: Five Star Food Distributors*, 56 Agric. Dec. 880, 893 (1997). Appendix A, attached and incorporated herein by reference, compares the amounts alleged to be due in the Complaint to the amounts admitted by Respondents in their Bankruptcy Schedule F.

The Department's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked. *In re Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)).

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[1]As the Respondent's *pro se* Answer failed to allege that it would make full payment within 120 days of December 1, 2008, it must be considered a "no pay" case. Moreover, there is no indication that any payment has been made which might have converted the case to a "slow pay" as opposed to a "no pay" case.

In this instance, Respondents have made an admission in a bankruptcy proceeding that they have failed to pay $381,700.60 to the same produce creditors named in the Complaint. Respondents have failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA, and they have not asserted that they will achieve full compliance with the PACA by making full payment within 120 days of the service of the complaint. This is a "no-pay" case.

The appropriate sanction in a "no-pay" case is license revocation, or where there is no longer any license to revoke, as is the case here, where Respondents' license has terminated, the appropriate sanction is publication of the facts and circumstances of the violations. *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. at 386-87. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See* 7 C.F.R. § 1.139.[2] Complainant's motion will be granted and the following decision is issued in the disciplinary case against Respondents without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondents are a limited liability company organized and existing under the laws of the State of North Carolina. Respondents' business address was 1007 Timbers Drive, Hillsborough, North Carolina 27278. Both Respondents T. Watford and L. Watford's mailing addresses are home addresses and are on file with the Hearing Clerk's Office, United States Department of Agriculture.
2. Respondent T. Watford was licensed or operating subject to license under the provisions of the PACA. License number 20050448 was issued to Respondent T. Watford on February 22, 2005.
3. At all times material herein, Respondents were operating under Respondent T. Watford's license. This license terminated on March 24, 2006, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d (a)), when Respondents failed to pay the required annual renewal fee.

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[2]A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R. § 1.141(b); *Veg. Mix, Inc. v. U. S. Dep't of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987).

4. During the period of December 18, 2005, through February 18, 2006, Respondents failed to make full payment promptly to eight (8) sellers of the agreed purchase prices in the total amount of $365,637.74 for 30 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in the course of interstate and foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondents' failure to make full payment promptly with respect to the 30 transactions set forth in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)).

Order

1. The facts and circumstances of the above violations shall be published.
2. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

Appendix A

COMPARISON OF COMPLAINT AND BANKRUPTCY SCHEDULE F

Produce Seller Listed in Complaint	Amount Alleged in Complaint to be Past Due and Unpaid	Amount Admitted in Respondents' Bankruptcy Schedule F as Undisputed
Taylor Farms Maryland, Inc.	$7,107.40	$5,555.50
G. Cefalu & Bro., Inc	$54,362.00	$55,866.50
ExaWorld Biz	$10,109.05	$17,675.00

Channel Imports	$7,872.00	$10,000.00
KGB International, Inc.	$33,345.86	$38,980.85
South Mill Dist. LP	$74,945.90	$76,000.00
Armstrong Marketing	$104,746.35	$104,746.35
Cornucopia Produce Co.	$73,149.18	$72,876.40
Totals	**$365,637.74**	**$381,700.60**

In re: KDLO ENTERPRISES, INC.
PACA Docket No. D-09-0038.
Decision and Order by Reason of Admissions.
Filed December 30, 2010.

PACA.

Jonathan D. Gordy, for AMS.
Kevin M. Pederson, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.

1. The Complaint, filed on December 2, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq*.) (herein frequently the "PACA").

Parties, Counsel, and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant"). AMS is represented by Jonathan D. Gordy, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309, Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.
3. The Complaint alleges that the Respondent, KDLO Enterprises, Inc. (herein frequently "KDLO" or "Respondent"), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay, during October 2006 through June 2007, 8 produce sellers for more than $450,000 in produce purchases. The Complaint alleges that KDLO willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
4. The Respondent is KDLO Enterprises, Inc., a Washington corporation.

KDLO is represented by Kevin M. Pederson, KDLO owner and officer (President).

5. KDLO Enterprises, Inc. on February 27, 2009, filed an Answer to the Complaint.

Procedural History

6. The hearing was scheduled for September 2010, in Tacoma, Washington. AMS then filed, on August 3, 2010, its "Motion for Official Notice of Bankruptcy Pleadings and Motion for Decision without Hearing by Reason of Admissions." *See* 7 C.F.R. § 1.139. The hearing was rescheduled for November. KDLO filed its Response to the Motion on September 22, 2010. The hearing was then canceled, to be rescheduled if needed after my ruling on the Motion. KDLO filed its Supplement to its Response on October 13, 2010. AMS filed its Reply on November 5, 2010. I now know that no hearing will be necessary.

" . . . a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *See In re H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998).[1]

7. After careful consideration, and I commend both AMS and KDLO for excellent work, I find that AMS's Motion must be and hereby is GRANTED. The admissions come not only from KDLO's filings in this case, but also from the filings in the bankruptcy case of Kevin M. Pederson and his wife Donna M. Pederson. *See* paragraphs 9 and 10. I issue this Decision and Order by Reason of Admissions, pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

Discussion

8. Section 2(4) of the PACA requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within

[1] *See also*, *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (decision without hearing by reason of admissions).

ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).[2]

9. I take official notice of the bankruptcy pleadings of Kevin M. Pederson and his wife Donna M. Pederson. *See,* for example, the Discharge of Debtor, granted November 18, 2009. AMS Motion Exhibit B p.1. KDLO is included as an "fdba" (formerly doing business as) of Debtor Kevin M. Pederson. Kevin Pederson identified himself as formerly operating under the trade name "KDLO Enterprises, Inc." In schedule F, "CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS," Kevin and Donna Pederson admitted that they owed $422,518.18 to the eight sellers listed in the Complaint, and they listed **$348,026.18** of that amount as **undisputed**. Schedule F, *In re Kevin Pederson*, Case No. 09-45837-PHB in the Western District of Washington (August 11, 2009) (ECF Docket No. 1). KDLO is a corporation, and Kevin M. Pederson and his wife are individuals; nevertheless, in these circumstances, their admissions in the Chapter 7 bankruptcy suffice to admit, for the corporation KDLO, the material allegations in the Complaint. I agree with AMS, in its Reply filed November 5, 2010, that KDLO's argument "has elevated the form of the corporation, while ignoring the substance of the bankruptcy." AMS Reply pp. 2-3.

" . . . KDLO's owners admitted in their Chapter 7 bankruptcy pleadings that they *were* the corporation;" AMS Reply p. 3. KDLO's business debts are clearly included in the Pedersons' bankruptcy. AMS Reply p. 3.

10. A comparison of the Complaint with the bankruptcy filing shows the following:

Produce Seller	Amount Alleged in the Complaint	Amount Admitted in Bankruptcy Schedule F
California Oregon Seed, Inc.	$4,216.00	$4,216.00
Sunkist Growers	$74,492.50	$74,492.00
Gold Digger Apples	22,848.50	$21,808.00
Evans Fruit	$251,425.30	$250,000.00
Salyer American Foods	$8,063.50	$7,447.50
Manson Growers Cooperative	$43,692.47	$18,000.00

[2] *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

C.M. Holzinger Fruit Co. (Holtzinger Fruit Co.)	$37,098.50	$38,141.50
Sterling Export	$8,785.00	$8,413.18
TOTALS:	$450,621.77	$422,518.18

Schedule F indicates that the amounts are undisputed with seven of the eight produce sellers; the amount of $74,492.00 owed to Sunkist Growers was the only one listed as disputed on Schedule F. (AMS Motion, Exhibit A p. 31.) Respondent KDLO's owners received a full discharge of this debt, as indicated in the Discharge of Debtor, *In re Kevin Pederson*, Case No. 09-45837-PHB.

11.The Department's policy in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In re Scamcorp, Inc., 57 Agric. Dec. 527, 549 (1998).

12.KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. [The Complaint was served on December 11, 2008.] KDLO's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. *See Scamcorp*, 57 Agric. Dec. at 549. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. *See id*. A civil penalty is not appropriate because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA", and it would not be consistent with the

Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id*., at 570-71.

13. KDLO's violations are "repeated" because repeated means more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See, In re Five Star Food Distributors*, 56 Agric. Dec. 880, 894-95 (1997). KDLO's violations of the PACA are also willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *See Scamcorp*, 57 Agric. Dec. at 553.[3] KDLO intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *See id*., at 553.

14. KDLO indicates that Evans Fruit Co. is largely responsible for KDLO's failures under the PACA. For purposes of this disciplinary case, I need not determine whether that is true. Where the licensee, such as KDLO, has failed to make full payment promptly to its produce suppliers, mitigating circumstances do not negate findings of "willful, flagrant and repeated violations." *See* AMS Reply pp. 8-13.

Findings of Fact

15. KDLO Enterprises, Inc., which is no longer in business, is a corporation incorporated and existing under the laws of the State of Washington. KDLO's business and mailing address are in Gig Harbor, Washington.

16. Pursuant to the licensing provisions of the PACA, KDLO Enterprises, Inc. was issued license number 1998-1922 on September 8, 1998. The license terminated on September 8, 2008, when KDLO failed to pay the annual renewal fee. Section 4(a) of the PACA (7 U.S.C. § 499a(a).

17. KDLO Enterprises, Inc., during October 2006 through June 2007, failed to make full payment promptly to 7 of the 8 produce sellers listed in

[3] Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by Respondent or actions undertaken with careless disregard of the statutory requirements. *See, e.g. Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983).

paragraph III of the Complaint of the agreed purchases prices, or the balance of those prices, in the amount of $348,026.18 for 28 lots of fruits and vegetables, all being perishable agricultural commodities, which KDLO purchased, received, and accepted in the course of interstate commerce.

18.KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. [The Complaint was served on December 11, 2008.] KDLO's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case.

Conclusions

19.The Secretary of Agriculture has jurisdiction over KDLO Enterprises, Inc. and the subject matter involved herein.

20.KDLO Enterprises, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during October 2006 through June 2007, by failing to make full payment promptly of the agreed purchases prices, or the balance of those prices, in the amount of $348,026.18 for 28 lots of fruits and vegetables, all being perishable agricultural commodities, which KDLO purchased, received, and accepted in the course of interstate commerce.

Order

21.KDLO Enterprises, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

22.This Order shall take effect on the 11th day after this Decision becomes final.

Finality

23.This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the

Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal

simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument*. Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement*. The Hearing Clerk shall advise

all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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REPARATION DECISIONS

GRASSO FOODS, INC. v. AMERICE, INC.
PACA Docket No. R-08-101.
Decision and Order.
Filed July 1, 2010.

PACA-R.

Damages, estimate of
Estimating damages is permissible as long as we do not move into speculation. Where determination of damages would be speculative (no objective benchmark can be found) they should not be awarded. Also, in arriving at an estimate, the uncertainty as to value must not be allowed to benefit the party who caused the uncertainty, or who had the burden of proving damages but failed to submit adequate evidence.

Damages, incidental and consequential
Storage fees can be awarded if agreed upon by the parties in a contract involving the sale of perishable agricultural commodities.

Damages, mitigation of
When assessing damages for resold product, it is necessary that Complainant show that its resale was made in a ""commercially reasonable manner". What is a "reasonable manner" depends upon the nature of the goods, the condition of the market and the other circumstances of the case. Where Complainant proved that the product to be resold was a "specialty item" with limited buyers, and that the product, once frozen, was not highly perishable, holding product in cold storage for several months until it could be resold was commercially reasonable.

Fees, award of
Fees and expenses will only be awarded to the extent that they are incurred in connection with an oral hearing. That an oral hearing might have been "contemplated" from the time of commencement of a reparation case does not necessarily make *all* work performed on that reparation case, from its early informal stages to the oral hearing, work that is "in connection" with the oral hearing. The prevailing party must clearly identify any fees and expenses incurred in connection with an oral hearing.

Interest
When parties contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, the percent of interest for which the parties contracted will be awarded. Where invoices provided to Respondent, and undisputed by Respondent, stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge or

interest on the invoice amount, interest of 18% on those invoices was awarded.

Trust, beneficiary of the
Where Complainant claimed that it was entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims, such an order was not issued. Only the district courts have jurisdiction over actions by private parties seeking to enforce payment from trust, including actions seeking injunctive relief. It is the purview of the district courts to issue an order declaring that a Complainant is a PACA trust beneficiary of a Respondent with valid PACA trust claims.

Christopher Young-Morales, Presiding Officer.
Mattioni Ltd., Counsel for Complainant.
Gentile & Dickler, Counsel for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereinafter, "PACA"). A timely Complaint was filed with the Department on February 28, 2008, in which Complainant sought a reparation award against Respondent in the amount of $1,215,428.65 which was alleged to be past due and owing in connection with transactions involving peppers. Complainant claims that for peppers purchased by order contract for f.o.b. delivery during the August 2006-August 2007 contract year and shipped to Respondent between July 30, 2007 and November 13, 2007, Respondent owes the amount of $281,758.65[1] and for peppers purchased by order contract for f.o.b. delivery during the August 2007-August 2008 contract year and never delivered to Respondent, Respondent owes the amount of $933,670.00.[2]

A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability and requesting an oral hearing.

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[1]The amount claimed in the Complaint for this produce was $281,758.65. Complainant subsequently modified this amount to $272,371.31.

[2] The amount claimed in the Complaint for this produce was $933,670.00. Complainant subsequently modified this amount to $352,774.96.

An oral hearing in this case was scheduled to be held on March 10-12, 2009, at the Martin Luther King Federal Bldg. and Courthouse in Newark, NJ. On March 3, 2009, a conference call was held, wherein the parties agreed to cancel the oral hearing and proceed by documentary procedure, in accordance with 7 C.F.R. § 47.20 of the Rules Of Practice Governing Reparation Proceedings Under The Perishable Agricultural Commodities Act. The parties further agreed that the testimony of witnesses would be presented by affidavit, and that Complainant would have the opportunity to request to depose any witness who testified by affidavit on behalf of Respondent, if Complainant deemed such request necessary, in accordance with 7 C.F.R. § 47.20 (a)(2). Thereafter, Complainant submitted an opening statement and affidavits, evidence, and a brief in support of its case; Respondent has, to date, made no documentary submissions, and has elected not to submit any additional evidence or file a brief.

Complainant submitted two (2) affidavits and twenty-seven (27) exhibits into evidence (various of the twenty-seven exhibits contained lettered subparts, for example, exhibits 5A-C, exhibits 6A-B, etc. These exhibits will be referred to in this decision as CX 1-27). Complainant submitted affidavits from Anthony Verchio, the Chief Operations Officer of Complainant, and from Janet Schumann[3], the Vice President of Complainant. The affidavits appear to be identical. Complainant also submitted a brief, which contained a claim for fees and expenses, with attached exhibits A-G.

Findings of Fact

1. Complainant, Grasso Foods, Inc., is a corporation whose business address is 2111 Kings Highway, Woolwich Twp., NJ 08085. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.

2. Respondent, Americe, Inc., is a corporation whose business address is 1405 Old Alabama Road, Suite 200, Rosewell, GA 30076. At the time of the transactions alleged in the Complaint, Respondent was licensed under

[3]Also known as Janet Tresch.

the PACA.[4]

3. Complainant is in the business of processing and selling peppers. These peppers are generally harvested, processed, frozen, and stored by Complainant and delivered to customers between the months of July through November. (Opening Statement, Verchio and Schumann affidavit, paragraph 6).

4. Complainant's customers establish their pepper requirements in advance for the upcoming year (because of the limited months that peppers are harvested, processed, and delivered). Complainant and its customers enter into agreements in about July or August to establish the quantity of peppers that Complainant will purchase and process on the customer's behalf for the next year. The contract year for Complainant and its customers generally runs from July or August of one year to July or August of the next. (Opening Statement, Verchio and Schumann affidavit, paragraph 7).

5. Complainant and Respondent have a longstanding relationship. Respondent has purchased peppers from Complainant since at least February 2004. Traditionally, in July or August the parties would discuss Respondent's pepper requirements for the upcoming year and would contract for and order a certain amount of peppers for delivery for the upcoming year at an agreed upon price. (Opening Statement, Verchio and Schumann affidavit, paragraph 9).

6. Based upon the quantity of produce ordered by Respondent in the contract between Complainant and Respondent, Complainant would purchase fresh peppers and process them to Respondent's specifications. They would then be frozen and sent to cold storage. The peppers would be handled at an agreed upon handling rate and placed into storage at an agreed upon storage rate. (Opening Statement, Verchio and Schumann affidavit, paragraph 10).

7. The terms of the sale of peppers were f.o.b., and when Respondent sent a truck to the cold storage facility, an amount of peppers would be loaded and Complainant would issue an invoice for the peppers loaded. This process was repeated throughout the life of each contract, so that

[4]Respondent's PACA license terminated in March 2008.

several pickups by Respondent would occur and several loads would be invoiced to Respondent by Complainant during each contract year, until the amount agreed upon in the original contract had been fulfilled. (Opening Statement, Verchio and Schumann affidavit, paragraph 16, CX 2).

8. In July 2006, the parties began discussions about Respondent's pepper requirements for the 2006-2007 contract year. Respondent stated in a July 13, 2006 email that it had "just been awarded business at a major account", and that it may need as much as 360,000 lbs. of yellow peppers and 1,800,000 lbs. of mixed red and green peppers during the 2006-2007 contract year. (Opening Statement, Verchio and Schumann affidavit, paragraph 13-15, CX 2).

9. In confirmation of the parties' agreement, on October 5, 2006 Respondent issued a purchase order to Complainant for the purchase of 485,000 lbs. of mixed red and green pepper strips at a price of $0.42 per pound, 72,000 lbs. of 3/8" red pepper strips at a price of $0.485 per pound, and 40,000 lbs. of yellow pepper strips at a price of $0.57 per pound. The purchase order stated that there was a storage and handling fee for the red strip peppers of $0.015 per pound for September[5] and a fee of $0.0075 per pound for each month thereafter, and a storage and handling fee for the yellow strip peppers of $0.15 per pound for November[6] and a fee of $0.0075 per pound for each month thereafter. (Opening Statement, Verchio and Schumann affidavit, paragraph 14, CX 3).

10. On January 29, 2007, Respondent issued an additional purchase order to Complainant for the purchase of 1,000,000 lbs. of mixed red and green pepper strips at a price of $0.40 per pound (CX 4). Complainant asserts that the price on the purchase order was a mistake, and that the actual price was $0.42 per pound. (Opening Statement, Verchio and Schumann affidavit, paragraph 15).

11. The terms of sale between Complainant and Respondent were f.o.b. (*see* note 8, *infra,* p. 8), and the agreement was that Respondent would

[5] The evidence submitted by Complainant does not indicate whether this storage fee began in September 2006 or September 2007.

[6] The evidence submitted by Complainant does not indicate whether this storage fee began in November 2006 or November 2007.

supply a truck upon which the peppers would be loaded, and shipped to Respondent. At this time Complainant would issue an invoice to Respondent for the shipped peppers. (Opening Statement, Verchio and Schumann affidavit, paragraph 16).

12. Between July 30, 2007 and November 13, 2007, pursuant to the agreement regarding the 2006-2007 contract year and the purchase orders issued by Respondent on October 5, 2006 and January 29, 2007, Complainant sold and delivered f.o.b. to Respondent various peppers in the amount of $272,371.31. (Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5A-19C).

13. The peppers under the 2006-2007 contract were sold in 15 separate shipments, and for each shipment, an invoice was issued. Each invoice stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge. (Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5A-19C).

14. There were no inspections requested for any of the shipments made between July 30, 2007 and November 13, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 17, CX 5A-19C).

15. Respondent accepted the shipments made between July 30, 2007 and November 13, 2007, and to date, has paid Complainant only $1,000.00, for the shipment made on July 30, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 18-19). This payment was made on December 13, 2007. (CX 5C).

16. In July 2007, the parties began discussions via email about Respondent's pepper requirements for the 2007-2008 contract year. (CX 23).

17. In confirmation of the parties' agreement, Respondent issued a purchase order to Complainant, dated August 2, 2007[7], for the purchase of 1,100,000 lbs. of mixed red and green pepper strips at a price of $0.43 per pound, 175,000 lbs of 3/8" red pepper strips at a price of $0.525 per pound, and 110,000 lbs. of yellow pepper strips at a price of $0.64 per pound. The purchase order stated that there was a storage and handling fee for all

[7] This purchase order, submitted by Complainant as CX 24, contains notations for orders made on October 30, 2007, which suggests that August 2, 2007 was not the actual date of CX 24. It appears that the purchase order was issued on August 2 and later amended.

products at a rate of $0.015 per pound, "effective October 1", and an additional fee of $0.0075 per pound for each month of storage. (CX 24).

18. On October 30, 2007, the parties agreed to add an additional 350,000 lbs. of mixed red and green pepper strips at a price of $0.43 per pound, and an additional 53,000 lbs. of red pepper strips at a price of $0.525 per pound. (Opening Statement, Verchio and Schumann affidavit, paragraph 32, CX 24).

19. On November 7, 2007, the parties agreed to add 312,000 lbs. of mixed red and green pepper strips at a price of $0.43 per pound. This addition was a carry over from the 2006-2007 contract year. (CX 25).

20. Respondent never took delivery of any of the produce agreed upon and ordered by Respondent in the contract for the 2007-2008 contract year. (Opening Statement, Verchio and Schumann affidavit, paragraph 34).

21. Prior to the parties entering into the contract for the 2007-2008 year, Respondent had failed to pay for several invoices issued by Complainant to Respondent for peppers from the 2006-2007 contract year. (CX 22).

22. Respondent sent numerous emails to Complainant between September 6, 2007 and November 29, 2007, wherein Respondent acknowledged that it owed money to Complainant for shipments of peppers, and stated that Respondent was having various financial and credit problems. (CX 22).

23. As of July 27, 2009, Respondent had failed to pay for the peppers identified in both the 2006-2007 contract and the 2007-2008 contract, with the exception of a single $1000.00 check tendered by Respondent on December 13, 2007, for payment of invoice 9596 for peppers delivered f.o.b. to Respondent on July 30, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraphs 18-20, 34, CX 5C, See Complainant's Brief, p. 2).

24. The informal complaint was filed on February 11, 2008, and the formal complaint was filed with the Department on February 28, 2008, which is within nine months from the date the cause of action accrued. (Report of Investigation).

Conclusions

Complainant claims that Respondent owes it for peppers purchased by

order contract for f.o.b.[8] delivery during the August 2006-August 2007 contract year and shipped to Respondent between July 30, 2007 and November 13, 2007, and for peppers purchased by order contract for f.o.b. delivery during the August 2007-August 2008 contract year and never delivered to Respondent.

Complainant alleges that Respondent is liable, as to the 2006-2007 contract, for the principal sum of unpaid invoices for peppers sold totaling $272,371.31[9], for finance charges on the unpaid invoices as of May 14, 2009 totaling $78,267.51, and for continuing finance charges of $4,085.56 per month beyond May 2009. Complainant alleges that Respondent is liable, as to the 2007-2008 contract, for the cost of produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent in the amount of $352,774.960, and for storage charges in the amount of $231,983.95 for produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent. As to the 2007-2008 contract, Complainant further alleges that Respondent is liable for "future" losses that will be incurred by Complainant: continuing storage charges for produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent in the amount of $6,354.30 per month, and "estimated" disposal expenses[11] in the

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[8] F.o.b. means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable condition...and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. 7 C.F.R. § 46.43 (i); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-976 (1997). The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment... . 7 C.F.R. § 46.43 (i).

[9] This includes an invoice for storage fees for certain of the peppers from the 2006-2007 contract, issued to Respondent on October 16, 2007. (CX 20).

[10] The total amount of produce ordered by Respondent in the 2007-2008 contract totaled $757,660 (1,762,000 lbs. X $0.43/lb.); Complainant granted a "credit" to Respondent for produce sold by Complainant to other buyers in the amount of $404,885.04. (Opening Statement, Verchio and Schumann affidavit, paragraph 39).

[11] While Complainant had not disposed of any of the peppers which were the subject of the 2007-2008 contract as of May 14, 2009, they nevertheless make the claim for disposal (continued...)

amount of $58,608.00. Finally, Complainant makes a claim for attorney's fees and expenses, and asserts that Complainant is entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims.

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. *Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc.*, 47 Agric. Dec. 581 (1988); *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987).

As to whether the contracts in question existed, Complainant has met its burden and proven by a preponderance that a contract existed as to both the 2006-2007 and the 2007-2008 contract years. (*See* Opening Statement, Verchio and Schumann affidavit, paragraphs 12-16, 18; CX 2, CX 3, CX 5A-19C, CX 23, CX 24, CX 25). The evidence of record indicates that a mutual manifestation of assent, a "meeting of the minds", occurred as to the material terms of both of the contracts at issue in this case. *See Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002 (1981).

Complainant has further proven by a preponderance of the evidence that respondent breached both contracts. *See Martori Bros. Distributors v. Houston Fruitland, Inc.*, 55 Agric. Dec. 1331, 1335-1336 (1996). Respondent breached the 2006-2007 contract when Respondent took delivery of and accepted[12] the peppers identified in the contract and invoiced to Respondent between July and November 2007, and failed to pay

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[11](...continued)
expenses, stating that "[Complainant] is hopeful that it will be able to sell additional product [from the 2007-2008 contract] but the shelf life of the product is expiring and if the product cannot be sold in the near future then [Complainant] will incur disposal charges which are estimated to be [$58,608.00]."

[12] The evidence of record suggests that Respondent accepted all of the peppers which were sent to Respondent between July and November 2007 without complaint, and Respondent did not require inspections for any of the shipments made between July 30, 2007 and November 13, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 19, CX 5A-19C).

for all but $1,000.00 of those peppers. *See Growers Marketing Service, Inc. v. Dino Produce, Inc.*, 38 Agric. Dec. 1599 (1979)(where seller shipped watermelons of kind and quality called for by buyer, buyer's failure to make full and prompt payment results in buyer being indebted to seller for amount owed); *see also In re Diamond Tomato Co.*, 49 Agric. Dec. 1153 (1990)(purchaser's failure to make full payment promptly to 6 sellers with respect to 23 lots of tomatoes constitutes willful, repeated, and flagrant violations of § 499b).

Respondent breached the 2007-2008 contract when Respondent failed to take delivery of any of the peppers ordered by Respondent. *See Brookside Farms v. Mama Rizzo's, Inc.*, 873 F.Supp. 1029 (S.D. Tex. 1995). In *Brookside*, the seller (Brookside) and the buyer (MRI) entered into a contract for the sale of fresh basil leaves. Under the contract, MRI agreed to purchase a minimum of 91,000 lbs. of fresh basil leaves for a one year term. MRI failed to pay for a portion of the 91,000 lbs. already delivered by Brookside, and failed to accept the minimum amount of basil leaves it agreed to purchase. Brookside brought suit for both the delivered produce for which MRI failed to pay, and for the unordered remainder of the 91,000 lbs. The court granted Brookside's motion for summary judgment, holding that MRI's refusal to pay for the basil delivered and MRI's failure to accept and pay for the minimum amount of basil it agreed to purchase were breaches of contract and violations of section 499b(4) of the PACA (7 U.S.C. § 499b(4)). *Id.* at 1036. Similarly, in this case, both Respondent's failure to pay for the peppers delivered and accepted in the 2006-2007 contract, and its failure to order and take delivery of the peppers in the 2007-2008 contract, were breaches of the contracts and a violation of section 499b(4) of the PACA, for which damages may be awarded.

Damages

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 "the full amount of damages sustained in consequences of such violations." *Ta-De Distributing Company, Inc., v. R.S. Hanline & Co., Inc.*, 58 Agric. Dec. 658 (1999). The long standing administrative practice favors the assessing of damages where possible. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484 (1979).

1) 2006-2007 contract year

As to the peppers that were delivered f.o.b. to Respondent, and for which Respondent failed to pay, Respondent is liable to Complainant for the full contract price of the peppers. The first and most basic rule, where goods have been accepted, is that the buyer who accepts goods is liable for the contract price. *See Growers Marketing Service, Inc. v. Dino Produce, Inc.*, 38 Agric. Dec. at 1599; *See also* UCC § 2 - 607(1). Between July 2007 and November 2007, Respondent accepted loads of peppers in 15 separate shipments from Complainant. In each case, an invoice was issued, and each invoice stated that the terms of payment were net 30 days. The invoice prices were in accord with the contract reached between the parties in July-August 2006.
(Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5A-19C).

As of July 27, 2009, Respondent had failed to pay for the peppers identified in the 2006-2007 contract, with the exception of a single $1000.00 check tendered by Respondent on December 13, 2007 for payment of invoice 9596 for peppers delivered f.o.b. to Respondent on July 30, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5C, Complainant's Brief, p. 2). Moreover, Respondent acknowledged that it had failed to pay for several invoices: Respondent sent numerous emails to Complainant between September 6, 2007 and November 29, 2007, wherein it admitted that it owed money to Complainant for shipments of peppers, and stated that Respondent was having various financial and credit problems. (CX 22). Respondent has offered no defense for its failure to pay for the produce accepted pursuant to the 2006-2007 contract. Therefore, Respondent is liable to Complainant for the full amount of the contract price, in this case evidenced by the invoices sent to Respondent between July 2007 and November 2007, less the $1,000.00 paid by Respondent on December 13, 2007. This amount totals $271,659.52.

Respondent is also liable for storage fees for peppers stored as part of the 2006-2007 contract, which were agreed upon by the parties at the time of the making of the contract in July-August 2006, and memorialized in the purchase order sent by Respondent to Complainant. (CX 3, CX 20). *Peak*

Vegetable Sales v. Northwest Choice, Inc., 58 Agric. Dec. 646, 654-655 (1999)(awarding storage fees); *Eustis Fruit Company, Inc., v. The Austen Company, Inc.*, 51 Agric. Dec. 861 (1992)(suggesting that storage fees are allowable if agreed upon in contract).[13] Complainant presented as evidence a breakdown of the charges in the amount of $711.79, set forth on an invoice dated October 16, 2007[14] and presented to Respondent. (CX 20). Respondent is liable to Complainant in the amount of $711.79 for storage fees for storage of peppers from the 2006-2007 contract year.

Complainant asserts that Respondent is liable for finance charges on the unpaid invoices, relating to the 16 separate transactions (one of these transactions includes an invoice for storage fees on produce, CX 20) that occurred under the 2006-2007 year contract, totaling $78,267.51 as of May 14, 2009. Complainant further asserts that Respondent is liable for continuing finance charges of $4,085.56 per month beyond May 2009. Complainant has provided a calculation of interest for each unpaid invoice through May 2009, and for each month thereafter. (CX 21).

The requirement of section 5(a) of the Act (7 U.S.C. § 499e(a)), that we award damages to the person or persons injured by a violation of section 2 of the Act, includes awards of interest. *L & N Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. *See W. D. Crokett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

If parties contract for the payment of interest at a rate which is different

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[13] Certain earlier PACA reparation cases have suggested that storage fees should not be awarded, and that a storage contract [or portion of a contract thereof, when there is a claim for storage fees in a PACA reparation involving a contract for the sale of produce] does not fall within the category of "transaction" under section 2(4) (7 U.S.C. § 499b(4)) of the Act. *See De Bruyn Produce Co. v. Ruben E. Lopez d/b/a R.L. Distributors*, 56 Agric. Dec. 992, 996, note 5 (1997); *Roger L. Burden dba Burden Produce Services v. Sonny Taylor and Richard Taylor dba Taylor Produce*, 50 Agric Dec. 1005, 1008 (1991); *see also Joanne M. Eady v. Eady Associates*, 37 Agric. Dec. 1589 (1978). However, the later cases cited in this decision suggest that storage fees can be awarded if agreed upon by the parties in a contract involving the sale of perishable agricultural commodities.

[14] This invoice also contained a statement advising Respondent that any unpaid balance after 30 days would be subject to a 1.5% (18 % per annum) finance charge. (CX 20).

than that normally awarded in reparation proceedings, this forum will award the percent of interest for which the parties contracted. *Dale Seaquist d/b/a Orchard hill Farm v. Gro-Pro, Inc. and/or Fruit Hill, Inc.*, 43 Agric. Dec. 161 (1984); *Swanee Bee Acres, Inc. v. Gro-Pro, Inc. and/or Fruit Hill, Inc.,* 42 Agric. Dec. 637 (1983); *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 (1970). Here, each invoice provided to Respondent stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge[15] or interest on the invoice amount. (Opening Statement, Verchio and Schumann affidavit, paragraphs 18-24, CX 5A-19C).

Terms contained in the seller's invoice become part of the parties' contract unless (1) the buyer expressly limited the seller's acceptance to the terms of the offer; or (2) the buyer objects to the new terms within a reasonable time; and (3) the additional terms materially alter the contract. *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 223 (2d Cir. 2000). Here, Respondent has made no claim that it limited its offer or timely objected to the interest provision in the invoices, or that the interest provision materially altered[16] the contract. The parties contracted, via the invoices issued by Complainant to Respondent between July and November 2007, for the payment of interest at a rate of 1.5 % interest on all balances unpaid after 30 days. Therefore, we award this rate on the past due invoices from the 2006-2007 contract, in the amount of $78,267.51 for charges up until May 2009, and $4,085.56 per month after May 2009, until

[15] Including CX 20, the invoice containing storage fees.

[16] Moreover, as was held in *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, 2005 U.S. Dist. Lexis 26974 (S.D.N.Y. 2005), a 1.5% interest charge per month does not materially alter the parties contract. *See Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F.Supp. 346, 351 (S.D.N.Y 1993)(enforcing a term in the invoice through which the defendant agreed that "past due accounts will accrue 1.25% interest per month").

the date of issuance of this order.[17] *See Pearl Grange Fruit Exchange, Inc.*, 29 Agric. Dec. at 978, 979.

2) 2007-2008 contract year

Complainant alleges that Respondent is liable, as to the 2007-2008 contract, for the cost of peppers sold to Respondent and never claimed by or delivered f.o.b. to Respondent in the amount of $352,774.96[18], and for storage charges in the amount of $231,983.95 for produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent. Complainant's claim is limited to the quantity of red and green pepper strips sold under the 2007-2008 contract; Complainant states that these are a specialty item and for that reason, they were more difficult to resell to other buyers[19]. (Opening Statement, Verchio and Schumann affidavit, paragraph 36).

As noted *supra* at 10-11, Respondent breached the 2007-2008 contract when it failed to take delivery of any of the peppers ordered by Respondent. Complainant points to the case of *S.N.A. Nut Company v. The Haagen-Dazs Company*, 247 B.R. 7 (N.D. Ill. 2000), as support for damages from this breach as to the mixed red and green pepper portion of the contract. In *S.N.A. Nut*, S.N.A. manufactured nuts for Haagen-Dazs under a sales contract, and Haagen-Dazs failed to perform under the contract and take possession of and pay for the nuts. The court found that S.N.A could recover damages because, *inter alia*, 1) the evidence was undisputed that the nuts in question were unique goods manufactured to Haagen Dazs' confidential specifications with no market value to any except Haagen

[17] Subsequent to the date of issuance of this order, interest on the past due invoices shall be determined in accordance with the rate set by 28 U.S.C. § 1961, *see infra* at 25. *See PGB International, LLC. Co. v. Bayche Companies, Inc.*, 65 Agric. Dec. 669, 672 (2006).

[18] The total amount of produce ordered by Respondent in the 2007-2008 contract totaled $757,660 (1,762,000 lbs X $0.43/lb.); Complainant granted a "credit" to Respondent for produce sold by Complainant to other buyers in the amount of $404,885.04. (Opening Statement, Verchio and Schumann affidavit, paragraph 39).

[19] Complainant presumably resold the other pepper items under the 2007-2008 contract with no damages perceived by Complainant.

Dazs; 2) S.N.A. provided undisputed evidence that it employed extensive marketing efforts to sell the nuts, that it expended considerable effort and resources in attempted resale, and that it made every reasonable effort to resell the nuts in a timely manner; and 3) the subject nuts being held by S.N.A in storage "no longer had any value whatsoever." *Id.* at 11-13.

In our case, while Complainant provided affidavits from Complainant's employees which stated that mixed red and green pepper strips were a "specialty item" with limited demand
(Opening Statement, Verchio and Schumann affidavit, paragraph 36), Complainant has provided no evidence that the mixed red and green pepper strips had no value to any other customer, as was the case in *S.N.A Nut*. Further, while Complainant has provided evidence of resale of the red and green strip peppers, it has not provided evidence that it expended "considerable effort and resources" in attempted resale, as was the case in *S.N.A Nut*. *See id.* at 10-13.

Nevertheless, in this case, since Respondent has provided no evidence to the contrary, and based on the affidavits submitted by Complainant, we find that the mixed red and green strip peppers were a specialty item. The evidence indicates that Complainant kept all 1,762,000 lbs. (the entire amount under the 2007-2008 contract) of the mixed red and green peppers in storage from October 2007 through July 2008, and then began selling portions of the mixed strip peppers to other buyers. As of May 2009, Complainant had resold 914,670 lbs. to other buyers. (Opening Statement, Verchio and Schumann affidavit, paragraph 39).

In assessing Complainant's damages as to the mixed strip peppers, we must determine whether the product's resale was made in a "commercially reasonable manner", and whether Complainant properly mitigated its damages. *See S.N.A. Nut Company*, 247 B.R. 7 at 10-13; *Valley Pride Sales, Inc. v. Dairy Rich Ice Cream Co., Inc., and/or Continental Food Sales, Inc.*, 53 Agric Dec. 879 (1994); U.C.C. § 2-703. Section 2-703 of the UCC provides that when a buyer refuses to perform under a sales contract, the seller may recover damages using a number of different methods to calculate loss as set forth in UCC §§ 2-704 through 2-709. The underlying purpose of each of these remedies is to ensure that the seller is made whole and the "[c]ourt must administer each of these remedies so that [the seller] may be put in as good a position as if [the buyer] had fully performed."

S.N.A. Nut Company, 247 B.R. at 8-9. For these sections of the UCC to apply, it is also necessary that Complainant show that its resale was made in a "commercially reasonable manner". "What is such a reasonable [manner] depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees." *Valley Pride Sales, Inc.*, 53 Agric Dec. at 885.

Here, as stated above, Complainant provided evidence that the mixed red and green strip peppers were a specialty item, and difficult to sell to buyers other than Respondent. (Opening Statement, Verchio and Schumann affidavit paragraph 36). Further, it appears from the evidence provided by Complainant that the peppers, once frozen, were not highly perishable, and that the sale of peppers to Respondent under the 2007-2008 contract would have begun in July 2008 (the contract was traditionally reached in July of the preceding year). (Opening Statement, Verchio and Schumann affidavit, paragraph 7, 12-18). Therefore, we find that the resale of mixed red and green strip peppers between July 2008 and April 2009 was "commercially reasonable", and a reasonable attempt to mitigate any damages caused by Respondent's breach. *See Valley Pride Sales, Inc.*, 53 Agric Dec. at 885.

The affidavits provided by Complainant show damages for the cost of mixed red and green strip peppers sold to Respondent under the 2007-2008 contract as follows:

Total amount ordered and unpaid-	1,762,000 lbs. X $0.43 =	$757,660.00
Credit for product sold -	914,760 lbs. X $0.44 =	$404,885.04
Net loss for unsold product-		$352,774.96

(Opening Statement, Verchio and Schumann affidavit, paragraph 39). According to Complainant's calculations, the portion of the red and green pepper mix that it resold fetched an average price of $0.442 per pound, which is greater than the original price agreed upon by the parties in the 2007-2008 contract (had Complainant sold the 914,760 lbs. at the original contract price of $0.43 per pound, it would have netted $393,346.80, which is less than the actual $404,885.04 amount it netted after resale to buyers other than Respondent).

Complainant calculates its net loss for unsold product by presumably

assuming that the remaining unsold 847,240 lbs. is worth nothing. Had Complainant produced evidence of such, then perhaps its calculation of damages could be adopted; however, Complainant produced no evidence to suggest that the remaining unsold peppers had no value whatsoever, as was done in the *S.N.A Nut* case. *See S.N.A. Nut Company*, 247 B.R. at 11. Instead, the affidavits submitted by Complainant somewhat equivocally state: "Grasso is hopeful that it will be able to sell additional product but the product is expiring and if the product cannot be sold in the near future then Grasso will incur disposal charges." (Opening Statement, Verchio and Schumann affidavit, paragraph 41). Estimating damages is permissible as long as we do not move into speculation. Where determination of damages would be speculative [no objective benchmark can be found] they should not be awarded. *See Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979). Also, in arriving at an estimate, the uncertainty as to value must not be allowed to benefit the party who caused the uncertainty, or who had the burden of proving damages but failed to submit adequate evidence. *See Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981).

Accordingly, since Complainant made more than it would have under the original 2007-2008 contract for the 914,760 lbs. of peppers resold, and since Complainant still had 847,240 lbs. of unsold peppers as of May 2009 that presumably had some unknown value, and since Complainant has provided us with no evidentiary benchmark for determining that value, we do not award Complainant damages as to its claimed net loss for unsold mixed red and green strip peppers under the 2007-2008 contract.

However, we will award damages as to expenses incurred in relation to Respondent's breach of the 2007-2008 contract. *See Summit Produce, Inc., v. James Polly d/b/a Star Produce*, 35 Agric. Dec. 41 (1976); *Pandol Bros., Inc., v. Prevor Marketing International, Inc.,* 49 Agric. Dec. 1193 (1990)(incidental and consequential damages resulting from breach will be allowed if the party who breached had reason to know the damages would be incurred); UCC § 2-714 and 715. Complainant claims storage charges

in the amount of $231,983.95[20] for the red and green pepper mix, for storage of the peppers between October 2007 through May 2009. The sum of the charges is based on a $0.015 charge per pound for the month of October 2007, and a $0.075 charge per pound for each month thereafter, to which Respondent agreed (in writing) at the time of the making of the contract. CX 24. Since Respondent agreed to the charges, and since the time period for storage of the peppers was reasonable (*see supra* at 16-18 regarding resale), we find that Respondent is liable to Complainant for storage fees in the amount of $231,983.95 for storage of the mixed red and green strip peppers through May 2009. *See Peak Vegetable Sales*, 58 Agric. Dec. at 654-655 (awarding storage fees); *see also Eustis Fruit Company, Inc.,* 51 Agric. Dec. at 861 (suggesting that storage fees are allowable if agreed upon in contract).

As to the 2007-2008 contract, Complainant further alleges that Respondent is liable for "future" losses relating to the mixed red and green strip peppers under the 2007-2008 contract that will be incurred by Complainant: continuing storage charges in the amount of $6,354.30 per month, and "estimated" future disposal expenses in the amount of $58,608.00. As stated *supra* at 19-20, damages that are speculative, with no objective benchmark for their determination, will not be awarded. *See Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979).

Here, Complainant requests future continuing monthly storage fees (after May 2009) in a specified amount based on the unsold 847,240 lbs. of mixed peppers as of May 2009. However, Complainant provides no evidence to suggest that it will sell *no* more peppers after May 2009, and that the poundage in storage will remain the same from month to month (thus justifying a fixed award of $6,354.30 per month, *i.e.*, 847,240 lbs. X $.075). Moreover, if it was indeed the case that Complainant *knew* it would sell no more peppers after May 2009, that the 847,240 lbs. would remain a static amount from month to month and was unsaleable, then Complainant would be obligated to immediately dump the produce to mitigate its incidental and consequential damages resulting from storage. Complainant

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[20] The total sum for storage costs was $242,275.20; Complainant provided a "credit" of $10,291.25, for storage charges paid by other buyers to whom the peppers were resold. (Opening Statement, Verchio and Schumann affidavit, paragraph 39)

provides no evidence that the remaining 847,240 lbs. is worthless and must be dumped.

Complainant submitted an equivocal statement wherein it stated that "[Complainant] is hopeful that it will be able to sell additional product [from the 2007-2008 contract] but the shelf life of the product is expiring and if the product cannot be sold in the near future then [Complainant] will incur disposal charges which are estimated to be [$58,608.00]." (Opening Statement, Verchio and Schumann affidavit, paragraph 41). Complainant would have us award both speculative continuing storage fees (speculative since Complainant may very well sell more of the 847,240 lbs. of peppers after May 2009), and speculative disposal charges (speculative since Complainant has no idea whether, or what amount, it might eventually dump). Complainant's somewhat vague and equivocal statement is inadequate to provide a benchmark for damages regarding future storage charges or possible estimated future disposal charges[21]. Therefore, we deny Complainant's claim of future storage charges (for charges after May 2009) in the amount of $6,354.30 per month or estimated future disposal charges in the amount of $58,608.00.

Complainant makes a claim for attorney's fees and expenses in this case, claiming that "[Complainant's] actions in defending this claim make an award for attorney's fees appropriate." (Complainant's brief at 12). Complainant also claims that certain fees were incurred preparing for the oral hearing (prior to the parties decision to convert to a documentary procedure). (Complainant's brief at 12-13). The fees and expenses provision under section 7(a) of the PACA (7 U.S.C. § 499g(a)) has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (2000); *Mountain Tomatoes, Inc., v. Patapanian & Son*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son,* 36 Agric. Dec. 24 (1977).

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[21] Dumping fees are allowed as damages where there is evidence of proper dumping due to breach of contract. *Shelby Farms v. Wellsworth Pickle Company,* 21 Agric. Dec. 190 (1962).

Section 47.19(d)(2) of the regulations applicable to the PACA (7 C.F.R. § 47.19(d)(2)) states that the term "fees and expenses" as used in section 7(a) of the Act includes:

(i) reasonable fees of an attorney or authorized representative for appearance at the hearing and for the taking of depositions necessary for introduction at the hearing;

(ii) fees and mileage for necessary witnesses at the rates provided for witnesses in the courts of the United States;

(iii) fees for the notarizing of a deposition and its reduction to writing;

(iv) fees for serving subpoenas; and

(v) other fees and expenses necessarily incurred in connection with the oral hearing. Fees and expenses which are not considered to be reasonable or necessarily incurred in connection with the oral hearing will not be awarded.

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc.*, 59 Agric. Dec. at 864; *Mountain Tomatoes, Inc.*, 48 Agric. Dec. at 715. It is the province of the Secretary to determine the reasonableness of the requested fees and expenses. *Id.*; *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Complainant claims that a portion of its attorney's fees and expenses were incurred in preparation for oral hearing, yet it does not enumerate which expenses were incurred in this fashion. Based on the record, Complainant did not incur any of the fees and expenses enumerated in section 47.19(d)(2) of the regulations (7 C.F.R. § 47.19(d)(2)). Complainant also appears to assert that the entire amount of its claimed fees and expenses should be awarded, because an oral hearing was "contemplated" from the start of the case, and therefore all work performed and expenses incurred were incurred in connection with the oral hearing. We disagree with Complainant's assertion. That an oral hearing might have been "contemplated" from the time of commencement of a reparation case does not necessarily make *all* work performed on that reparation case, from its early informal stages to the oral hearing, work that is "in connection with the oral hearing." We find that Complainant's claims for fees and expenses are for fees and expenses "which would have been incurred in any event under the documentary procedure." *See, e.g., East Produce,* 59 Agric. Dec. at 865-866. Based on the foregoing, we deny Complainant's claim for fees

and expenses.

Finally, Complainant claims that it is entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims. 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. The trust is a statutory trust which operates in favor of all unpaid suppliers, sellers and agents. *C&E Enterprises, Inc. d/b/a Koyama farms, et. al., v. Milton Poulos, Inc.*, 47 Agric. Dec. 1442, 1443 (1988). The trust provisions are found in section 5(c) of the PACA (7 U.S.C. § 499e(c)). Section 5(c)(5) of the Act addresses PACA trust jurisdiction, and states:

[t]he several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.

(7 U.S.C. § 499e(c)(5); *Tanimura & Antle, Inc. v. Pack Fresh Produce, Inc.*, 222 F3d 132 (2000)([t]he district courts have jurisdiction over actions by private parties seeking to enforce payment from trust, including actions seeking injunctive relief). Therefore, we do not have jurisdiction to issue an order declaring that Complainant is a PACA trust beneficiary of Respondent with valid PACA trust claims.

Respondent's failure to pay Complainant monies owed under the 2006-2007 and 2007-2008 contracts is a violation of section 2 of the Act for which reparation should be awarded to the Complainant, with interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970). As to the 2006-2007 contract, we have determined that Respondent is liable to Complainant in the amount of $271,659.52. Respondent is also liable to Complainant for storage fees in the amount of $711.79, which were invoiced to Respondent on October 13, 2007 for storage of peppers from the 2006-2007 contract. The total damages owed for this contract is $272,371.31. As to the 2006-2007 contract, the parties agreed to the payment of interest at a rate of 1.5 % interest on all balances unpaid after 30 days. Therefore, we award this rate on the past due invoices from the 2006-2007 contract, in the amount of $78,267.51 for charges up until May

2009, and $4,085.56 per month after May 2009, until the date of issuance of this order. *See Pearl Grange Fruit Exchange, Inc.*, 29 Agric. Dec. at 978, 979. Subsequent to the date of issuance of this order, interest on the past due invoices shall be determined in accordance with the rate set by 28 U.S.C. § 1961, *i.e.*, the interest shall be calculated at a rate equal to the weekly average one year constant treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the order. *See PGB International, LLC. Co. v. Bayche Companies, Inc.*, 65 Agric. Dec. 669, 672 (2006); *see also* 71 Fed. Reg. 25133 (April 28, 2006).

As to the 2007-2008 contract, we find that Respondent is liable to Complainant for storage fees in the amount of $231,983.95 for storage of the mixed red and green strip peppers through May 2009. Interest on this portion of the award shall be determined in accordance with 28 U.S.C. § 1961. *Id*. Interest on awards of damages have traditionally been calculated from the first day of the month following the date upon which payment was due; however, in this case, as to the 2007-2008 contract, while the evidence shows that the parties agreed upon monthly charges and their amounts, the evidence does not show when the monthly storage charges were due from Respondent or to be paid to Complainant. Therefore, interest on these cumulative monthly charges up until May 2009 is awarded from the date we adjudicated them as due.

Complainant in this action paid a $300.00 handling fee to file its complaint. Pursuant to 7 U.S.C. § 499(e)(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 $272,371.31, plus interest in the amount of $78,267.51 for charges up until May 2009, and $4,085.56 per month from June 2009 to June 2010. Subsequent to the date of issuance of this Order, interest on the past due invoices shall be at the rate of 0.29 % per annum, until paid.

Respondent shall further pay Complainant as reparation $231,983.95, with interest thereon at the rate of 0.29 % per annum, until paid; plus the amount of $300.00.

Copies of this Order shall be served upon the parties.
Done at Washington, D.C.

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DENNIS B. JOHNSTON, DON M. JOHNSTON, GERALD A. JOHNSTON, KEVIN C. JOHNSTON, AND TARI L. HENDERSON, d/b/a JOHNSTON FARMS v. AG GROWER SALES LLC.
PACA Docket No. R-08-137.
Decision and Order.
Filed July 7, 2010.

PACA-R.

Damages – Interest rate in confirming forms

Contract Terms – Failure to enforce terms constitutes a waiver

Contract Terms – Waived terms reinstated with reasonable notice

Complainant alleges that it is entitled to recover interest on its invoices which expressly state that "Past Due Accounts will be assessed a late payment service charge at the rate of 1½% per month or 18% per annum from the date of invoice." Respondent, rather than objecting to the "FOB Prompt" payment and service charge terms in Complainant's invoices, simply chose to ignore them. Comment 6 to section 2-207 of the Uniform Commercial Code makes it clear that a merchant's decision to ignore additional terms in confirming forms constitutes acceptance of those terms.

We found that the payment and interest charge provisions in Complainant's invoices were incorporated into the parties' sales contracts. In addition, we found that Respondent's late payments over many years and Complainant's failure to charge interest during those years did not modify the parties' contracts, but that Complainant had waived its right to recover interest charges for late payments that it accepted prior to giving Respondent reasonable notice that the service charge provision in the parties' contracts would be enforced.

We awarded prejudgment interest at the contractually agreed rate of 18% on any unpaid amounts from the effective date of Complainant's reasonable notice to Respondent, until paid, up to the date of the judgment. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978, 979 (1970). In addition, we awarded post-judgment interest on the judgment amount from the date of the judgment until paid at the rate set by 28 U.S.C. § 1961. *See PGB International, LLC. Co. v. Bayche Companies, Inc.*, 65 Agric.

Dec. 669, 672 (2006).

Patrice H. Harps, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Ogden Murphy Wallace, P.L.L.C., Counsel for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $4,620.00 in connection with thirteen truckloads of potatoes 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 a Counterclaim in the amount of $2,260.00 for damages allegedly incurred in connection with three of the transactions contained in the Complaint. Complainant filed a Reply to the Counterclaim denying liability to Respondent.

Neither the amount claimed in the Complaint nor in the Counterclaim exceeds $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. Respondent filed an Answering Statement. Complainant filed a Statement in Reply. Neither party submitted a brief.

Findings of Fact

1. Complainant is a partnership comprised of Dennis B. Johnston, Don M. Johnston, Gerald A. Johnston, Kevin C. Johnston, and Tari L. Henderson, doing business as Johnston Farms, whose post office address is P.O. Box 65, Edison, California, 93220-0065. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, AG Grower Sales LLC, is a limited liability company whose post office address is 636 Valley Mall Pkwy., Ste. 203, East Wenatchee, Washington, 98802-4875. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. 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 California, to Respondent's customer in San Louis Obispo, California, 50-50# sacks of #2 Budget red potatoes at $4.05 per sack, or $202.50, and 50-50# cartons of #1A El Diablo Rojo red potatoes at $8.05 per carton, or $402.50, and 40-50# cartons of #1B El Diablo Rojo red potatoes at $10.05 per carton, or $402.00, and 10-50# cartons of Creamer El Diablo Rojo red potatoes at $28.05 per carton, or $280.50, and 50-50# cartons of Premium Bluejay yellow flesh potatoes at $13.05 per carton, or $652.50, plus $30.00 for pallets, for a total agreed price of $1,970.00, f.o.b., billed on invoice number 702082. (Complaint, Ex. 1.) Respondent paid invoice number 702082 in full prior to the Complaint being filed.

4. On or about June 19, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Denver, Colorado, 100-50# cartons of #1B El Diablo Rojo red potatoes at $12.05 per carton, f.o.b., or $1,205.00, plus $15.00 for pallets, for a total agreed price of $1,220.00, billed on invoice number 702149. (Complaint, Ex. 2.) Respondent paid invoice number 702149 in full prior to the Complaint being filed.

5. On or about June 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of New York, 50-50# sacks of #1A El Diablo Rojo red potatoes at $10.05 per sack, or $502.50,

and 50-50# cartons of Creamer El Diablo Rojo red potatoes at $23.05 per carton, or $1,152.50, and 100-50# cartons of #1A Bluejay yellow flesh potatoes at $13.05 per carton, or $1,305.00, and 50-50# cartons of Creamer yellow flesh potatoes at $27.05 per carton, or $1,352.50, plus $37.50 for pallets, for a total agreed price of $4,350.00, f.o.b., billed on invoice number 702258. (Complaint, Ex. 3.) Complainant received payment in full for invoice 702258 on or by November 19, 2007, on Respondent's check number 7459. (Complaint, Ex. 8-9.)

6. On or about June 27, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of New Jersey, 150-50# cartons of Creamer Bluejay white potatoes at $20.05 per carton, or $3,007.50, and 200-50# cartons of Creamer Bluejay yellow flesh potatoes at $30.05 per carton, or $6,010.00, plus $23.50 for a temperature recorder, and $52.50 for pallets, for a total agreed price of $9,093.50, f.o.b., billed on invoice number 702309. (Complaint, Ex. 4.) Respondent reported a condition problem to Complainant regarding the 150 cartons of Creamer Bluejay white potatoes, and Complainant granted Respondent an allowance. (Complaint, Ex. 41-2.) On June 28, 2007, Complainant issued a corrected version of invoice number 702309, billing Respondent for 150-50# cartons of Cramer Bluejay white potatoes at the reduced price of $11.00 per carton, or $1,650.00, and 200-50# cartons of yellow flesh potatoes at the original price of $30.05 per carton, or $6010.00, plus $23.50 for a temperature recorder, and $52.50 for pallets, for an adjusted total price of $7,736.00, f.o.b. (Complaint, Ex. 5.) Respondent paid Complainant $7,720.00 for invoice number 702309 on check number 6776, on or about August 10, 2007, leaving an unpaid balance of $16.00. (ROI, Ex. C, p. 1, and Answer, Ex. D-5-2.)

7. On or about June 29, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of Nebraska, 357-50# cartons of #1A El Diablo Rojo red potatoes at $7.75 per carton, or $2,766.75, and 21-50# cartons of #1B red potatoes at $14.05 per carton, or $295.05, and 14-50# cartons of #1B yellow flesh potatoes at $10.05 per carton, or $140.70, plus $60.00 for pallets, for a total agreed price of $3,262.50, f.o.b., billed on invoice number 702316. (Complaint, Ex. 6.) Respondent issued check number 6738 to Complainant on August 1, 2007,

in payment of invoice 702316. (Answer, Ex. G-15.) Complainant refused to accept the check and returned it to Respondent due to alleged unauthorized deductions taken against other invoices paid with the same check, leaving an unpaid balance of $3,262.50. (Complaint, Ex. 31-32.) Respondent issued another check number 7628 to Complainant on December 10, 2007, in payment of invoice 702316. (Complaint, Ex. 43.) Complainant refused to accept the check and returned it to Respondent as an unsatisfactory payment seeing the payment included unauthorized deductions taken against other invoices (Complaint, Ex. 44), leaving an unpaid balance of $3,262.50.

8. On or about June 29, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Fresno, California, 50-50# sacks of #2 Budget red potatoes at $4.05 per sack, or $202.50, and 50-50# cartons of #1A El Diablo Rojo red potatoes at $8.05 per carton, or $402.60, and 50-50# cartons of Premium Bluejay yellow flesh potatoes at $13.05 per carton, or $652.50, for a total agreed price of $1,257.50, f.o.b., billed on invoice number 702336. (Complaint, Ex. 7.) Complainant received payment in full for invoice number 702336 on or by November 19, 2007, on Respondent's check number 7459.
(Complaint Ex. 8-9.)

9. On or about June 30, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in El Paso, Texas, 430-100# sacks of #1A Bluejay Norkotah Russet potatoes at $8.75 per sack, f.o.b., or $3,762.50, plus $23.50 for a temperature recorder, and $127.50 for pallets, and $75.00 for a phytosanitary inspection, for a total agreed price of $3,988.50, billed on invoice number 702339. (Complaint, Ex. 10.)

10. On July 2, 2007, the U.S.D.A. performed an inspection at Respondent's customer in El Paso, Texas, on the 430 sacks of potatoes, mentioned in Finding of Fact number 9. Pulp temperatures at the time of the inspection ranged from 41 to 42 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 10% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 19% damage by quality and condition defects. The inspector stated the

potatoes failed to grade U.S. No. 1 account condition. (Complaint, Ex. 11.) Respondent rejected the truckload of potatoes to Complainant. Following the rejection of the potatoes Respondent billed Complainant $2,000.00 for freight, and $154.00 for the federal inspection, and $130.00 for a Mexican inspection cancellation fee, and $75.00 for a Mexican inspection, or a total of $2,359.00 on its invoice number 5451. (Complaint, Ex. 19.) Complainant paid Respondent $2,000.00 for freight and $154.00 for the cost of the federal inspection, or $2,154.00 on check number 36276, dated August 17, 2007. (Complaint, Ex. 20.)

11.On or about June 30, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in El Paso, Texas, 430-100# sacks of #1A Bluejay Norkotah Russet potatoes at $8.75 per sack, f.o.b., or $3,762.50, plus $23.50 for a temperature recorder, and $127.50 for pallets, and $75.00 for a phytosanitary inspection, for a total agreed price of $3,988.50, billed on invoice number 702340. (Complaint, Ex. 13.)

12.On July 2, 2007, the U.S.D.A. performed an inspection at Respondent's customer's location in El Paso, Texas, on the 430 sacks of potatoes, mentioned in Finding of Fact number 11. Pulp temperatures at the time of the inspection ranged from 41 to 43 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 8% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 17% damage by quality and condition defects. The inspector stated the potatoes failed to grade U.S. No. 1 account condition. (Complaint, Ex. 14.) Respondent rejected the truckload of potatoes to Complainant. Following the rejection of the potatoes Respondent billed Complainant $2,200.00 for freight, and $115.00 for the federal inspection, and $130.00 for a Mexican inspection cancellation fee, for a total of $2,445.00 billed on its invoice number 5449. (Complaint, Ex. 18.) Complainant paid Respondent $2,200.00 for freight and $115.00 for the cost of the federal inspection, or $2,315.00 on check number 36276, dated August 17, 2007. (Complaint, Ex. 20.)

13.On or about June 30, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in El Paso, Texas, 430-100# sacks of #1A Bluejay Norkotah Russet potatoes at $8.75 per sack, f.o.b., or $3,762.50, plus $23.50 for a temperature recorder, and $127.50 for pallets,

and $75.00 for a phytosanitary inspection, for a total agreed price of $3,988.50, billed on invoice number 702341. (Complaint, Ex. 16.) The truck carrying the potatoes broke down due to mechanical problems and never arrived at the intended contract destination in El Paso, Texas. The potatoes were returned to Complainant's place of business, where they were accepted and returned to inventory. Respondent sent invoice number 5450, for $2,000.00 to Complainant for freight billed by the carrier to Respondent's customer in El Paso, Texas. (Answer, Ex. G-11.)

14.On or about July 2, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of Nebraska, 441-50# cartons of #1A El Diablo Rojo red potatoes at $7.75 per carton, f.o.b., or $3,417.75, plus $23.50 for a temperature recorder and $67.50 for pallets, for a total agreed price of $3,508.75, billed on invoice number 702354. (Complaint, Ex. 21.) Respondent paid invoice number 702354 in full prior to the Complaint being filed.

15.On or about July 24, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Las Vegas, Nevada, 850-50# sacks of #2 Budget Norkotah Russet potatoes at $4.15 per sack, f.o.b., or $3,527.50, plus $1,062.50 for freight, and $127.50 for pallets, for a total agreed delivered price of $4,717.50, billed on invoice number 702782. (Complaint, Ex. 22.) Respondent paid invoice number 702782 in full, on or by September 19, 2007, prior to the Complaint being filed.

16.On or about July 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Las Vegas, Nevada, 400-50# sacks of #2 Baker Budget Norkotah Russet potatoes at $4.15 per sack, f.o.b., or $1,660.00, plus $60.00 for pallets, for a total agreed price of $1,720.00, billed on invoice number 702799. (Complaint, Ex. 23.) Respondent paid invoice number 702799 in full, on or by September 19, 2007, prior to the Complaint being filed.

17.On or about July 27, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Las Vegas, Nevada, 850-50# sacks

of #2 Baker Budget Norkotah Russet potatoes at $4.15 per sack, delivered, or $3,527.50, plus $1,062.50 for freight, for a total agreed price of $4,590.00, billed on invoice number 702815. (Complaint, Ex. 24.) Respondent paid invoice number 702815 in full, on or by September 19, 2007, prior to the Complaint being filed.

18. Complainant notified Respondent of its intention to start enforcing the payment term and interest clause in the parties' contracts by letter dated October 31, 2007, as follows:

> …We are also demanding interest be paid as per the terms of sale, see invoice. The interest is due at the rate of 1½% per month commencing ten (10) days after arrival of the product….

(Complaint, Ex. 37.)

19. The informal complaint was filed on September 15, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

This proceeding concerns thirteen truckloads of potatoes that Respondent purchased from Complainant. Complainant alleges Respondent owes the sum of $4,620.00, plus interest, on two of its invoices, numbers 702309 and 702316.[1] In addition, Complainant is seeking interest from Respondent for alleged late payments on eight of its invoices, numbers 702082, 702149, 702258, 702336, 702354, 702782, 702799, and 702815,[2] that were paid in full by Respondent prior to the Complaint being filed. Complainant further alleges that nothing is owed to either party on its remaining three invoices, numbers 702339, 702340, and 702341, that are the subject of Respondent's Counterclaim.[3]

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[1] Complaint, ¶ 10, and Ex. 4 and 6.

[2] Complaint, ¶¶ 7, 8, and 10, and Ex. 1-3, 7, and 21-24.

[3] Complaint, ¶ 7G, and Ex. 10, 13, 16.

Respondent, in its Answer, denies Complainant is entitled to interest,[4] but admits owing $3,262.50 to Complainant for the potatoes. Respondent, however, alleges that Complainant owes it $2,260.00 in damages for freight and other expenses, which Respondent seeks to offset through its Counterclaim. Respondent states the following in its Answer:

> … Johnston is entitled to nothing more than the difference between what AGS owes to Johnston, being $3,262.50 and what Johnston owes to AGS, being $2,260.00, or a total of $1,002.50....[5]

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914, 919 (1975).

First we will consider the evidence submitted with respect to Complainant's invoices, numbers 702309 and 702316, for which Complainant alleges a balance of $4,620.00 remains due from Respondent for two truckloads of potatoes. Respondent has not denied receiving and accepting the two truckloads of potatoes. 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, 844 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. *See* UCC § 2-607(4).[6] We will now consider the evidence submitted concerning these two transactions as follows:

Complainant's invoice number 702309

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[4] Answer, p. 2, ¶ 7.6.

[5] Answer, p. 12 ¶ 8.5.

[6] *See also The Grower-Shipper Potato Co. v. Southwestern Produce Co.,* 28 Agric. Dec. 511, 514 (1969).

Respondent purchased a truckload of potatoes for an agreed price of $9,093.50, f.o.b.[7] Complainant agreed to reduce the price after Respondent reported condition problems upon arrival.[8] Although Complainant alleges Respondent has not furnished proof of its alleged problems,[9] Complainant has not shown its price reduction was hinged upon Respondent providing proof. In fact, Complainant issued a corrected invoice, billing Respondent the reduced price of $7,736.00.[10]

Respondent paid Complainant $7,720.00,[11] leaving an unpaid balance of $16.00.[12] Respondent asserts in its Answer that the underpayment was due to a $.05 per carton billing error on Complainant's corrected invoice and an overcharge of $23.50 on the invoice for a temperature recorder that was not ordered.[13] Based upon Respondent's failure to promptly object to the adjusted invoice received from Complainant,[14] Respondent is liable to Complainant for the unpaid balance of $16.00.

Complainant's invoice number 702316

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[7] Complaint, ¶ 7D, and Ex. 4.

[8] Complaint, ¶ 7D, and Ex. 41-2, ¶ 3.

[9] Complaint, ¶ 7D, and Ex. 41-2, ¶ 3, and Opening Statement (Response to Answer), p. 1, ¶ 7.5.

[10] Complaint, ¶ 7D, and Ex. 5.

[11] ROI, Ex. C, p. 1, ¶ 3, and Answer, Ex. D-5-2.

[12] Complaint ¶ 7D, and ROI, Ex. C, p. 1, ¶ 3, and Answer, Ex. D-5-1and D-5-2, and Opening Statement (Response to Answer), ¶ 7.5.

[13] Answer, p. 10, ¶¶ D.5-D.7.

[14] 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, 1636 (1983) *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-225 (1960).

Respondent purchased a truckload of potatoes, for a total agreed price of $3,262.50, f.o.b.[15] Respondent issued check number 6738 to Complainant as payment.[16] Complainant returned the check to Respondent as an unsatisfactory payment due to alleged unauthorized deductions being taken against this transaction and other disputed transactions.[17] Respondent issued a second check, number 7628,[18] which Complainant also returned to Respondent for the same reasons, leaving an unpaid balance of $3,262.50.[19] Checks combining payments for disputed and undisputed transactions do not meet the good faith tender requirement of UCC § 3-311. *See Lindemann Produce, Inc. v. ABC Fresh Marketing, Inc., et al.,* 57 Agric. Dec. 738, 745 (1998). We find Respondent is liable to Complainant for the unpaid balance of $3,262.50, [20] which Respondent admits owing.[21]

We will now consider the evidence concerning Respondent's Counterclaim, and Respondent's allegation that Complainant owes it $2,260.00 for inbound freight and other costs associated with three truckloads of potatoes billed on Complainant's invoices, numbered 702339, 702340, and 702341,[22] as follows:

Complainant's invoice numbers 702339

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[15] Complaint, ¶ 7E, and Ex. 6.

[16] Answer, p. 7, Ex. G-15.

[17] Complaint, ¶ 7E, and Ex. 31-32.

[18] Complaint, Ex. 43.

[19] Complaint, Ex. 44.

[20] Complaint, ¶ 7E.

[21] Answer, p. 12 ¶ 8.5.

[22] Answer, p. 14, ¶ CC-4.

On or about June 30, 2007, Respondent purchased 430-100# sacks of #1 Russet potatoes for a total agreed price of $3,988.50.[23] On July 2, 2007, the U.S.D.A. inspected the 430 sacks of potatoes El Paso, Texas at Respondent's customer's location. Pulp temperatures at the time of the inspection ranged from 41 to 42 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 10% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 19% damage by quality and condition defects. The inspector stated the potatoes failed to grade U.S. No. 1 on account of their condition.[24]

Respondent rejected the truckload of potatoes to Complainant and billed Complainant $2,000.00 for freight, $154.00 for the federal inspection, $130.00 for a Mexican inspection cancellation fee, and $75.00 for a Mexican inspection, for a total of $2,359.00 billed on its invoice number 5451.[25] Complainant paid Respondent $2,000.00 for freight and $154.00 for the cost of the federal inspection, or $2,154.00 on check number 36276.[26] Complainant denies owing the remaining balance of the invoice concerning a Mexican inspection and/or Mexican inspection cancellation fees.[27] Since Respondent has not submitted any evidence, such as invoices from the Mexican Inspection Service to support any of these alleged charges, Respondent's claim for these charges is denied.

Complainant's invoice number 702340

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[23] Complaint, ¶ 7G, and Ex. 10.

[24] Complaint, Ex. 11.

[25] Complaint, Ex. 19.

[26] Complaint, Ex. 20.

[27] Opening Statement (Response to Answer), ¶ 8.1.

On or about June 30, 2007, Respondent purchased 430-100# sacks of #1 Russet Potatoes for a total agreed price of $3,988.50.[28] On July 2, 2007, the U.S.D.A. inspected the 430 sacks of potatoes El Paso, Texas at Respondent's customer's location. Pulp temperatures at the time of the inspection ranged from 41 to 43 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 8% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 17% damage by quality and condition defects. The inspector stated the potatoes failed to grade U.S. No. 1 account condition.[29]

Respondent rejected the truckload of potatoes to Complainant and billed Complainant $2,200.00 for freight, $115.00 for the federal inspection, $130.00 for a Mexican inspection cancellation fee, for a total of $2,445.00 billed on its invoice number 5449.[30] Complainant paid Respondent $2,200.00 for freight and $115.00 for the cost of the federal inspection, or $2,315.00 on check number 36276, dated August 17, 2007.[31] Complainant denies owing the remaining balance of the invoice concerning the cost of a Mexican inspection and/or Mexican inspection cancellation fees.[32] Since Respondent has not submitted any evidence, such as invoices from the Mexican Inspection Service to support any of these charges, Respondent's claim is denied.

Complainant's invoice number 702341

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[28] Complaint, ¶ 7G, and Ex. 13.

[29] Complaint, Ex. 14.

[30] Complaint, Ex. 18.

[31] Complaint, Ex. 20.

[32] Opening Statement (Response to Answer), ¶ 8.1.

On or about June 30, 2007, Respondent purchased 430-100# sacks of #1 Russet potatoes for a total agreed price of $3,988.50.[33] The truck carrying the potatoes broke down due to mechanical problems before reaching the intended contract destination in Texas.[34] The potatoes were returned to Complainant's place of business in California, where they were accepted by Complainant and returned to inventory.[35] Complainant asserts it only accepted the returned potatoes as a courtesy to Respondent,[36] but Respondent alleges Complainant demanded the return of the potatoes.[37] The trucker asserts that even though its truck broke down it could have completed delivery to the contract destination, but Complainant decided to take the potatoes back.[38]

Since the parties have put forth conflicting allegations regarding what transpired after the truck broke down, we cannot conclude the parties agreed to a novation or rescission of the contract, which would require a clear agreement between the parties. *Eastern Potato Dealers of Maine, Inc. v. Commodity Marketing Co.,* 36 Agric. Dec. 2017, 2021-2022 (1977); *Morris Bros. Fruit Co. v. Elmer Stutzman, et al.,* 1 Agric. Dec. 98, 101 (1942). Respondent sent invoice number 5450, for $2,000.00 to Complainant for freight billed by the trucker,[39] which amount Respondent is seeking to recover through its Counterclaim. As evidence of the freight charge, Respondent provided a copy of invoice number 100707, dated

[33] Complaint, ¶ 7G, and Ex. 16.

[34] Answer, p. 6, ¶ G.5.

[35] Complaint, ¶ G, and Opening Statement (Response to Answer), ¶ G.

[36] Complaint, ¶ G.

[37] Answer, p. 6, ¶ G.7.

[38] Answer, Ex. G-5.

[39] Answer, Ex. G-11.

October 7, 2007, for $2,000.00, issued by its customer in El Paso, Texas.[40]

Regarding a seller's stoppage of delivery in transit or otherwise, section 2-705 of the Uniform Commercial Code ("UCC") (3)(b) states as follows:

> After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

In this instance, the trucker was the bailee or custodian of the potatoes. From the evidence in record and for the reasons discussed above, we find Respondent can recover $2,000.00 through its Counterclaim for freight charges due to Complainant's stoppage of delivery of the potatoes while they were in transit.

Lastly, we consider Complainant's claim for interest at a rate of 1½% per month, or 18% per annum, due on the alleged late payments on invoices. Since failing to make prompt payment is a violation of section 2(4) of the PACA, we have awarded interest on late-paid transactions in prior cases. *See* 7 U.S.C. § 499b(4) (requiring PACA licensed merchants to make "full payment promptly").[41] In *Peak Vegetable Sales v. Northwest Choice, Inc.*, 58 Agric. Dec, 646, 657 (1999), we awarded interest on a late-paid produce debt noting that "the award of interest in this situation will provide an additional motive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued." *See id*., at 657 – 658. Although the Complainant, Peak Vegetable Sales, sought interest at a rate of 24% per annum, we deemed that rate of interest

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[40] Answer, Ex. G-8.

[41] An award of interest "is nothing more than an adjunct to the award of damages, a differential paid to compensate for the loss of the use of a sum of money for a period of time." *See PGB International LLC, Co. v. Bayche Companies, Inc.,* 65 Agric. Dec. 669, 671 - 672 (2006) (quoting *Sherwood v. Madda Trading Co.,* 1979 WL 11487, slip op. at *12 (CFTC)).

unreasonable and awarded interest at a rate of 10% per annum. *See id.,* at 657.

In the case of *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.,* 29 Agric. Dec. 978, 979 (1970), which is often cited for the proposition that the Secretary can award interest as a measure of damages, we also awarded interest for a late-paid produce debt. In that case, the Respondent, Mark Bernstein Co., Inc., ("Bernstein"), purchased 1,375 cartons of frozen cherries from the Complainant, Pearl Grange Fruit Exchange, Inc., ("Pearl Grange"), on July 15, 1969. The total contract price was $7,947.50, which included $110 in freight charges. Pearl Grange's invoices specified that payment was to be net cash on receipt of the invoice with interest at a rate of ¾ of 1% per month (9% per annum) on any part of the invoice not paid within 30 days of the invoice date. Pearl Grange's invoice for the 1,375 cartons of frozen cherries at issue was dated August 13, 1969. In April of 1970, Bernstein paid $1,500 on the invoice leaving an unpaid balance of $6,447.50 that Bernstein was ordered to pay to Pearl Grange, with interest, in the reparation award. The Judicial Officer also awarded interest, at the 9% rate specified in Pearl Grange's invoices, on the full invoice amount of $7,947.50 until the time of Bernstein's late payment of $1,500 in April of 1970.[42]

In the instant case, Complainant's claim for interest is based on its invoices which expressly state that "Past Due Accounts will be assessed a service charge at the rate of 1½% per month or 18% per annum from the date of invoice." *See*, *e.g.*, Complaint Ex. 4 (emphasis omitted). Respondent argues that it never agreed to the 1½% per month charge on overdue invoices and notes that it ignored the "FOB Prompt" payment term and service charge provisions in Complainant's invoices for at least the last eleven years. Respondent's practice was "usually" to make payment to Complainant 25 to 40 days after the shipping date. *See* Answer at pp. 2 - 3, ¶¶ (b), (h). Until this dispute arose over three ill-fated shipments to

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[42] The 9% per annum rate of interest specified in Pearl Grange's invoice was higher than the rate of interest that the Department typically applied to damage awards at the time. *See, e.g., E.B. Costin, Jr. v. E.J. Harrison & Son, Inc.,* 29 Agric. Dec. 981, 986 (1970) (awarding interest at the usual rate of 8% per annum). In another case, *Flanagan and Jones, Inc. v. Tom Rotta d/b/a Sparkling Ranches,* 43 Agric. Dec. 242, 244 (1984), the Judicial Officer declined to award interest at a rate of 1½% per month because there was no interest clause in Complainant's invoices.

Mexico, Complainant never demanded interest on overdue invoices. *See id.*, at ¶ i. Like Respondent, Complainant also ignored the prompt payment terms on Respondent's invoices. *See id*., at p. 3, ¶ m, and Ex. 4.

As Respondent notes in its Answer, we look to the UCC in order to determine if the prompt payment and service charge provisions on Complainant's invoices were incorporated into each sales contract as additional terms. Section 2-207(2) of the UCC states in relevant part:

> The additional terms 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.

Here, both parties are licensed under the PACA to do business in the produce trade and both are "merchants" as that term is used in the UCC. *See* UCC § 2-104 (defining a merchant as someone "who deals in goods of the kind" or who "holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction"). Therefore, pursuant to section 2-207(2),[43] the prompt payment term and service charge provision on Complainant's invoices, which were confirmations of the parties' oral contracts, were incorporated into each sales contract unless they fall within one of the exceptions to incorporation in subsections (a) through (c).

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[43] Although Respondent's business is located in Washington and Complainant is located in California, both states have adopted the same version of 2-207. *See* RCW 62A.2-207(2) (Washington Code); Cal. Comm. Code § 2207. *See also*, *e.g.*, *In re Fleming Companies Inc. v. Fleming Companies, Inc*., 316 B.R. 809, 816 (D. Del. 2004) (noting that 2-207 had been adopted verbatim by many states). Section 2-207 does away with the common law "mirror image rule." *See, e.g.*, "UCC § 2-207: The Drafting History," 49 Bus. Law 1029, 1036 (1994).

Subsection (a) of section 2-207(2) is not applicable to the present case because neither of the parties' forms contained any express limitations. Subsection (b) prohibits the incorporation of clauses that materially alter the contract. Comment 4 to section 2-207 gives examples of clauses that would materially alter a contract, while Comment 5 gives example of clauses that should be incorporated if no seasonable objection is made by the merchant receiving the confirmation form. Comment 5 notes that incorporating "a clause providing for interest on overdue invoices" and "fixing the seller's standard credit terms where they are within the range of trade practice" would involve no element of unreasonable surprise. Rather than objecting to the prompt payment and service charge terms in Complainant's invoices, as required by subsection (c) of section 2-207(2), Respondent simply chose to ignore them. Comment 6 makes it clear that a merchant's decision to ignore additional terms in confirming forms constitutes acceptance of those terms.

Based on the foregoing analysis, we find that the payment and interest charge provisions in Complainant's invoices were incorporated into the parties' sales contracts. Our decision is consistent with the application of section 2-207(2) by federal courts that have been confronted with similar provisions on produce invoices. *See, e.g., Coosemans Specialties, Inc. v. Garguilo*, 485 F.3d 701, 708 (2nd Cir. 2007) (invoice clauses providing for attorneys' fees were incorporated into the parties' contracts pursuant to 2-207); *Ruby Robinson Co., Inc. v. Kalil Fresh Marketing, Inc.*, 2009 WL 3378419, slip op. at *1 (S.D. Tex 2009) (attorneys' fees provisions in invoices were incorporated into the parties' contracts pursuant to 2-207); *Senn Bros., Inc. v. Foothills Meat & Produce, Inc.*, 2008 WL 2559418, slip op. at *3 (W.D. N.C. 2008) (terms included on seller's invoices became binding on the parties pursuant to 2-207); *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, 2005 WL 3006032, slip op. at *4 (S.D. N.Y. 2005) (interest and collection costs provisions in seller's invoices were incorporated into the parties' contracts, subject to a limitation of reasonableness, pursuant to 2-207); *Fleming Companies*, 316 B.R. at 815 - 816 (attorneys' fees provisions on invoices enforceable pursuant to 2-207).[44] Service charge

[44] *See also Vulcan Automotive Equipment, Ltd v. Global Marine Engine & Parts, Inc.*, 240 F.Supp.2d 156, 162 - 163 (D. Rhode Island 2003) (invoice service charge provision was (continued...)

and attorneys' fee clauses have become commonplace on produce invoices because many federal courts have determined that these fees are recoverable in PACA trust actions pursuant to 7 U.S.C. § 499e(c)(2). *See*, *e.g.*, *Middle Mountain Land and Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220, 1224 - 1225 (9th Cir. 2002); *Consumers Produce, Inc. v. R. Family Market*, 2009 WL 2351642, slip op. at *1 (N.D. Ohio 2009); *JC Produce, Inc. v. Paragon Steakhouse Restaurants*, 70 F. Supp.2d 1119, 1123 (E.D. Ca. 1999).

Respondent argues that the parties' course of performance over many years ultimately modified or waived the express payment term and interest charge provision on Complainant's invoices. *See* Answer at pp. 3 – 4 (citing UCC §§ 2-208 and 209). Pursuant to section 2-208(1) of the UCC, "'course of dealing' or 'course of performance' can be used to flesh out an ambiguous or incomplete agreement." *See Sethness-Greanleaf, Inc. v. Green River Corp.*, 65 F.3d 64, 67 (7th Cir. 1995). In the instant case, there is no need to look to the parties' course of performance to interpret the contract terms at issue. The "FOB Prompt" payment term and service charge clause on Complainant's invoices, which were accepted by Respondent's silence and incorporated into each sales contract, are not ambiguous. Prompt payment under the PACA means that payment is due "within 10 days after the day on which the produce is accepted." *See* 7 C.F.R. § 46.2(aa)(5). Pursuant to the service charge clause, overdue balances incurred interest at a rate of 1½% per month from the date of invoice. Section 2-208(2) makes clear that express contract terms control course of performance and course of dealing. *See, e.g.*, *Central Illinois Public Service Company v. Atlas Minerals, Inc.*, 965 F.Supp. 1162, 1176 (C.D. Ill. 1997) (discussing 2-208(2)). In other words, Respondent's late payments over many years and Complainant's failure to charge interest did not modify the parties' contracts. "[A] vendor who cuts the buyer some slack . . . does not thereby 'agree' to forbear indefinitely." *See Sethness-Greanleaf*, 65 F.3d at 67.

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[44](...continued)
incorporated into engine contract pursuant to 2-207).

Nonetheless, we agree with Respondent's contention that Complainant, after more than a decade of forbearance, waived interest charges for late payments that it accepted prior to giving Respondent reasonable notice that the service charge provision in the parties' contracts would be enforced. *See* UCC § 2-208(3) (course of performance inconsistent with contract terms can show waiver); UCC § 2-209(5) (retraction of a waiver requires reasonable notice).[45] When the instant dispute over the Mexican shipments went sour, Complainant notified Respondent of its intention to start enforcing the payment term and interest clause in the parties' contracts by letter dated October 31, 2007. *See* Complaint Ex. 37 ("[w]e are also demanding interest be paid as per the terms of sale"). Apparently Respondent received Complainant's letter because shortly thereafter it paid two outstanding invoices. *See id*., at Ex. 8. The payments were received by Complainant on or by November 19, 2007. *See id*., at Ex. 41. Thus, we find that Complainant successfully retracted its waiver with the October 31, 2007, letter and that as of November 19, 2007, and interest began to accrue on any remaining overdue amounts. By that date, Respondent plainly had reasonable time to undo its reliance on the waiver and remit any overdue payments to Complainant in order to avoid the service charge.

The only remaining question is whether the rate of prejudgment interest set by the parties' contracts is reasonable. As noted above, we have rejected claims for interest at rates that we have deemed to be unreasonable. *See Peak Vegetable Sales*, 58 Agric. Dec at 657 (rejecting a claim for interest at a rate of 24% per annum). The 1½% per month, 18% per annum, rate is higher than the rate that is typically applied in PACA reparation cases using the formula in 28 U.S.C. § 1961. *See PGB*, 65 Agric. Dec. at 672. However, we cannot say that the 18% rate set by the parties' contracts in this case is unreasonable. Numerous courts have awarded prejudgment interest at 18% based on similar contract provisions. *See*, *e.g.*, *Palmareal*

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[45] Waiver "is the intentional relinquishment of a known right." *See Sethness-Greanleaf*, 65 F.3d at 67. Pursuant to section 2-209(5) of the UCC, "[a] party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver." *See Getty Terminals Corp. v. Coastal Oil New England, Inc.*, 995 F.2d 372, 374 - 375 (2nd Cir. 1993) (applying 2-209(5) to find waiver).

Produce Corp. v. Direct Produce #1, Inc., 2008 WL 905041, slip op. at **3 – 4 (E.D.N.Y. 2008) (awarding interest at 18% set by invoice clause); *John Georgallas Banana Dist. of New York, Inc. v. N&S Tropical Produce, Inc.*, 2008 WL 2788410, slip op. at * 5 (E.D.N.Y. 2008) (same); *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Services, Inc.*, 2007 WL 4302514, slip op. at **7- 8 (S.D.N.Y. 2007) (same); *Dayoub Marketing*, 2005 WL 3006032, at **4 – 5 (same); *Vulcan Automotive*, 240 F.Supp.2d at 163 - 166 (same). Accordingly, we will award prejudgment interest at the 18% rate set by Complainant's invoices in this case.

In summary, we find that Complainant has proven a breach of contract with regard to invoices 702309 and 702316. Respondent is liable to Complainant for the unpaid balance of $16.00 for the potatoes billed on Complainant's corrected invoice number 702309, plus the full agreed price of $3,262.50 for the potatoes billed on Complainant's invoice number 702316, for a total of $3,278.50. However, that amount will be offset by $2,000.00 for freight that we found owing to Respondent on Complainant's invoice number 702341, leaving a total unpaid amount of $1,278.50. Respondent's failure to pay Complainant $1,278.50 is a violation of section 2 of the Act for which reparation should be awarded.

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." *See* 7 U.S.C. § 499e(a). As discussed above, the secretary has long included interest, at a reasonable rate, as part of each reparation award. *See Pearl Grange,* 29 Agric. Dec. at 979; *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 338 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66, 67 (1963). Respondent shall pay Complainant prejudgment interest at the contractual rate of 18% from November 19, 2007, until the date of the Order. Complainant waived interest on the late-paid invoices listed in the Complaint. Respondent paid these invoices before Complainant effectively retracted its waiver on November 19, 2007. Consistent with past decisions, post-judgment interest will be applied in accordance with 28 U.S.C. § 1961, 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. *See PGB,* 65 Agric. Dec. at 671-672.

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 to file its Counterclaim. Each party proved a violation of section 2 of the Act (7 U.S.C. § 499b) by the other. Therefore, each is entitled to recover the $300.00 handling fee paid by the other. However, since the handling fees offset one another, neither party shall be required to pay the other party's $300.00 handling fee.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $1,278.50, with interest thereon at the rate of 18% per annum from November 19, 2007, up to the date of this Order.

Respondent shall pay Complainant interest at the rate of 0.29 % per annum on the sum of $1,278.50 from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

FRESH HARVEST INTERNATIONAL, INC. v. TOMAHAWK PRODUCE, INC.
PACA Docket No. R-09-057.
Order on Reconsideration.
Filed July 28, 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

Order

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on March 31, 2010, in which Respondent was ordered to pay Complainant, as reparation, $23,474.20, with interest thereon at the rate of 0.42 percent per annum from November 1, 2007, until paid. On April 29, 2010, the Department received from Respondent a Petition for Reconsideration ("Petition") of the Decision and Order. Complainant was served with a copy of the Petition and afforded the opportunity to submit a reply. On June 22, 2010, the Department received from Complainant a Reply to Respondent's Petition for Reconsideration ("Reply").

Complainant brought this action to recover the agreed purchase price for three truckloads of sugar snap peas sold and shipped to Respondent. In response to Complainant's allegation of non-payment, Respondent asserted that it paid Complainant $22,000.00 for the sugar snap peas via wire transfer. In the Decision and Order, we found that the evidence submitted established by a preponderance of the evidence that the $22,000.00 that Respondent wired to Complainant represented an investment in a Peruvian sugar snap pea joint venture, not payment for the three sugar snap pea shipments in question. As Respondent therefore failed to prove its defense of payment, we found that Respondent was liable to Complainant for the agreed purchase price of the sugar snap peas, or a total of $23,474.20.

In the Petition, Respondent states we erred in finding that the purchases were straight f.o.b. sales. In addition, Respondent states we incorrectly found that Complainant had timely invoiced for the product. (Petition, p. 1) Respondent asserts, to the contrary, that the transactions were price after

sale and that it did not receive any invoices from Complainant until after the prices were settled. According to Respondent, the returns were usually settled three to four weeks following arrival. (Petition, p. 2)

In its response to the Petition, Complainant points out that Respondent has neither challenged the amount of the award nor the reasonable value of the produce in its Petition. Complainant states this is shown by Respondent's assertion that it never received any invoices from Complainant until after the prices were settled, thereby admitting that the invoice price represents the price Respondent agreed to pay for the product. (Reply, p. 1) As the dispute therefore did not involve the value to be assigned to the subject peas, Complainant states the issue of whether the sales were for a fixed price or price after sale is irrelevant. Moreover, Complainant states Respondent's contention that it did not receive the invoices until three or four weeks following arrival supports the conclusions of the Decision and Order in that Respondent wired a total of $22,000.00 to Complainant between September 5th and 14th, 2007, whereas the invoices in question are dated from September 5th through September 19th, 2007, so Respondent is, in effect, arguing that it paid the invoices before they were received.

As Complainant correctly points out, the issue of whether the three truckloads of sugar snap peas in question were sold price after sale is irrelevant given that Respondent admitted purchasing the produce in question at the prices invoiced and asserted as its only defense the allegation that it paid Complainant $22,000.00. (Ans. Stmt., p. 2) We also agree that Respondent's allegation concerning the timeliness of the invoices actually supports the conclusion that the $22,000.00 paid by Respondent was an investment in a Peruvian sugar snap pea joint venture rather than payment for the invoices in question, as under the scenario posed by Respondent payment for the invoices would have preceded their receipt.

Respondent next asserts that it never had an agreement with the factoring company Agricap, and that Agricap was to have nothing to do with the invoices in question. Respondent asserts specifically:

Initially, we note that while Respondent asserts that Agricap was not to be involved in the subject transactions, Respondent does not point to any evidence in the record to substantiate this contention. Moreover, as we noted in the Decision and Order, the invoices submitted by Complainant

bear a prominent statement on their face instructing Respondent to remit payment to Agricap. (D&O, p. 4) Hence, the evidence fails to substantiate Respondent's contention that Agricap was not to be involved with the invoices at issue in this dispute.

With respect to the issue raised by Complainant in its Reply, in the Decision and Order we stated:

> 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.

(D&O, p. 4)

The involvement of the factoring company Agricap in the transactions in question was therefore mentioned to show that, presuming Respondent was timely invoiced for the product, Respondent should have been aware prior to the wire transfer of September 14, 2007, that payment for the sugar snap peas in question should have been remitted to Agricap, rather than directly to Complainant. Although Respondent has asserted in its Petition that the invoices were not timely received (Petition, p. 2), this allegation, if proven, would only remove one of several factors that led to our conclusion that Respondent's wire transfer of $22,000.00 was an investment in a sugar snap pea joint venture and not payment for the invoices in question.

Respondent states next that Complainant has been cited by the Department for repeated and flagrant violations of the Act, thereby raising a question as to its credibility and giving cause for the Hearing Officer to reconsider the Decision and Order. Respondent refers specifically to a U.S.D.A. press release dated October 6, 2009, stating that Complainant was cited for willful, repeated and flagrant violations of the Act for its failure to pay $655,285.39 for 318 lots of produce that the company distributed in the

course of interstate commerce during the period of July through September of 2007. (Petition, pp. 2-3) In response, Complainant states this issue is irrelevant to the matters raised in this proceeding and explains that it encountered financial problems and could not pay its bills due to the failure of customers and business associates, such as Respondent, that did not pay their debts to Complainant. (Reply, p. 3) We agree that Complainant's violation of the prompt pay provisions of the Act has no bearing on the credibility of the statements and evidence it presented in this proceeding.

Finally, Respondent argues that we erroneously stated that e-mail messages exchanged between the parties concerning the sugar snap pea joint venture were sent before the dispute concerning the subject invoices arose. Respondent states specifically that the first transaction occurred on September 5, 2007, and the e-mail messages were sent on August 14th and September 21st, the first one prior, not making a commitment, and the second one long after the shipments took place. (Petition, p. 4) Complainant asserts in response that the Judicial Officer concluded that the e-mail exchange between the parties and Andean Produce took place before a *dispute* arose, not before the shipments took place. (Reply, p. 3) Complainant asserts further that if Respondent had no involvement in the Andean Produce transaction then it would have responded to the e-mails and questioned why it was being copied on them and clarifying to Mr. Ellis [Complainant] that the $22,000 payment was to be applied to the invoices and not as an investment. Complainant states Respondent could offer no proof that it challenged the statements in the e-mails. (Reply, p. 4)

The e-mail messages in question, which were exchanged between Complainant and Respondent and a Peruvian firm, Andean Produce, are dated August 14th and September 21st, 2007, and the latter message mentions both Complainant and Respondent losing $22,000.00 on the venture. (ROI Ex., D7, D14) While Respondent is correct that the second message was sent after the last load of onions at issue in the Complaint was shipped on September 19, 2007, there is no indication that Complainant was aware at that time that Respondent intended to claim that the $22,000.00 wired to Complainant was payment for the invoices in question. Hence, the e-mail messages were sent before the *dispute* with respect to the subject transactions arose. Moreover, as we mentioned in the Decision and Order, Respondent failed during the course of the proceeding to address any of the issues raised in these e-mail messages. (D&O, p. 7) For these reasons, we

concluded that the e-mail messages, coupled with the evidence showing that Complainant wired funds to Andean Produce at the same time it received the wire transfers in question from Respondent, were sufficient to establish Complainant's contention that the $22,000.00 that Respondent wired to Complainant was an investment in a Peruvian sugar snap pea joint venture. (D&O, p. 7) None of the issues raised in Respondent's Petition alter this conclusion.

Based on our review of the evidence and for the reasons cited, we conclude that Respondent's Petition for Reconsideration is without merit and should be denied. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. 499g).

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 percent 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, D.C.

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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.
Order on Reconsideration.
Filed August 17, 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

Order on Reconsideration

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on March 5, 2010, in which (1) the Complaint against Respondent Pacific Sun Distributing, Inc. (hereafter "Pacific Sun") was dismissed; (2) Respondent Value Produce, Inc. (hereafter "Value Produce") was ordered to pay Complainant, as reparation, $253.60, with interest thereon at the rate of 0.34 percent per annum from February 1, 2007, until paid; (3) Complainant was ordered to pay Value Produce, as reparation, $4,815.75, with interest thereon at the rate of 0.34 percent per annum from February 1, 2007, until paid; (4) Complainant was ordered to pay Value Produce $2,478.50 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from the date of the Order, until paid; and (5) Complainant was ordered to pay Pacific Sun $4,530.00 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from the date of the Order, until paid.

On April 1, 2010, the Department received from Complainant a Petition for Reconsideration of Order (hereafter "Petition"). The Respondents were each served with a copy of the Petition and afforded the opportunity to submit a reply. On April 29, 2010, the Department received from Value Produce a response to Complainant's Petition, requesting that the original Order be affirmed. Pacific Sun waived the opportunity to submit a response.

In the Petition, Complainant asserts that (1) USDA Market News prices should have been used to determine the reasonable value of the consigned tomatoes at issue in the Complaint because Value Produce's employee, Mr. Ray Park, negligently handled the tomatoes consigned to him by Complainant; and (2) the Respondents should not have been awarded attorney's fees because the decision should have been in Complainant's favor. (Petition at 1-2)

Turning first to Complainant's contention that he should have been awarded the reasonable value of the tomatoes based on USDA Market News prices, we have repeatedly held that in the absence of fraud or some other breach of the consignee's fiduciary obligations, the consignee is not liable to the consignor merely because the goods fetched less on resale than the market price or the amount the consignor expected. *Tex-Sun Produce v. International Produce Distributors, Inc.*, 48 Agric. Dec. 1110, 1114 (1989); *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420, 1423 (1972); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250, 1254 (1956); *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091, 1095 (1956). We explained in *Tex Sun* that "[t]he consignor chooses his agent and derives full benefit from exceptionally good performance and must also bear the consequences of poor performance." *Tex Sun Produce*, 48 Agric. Dec. at 1114-15. Complainant never alleged that Mr. Park acted fraudulently or that he otherwise breached his fiduciary duties as a consignee.[1] Rather, Complainant simply asserted his claim based on USDA

[1] In the Petition, Complainant states "[a]pparently Mr. Park was not skilled in handling the magnitude of tomatoes which it received from Complainant which is evident from the prices Mr. Park sold the tomatoes for." (Petition p. 1) Mr. Park's purported lack of skill is (continued...)

Market News prices without providing any basis for making this claim. Comparable evidence has been repeatedly rejected. *Id*. at 1115.

Moreover, the case that Complainant cites in the Petition as supporting his argument concerning the use of USDA Market News prices, *Dennis Produce Sales, Inc. v. Caruso-Ciresi, Inc.*,[2] concerns the sale of produce where the price was to be set after shipment. *Id*. at 181. In Dennis Produce, the parties failed to agree on a price, and we therefore had to establish the reasonable price at the time of delivery. *Id*. So, the circumstances in that case are not pertinent to the consignment transaction at issue here. In this case, Complainant did not allege that this transaction was a sale. Consequently, Complainant failed to establish any cause for resorting to the use of USDA Market News prices to determine the reasonable value of the tomatoes.

For the reasons just stated, Complainant did not prevail on the allegations of the Complaint. (D&O p. 21) As a result, Complainant was ordered to pay the reasonable fees and expenses incurred by the Respondents in connection with the oral hearing in accordance with section 7(a) of the Act (7 U.S.C. § 499g(a)). (D&O p. 20) The arguments raised by Complainant in the Petition do not alter this conclusion.

Based on our review of the evidence and for the reasons cited, we are denying Complainant's Petition. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. § 499g).

Order

The Complaint against Respondent Pacific Sun Distributing, Inc. is dismissed.

Within 30 days from the date of this Order, Respondent Value Produce, Inc. shall pay Complainant as reparation $253.60, with interest

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[1](...continued)
not cause for finding that Complainant is due more than the net proceeds derived from Mr. Park's sales.

[2] 42 Agric. Dec. 178 (1983).

thereon at the rate of 0.34 percent 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 percent per annum from February 1, 2007, until paid. Within 30 days from the date of this Order, Complainant shall pay Respondent Value Produce, Inc. $2,478.85 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from March 5, 2010, until paid.

Within 30 days from the date of this Order, Complainant shall pay Respondent Pacific Sun Distributing, Inc. $4,530.00 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from March 5, 2010, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.
August 17, 2010.

ROGERS BROTHERS FARMS, INC. v. SKYLINE POTATO COMPANY.
PACA Docket No. R-08-084.
Decision and order.
Filed August 26, 2010.

PACA-R.

Grower's agent, duties of
A grower's agent may be held liable for extremely low returns remitted to its principal on consignment when it fails to provide justification for unauthorized adjustments, dumping, and sale for "process".

Grower's agent, measure of performance
In the absence of accounts of sale from ultimate receivers or timely, impartial inspections, grower's agent's performance of its duty to the grower is measured against Market News Service price reports.

Condition defects, evidence of

Testimony of buyer/consignee's trucker and reports from buyer/consignee's customers do not prove condition defects; they are parties to the transactions, so their reports are not impartial.

Charles Kendall, Presiding Officer
Louis W. Diess, III, Counsel for Complainant
William J. Friedman, Counsel for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.)(the Act). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $204,124.00 in connection with Respondent's packing and sale of Complainant's crop of potatoes in interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The parties took part in a December 30, 2008 teleconference, in which this case was set down for oral hearing beginning Tuesday, February 24, 2009.

On January 12, 2009, Respondent filed Respondent's First Motion to Dismiss (First Motion). In response, on February 2, 2009, Complainant filed Complainant's Opposition to Respondent's First Motion to Dismiss (Opposition).

On January 27, 2009, the Presiding Officer issued a Notice of Hearing and Summary of Teleconference. The Notice of Hearing said, "NOTE: Since the hearing is imminent and parties must have 20 days to reply to any motion(s), any motions filed later than January 30, 2009 will only be considered contemporaneously with post-hearing briefs."

Nonetheless, on February 6, 2009, Respondent submitted to the Presiding Officer, by e-mail, Respondent's Reply in Support of Its Motion to Dismiss (Reply), along with a request to file said Reply.

On February 9, 2009, the Presiding Officer issued an Order denying Respondent's First Motion. The order further stated that Respondent's February 6, 2009 Reply would not be entertained at that time, for the reasons noted in the Notice of Hearing. The Order provided that

Respondent would be allowed to file the Reply in conjunction with its post-hearing brief.

Since the amount claimed as damages exceeds $30,000.00 and the Respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15). The oral hearing was held on Tuesday, February 24, 2009 in Saguache, Colorado before Charles L. Kendall, Presiding Officer. The Complainant was represented by Louis W. Diess, III, Esq. of McCarron & Diess, located in Washington, DC, and the Respondent was represented by William J. Friedman, Esq. of Covington & Burling, LLP, also located in Washington, DC. Complainant presented three witnesses, and offered four exhibits which were entered into the record (herein designated CX 1 through CX 4). Respondent presented four witnesses, and offered 15 exhibits which were entered into the record (herein designated RX 1 through RX 15). Respondent, in addition, offered a new exhibit at hearing which was used for cross-examination of one of Complainant's witnesses. The document pertained to a previous growing season, and since Complainant's witness did not deny or contradict the contents or nature of the document, it had no function as extrinsic impeachment of the testimony; therefore, it was not admitted.

At oral hearing Respondent renewed its motion to dismiss, and asked for an opportunity to present evidence at the outset of the hearing to support its motion. Respondent was permitted to proceed out of order at the outset of the hearing, to the extent of calling and examining a witness, Complainant's banker, that Respondent felt would support oral renewal of its motion to dismiss (Tr. 18-25). The testimony elicited did not lead to a ruling dismissing the case (Tr. 45, 238-239), and the hearing continued (Tr. 45).

At the conclusion of the hearing, a schedule was set for filing post-hearing briefs and requests for fees and expenses. Since the parties did not agree on the need for reply briefs, none were scheduled; single, simultaneous briefs were due by May 4, 2009. Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department and neither party elected to file objections to the opposing party's claim for fees and expenses within the

time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)). Complainant's and Respondent's briefs are referred to herein as "CB" and "RB", respectively. The transcript of the proceeding is designated "Tr.".

After the deadline for briefs, on May 18, 2009, Respondent filed Respondent's Renewed Motion to Dismiss for Lack of Jurisdiction Following Testimony and Evidence Adduced at February 24, 2009 Hearing and Request for Post-Disposition Mediation (Renewed Motion). On June 18, 2009, Complainant filed Complainant's Opposition, and on June 26, 2009, Respondent filed its Reply to Complainant's Opposition to Respondent's Renewed Motion to Dismiss for Lack of Jurisdiction (Reply to Renewed Opposition), which was considered and treated as a supplement or continuation of the Renewed Motion.

In each of its motions to dismiss, Respondent argued that Complainant filed its informal complaint more than nine months after the cause of action accrued. Respondent's argument in this regard is without merit. It overlooks the fundamental fact that Respondent acted as a grower's agent in relation to Complainant; the relevant requirements and timelines are dictated by that fact. An Order on Respondent's Renewed Motion to Dismiss was issued on February 24, 2010, denying Respondent's motion to dismiss the case for lack of jurisdiction, with full explanation for the denial.

Findings of Fact

1. Complainant Rogers Brothers Farms, Inc. is a corporation whose address is 11495 N. Road 108, Hooper Colorado 81136. At all times material to this proceeding, Complainant was not licensed under the Act. (RX 14).

2. Respondent Skyline Potato Company is a corporation whose mailing address is P.O. Box 416, Center, Colorado 81125. At all times material, Respondent was licensed under the Act. (RX 14: RB, pg. 4).

3. Complainant, at the material time, was a farm, which raised potatoes and wheat
(Tr. 47).

4. Complainant did not pack and sell its own potatoes (Tr. 49).

5. After harvest of the 2005 crop, early in October 2005, Respondent's buyer, Doug Wert, indicated that Respondent wanted to handle

Complainant's 2005 crop of "nugget" potatoes. (Tr. 54). The "nugget" crop was stored in a climate-controlled shed, or "bin", at Complainant's farm. (Tr. 52).

6. In late June or early July 2006, the parties entered into an oral contract wherein Respondent would size and grade Complainant's 2005 crop of "nugget" potatoes and pack them in boxes or bags and sell them. (Tr. 55-56, 200).

7. On July 10, 2006, Respondent's contract hauler, Mark Barela, began to haul the potatoes from Complainant's shed. (Tr. 189). All the potatoes were taken from the bin at Complainant's farm to Respondent's packing facilities between July 10, 2006 and July 14, 2006. (Tr. 58, 178, 201). The total amount of potatoes hauled from Complainant's bin to Respondent's packing shed was 37,489 hundredweight (cwt). (CX 1, CX 2; Tr. 143-144).

8. From mid-July 2006 through on or about August 5, 2006, Respondent had potatoes returned to it by its customers. (RB pg. 8; RX 2 through RX 7; Tr. 184, 203-215).

9. On or about August 24, 2006 Respondent made a partial accounting, or "pack-out", of Complainant's potatoes (RX 10; Tr. 219), pending final estimates on adjustments (Tr. 221). Complainant asserts that it did not receive the August 24, 2006 "packout"with the payment check of that date (Tr. pg. 128).

10. Respondent generated a final accounting, or "pack-out", on November 8, 2006 (RX-12; Tr. 226-227). The final accounting (RX 12) indicated that Respondent had handled 34,489 cwt of Complainant's potatoes, and would remit to Complainant a net return per hundredweight of $4.32, for a total of $149,029.00.

11. Respondent paid Complainant based on these accountings, or "pack-outs", with a check dated August 24, 2006 in the amount of $87,000.00 and a check dated November 10, 2006 in the amount of $62,029.00 (RX-13), for a total of $149,029.00.

12. Complainant filed its informal complaint on May 10, 2007, which was within nine months after the cause of action therein accrued.

Conclusions

The relevant definition of the relationship between Complainant and Respondent in this case is found at 7 C.F.R § 46.2(q):

> (q) *Growers' agent* means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies, or other services.

Complainant in this case is a grower. Respondent distributed the subject potatoes in commerce for or on behalf of Complainant, and performed all of the above services other than planting and harvesting. (Tr. 55-56, 200). Respondent, then, is a grower's agent, and any rights or responsibilities it has under the PACA are those of a grower's agent.[3]

The parties disagree over the terms of how Complainant would be paid for its potatoes. According to Complainant, Respondent agreed to purchase the front half of Complainant's bin, made up of smaller potatoes, for $9.00 per cwt., and to handle the remaining half on a "pack-out" basis with a minimum return of $10.00 per cwt. (RX 14; Tr. 55, 103-104). Respondent alleges that the initial oral agreement was modified to a "pack-out" basis for all the potatoes that it hauled from Complainant's bin. (Tr. 192, 232-233).

Section 46.32(a) of the regulations (7 C.F.R. § 46.32(a)) makes it the duty of a grower's agent to reduce the terms of agreement between the

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[3] In the Order on Respondent's Renewed Motion to Dismiss issued in this case, we noted that Complainant was a farm (Tr. 47), that Complainant did not pack and sell its own potatoes (Tr. 49), that all the potatoes were taken from the bin at Complainant's farm to Respondent's packing facilities (Tr. 178, 201) where Respondent was to put them in bags or cartons and sell them (Tr. 200), and that Respondent paid Complainant based on Respondent's accountings, or "pack-outs"(RX 13). The Order pointed out that the relationship between a grower and a grower's agent is not dependent on how the parties may characterize the transactions between them in their pleadings or arguments. For example, we have held that the evidence supported a grower's agent relationship, rather than just a sale, even where a complainant claimed a sale of numerous shipments to the respondent, but the complainant issued no invoices and the respondent remitted payment based on "pack-out" sheets. *Art Lozano v. Whizpac, Inc.*, 46 Agric. Dec. 658 (1987). In the present case, as in *Lozano*, Respondent remitted payment to Complainant on the basis of Respondent's "pack-out" sheets.

grower and the agent to writing. An agent who does not make and keep such a writing is in violation of the Act and may be liable for any damages resulting therefrom. *Id*. Here, we do not find any direct damages to have been caused by Respondent's violation of section 46.32(a). Respondent's failure to reduce the agreement to writing, however, leads us to credit Complainant's characterization of the contract terms over Respondent's. The conflicting evidence adduced at hearing leaves the contract terms ambiguous. The norm in contract interpretation is that ambiguous terms are construed against the drafter.[4] Respondent had a duty to be the drafter. Its breach of that duty leaves it at a disadvantage in arguing terms of the agreement that it failed to draft.

The analysis of the first half of the agreement, that Respondent would purchase the front half of Complainant's bin, made up of smaller potatoes, for $9.00 per cwt., is fairly straightforward. Respondent took the potatoes from Complainant's bin to its own packing shed, and then sorted and packed them for subsequent sale. Loading/unloading the potatoes was an act of acceptance under 7 C.F.R. § 46.2(dd). *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990); *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980). Respondent's subsequent sale of the potatoes also constitutes an act of acceptance. *Dave Walsh Co. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 2085 (1983).

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). Having accepted half of Complainant's bin of potatoes for purchase and subsequent packing and resale, Respondent became liable for the purchase price of $9.00 per cwt., less any damages resulting from any breach of contract by Complainant.

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[4] The Supreme Court expressed this principle as "the general maxim that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210; 90 S.Ct. 880, 884 (1970).

Respondent argues on brief, and its buyer testified at hearing (Tr. pg. 191) that it rejected the potatoes at the end of the first day of hauling, July 10, 2006 (RB pp. 6-7). Complainant's witnesses, on the other hand, testified that even after the first day, Respondent's buyer expressed satisfaction with the potatoes (Tr. pp. 60, 107). The parties, then, disagree about whether there were significant condition defects in the potatoes, and whether Respondent made a clear statement of rejection. To be effective, rejection must be timely (7 C.F.R. § 46.2(cc)), and must be clearly stated. We have previously said, "The need for a clear and unmistakable rejection is doubly necessary where there is a subsequent unloading of the produce by the receiver, with a claim that the produce was to be handled for the shipper's account." *Beamon Brothers v. California Sweet Potato Growers*, 38 Agric. Dec. 71, 74 (1979).

Because of Respondent's acts of acceptance, *i.e.*, taking the potatoes from Complainant's bin to its own packing shed and sorting, packing, and selling them, and because Respondent produced no evidence of rejection other than its buyer's testimony,[5] we find that Respondent did not establish that it made an effective rejection of the potatoes that it purchased for $9.00 per cwt. from Complainant. Therefore, our analysis turns to the question of whether Respondent's liability for those potatoes is reduced by a breach on the part of Complainant. After it has received and accepted the produce, the burden to prove breach and/or damages is on Respondent. *Santa Clara Produce, Inc., v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971).

Respondent offered testimony from its trucker that toward the end of the first day of hauling, "we started smelling some rot" and that he saw something like mud and flakes of potato underneath the machine (Tr. pp. 173-174), and testimony from its buyer that there was soft rot around the air tubes of Complainant's bin (Tr. pp. 190-191). In contrast, Complainant's witnesses testified that the pile looked good, with a tiny bit of rot at the bottom of the tubes, which is normal (Tr. pg. 59), and that Respondent's buyer said that the potatoes looked good (Tr. pp. 60, 107).

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[5] Respondent's president also testified regarding the purported July 10, 2006 rejection, but he did not claim to have been involved in any such communication; he simply acknowledged that he had heard the testimony of his buyer (Tr. 221-222).

The subjective, inherently self-interested testimony of the parties provides little basis for determining the actual condition of the potatoes at the time of their acceptance. As we have previously stated, "We have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damage." *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); *see also Tyre Farm, Inc. v. Dandrea Produce, Inc.*, 45 Agric. Dec. 796 (1986). In the absence of a timely, neutral inspection, we find that Respondent has failed to carry its burden of showing breach by Complainant. Respondent, therefore, is liable for the full contract price of $9.00 per cwt. for half of the potatoes that it hauled out of Complainant's bin.[6] Respondent is liable to Complainant for one half of the potatoes, or 18,441.40 cwt. at a rate of $9.00/cwt., for a total of $165,972.60.

In regard to the second half of Complainant's bin of potatoes, the parties are in agreement as to how it would be handled by Respondent. Complainant asserts that the agreement of the parties from the outset was that the second half would be handled on a "pack-out" or consignment basis (CB pg. 2; Tr. pp. 55, 103-104). Respondent asserts that the initial agreement of the parties was supplanted by a new oral agreement of the parties to proceed under a "packout" agreement for [all of] the stored potatoes (RB pg. 7; Tr. pg. 192).[7] Respondent's buyer described a

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[6] The line item "Russet Bulk Culls Dumped" on Respondet's pack-outs RX 10 and on RX 12 were identified by Respondent's president as being culls that were unable to be packed or processed, and were identified as such at Respondent's facility (Tr. pp. 223-224). Since the quantity, 606.20 cwt., is less than five percent of the total, the dumping of those identified culls will be permitted. 7 C.F.R. 46.23. The total quantity of potatoes at issue, then, is the amount of potatoes hauled from Complainant's bin to Respondent's packing shed, 37,489 cwt. (CX 1, CX 2; Tr. 143-144) minus the 606.20 cwt. of culls dumped, or 36,882.80 cwt. One half of that amount is 18,441.40 cwt.

[7] The party claiming a modification of contract terms has the burden of proving that modification. *Regency Packing Co., Inc. v. The Auster Company, Inc*., 42 Agric. Dec. 2042 (1983). Respondent did not reduce the alleged new agreement to writing, and therefore failed to carry its burden of proving the modification. As to the second half of the bin, however, the parties agree that it was to be handled on a "packout" basis, so it will be

(continued...)

"packout" arrangement as being a form of consignment, wherein Respondent would pack the consigned potatoes in bags or boxes and sell them (Tr. pg. 200-201). We review Respondent's handling of the second half of Complainant's bin of potatoes, then, as a grower's agent's handling on consignment. The parties differ on whether the "packout" arrangement included a minimum or "bottom" price to be returned for the consignment. Complainant alleges that the potatoes in the second, or back, half of the bin, which looked better and bigger than the small ones in the front half, were to be handled on a "packout" basis with a minimum return of $10.00/cwt. (Tr. pp. 55, 103-104). Respondent's buyer testified that there was no agreement as to a minimum return (Tr. pp. 192-193). Respondent's president also testified in this regard (Tr. pg. 230), but took no part in the negotiations.

Whether they are grower's agents or not, all licensees who accept produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. 7 C.F.R. § 46.29. Grower's agents have additional, specific duties to the growers whose goods they handle on consignment. The section requiring a grower's agent to reduce agreements to writing (7 C.F.R. § 46.32(a)) provides:

An agent who fails to perform any specification or duty, express or implied, is in violation of the Act and may be held liable for any damages resulting therefrom and for other penalties provided under the Act for such failure.

The dispute in this case is essentially over the question of whether Respondent performed its duty as a grower's agent by exercising reasonable care and diligence in disposing of Complainant's consigned potatoes promptly and in a fair and reasonable manner. Respondent remitted payment to Complainant that it reported as representing a net return of $4.32/cwt. for Complainant's consigned potatoes (RX 12). Complainant offered into evidence, without dispute, the Market News Service Reports for Norkotah/Nugget potatoes from the San Luis Valley of Colorado for the relevant time period, which show an average net return of $15.58/cwt.

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[7](...continued)
analyzed in those terms.

The fact that prices remitted by a consignee are substantially lower than the applicable Market News Service prices, taken by itself, would not necessarily show that the consignee was liable for negligence in the discharge of its duties. For example, in *LaVerne Co-Operative Citrus Assn. v. Mendelson-Zeller Co., Inc*., 46 Agric. Dec. 1673 (1987), we declined to argue with the results of an actual accounting by the broker who received the produce and sold it on behalf of the respondent grower's agent. In that case, however, the grower's agent had been specifically granted the widest possible latitude in the written agreement it had with the grower. As noted above, Respondent in the present case did not reduce the agreement with Complainant to writing. Therefore, Respondent in this case is not relieved of the ordinary standard of care contemplated by 7 C.F.R. § 46.29 for any licensee acting as a consignee.

In *Mayoli, Inc. v. Weis-buy Services, Inc*., 65 Agric. Dec. 648, 663 (2006), even though the grower's agent agreement in that case included terms granting the agent broad discretion to determine the price at which the subject produce would be sold, we said, "It has long been held that '[w]hile an agent does not insure the success of an undertaking or a guarantee against mistakes or errors of judgment, he may be liable to his principal for damages resulting from his failure to exercise ordinary and reasonable care, diligence, and skill in the performance of his duties." *See also Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc*., 46 Agric. Dec. 709, 716 (1987); and *Akers Marketing Co., Inc. v. Anthony Lobue Packing Co.*, 39 Agric. Dec. 1184, 1189 (1980).

In addition to the duty to reduce the agency agreement to writing, a grower's agent has a duty under section 46.32(b) of the regulations (7 C.F.R. § 46.32(b) to:

> . . . prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce... Agents shall issue receipts to growers and others for all produce received. A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers from similar produce being handled at the same time. Each lot shall be so identified and

> segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce. The records shall show the result of all packing and grading operations, including the quantity lost through packing and grading and the quantity and quality packed out. If the culls are sold, they shall be included in the accounting. Unless there is a specific agreement with the growers to pool all various growers' produce, the accounting to each of the growers shall itemize the actual expenses incurred for the various operations conducted by the agent and all the details of the disposition of the produce received from each grower including all sales, adjustments, rejections, details of consigned or jointed shipments and sales through brokers, auctions, and status of all claims filed with or collected from the carriers. The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting....The failure of the agent to render prompt, accurate and detailed accountings in accordance with Sec. 46.2 (z) and (aa), is a violation of the Act.

Respondent offered a document into evidence (RX 10), dated August 24, 2006, that Respondent's president described as a "partial accounting" which provided an estimated net return for the potatoes that had been handled up to that point (Tr. pg. 219).[8] The August 24, 2006 "packout" shows three columns: 1) "Description"–the type/size of box or bag, or whether the potatoes in a particular grouping were dumped, sold in bulk, "dumped in the trade, handled "commercial Process", etc.; 2) "Cwt."–the number of hundredweight of potatoes for each classification in the "Description" field; and 3) "NetReturn"–the dollar amount to be remitted for each type of box, bag, or other handling group. The "packout" reported a total net return of $181,562.84 on a total of 34,489 cwt. of potatoes. From that amount, the amount of $40,000.00 was subtracted for "Reserve for product condition discounts and freight on dumped product," leaving an "Estimated net return" of $141,562.84. Respondent, at that time, remitted to Complainant a check in the amount of $87,000.00.

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[8] Complainant asserts that it did not receive the August 24, 2006 "packout"with the payment check of that date (Tr. pg. 128).

Respondent remitted to Complainant a second check dated November 10, 2006, and at that time (Tr. pg. 223) or shortly thereafter (Tr. pg. 156) also provided a final "packout" dated November 8, 2006. This final "packout"(RX 12) was substantially the same as the earlier one (RX 10), with the addition of a column titled "Net/Cwt.", showing the rate of return per hundredweight for each classification of potatoes. The last entry in that added column shows the overall rate of return of $4.32/cwt.

The accountings (RX 10, RX 12) offer no information about when the product was sold, where, or to whom. Neither they nor any supporting evidence provide the essential information required by 7 C.F.R. § 46.2(y)(1), which provides, "'Truly and correctly to account means, in connection with: Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce. . ."

The absence of detailed information as to the disposition of the potatoes makes it exceedingly difficult to assess whether Respondent exercised reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. For example, the summary item, "Reserve for product condition discounts and freight on dumped product" (RX 10), for which Respondent subtracted $40,000.00 from the remittance, is accompanied by no detail as to what discounts were granted, where and when any dumping occurred, or what type of freight was employed, when, and the rates therefor. Potatoes listed on the second packout (RX 12) as "Russet #1 Culls Process" are reported as resulting in a net return of $0.78/cwt., without any indication as to where they were processed, when, or by whom. Potatoes listed on the second packout as "Russet Commercial PROCESS PROCESS" (14,214.40 cwt. of them) are reported as resulting in a net return of $0.99/cwt., also without any indication as to where they were processed, when, or by whom. An additional 3,008.00 cwt. are reported as "Dumped in Trade", yielding no return at all, without any documentation as to who dumped them, when, where, or why. *Id*.

Respondent contends that Complainant breached its agreement to provide potatoes that met Skyline's quality and grade specifications (RB pg. 11), and explains the low returns that it realized for Complainant's potatoes

by stating that, "Skyline agreed to make its best efforts to move the Rogers' potatoes despite their substandard quality" (RB pg. 18).[9]

Absent an adequate accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986); *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 *Agric. Dec.* 1869 (1994). *See also South Florida Growers Association, Inc. v. Country Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684, 706 (1993); *V. Barry Mathis, d/b/a Barry Mathis Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987).

In the instant case, however, there is no prompt inspection in the record to show the percentage of condition defects, if any, that the potatoes exhibited when Respondent accepted them. In lieu of proof of condition by means of an impartial inspection report, Respondent offered the testimony of its own employee (Tr. pp. 190-191) and its hired trucker (Tr. pp 173-174), and several exhibits (RX 2 through RX 7) that were offered to show subsequent rejections by Respondent's customers.

RX 2 consists of an invoice from Respondent to Wal-Mart in Johnstown, NY, followed by photos of potatoes in Respondent's bags. RX 3, RX 4, and RX 5 are each titled "Wal-Mart Rejection Notification"; they include charts that purport to show levels of condition defects, and RX 3 and RX 4 include photos of potatoes (without any packaging). RX 6, titled "Trouble Notification" is from Potandon Produce, LLC of Idaho Falls, ID, and includes an invoice register referencing Skyline (Respondent). RX 7 is one

[9] Respondent further states that, "Complainant's failure to deliver potatoes in compliance with the contract requirements constitutes a breach of contract for which Respondent is entitled to recover provable damages" (RB pg. 20). In regard to Respondent's purchase of the first half of the potatoes, we have already found that Respondent did not carry its burden of proving breach. In regard to the second half, Respondent handled them on consignment. Therefore, our analysis does not involve damages for breach of a warranty of suitable shipping condition by the consignor; it involves the question of whether Respondent, the consignee, exercised reasonable care and diligence in disposing of the produce.

page of a USDA inspection certificate performed on July 31, 2006 for Seven Stars of Forest Park, GA on a load of "Skyline" Russet potatoes.[10]

Respondent's president testified that the potatoes referenced and depicted in RX 2 through RX 7 were the potatoes that Respondent had hauled in from Complainant (Tr. pp. 204, 206, 207, 210-211). There is nothing, however, in any of the exhibits identifying Complainant as the source of the potatoes. There do not appear, and Respondent's president did not reference, any sort of lot number or any other identification as required under (7 C.F.R. § 46.32(b)), which provides in pertinent part, "A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers from similar produce being handled at the same time. Each lot shall be so identified and segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce."

A similar attempt by a respondent to use the testimony of the truck driver and its customer to prove condition defects, in the absence of neutral and independent inspection, was rejected in *W. T. Holland & Sons, Inc. v. Clair Sensenig*, 52 Agric. Dec. 1705, 1710:

> Respondent did not secure a federal inspection of the produce nor any other kind of neutral and independent inspection. Although respondent submitted sworn statements from its customer and the truck driver to give credibility to its breach of contract allegation, we cannot accord a great deal of weight to either of those statements for various reasons. First, both parties are biased in that the truck driver is employed by respondent and the customer has a vested interest in the transaction. Second, neither person has been shown to be qualified to conduct inspections and determine the condition of produce. Third, as to the customer's statement, there is no proof that it is complainant's produce which is being referred to in the letter. For these foregoing reasons, we have not accorded either statement a great deal of weight as it relates to the condition of the produce.

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[10] The certificate states that the inspection report is "Continued on Certificate M048943." Certificate M048943 was not offered into evidence by Respondent.

Here, we find Respondent's offered evidence lacking for precisely the same reasons as in *W. T. Holland & Sons*. Respondent's customers may or may not have rejected potatoes that came from Complainant. If they did, there is no evidence that Respondent demanded justification from its customers. Where a grower's agent has allowed rejection by its customer without an inspection, we have held the grower's agent liable, saying, "Without an impartial inspection report, we are merely left with self-serving statements. It was negligent for respondent to allow the rejection of this lot of onions without an impartial inspection to determine whether State Produce was justified in its rejection." *Sousa*, 46 Agric. Dec. 709, 718 (1987).

To the extent that some of the potatoes were not reported as rejected by Respondent's customers, but were sold subject to the "product condition discounts" cited in the first "packout" (RX 10), or were sold at rates of $0.78/cwt. or $0.99/cwt., Respondent, in essence, granted its customers substantial adjustments or allowances on the price. Where a grower's agent failed to enter into a written agreement with the grower, or furnish a written statement of the terms under which it would handle grower's potatoes, allowances granted by the grower's agent have been disallowed. *Big Sky v. S & H, Inc*., 55 Agric. Dec. 1312 (1996). We have also stated that a grower's agent was obligated not only to get the best possible price for the grower's produce, but also not to allow an adjustment unless such adjustment was warranted; absent condition evidence from a timely inspection, granting adjustments without specific authorization by the grower was deemed not warranted. *Anthony Podesta, Inc. v. Foppiano Packing Co., Inc. a/t/a JMB Packing Co.*, 45 Agric. Dec. 1581 (1986).

Respondent cites several cases as support for the proposition that, "Skyline thus carried its burden to prove a material breach under USDA's reparation cases." (RB pp. 11-12).[11] In the first case cited, *Perez Ranches, Inc. d/b/a P.R.I. Sales v. Pawel Distributing Co.*, 48 Agric. Dec. 725 (1989),

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[11] Respondent's overall argument is not actually about material breach, but about a breach of the warranty of suitable shipping condition. Only one of the cases cited deals with material breach; in *Diamond Fruit & Vegetable Distributors, Inc. v. Muller Trading Company, Inc*., 66 Agric Dec. 882, 888 (2007), the seller was found to have committed a material breach when it shipped seeded, not seedless, watermelons. No condition breach was found. The situation here is not at all analogous. Note: Even *Diamond Fruit & Vegetable* involved a Federal inspection.

we held that the respondent failed to establish breach because the Federal inspection was not timely. In the next, *Santa Clara Produce, Inc. v. Caruso Produce, Inc*., 41 Agric Dec. 2279 (1982), the respondent did prove breach by a timely federal inspection. In *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric Dec. 1109 (1971), the respondent obtained a federal inspection, but failed to prove breach because it did not prove a grade agreement. Later, Respondent (RB pg. 18) cites *Fru-veg Marketing, Inc v. J. F. Palmer & Sons Produce, Inc*. 65 Agric. Dec. 1452 (2006), in which the central issue is a failure to secure a USDA inspection to justify below-market sales and dumped product.

In short, an argument as to breach due to condition is most readily made by means of a prompt, neutral inspection. Respondent's failure to produce an inspection or inspections is particularly baffling in light of four facts in this case:

1) Respondent's buyer, Doug Wert, testified that he is a former senior USDA licensed fruit and vegetable inspector with over 30 years experience, including inspecting potatoes. (RB pg. 5; Tr. pp. 181-182). He might be presumed to be very familiar with the purpose and role of neutral, impartial inspections.

2) Complainant's witnesses testified, without being challenged or refuted, that Doug Wert told them that he didn't know why the potatoes were being returned by Respondent's customers, since the inspections looked good (Tr. pp. 62, 108-109).

3) A letter dated August 9, 2006 to Greg Rogers from Respondent's president, Randy Bache (RX 11), states that, "All packing, **inspections**, and dump charges have been absorbed by Skyline." (Emphasis added.)

4) The State of Colorado has in effect a Marketing Order Regulating the Handling of Potatoes Grown in the State of Colorado, which mandates that, with limited exceptions, no handler shall handle potatoes unless such potatoes are inspected by an authorized representative of the Federal or Federal-State Inspection Service and are covered by a valid inspection certificate (CB, Exhibit 1).[12]

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[12] We take official notice that this provision appears at Section V, Paragraph A, of the Colorado Potatoes Market Order, available as of August 13, 2010 at: (continued...)

Respondent failed to provide justification for the adjustments, dumping, and sale for "process" that contributed to the extremely low returns that it remitted to Complainant for the potatoes Respondent handled on consignment, with one minor exception. The line item "Russet Bulk Culls Dumped" on RX 10 and on RX 12 were identified by Respondent's president as being culls that were unable to be packed or processed, and were identified as such at Respondent's facility (Tr. pp. 223-224). Since the quantity, 606.20 cwt., is less than five percent of the total, the dumping of those identified culls will be permitted. 7 C.F.R. 46.23. The total quantity of potatoes at issue, then, is the amount of potatoes hauled from Complainant's bin to Respondent's packing shed, 37,489 cwt. (*see supra* note 4) minus the 606.20 cwt. of culls dumped, or 36,882.80 cwt.

The reasonable value of the potatoes, as discussed above, is the Market News Service average price for the relevant time, or $15.58/cwt. The agreement between the parties, however, was that Respondent would purchase half of the potatoes for $9.00/cwt. and handle the other half on a "packout" basis with a minimum of $10.00/cwt. Complainant's witnesses consistently testified that that was their understanding of the contract (Tr. pp. 55, 103-104), and that was the contract that Complainant sought to enforce in its complaint (RX 14). There is no evidence of record that Respondent actually sold the potatoes at market price, and deceptively remitted a small fraction of what it received; therefore, we do not find Respondent's handling of Complainant's potatoes to be fraudulent. It would appear that Respondent sold the potatoes for less than the $10.00/cwt. minimum simply because it failed to act diligently in its consignor's best interest by accepting unsupported rejections and unjustified dumping. Respondent is thus liable only for the agreed $10.00/cwt. minimum return for the second half of the potatoes.

We find that Respondent is liable to Complainant for its purchase of one half of the potatoes, or 18,441.40 cwt. at a rate of $9.00/cwt., for a total of $165,972.60. Respondent is liable to Complainant for the consigned half of the potatoes, or 18,441.40 cwt. at a rate of $10.00/cwt., for a total of $184,414.00. In sum, Respondent is liable to Complainant for the potatoes in an amount of $350,386.60. Respondent has paid Complainant

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[12](...continued)
http://www.colorado.gov/cs/Satellite/Agriculture-Main/CDAG/1167928164615

$149,029.00 for the produce. Respondent's failure to pay Complainant the $201,357.60 balance of the purchase price and remittance is a violation of section 2 of the Act for which reparation should be awarded to Complainant.

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.

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." Complainant is the prevailing party in this case, so fees and expenses will be awarded to Complainant 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. Louis W. Diess, III, attorney for Complainant, timely filed an Affidavit of Counsel and Claim of Complainant Rogers Bros. Farms, Inc. for Fees and Expenses in Connection with Oral Hearing (Affidavit and Claim). Respondent entered no objection to the Affidavit and Claim. As detailed in Appendix A to the Affidavit and Claim, Mr. Diess claims total attorneys' fees for hearing preparation of $24,626.25 for 92.70 billable hours.

Items which will not be allowed are of three types: 1) work done in response to Respondent's Motion to Dismiss; 2) review or preparation of evidence introduced either by Complainant or Respondent; and 3) travel to and from Colorado for the hearing.

Specifically, disallowed items of the first type, regarding the Motion to Dismiss, are those listed in Appendix A as follows: Page 2, lines 11, 12, 13, 15, 16, 20, 22, 23, 24, 25; Page 3, lines 1, 7, 8. The work and costs of addressing Respondent's Motion to Dismiss are not recoverable, as they would have been would have been incurred if the case had proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20). *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707 (1989); *Nathan's Famous v. N. Merberg &*

Son, 36 Agric. Dec. 243 (1977). These items represent 10.05 hours, for a total of $2,847.00, which will not be allowed.

Disallowed items of the second type, regarding the acquisition, preparation, or review of evidence, are those listed in Appendix A as follows: Page 3, lines 2, 5, 14; Page 4, line 3. This evidence, whether Complainant's Colorado Potato Marketing Order or Respondent's Exhibit 8, presumably would have been generated and/or reviewed if the case had proceeded under the documentary procedure, and therefore the costs involved are not recoverable. These items represent 3.25 hours, for a total of $898.00, which will not be allowed.

Finally, attorney fees for time spent traveling to and from the hearing are not recoverable. *East Produce, Inc. v. Seven Seas Trading Co., Inc*., 59 Agric. Dec. 853 (2000); *Golden Harvest Farms, Inc. v. Stanley Produce Co. Inc*., 38 Agric. Dec. 727 (1979). These items, listed in Appendix A at: Page 4, lines 5, 6, and 7, represent 28 hours, for a total of $8,400.00, which will not be allowed.

After making the noted adjustments, the attorney fees Complainant may recover in connection with the oral hearing total $12,481.25.

Mr. Diess also claims expenses totaling $2,163.56, including $359.55 for a copy of the hearing transcript, $100.00 for copies of the hearing exhibits, $924.20 for airfare, and other travel related expenses. All of the claimed expenses appear reasonable and will be permitted. When we add the expenses totaling $2,163.56 to the attorney fees totaling $12,481.25, the total fees and expenses Complainant may recover in connection with the oral hearing amount to $14,644.81.

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 (including any handling fee paid by the injured person or persons under section 6(a)(2)) sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217, 239 (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 also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. *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, 339 (1970); and *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*., Order on Reconsideration, 65 Agric. Dec. 669, 672-73 (2006).

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $201,357.60, with interest thereon at the rate of 0.25 percent per annum from August 24, 2006, until paid, plus the amount of $300.00. Within 30 days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses, $14,644.81, with interest thereon at the rate of 0.25 percent per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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.

In re: CHERYL A. TAYLOR.
PACA-APP Docket No. 06-0008.
In re: STEVEN C. FINBERG.
PACA-APP Docket No. 06-0009.
Stay Order.
Filed September 2, 2010.

PACA-APP.

Charles E. Spicknall, for the Administrator, AMS
Stephen P. McCarron, Washington, DC, for Petitioners.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I issued *In re Cheryl A. Taylor*, __ Agric. Dec. ___ (Sept. 24, 2009). On September 1, 2010, Cheryl A. Taylor and Steven C. Finberg filed a Motion for Entry of Order of Stay seeking a stay of the Order in *In re Cheryl A. Taylor*, __ Agric. Dec. ___ (Sept. 24, 2009), pending the outcome of proceedings for judicial review. On September 1, 2010, the Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], filed a response to Ms. Taylor and Mr. Finberg's Motion for Entry of Order of Stay stating AMS has no objection to the requested stay.

In accordance with 5 U.S.C. § 705, Ms. Taylor and Mr. Finberg's Motion for Entry of Order of Stay is granted. For the foregoing reason, the following Order is issued.

ORDER

The Order in *In re Cheryl A. Taylor*, __ Agric. Dec. ___ (Sept. 24, 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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In re: LORETTA BORRELLI.
PACA-APP Docket No. 10-0137.
Order.
Filed November 5, 2010.

PACA-APP.

Leah Battaglioli, Esquire and Charles Kendall, Esquire, for Respondent.
Linda Strumpf, Esquire, for Petitioner.
Order issued by Peter M. Davenport, Chief Administrative Law Judge.

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In re: MARY A. SPINALE.
PACA-APP Docket No. 10-0139.
Order.
Filed November 5, 2010.

PACA-APP.

Leah Battaglioli, Esquire and Charles Kendall, Esquire, for Respondent.
Linda Strumpf, Esquire, for Petitioner.
Order issued by Peter M. Davenport, Chief Administrative Law Judge.

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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.

In re: J & N PRODUCE, INC.
PACA Docket No. D-09-0037.
Default Decision and Order.
Filed July 9, 2010.

PACA.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

In re: O'LIPPI & CO., INC.
PACA Docket No. D-10-0032
Default Decision and Order.
Filed August 24, 2010.

PACA.

Delisle Warden, for AMS.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

In re: TCRS, INC d/b/a EAST TENNESSEE PRODUCE.
PACA Docket No. D-09-0075.
Default Decision and Order.
Filed August 26, 2010.

PACA.

Ciarra Toomey, for AMS.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

In re: TANIMURA DISTRIBUTING, INC.
PACA Docket No. D-10-0118.
Default Decision and Order.
Filed August 31, 2010.

PACA-D.

Charles E. Spicknall, for the Deputy Administrator, AMS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

In re: MIAMI BEST TROPICAL ENTERPRISE, INC.
PACA Docket No. D-10-0332.
Default Decision and Order.
Filed October 4, 2010.

PACA-D.

Leah C. Battaglioli, for the Deputy Administrator, AMS.
Respondent, Pro se.
Default decision issued by Jill S. Clifton, Administrative Law Judge.

In re: CONTINENTAL GROWERS, INC.
PACA Docket No. D-10-0221.
Default Decision and Order.
Filed October 13, 2010.

PACA-D.

Brian P. Sylvester, for the Deputy Administrator, AMS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

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In re: JC PRODUCE LLC.
PACA Docket No. D-10-0309.
Decision and Order By Reason of Default.
Filed December 27, 2010.

PACA-D.

Ciarra A. Toomey, for the Deputy Administrator, AMS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

CONSENT DECISIONS

Sirmon Produce, Inc., and Sirmon Farm, PACA-D-10-0004, 10/08/25.
Missiana Produce Inc., PACA D-10-0005, 10/10/12.
SK Foods, L.P, PACA-D-10-0111, 10/12/08.